Assessment of Public Comment

for

Public Comments Received

on the

NEW YORK STATE

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

COMPREHENSIVE REVISIONS TO SOLID WASTE REGULATIONS

FOUND IN 6 NYCRR PART 360, PART 364, PART 369, AND ASSOCIATED REGULATIONS

June 2017

Table of Contents

Introduction

The New York State Department of Environmental Conservation proposes to amend the regulations that implement the solid waste program in New York State. This includes amendments to existing regulations on Solid Waste Management Facilities (6 NYCRR Part 360), Waste Transporters (6 NYCRR Part 364) and Waste Reduction and Recycling Projects (6 NYCRR Part 369).

In addition to the amendments to existing Parts 360, 364, and 369, this rulemaking will incorporate minor amendments to 6 NYCRR Part 621, Uniform Procedures. These amendments specifically address paragraph 621.4(m)(2), which sets forth a list of minor solid waste management facility projects. This list has been revised to reflect the criteria in the proposed revisions concerning permitting thresholds for certain facilities and also includes a new provision which should help foster the development of anaerobic digestion facilities proposed to be located at the site of an existing solid waste landfill.

Due to significant reorganization of the existing Part 360 into the series format described below, minor revisions addressing renumbering will be made to existing Parts 370, 371, 372, 373, and 374 to ensure appropriate cross references. Additionally, proposed revisions to existing Part 360 include the removal of existing Subpart 360-14, the regulatory criteria for used oil. The regulatory criteria for used oil will now be contained solely in Subpart 374-2, Standards for the Management of Used Oil. However, permits for used oil handling facilities will still be issued pursuant to Part 360. Revisions to Subpart 374-2 will be included in this rulemaking to address this change. Used oil collection center requirements are amended to more closely parallel federal requirements. There are no other proposed changes to the technical standards associated with this revision.

This rulemaking will also include specific amendments to 6 NYCRR Subpart 373-4, Facility Standards for the Collection of Household Hazardous Waste and Hazardous Waste from Conditionally Exempt Small Quantity Generators. Currently, household hazardous waste collection facilities and events are regulated as Part 360 non-specific facilities, using the requirements of 6 NYCRR Subpart 373-4, though no permits are issued under Subpart 373-4. Under this action, existing Subpart 373-4 is proposed to be repealed and the requirements of that subpart are proposed to be incorporated into the new Subpart 362-4.

The draft regulations were published for public review and comment in 2016, with the public comment period ending on September 13, 2016. Public hearings were held on June 2, 6, 7, and 9, 2016.

General Comments (Supporting Documents, etc.)

Comment: NYSDEC has not adequately analyzed the economic or environmental impacts of its Part 365 biohazard waste regulations. NYSDEC's Job Impact Statement

states, without any supporting analysis, “the proposed regulations themselves will not negatively affect employment opportunities.” This is not the case; the proposed regulations of food waste are already discouraging investment and job creation, and the regulatory burdens imposed on farmers and food manufacturers could have an adverse employment impact in regions where jobs are currently scarce. NYSDEC’s Rural Flexibility Analysis states “most generators choosing to treat RMW or other biohazard waste on-site will incur no additional costs since many, especially those based in healthcare, academic or research institutions already have autoclaves in place for processing their waste.” This is untrue with respect to many food producers, however, and even those facilities that have autoclaves on site will incur additional compliance costs that could result in disproportionate rural impacts. NYSDEC’s Regulatory Impact Statement acknowledges that “[r]equirements have been added for … contaminated food supply waste,” but states “[t]hese new requirements are unlikely to add significant cost to the management of these waste streams.” No support is offered for that conclusion, which ignores the substantive compliance obligations imposed by NYSDEC’s new food regulations. By increasing the cost and burden of food testing, NYSDEC’s proposed regulations create a perverse incentive for food manufacturers to minimize such testing. However, the proposed Generic Environmental Impact Statement for the proposed rules fails to consider the potential environmental and human health impacts with respect to food safety.

Response: The regulations have been revised to clarify that they do not apply to food safety laboratories and to better define the types of infectious wastes that will be regulated.

Comment: The proposed beneficial use determination rules fail to address expected adverse impacts on the regulated community and the Draft Generic Environmental Impact Statement (“DGEIS”) fails to take a “hard look” at the environmental impacts associated with the proposed changes.

Response: The Department disagrees that a hard look has not been taken of the proposed beneficial use regulations, however, the DGEIS has been revised to include additional information on impacts.

Comment: The regulatory impact statement, the flexibility analysis for small business and local government, the job impact statement has not adequately considered or addressed the impact of these regulations on businesses, generally, the impact to small businesses. The supporting documents do not address the true economic impacts of the regulation. The economic impacts and burdens of the proposed regulations are demonstrable, yet there is no consideration of any other approach. This failure to address these impacts on small C&D and fill material transfer stations is an aggregation of the requirement of SAPA Section 202-B which requires the department shall consider utilizing approaches that will accomplish the objectives of applicable statutes, while minimizing any adverse impact of the rules of small businesses. There has been no such consideration in this analysis.

Response: Efforts have been taken to reduce unnecessary impacts to small businesses. These impacts have been taken into consideration in the supporting documents, and adjustment to regulatory language have been made in response to comments.

Part 360 General Requirements

General Comments on the Rulemaking:

Comment: The regulations should be clear that they apply to waste handling and management components at the property. Construction, maintenance and operation of other facilities such as administration offices, maintenance buildings, etc. which are not used for waste management should not require modification of the Part 360 Permit.

Response: The regulations apply to those operations that are integral to solid waste management at the site.

Comment: The current hazardous waste regulations create a loophole for oil and gas waste. We urge the DEC to include in its rulemaking package a modification that would require the hazardous waste resulting from oil and gas operations to be subject to the same regulations as other hazardous waste.

Response: Hazardous waste determinations are outside the scope of this rulemaking.

Comment: The requirement restricting the acceptance of source-separated recyclables should apply to all registered and permitted solid waste disposal facilities.

Response: The restriction does not apply to facilities that are intended to accept source-separated recyclables such as recyclables handling and recovery facilities.

Comment: We are very concerned about the exemptions and permitting described in the State's proposal. The proposal just isn't strong enough to adequately protect human health in our community. The effect that small businesses can have on human health is being underestimated.

Response: The exemptions included in the proposal are restricted to materials and activities which will have minimal negative impacts on human health and the environment.

Comment: Many sections allow the DEC to use its 'opinion', or to require compliance to the 'satisfaction of the department', or to have subjective (non-numeric) compliance limits. It is recommended that these vague statements be made more specific to ensure ease of implementation for the DEC and the regulated community.

Response: The department has reduced the number of these instances to the extent possible. However, some flexibility is retained in the regulations so that DEC staff can promptly respond to site-specific requests from the regulated community.

Comment: Whereas under the RPS the landfill gets an automatic eligibility pass to use the off gases to generate renewable energy, the Taylor gasifier must sort out all the non-biomass elements leaving a clean biomass fuel product, with associated inspections, gasification, and facility permitting as previously indicated.
DEC regulation should not follow this onerous punitive requirement contained in the Biomass Power Guide in developing new regulation and should so indicate that if permitting and emission standards are met that an aerobic digester, a landfill and a gasification system stand on equal regulatory footings.

Response: The Renewable Portfolio Standard is outside the scope of this rulemaking.

Radiation Monitoring
Comment: The following requirements for radiation detectors should be added to the following sections: 362-1.5(b)(7) Combustion & Thermal Treatment Facilities, 36 1-3.5(a)(19) Composting & Organics Processing Facilities, 362-2.3(d)(l) MSW Processing Facilities, 362-3.5(e)(l) Transfer Facilities, and 363-8.1(a)(4) Landfills: "A minimum of 1000 cubic inches plastic scintillation detectors with 81h inch lead shielding in weather-tight housing. Detector should be installed to be capable of reading both sides of the vehicle/container. Includes both sigma and sum alarm."

Response: Additional detail associated with the appropriate radiation detectors has been added to the proposal. However, the recommendation to include specifications for radiation detectors has not been adopted. The use of a performance standard will address the potential for regulated radioactive waste to be mishandled.

Comment: The threshold of acceptance of 25 pCi/g is far above background levels and thus too high. Indeed, background levels of radium in New York are just 0.85 pCi/g - more than 30 times lower than DEC's proposed radiological threshold. Consequently, loads of waste containing levels of radium just under that threshold automatically violate DEC's definition of "significant contamination" where radium levels are detected at "more than twice background levels."

Response: The threshold detection limit of 25 pCi/g is not a determination of significant contamination. Instead, the detection limit is designed to trigger further inquiry into whether the waste is considered a regulated radioactive waste and where such waste should be disposed. As to the appropriateness of the selected threshold, a health risk assessment conducted by Argonne National Laboratories found that that an acceptable radiation level in waste accepted at a landfill is 50 pCi/g. In order to control for factors that reduce the effectiveness of radiation detection such as shielding, the Department has chosen a reduced level of 25 pCi/g.

Comment: The proposed regulation requiring all Combustion Facilities/Select Transfer Stations/Landfills to have radiation detection devices is seen as another unfunded mandate that will cost several thousands of dollars. It is our understanding that the radiation detection information DEC currently is aware of has proved that findings are related to isotopes of patients undergoing medical treatments. To impose such an expense across the board in light of these findings, seems unwarranted. Not only is there the expense of the detector at the scale, but in addition there are the costs of hand held units, back up units in case of equipment failure, required calibrations, operational issues, and the detrimental impact to small hauling businesses that risk having vehicles out of commission while the waste is set aside. Our suggestion is to continue to determine the need for radiation detectors on a site-specific basis and the service territory's commercial and industrial demographics.

Response: The Department recognizes that the requirement to install and maintain radiation detectors will result in added costs to facilities and that waste generated from patients undergoing medical treatment has the potential to trigger the detectors. However, disposal of regulated radioactive waste is prohibited without specific approval from the Department. Regulated radioactive waste is radioactive material that is processed and concentrated and does not include naturally occurring radioactive material. The Department has determined that radiation detectors are an appropriate and effective method to ensure that regulated radioactive waste is restricted from the facilities, and has included the requirement at the minimum number of facility types to reduce the impact on the industry.

Comment: Due to the steady nature of background radiation concentrations at our facilities, we do not believe there is a need to record background values on a daily basis. In addition, many fixed radiation detection systems adjust the radiation alarm setpoint (2x to 5x back ground) based on current background levels ("floating" setpoint) by monitoring background levels on a continuous basis. Alternatively, this background reading could be recorded on a calendar quarterly basis as described below for other system checks.

Response: Daily background radiation checks are a standard practice which helps ensure the proper operation of radiation detection devices.

Comment: The language should be modified to require the field check be performed on a calendar quarterly basis, unless otherwise required more frequently by the manufacturer. Performing field checks of the radiation detectors on a weekly basis is excessive considering the calibration frequency of these devices is normally annually.

Response: A field check is a simple test with a known source to ensure that the radiation detector is working properly.

Comment: The language should be modified so that the requirement to calibrate radiation detectors also reflect the calibration frequency recommended by the manufacturer, rather than the current requirement of annual calibration.

Response: The relevant language has been adjusted in the express terms.

Comment: Specific language should be included identifying the procedures for load evaluation and rejection. For example, West Virginia requires that radiation monitoring must alarm at 10 uR/hr above local background levels. For any alarm event, the facility is required to provide an incident report to the agency within 24 hours of the initial alarm. In addition to the notification, waste loads triggering an alarm must be sampled and analyzed for the combined concentration of radium-226 and radium-228. If the combined radium concentration exceeds 5 pCi/g above local background, the load must be rejected.

Response: Similar requirements related to trigger alarms and prohibited wastes are included in the proposal, although decisions about whether a load should be rejected would depend on the type of waste that triggered the radiation detector. A requirement to report any trigger event to the Department within 24 hours has been added to the proposal.

Comment: Identify participating state agencies to provide supplemental technical and logistical support for radiation detection monitoring activities, specifically isotope identification and response actions.

Response: Participating agencies include the Department's Radiation Management Section, in consultation and partnership with the state Department of Health.

General Comments on Part 360:

Comment: Part 360 adds reporting requirements, particularly in the beneficial use realm which have no legitimate protective function, i.e., they do nothing to detect or mitigate any adverse public health issues. They certainly generate additional means for the Department to initiate revenue-enhancing administrative actions against companies, municipalities, and individuals but otherwise provide no significant planning data.

Response: Any additional reporting requirements that have been added as part of this revision were chosen in order to improve compliance with regulatory requirements. While the Department encourages beneficial use of material that would otherwise qualify as solid waste, it is necessary to take steps to ensure that materials covered by a beneficial use determination are being handled in a manner consistent with the determination. In that regard, reports submitted to the Department serve as a tool to detect and prevent unintended environmental impacts.

Comment: The regulations are silent to penalties and/or the process to stop non-permitted facility/transporter operations. Part 360's regulatory objective only works on those who choose to be regulated or are demanded to be by the Department.

Response: Enforcement associated with regulatory violations is outside the scope of this regulation.

Comment: Under current statute and regulations, solid waste is subject to NYSDEC regulation after it is generated by being discarded. Some proposed revisions will regulate certain materials prior to discard.

Response: The definition of solid waste includes any material that is spent, worthless, or in excess to the generator and is processed, disposed of, transferred or accumulated. Exemptions are included in the regulation for most handling of solid waste at the point of generation.

Section 360.2 Definitions:

Comment 360.2: The definition of waste in the rule is inconsistent with, and should be aligned with the statute.

Response: Although the wording in statute and in regulation are not identical, the definitions are consistent.

Comment: More than 40 percent of the original Part 360-1.2 definitions have been eliminated in this draft version without explanation. It is suggested that the original definitions by number be considered for retention. They are: 4, 12, 25, 37, 40, 41, 43, 73, 82, 86, 118, 135, 146, 150, 153, 154, 158, 186 and 187 from the current Part 360-1.2(b) list.

Response: The definitions removed were primarily removed because they were no longer used in the regulation.

Comment: The regulations should establish clear definitions for different types of drill cuttings.

Response: Drill cuttings, which are generated through air- or water-based drilling methods are considered C&D debris. Drill cuttings which are generated through methods which use additives such as polymers or mineral oils are considered contaminated and are therefore required to be disposed of at a municipal solid waste landfill. These conclusions are based on existing definitions and no further definitions are necessary.

Comment: A definitions needs to be added for “point of generation”. In regards to “institutional waste” is point of generation anywhere on contiguous property or something different?

Response: The point of generation is the entirety of the property where the waste is generated.

Comment: There is no definition of “waste handler” other than specific to tires. A definition is need since there is a definition for “waste handler” for universal and hazardous waste.

Response: Waste handler is not a term which is used in the proposed regulations.

Comment: A definition of “plugging fluid” is needed in reference to 360.12(f)(3)(ii). The intent and use of this term is unclear.

Response: Since the activity of plugging non-producing gas or oil production wells, and associated materials and practices, are defined in the department’s regulations, and is well known to the industry, the department disagrees that a definition is needed in 360.12(f).

Comment: Consideration should be given to identifying defined terns by capitalization or italics. This would allow the reader to differentiate between defined terms and undefined terms.

Response: The official publication of the proposed rules, when adopted, will follow the format established by the New York Department of State. The department will consider this comment, however, when publishing the final rule in other locations.

Comment: We recommend the development of a definition section in Part 365 for terms that might create confusion and/or are not defined elsewhere. For example, “biological drug waste” and “bone shadow” should be defined. We understand that there are already several definitions incorporated into Section 360.2 – Definitions, however it would be helpful if they were to be incorporated directly into Part 365.

Response: A decision was made early in the rulemaking process to include all definitions which are used in Parts 360-369 in Part 360. Definitions for “bone shadow” and “biological drug waste” have been added to section 360.2.

Comment: The term “commercially generated” is used in Part 364-3.l(d) and appears to mean waste that is commercially transported but which may have been generated at a residential or noncommercial location. This may be confusing and could be clarified by incorporating a defined term.

Response: The language in the regulations has been revised to address this concern.

Comment: The term “convenience station” is used in the regulations. Please define this term or replace it where it is used in the regulations with another defined term.

Response: As the regulatory language suggests, a convenience station is a location at a solid waste management facility where noncommercial vehicles can unload solid wastes and recyclables. No additional definition is necessary.

Comment: The term “disposal area” is used several times in Part 363, please add a definition for this.

Response: The term is clear by standard usage and needs no additional definition**.**

Comment: Consider adding a definition of “papermill residuals” to read as follows: Papermill Residuals means the fibrous by-product of pulp and paper manufacturing facilities, including but not limited to de-inking mills, that is composed primarily of cellulose, has a minimum of 20% solids, contains no domestic sewage input, and has a C:N ratio of no less than 25:1.

Response: A new definition for papermill residuals has been added to the proposed regulations, however, papermill residuals may include materials that do not meet the definition proposed. Papermill residuals that may be amenable to beneficial use are a subset of all residuals generated by the process and are handled under the specific provisions in the regulations (land application criteria, etc.).

Comment: The term “regulated waste” is used in Part 364 and in the definition of “waste transporter”. This term should be defined.

Response: The waste types which fall under the term regulated waste are found in section 364-1.2.

Comment: Consideration should be given to including a definition of *Remediation Waste* consistent with DER 10 and other regulations and related policy. Remediation Waste is typically waste resulting from a spill or release of a contaminant into the environment. Non-hazardous remediation waste is typically managed as industrial waste, however it is not the result of a manufacturing or industrial process. Remediation waste could require an Industrial Waste Form (47- 19-7)

Response: This term is not used in this proposal.

Comment: The term *Special Waste* is used on DEC’s website but a definition needs to be added to the Part 360 regulations.

Response: There is no specific definition for the term ‘special waste’ under this proposal, as it refers to waste that require some specific landfill handling procedures beyond that of typical solid waste. Examples of these wastes are included in subparagraph 363-12.3(a)(1)(ii).

Comment: Please define “product stewardship items.”

Response: A definition for product stewardship has been added to the proposal.

Comment: The proposed regulations do not define the term “disposal,” even though it appears in the proposed regulations at least 40 times. For example, section

360.12(a)(1) states “this section also does not apply to waste used in a manner that constitutes ‘disposal.’” Only two definitions in the proposed regulations hint at what disposal means, and both are too broad. The definition of solid waste suggests that disposal means “discharge, deposit, injection, dumping, spilling, leaking or placement into any land or water so that the material or any constituent thereof may enter the environment or be emitted into the air or discharged into the groundwater or surface water.” This definition more closely corresponds to the CERCLA definition of a “release,” which lacks the intent or purpose element that "disposal" should contain. In contrast, the definition of “disposal facility” implies that “disposal” means “intentionally placed and intended to remain.” 360.2(b)(85). The following definition of “disposal” should be added:

“Disposal” means the intentional discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

Response: Disposal is defined in Article 27 of the Environmental Conservation Law. Subdivision 360.2(a) includes a sufficient definition of terms to meet the needs of the proposal.

Comment: Definition for "Biomass" and "Biomass Prepared Fuel' should be incorporated as follows:

"Biomass" means paper, fiber, food waste, leather, textiles, wood excluding pressure treated and painted wood; separated and removed by manual labor or mechanically from MSW, C&D debris and waste-wood."

"Biomass prepared fuel" means paper, fiber, food waste, leather, wood excluding pressure-treated and painted wood (BIOMASS); separated and removed by manual labor or mechanically from MSW, C&D debris and waste-wood.

Response: These terms are not used in this proposal.

Comment: A definition for "Char" should be incorporated as follows: Char means the in between state of carbon when transformed from its solid state to its gaseous state by oxygen starved pyrolysis technologies.

Response: This term is not used in this proposal.

360.2(a)(1)
Comment: This section states “Solid waste or waste means, except as described in paragraph (4) of this subdivision…” The exceptions to solid waste are codified in section 360.2(a)(3), not (4).

Response: The citation has been corrected in the proposal.

Comment: Scrap metal should be excluded from the definition of solid waste. The Department should amend the proposed definition of "solid waste" to conform to the definition provided by the EPA in the recently revised RCRA regulations. Thus, a scrap processor which accepts scrap metal with a bona fide intent to recycle the incoming metallic scrap in such manner as it meets a generally accepted commodity specification will not be defined as a solid waste management facility.

Response: Scrap metal is solid waste and facilities which manage scrap metal are covered by specific requirements under the proposal. The Department recognizes that EPA and other agencies, may utilize a different definition of solid waste. New York's definition of solid waste, however, is informed by the definition of solid waste adopted by the legislature.

360.2(a)(2)
Comment: The terms "spent, worthless, or in excess to the generator" as used in the definition of solid waste are subjective and undefined and should be deleted. Including these terms in the definition could create a loophole and lead to ligation regarding the generator's intent.

Response: The terms are used to identify the point at which material becomes subject to the requirements of Part 360. Moreover, the concept of being spent, worthless, or in excess to the generator is embodied in the legislative definition of solid waste.

360.2(a)(2)(i)
Comment: Consider revising, clarifying, or deleting this provision. Processing encompasses a broad range of conditions. Intent of this section is unclear, it would regulate material that is processed but not disposed.

Response: The Part 360 regulations govern facilities which process solid waste prior to disposal so it is appropriate to include processing in the list of regulated activities.

360.2(a)(2)(ii)
Comment: This citation should end after the phrase "into or on any land or water". Delete "so that the material or any constituent thereof may enter the environment or be emitted into the air or discharged into groundwater or surface water". Solid waste disposal should be regulated without leaving room for debate as to whether waste may or may not be contained by the waste-management device.

Response: This language is consistent with existing definitions and the legislative definition of disposal and has not been changed as part of this proposal.

360.2(a)(2)(iii)
Comment: The definition needs to be modified as follows: (iii) surrendered, accumulated or transferred instead of, or before being processed or disposed.

Response: Surrendered in this case would be equivalent to transferred.

360.12(a)(3)
Comment: Define “material” otherwise it covers all physical things. If the material is a proper candidate for determination, the existence of other material is irrelevant. The focus of regulation should be material content, not origin. Control over content at deposition eliminates the need for this logistically impossible policy.

Response: “Material” reflects its common dictionary definition and is intended to be understood in its plain language meaning. When a material is determined to be used beneficially, the Department bases its determination on there being no other material present in significant amounts. Origin of material, for example from a Department-authorized facility, implies a level of quality control that may allow the Department to reduce requirements for a BUD or to allow use under a pre-determined BUD.

360.2(a)(3)(i)
Comment: This section exempts certain "materials that are intended for reuse for their original function, without processing..." If a material has commercial value, and can be reused without processing, the regulations should exempt it from the definition of solid waste whether or not that reuse is for the original function. Recommended change: (i) materials that are intended for reuse for their original function, or that have commercial value and can be reused, without processing, such as materials at a garage sale, consignment shop, textile collection location or similar venue;

Response: Reuse of these materials are regulated under the Beneficial Use regulations in Section 360.12.

360.2(a)(3)(ii)
Comment: Please provide examples of materials "used in the production of food products".

Response: There are materials that are traditionally considered wastes that are being processed into other human food products. An example is the processing of grape seeds to generate grape oils.

360.2(a)(3)(viii)
Comment: "Known or suspected" implies a requirement to test for comparison to published standards. "Known or Suspected" by who? If soil is not known or suspected to be contaminated and is reused pursuant to this exemption, what protection do the generators and users have that the soil will not be subsequently tested and found to contain constituents above certain levels? Elsewhere in the proposed revisions, the reference to "known or suspected" is coupled with a reference to the Unrestricted Soil Cleanup Objectives (SCOs) of 6 NYCRR 375.6. This is very problematic as it will result in any soil not meeting the Unrestricted SCOs as being a solid waste.

Response: This exclusion was intended to ensure that clean, undisturbed soils such as native soils are not subject to solid waste regulations; known or suspected contamination in fact implies that no testing or comparison to standards has been performed or is required, only a knowledge of the material from its location, site history and visual or other observable characteristics. This exclusion nonetheless has been removed and reuse of clean excavated soil is addressed in Section 360.13.

Comment: This citation appears to reinforce pre-determined BUD in that non-contaminated soil is not solid waste (no known or suspected), key word is contaminant (not contamination)—other opening is "due to human activity". The difficulty in proving this issue is qualitative at best and could create very difficult scenarios of disagreement.

Response: The department disagrees that this criterion is only qualitative or subjective; a soil's potential for being contaminated due to human activity can be documented through soil science and site investigation. Nonetheless, this exclusion has been removed and reuse of clean excavated soil is addressed in Section 360.13.

360.2(a)(3)(ix)
Comment: Section 360.2(a)(3)(ix) should be deleted unless Section 360.12 of the proposed regulations is substantially amended to overhaul DEC's process for Beneficial Use Determinations (BUD), instituting rigorous decision-making subject to SEQR and public review. The current often cursory BUD process leaves citizens and the environment at risk.

Response: The department disagrees; the revised 360.12 provides for more rigorous review of and better recordkeeping for case-specific determinations.

360.2(a)(3)(x)
Comment: The kinds of materials which are included for use in artificial reefs should be specified. For example, NYSDEC has in the recent past accepted dredged material (i.e. rock) from the NY/NJ Harbor Deepening Program at its Hempstead Artificial Reef.

Response: The department disagrees; any material proposed for use in an artificial reef, whether a waste or not, is subject to requirements of state and federal marine protection programs; these requirements can be relied upon to ensure the use of the material will not pose harm to the environment.

360.2(b)(1)
Comment: Who determines if a waste is being "accumulated speculatively"? Or if there is no "realistic potential for being beneficially used"? Many materials have reuse potential. Imposing strict limits on storage prior to reuse will thwart legitimate reuse opportunity.

Response: This determination would be made by the department. It should be noted the term "accumulated speculatively" is no longer used in the regulations, and the term

and definition have been removed. The storage time frames in the beneficial use section are in place to prevent speculative accumulation.

360.2(b)(8) Alternate Fuel
Comment: "Biomass prepared fuel (BPF)" be included in the definition of “alternative fuels”. It would be worded "Paper, fiber, food, leather, and wood (excluding pressure treated and painted) with gradation of 2" or less and may include small quantities of other organics including textiles and plastics (excluding PVC).

Response: Biomass prepared fuel is not a term which is used in the proposal.

360.2(b)(10) Amendment
Comment: This term does not appear to require a definition in this Subpart, as it is only used for in section 360.12. In general, the term "amendment" has many other uses and meanings throughout the regulations. Consider embedding the definition in section 360.12, and remove from this section.

Response: Amendment is also used in the description of composting facility operations in Part 361-3, so a distinction is needed. There has been confusion concerning what amendment means for dredge management, necessitating the need for a definition. Definitions are typically included in this section of Part 360.

360.2(b)(19) Aquifer
Comment: Over the years, there have been specific issues raised during the permitting of landfills in regard to primary and principal aquifer determinations. For clarification, we believe these specific TOGS 2.1.3 notes be incorporated into the definitions to make sure these factors are appropriately considered. Therefore the definitions should read as follows with the addition of these TOGS notes:

(i) Primary water supply aquifer *or* primary aquifer means a highly productive aquifer which is presently used as a source of public water supply by major municipal water supply systems. To be considered a Primary Aquifer, all three of the following criteria must be met: 1) have a minimum contiguous areal extent of 5 square miles; 2) thickness of saturated deposits of highly permeable material should average at least 20 feet through much of the area, with some locations at least 50 feet thick; and 3) have sustained yields to individual wells of 50 gpm or more from sizable areas (two square miles or greater) throughout the aquifer.

(ii) Principal aquifer means a highly productive aquifer or deposits whose geology suggests abundant potential water supply, but which is not intensively used as a source of water supply by major municipal systems at the present time. Some water supply development has taken place in some of these areas but it is generally not as intensive as in the primary aquifer areas. The minimum criteria found in Primary Aquifer for aquifer size, deposit thickness and sustained yields also apply to Principal Aquifers.

Furthermore, given the lack of clarity regarding the EPA's definition of a sole-source aquifer and the recent issues in the state for siting projects within sole-source aquifers, if additional requirements are to be imposed for sites in proximity to sole-source aquifers, that these be more clearly defined in the Part 360 definitions. For clarification, it is important to modify the definition of Sole source aquifer as shown below.

(iii) Sole source aquifer means an aquifer which has been designated by the EPA as the sole or principal source of drinking water for a community. The run-off and recharge areas of a sole source aquifer are not considered part of a sole source aquifer for the purposes of this definition.

Response: These are determinations which are made by the Division of Water. Therefore, it is inappropriate to specify the criteria by which the Division of Water makes the determination in this definition..

360.2(b)(20) Ash residue
Comment: The definition of “ash residue” refers to a combustion process and does not accurately define a thermal gasification process. We request a definition that includes "Char" the in-between state of carbon that has not fully transformed from a solid to a gas.

Response: Material remaining after thermal gasification would meet the definition of residue.

Comment: Change “ash residue” to “combined ash residue”. This change is consistent with industry terminology and would clarify that this residue contains fly ash and residue from air pollution control device.

Response: While most ash is combined, facilities may choose to manage the various ash types separately.

360.2(b)(28) Biofuels
Comment: “Biofuels” are restricted to vegetable or animal fat sources; therefore, if a liquid fuel were made from landfill gas, it would not fit the definition excluding the production. Biofuels are not necessarily exclusively liquid fuels. For example, wood is a biofuel, compressed natural gas from digester or landfill are also biofuels. We suggest DEC consider revising this definition.

Response: For the purposes of the Part 360 Series regulations, this definition of biofuels fits the materials described and their unique management requirements. It does exclude other organic materials from use or organic wastes from approval for use as fuels.

360.2(b)(29) Biohazard incident
Comment: The definition of “biohazard incident waste” seems to be directed at large-scale events that happen outside the laboratory environment, but the term “accidental

spill…from a laboratory" could easily be interpreted to include very small-scale events. Please include language in the definition to describe the scale of the "incident" covered by the definition.

Response: The term has been deleted from the regulations and clarification of the specific biological agents of concern has been added.

Comment: We recommend that the definition of "biohazard incident waste" be revised to exclude spills associated with food and agricultural activities. It is proposed that the wording be amended to read:

"Biohazard Incident Waste" means waste, except from food and agricultural activities, generated as a result of, contaminated by or including any residue associated with a spill or release of an infectious agent or biological toxin with a recognized high or elevated risk of morbidity or mortality, regardless of origin (including from a naturally occurring source), in a public space or area, or the environment.

Response: The term has been deleted from the regulations and clarification of the specific biological agents of concern has been added.

360.2(b)(30) Biohazard
Comment: We recommend that the definition of biohazard waste be amended to exempt all food and agricultural activities which include quality testing laboratories, FDA validation activities and laboratories, USDA testing activities and food research laboratories. The definition should be modified to read "other solid waste, excluding-waste from food and agricultural activities, that present a risk similar to or greater than regulated medical waste due to the presence of infectious agent(s)".

Response: The term has been deleted from the regulations and clarification of the specific biological agents of concern has been added.

Comment: We recommend that the definition of biohazard waste be revised to eliminate microbiological laboratories associated with food and agricultural activities. It is proposed that the wording be amended to read: "Biohazard waste can include biohazard incident waste, trauma scene waste, human remains management waste, prion or animal prion waste, and waste from biomedical, pharmaceutical or research activities pertaining to those laboratories."

Response: The term has been deleted from the regulations and clarification of the specific biological agents of concern has been added.

Comment: The definition of "biohazard waste" is impermissibly vague and overly expansive. RMW and infectious agents are both defined in NYSDEC regulations. However, RWM comprises a broad range of waste products from used sharps and medical products to animal specimens and chemical and biological agents used in medical research, which present wildly varying degrees of risk. Many types of RMW do

not present risk at all. Defining biohazard waste in comparison to the risk posed by RMW leaves no way to reasonably determine whether a given materials is, in fact, biohazard waste. Even if one could calculate the "risk" posed by any given type of regulated medical waste, there is no single measure of risk posed by regulated medical waste as a category. The New York Court of Appeals has held that a regulatory definition must provide "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." The definition, as currently proposed, does not comply with that requirement. In addition to being impermissibly vague, the proposed definition is excessively broad, capturing everything from highly communicable chemical agents to spoiled food. As drafted, the proposed regulations will impose substantial new burdens on the state's food manufacturers and food safety network, with potentially significant economic and public health impacts. Food waste products should be excluded from the definition of biohazard waste.

Response: The term has been deleted from the regulations and clarification of the specific biological agents of concern has been added.

360.2(b)(35) Biosolids
Comment: We recommend the below changes be consistent with the EPA definition:

"Biosolids" means the nutrient-rich organic sludges resulting from treatment of wastewaters from publicly or privately owned or operated sewage treatment plants that have been treated to a point that can be used to improve and maintain productive soils and stimulate plant growth. Biosolids does not include grit or screenings, or ash generated from the incineration of biosolids.

Response: The Department agrees the EPA definition is more limited than the definition proposed in Part 360. The EPA definition attempts to limit the definition of biosolids to those materials that could potentially be beneficially used. However, the EPA definition can be difficult to use in practice. The use of semi-solids or solids in the definition, as opposed to sludges, is appropriate in Part 360 as the data is not always available to make the determination whether the material is biosolids or sewage sludge. Therefore, the Department prefers to characterize the material as biosolids and label those that land apply, compost, etc. as biosolids that are beneficially used or recycled.

360.2(b)(43) By or on behalf of a municipality
Comment: DEC should consider that service areas are not rigid, service areas change with market conditions and may overlap.

Response: The regulations recognize that service areas may change and facilities can modify approvals to reflect new service areas.

360.2(b)(49) Combustion
Comment: The definition of "Combustion" should be furthered clarified to read: "which uses high temperatures and oxygen .... " The word "and" should be changed to read "which uses high temperatures ***with*** oxygen as its primary process."

Response: The relevant language has been adjusted in the express terms.

360.2(b)(52) Commercial aggregate
Comment: Must be limited to whether it is sold, not whether some engineer drafted specifications for the material.
The vast majority of fill commercial aggregate such as “minus 3/8ths” is an understood product of commercial aggregate and is not specified by an engineer. The requirement of an engineer’s specification is contrary to the reality of the commercial marketplace.

Response: The reference to a specification prepared by a professional engineer applies only to the last example in the definition, which concerns a location-specific aggregate. The remaining materials exemplified in the definition do not require the involvement of a professional engineer, but must meet a standard aggregate specification in order to be considered legitimately recycled in this manner.

Comment: Commercial aggregate is much broader than stated in the proposed definition and should include any marketable soil, stone and fill material.

Response: For the purpose of the proposed regulations, the department has defined aggregate to include the specific uses described, whereas other stone, soil and fill materials, while not meeting the department’s specification of an aggregate, are and can continue to be used as grade adjustment or other purpose fill.

Comment: The language- ‘according to a standard aggregate specification or an area-specific or location-specific aggregate specification prepared by a professional engineer’ is open ended. Where is the standard aggregate standard?

Response: The department will not specify any standard, since several industry-recognized standards exist which would fulfill this requirement.

360.2(b)(53) Commercial waste
Comment: We would like to note that “commercial waste” a component of MSW and does not require pre-approval for disposal. The current definition includes non-manufacturing activities at industrial facilities. Is the expectation that office waste or cafeteria waste from a manufacturing business is considered industrial waste? Is non-hazardous plant trash (i.e, empty containers, non-recyclable packaging, etc.) that is generated in the plant, but is not a process waste considered industrial? Does plant trash require a Waste Characterization Profile Form (47-19-7)?

Response: The wastes generated in non-manufacturing activities is considered a municipal solid waste rather than an industrial waste. This includes wastes generated in offices or cafeterias at manufacturing facilities. Language has been adjusted in the express terms.

360.2(b)(61) Concentrated Animal Feeding Operation

Comment: Under the Department's draft ECL permit, farms, of CAFO size, would not be considered a point source if they are in compliance with the ECL permit. We request that the Department review the definition of a CAFO in the Part 360 regulation and make adjustments so it more accurately reflects the true definition of a Concentrated Animal Feeding Operation.

Response: The department will revise the definition to delete the reference to a point source and better reflect the CAFO program definitions.

360.2(b)(63) Construction & (64) Construction and demolition debris
Comment: The regulations must be modified, starting with amending the definitions of "Construction and Demolition Debris" as well as "Construction", to allow for material that is just recognizable uncontaminated concrete, asphalt, rock, brick and soil (RUCARBS), particularly soil and rock, to not be considered C&D debris. Such material may still be subject to oversight, tracking as an example, but not be managed as a waste in the same manner as debris from the demolition of a building such as wood, wall coverings, plaster, drywall, plumbing fixtures, insulation, roofing shingles, plastics, etc. This change would foster opportunities for appropriate reuse/recycling of such RUCARBS, rather than large volumes being stored for extended periods of time or seeking disposal sites rather reuse/recycling opportunities. DEC recently confirmed that materials with lead-based paint below 5 mg/L, or building products with PCB concentrations below 50 mg/kg can be managed as construction and demolition debris.

Response: The pre-determined beneficial uses have been modified in the proposal to reflect that recycled concrete and masonry products, brick, rock, and asphalt pavement are not solid waste once they meet the specifications for reuse established by the Department of Transportation.

360.2(b)(64) Construction and demolition debris
Comment: This definition is confusing (and circular) as the regulations, 360.2(b)(136), also define one type of "historic fill" as "construction and demolition debris". The regulations should recognize a "de minimis" exception for historic fill adhering to materials generated during the demolition of structures or buildings in cities of over 1 million without taking the overall material out of the C&D category.

Response: This definition also excludes other materials with the understanding that incidental quantities in C&D debris would not disqualify the material from being classed as C&D debris. The historic fill definition is no longer used in the regulation and has been replaced by the term "fill material" and addressed its management separately from C&D debris elsewhere in the regulations.

Comment: It is impossible to base the policy on anything other than the content of the material as is done by NYC.
Separate Fill Material from C & D as is done by NYC. Clean fill cannot be regulated under the same structure as C & D.

Response: The department has not revised this definition, but has added a separate definition of “fill material” and addressed its management separately from C&D debris elsewhere in the regulations.

Comment: Although poorly drafted, the phrase “any containers having more than one inch of residue remaining on the bottom” renders honest regulation impossible as the vast majority of containers of C & D after they have been transported contain more than one inch of “fines”. Therefore, the vast majority of C & D in containers are no longer C&D.

Response: The residue remaining in containers, in this definition, refers to paints, solvents, coatings, oils or the like in cans, totes or other liquid-bearing containers.

Comment: This definition should include wood pallets.

Response: Wood pallets are not part of construction and demolition debris.

Comment: The word "uncontaminated" in the proposed definition needs clarification. Some NYSDEC personnel take this to mean that sampling and chemical testing are required. The promulgation history of Part 360 clearly indicates that Construction & Demolition (C&D) is not to be "contaminated with other solid waste". These can typically be verified by a visual inspection. Please clarify.

Response: Visual identification of whether C&D debris is contaminated by other waste is consistent with the definition of ‘uncontaminated’ included in this proposal.

Comment: Short definition major change is that it does not describe what is in C&D but instead only lists what is not in C&D. Major issue is that C&D cannot contain historic fill. But later definition indicates historic fill includes C&D. This infers that any material with non-native components that may have been in the ground prior to October 1962 is historic fill and thus even though excavated for or by construction and including material (excluding historic fill) that would after 1962 be C&D, it is not. The definition creates a qualitative description that could be easy to rule on inconsistently. How do we make distinctions in dirt mixed with aggregate that could have been in the ground before or after October 1962? This would all appear to be historic fill therefore only virgin soil/dirt can be C&D. Anything else appears to fall under historic fill.

Response: The historic fill definition is no longer used in the regulation and has been replaced by the term “fill material” and addressed its management separately from C&D debris elsewhere in the regulations.

360.2(b)(64) Construction and demolition debris & (65) Construction and demolition debris processing facility

Comment: The NYSDEC should create another definition for RUCARBS or CARBS, which can be used throughout the Part 360 regulations to provide an exemption in the regulations for RUCARBS facilities from permitting requirements in whole, or in part, as

well as in other instances where RUCARBS facilities or materials should be distinguished from traditional C&D facilities. A second suggestion is that NYSDEC remove “soil” from the reference in section 360.13 as it potentially excludes RUCARBS from historic fill, as this media is the most problematic and risky for the industry (making it RUCARB / CARB). The revised definition should allow for an incidental amount of soil, perhaps by percentage (but a defined volume), as incidental soil is likely to accompany the RUCARB.

Response: A definition of “fill material” has been added to 360.2 to address soil and soil-like materials that the department agrees should be managed separately from concrete, rock, brick and asphalt pavement.

360.2(b)(65) Construction and demolition debris processing facility
Comment: The term "handles" is undefined and should be removed. Many solid waste facilities (e.g., transfer stations and landfills) "handle" construction and demolition debris. Likewise, the term "handle" should be removed from 361-5.1 and 362-3.1. Furthermore, the term "processes" should be more specifically defined for "construction and demolition debris processing facilities" to exclude processing methods for size reduction, compaction, or consolidation (i.e., the methods commonly used by transfer stations). Otherwise, transfer facilities handling construction and demolition debris would be subject to regulation as a "construction and demolition debris processing facility" due to the ambiguous definition for processing.

Response: The term has been removed, and the definition has been adjusted.

360.2(b)(66) Container
Comment: Define “material” as used in this definition.

Response: The term “material” has been replaced with “waste” in the proposal.

Comment: A clear definition of “contaminated” should be provided.

Response: The definition of “uncontaminated” that is included in the definitions is sufficient.

360.2(b)(70) Cultures and stocks
Comment: We note the definition of “cultures and stocks” does not include “…human or primate cell lines, impure animal cell lines…” as was included in the same definition in the pre-proposal version of Part 365 regulations at 365-1.2(a)(12). Please clarify how these materials are to be regulated in the current proposed draft.

Response: The definition has been amended to clarify how these materials are to be regulated.

360.2(b)(71) Cumulative loading limit

Comment: Cumulative loading limit for agricultural soils is defined only in terms of metals; the State may want to include other compounds of concerns, such as estrogenic compounds.

Response: The cumulative metal loading limits are used for biosolids land application based on federal regulations concerning the accumulation of heavy metals. There are no similar federal standards for other compounds at this time.

360.2(b)(73) Custodial care period
Comment: This defined term should only apply to landfills and land disposal facilities. Other types of SWMF simply do not require long-tern custodial care.

Response: The definition has been adjusted.

360.2(b)(78) Decontamination
Comment: We recommend that DEC either expand this definition to be applied to all uses of the term, or define "Decontamination" for a specific use in a subpart to avoid confusion with similar definitions such as "uncontaminated". This term is used several times throughout the regulations, and it is unclear if each use of the term is meant to correspond with the definition provided.

Response: The definition has been revised since use of the term decontamination was limited to proposed Part 365.

360.2(b)(78)(ii) Disinfection
Comment: Additional clarification is needed regarding who else, other than the US EPA, would be an appropriate regulatory authority approving the use and application of a disinfectant.

Response: The definition has been revised to address the stated concern. Both the USEPA and the department register products which meet the definition of a pesticide. The proposed regulations intended to indicate that use of a disinfectant should be consistent with approved labels, not that the regulatory agencies approve each use of a disinfectant

360.2(b)(82) Destroyed
Comment: Although a medical facility has implemented a sharps management program, it is not possible to confirm that 100% of sharps have been rendered unidentifiable. Through effective programs and equipment, it may be possible that the majority of sharps could be rendered unidentifiable; consider revising to "90%".

Response: It is important to manage and dispose of needles, lancets and syringes safely to prevent injury and disease. NYS law requires sharps to be both treated and destroyed prior to disposal in a landfill. 100 % destruction ensures that sharps cannot be scavenged for reuse, provides a level of safety against needle sticks during recovery of metal and plastics from treated sharps and ensures that they can be safely disposed.

360.2(b)(83) Discharge
Comment: Eliminate “waste constituent” or rationally define what it means and how it fits in any cost/effective policy concern. The fact that this is the only portion of the related waste definitions where the concept of “constituents” is referenced leads to the conclusion that is a stray, uncontemplated drafting thought. It is important to refrain from including concepts that are not thought out and related to the regulatory structure elsewhere.

Response: The definition has been adjusted.

Comment: Discharge is not always related to a waste, for example, stormwater is discharged to the surface and we test it for contamination. Is the intent of this for a permitted activity versus an unpermitted activity? Would it be appropriate to revise the term to "unpermitted release"?

Response: The definition been adjusted.

Comment: This definition clearly indicates that anything liquid moved by means of human intent and direction is intentional and what is moved is “waste”. Should all water moved as a result of diversion of existing flow be a waste?

Response: The definition been adjusted.

360.2(b)(85) Disposal facility
Comment: A waste-to-energy facility should also be considered a disposal Facility, although the waste is not intended to remain. See proposed definition: “’Disposal facility’ means a facility where waste is intentionally placed and where the waste is intended to remain or be destroyed.”

Response: A waste-to-energy facility processes solid waste via combustion to reduce its volume and recover energy. No disposal takes place at the facility.

360.2(b)(86) Disturbed
Comment: "Disturbed" soil does not mean the earth material is known or suspected of being contaminated. Virgin soil is often regraded. Is it really the NYSDEC's intent to have any previously disturbed soil classified as solid waste or assumed to be known or suspected of being contaminated? Please clarify.

Response: This is not the department’s intent. The definition does not include reference to contamination.

Comment: Define earth moving activity.

Response: This term is self-explanatory.

Comment: Drill cuttings is a waste originating from the exploration and production process and would be considered “Drilling and Production Waste”. We recommend that DEC include drill cuttings in §360.2(b)(88). Furthermore, what is DEC's expectation for soil contaminated with drilling and production fluids? Would the impacted soil be considered drilling and production waste or industrial waste?

Response: Drill cuttings are already included in the proposed definition. Soil impacted by drilling or production fluids would be considered drilling and production waste.

360.2(b)(97) Event
Comment: Consider changing the term to “collection event”, as to avoid confusion with other types of events, such as storm event.

Response: The term has been changed in the definitions and throughout the proposed express terms.

360.2(b)(98) Excluded waste
Comment: In the definition of “excluded waste”, the products of source-separated yard trimmings, source separated recyclables, and source-separated food scraps should be allowed as a biomass prepared fuel (BPF) when used as a waste derived feedstock to produce alternative and innovative renewable energy products or alternative innovative fuel and transportation products. The Governor's 50% renewable energy requirement by 2030 will require all of the biomass available to help ensure our striking that goal. This is especially true when landfills are not prohibited from accepting biomass waste. This does not appear to be fair and equal treatment, nor appropriate sound environmental policy for future alternative innovative energy products.

Response: Biomass prepared fuel may be authorized as an alternative fuel and is regulated by the Department’s Division of Air Resources. When approved by the Division of Air Resources, the combustion of alternative fuel is exempt from Part 360 regulations as described in Subpart 362-1.

360-2(b)(100) Expansion
Comment: This definition should be limited solely to the throughput capacity of a facility. If the facility has the capacity to store more solid waste, it should be able to do so without re-permitting. This definition should be further clarified to exclude an expansion in the footprint of a facility that does not increase throughput. For example, placing a weighing station on adjacent property or a storm water collection receptacle on adjacent property should not be considered an expansion of the transfer facility because they do not increase the throughput of the facility.
Recommended Changes: (100) Expansion means an increase in the approved throughput beyond the limits approved in the permit for a facility. In the case of landfills, expansion also means a lateral or vertical increase in size beyond the limits approved in the permit. An increase in the lateral size of a non-landfill facility that does not increase the throughput of that facility will not be considered an expansion.

Response: An increase in the storage capacity of a facility can be a significant change to the facility's operations.

360.2(b)(101) External slope
Comment: The definition of "external slope" should be revised to read as follows: External slope means any slope in a landfill which is constructed along the outer boundary edge of an existing liner system.

Response: The proposed regulations have bene revised to make this adjustment.

360.2(b)(102) Facility
Comment: The definition of "facility" is too broad. For Part 360 purposes, "facility" should be limited to the actual solid waste handling and disposal units. It should not include administrative offices, maintenance buildings and other structures unrelated to the management of solid waste.

Response: The department agrees that the definition should not include structures or buildings unrelated to the management of solid waste. This current definition is consistent with this concept.

Comment: "Facility" must first be defined as that approved in the permit/registration application. Both the agency and the permittee must have a clear legal definition of the exact boundaries of the facility. This vague proposal will lead to many avoidable disputes. Transportation after initial collection should be omitted for the same reason noted above.

Response: The term is used for any location where solid waste is managed beyond the initial collection process, and can include locations such as exempt facilities or illegal facilities where a permit or registration has not been issued. Transportation is separate and distinct from a facility.

Comment: "Facility" is an all-encompassing term. "Disposal facility" is limited to those facilities where waste is intentionally placed. These are the facilities requiring post-closure and custodial care.

Response: Disposal facility is defined separately in the proposal and is a specific type of facility.

360.2(b)(103)
Comment: Farms rotate crops on several separate areas of land, areas of land that are not currently being used for crops should still be considered part of the farm. For this reason the following definition for "farm" should be used:

"Farm" means an area or location recently used for the raising or harvesting of any agricultural or horticultural commodity through the cultivation of soil, hydroponics, or the

raising, shearing, feeding, caring for, training, or management of livestock, bees, poultry, forbearing animals, fish, domestic animals or wildlife.

Response: The definition includes those areas where farming activities take place, and is not restricted to only areas were crops are actively being raised. The language in the proposed regulation has been retained.

360.2(b)(108) Final Cover System
Comment: Geosynthetics may be approved or permitted as final cover at for all or portions of a landfill. We suggest the removal of the requirement to "support vegetation" from this definition to leave open the possibility of geosynthetics as final cover as shown in proposed definition below:

"Final cover system" means an engineered layer of materials approved by the department in accordance with Part 363 of this Title that is placed on any surface of a landfill where no additional waste will be deposited, and serves to restrict infiltration, control landfill gas and promote surface drainage.

Response: The definition has been revised to allow for the possibility of a geosynthetic as the uppermost layer of the final cover system.

360.2(b)(110) Flowable fill
Comment: We suggest adding the requirement to be capable of being pumped be added to the definition for flowable fill as follows: "Flowable fill" means a self-compacting, cementitious, low-strength mixture of soil, water, or coal combustion residuals, used to backfill excavations and capable of being pumped.

Response: The department agrees that this characteristic of flowable fill is recognized across the construction industry and has added it to the definition.

360.2(b)(112) Food crops
Comment: Why does the definition of "food crops" exclude grains?

Response: The definition does not exclude grains. There are examples of food crops included in the definition (fruits, etc.) but the definition includes the phrase "but not limited to".

Comment: Several crops that would fall under this definition, such as tobacco, may not necessarily be directly consumed by humans. We recommend the insertion of "directly or indirectly" to include these types of crops, as proposed as follows:

"Food crops" means crops consumed by humans, directly or indirectly, including, but not limited to, fruits, vegetables, and tobacco.

Response: The definition of food crops is used in the regulation of biosolids use and comes directly from existing federal regulations, 40 CFR Part 503. To avoid confusion

between State and federal regulations, we prefer to use the same definitions outlined in the federal regulations.

360.2(b)(113) Food processing waste
Comment: Food processing waste is the result of a manufacturing process, is this considered an industrial waste? Does it require a Waste Characterization Profile Form (47-19-7)?

Response: Food processing waste is considered an industrial waste, and must be approved for disposal through use of forms and procedures included in the landfill's waste acceptance plan. Whether Form 47-19-7 is required depends on the procedures used at a particular landfill.

Comment: This definition should be broadened to include meat and egg as food waste.

Response: The definition has been revised to clarify that it includes egg shells. This definition is used primarily for land application facilities under 361-2 that apply these materials as a source of nutrients for the soil. Due to the potential disease and spoilage concerns, meats are excluded.

360.2(b)(117) Friable asbestos-containing waste
Comment: The definition of "friable asbestos-containing waste" does not include asbestos discarded by households. Households are defined as single and multifamily residences, hotels, etc. (137); 363-2.1 (a) Exempt facilities - says in effect that the storage, processing and disposal of asbestos is not exempt from this Subpart for an owner occupied single family residence. But according to the definition of friable asbestos there is no friable asbestos in households.

Response: Friable asbestos wastes may be disposed of by residences as a part of municipal solid waste which is collected and sent to a solid waste management facility. However, proposed subdivision 363-2.1(a) restricts friable asbestos waste from being disposed of at an owner-occupied single-family residence.

Comment: Consider reverting to the current Part 360 defined term for *"Asbestos Waste"* with an exclusion for non-friable asbestos waste embedded in the definition. The Part 360 regulations should ensure consistency with NYS Department of Labor Code Rule 56 management requirements by the generator and EPA regulation criteria. Include clarification on management of vermiculite and asbestos management as it relates to homeowners/residents.

Response: The proposed definition is consistent with Department of Labor codes. With the exception of on-site disposal, the management of asbestos by homeowners is beyond the scope of this rulemaking.

360.2(b)(118) Gas recovery equipment
Comment: The definition for “gas recovery equipment” should include language beyond transporting “landfill gas” only.

Response: This term refers to the equipment which collects landfill gas from inside the landfill and delivers it a treatment system, but it does not include the treatment system itself.

360.2(b)(120)
Comment: There should be clarification added to the term gasification**.** There are several different types of gasification technologies in this definition and they are all lumped into one category even though they are distinctly different.

Response: The various types of gasification are all regulated under Part 362-1.

Comment: We recommend additional criteria be used to define “Gasification”, proposed below:

“Gasification” means the thermal conversion of organic material at a temperature exceeding 700 degrees Celsius with a limited amount of combustion in waste by direct or indirect heating in the presence of air into syngas products.

Response: The proposed definition provides flexibility in defining the term. Therefore, it has been retained.

360.2(b)(121) Generator
Comment: A generator can produce a waste by changing the composition of an existing waste, for example MSW incinerators create ash from MSW. For this reason, the definition of “generator” should read as follows: “Generator” means any person whose act or process produces or changes a waste or whose act first causes waste to be subject to regulation under this Title.

Response: The proposed definition provides for the example noted in this comment, in that a municipal waste combustor carries out a process which produces a waste. The proposed definition has been retained.

Comment: The word gross in the definition for “gross contaminants” does not appear to be the proper word. In litigation the word "Gross" means many, numerous or large. The simplistic word for this use should refer to "residues." Residues could include "inorganic household waste" (HHW) or unidentifiable.

Response: The term “gross” in this context means large and visual, as opposed to chemical pollutants such as heavy metals. The term is used for municipal solid waste composting, to ensure the compost product does not contain plastics, or other constituents that would limit marketability. The regulations also contain other criteria for pollutants that can be identified by laboratory analyses.

360.2(b)(135) High-volume organic waste generators
Comment: This definition poses a specific requirement for an average volume of no more than 104 tons per year, which may pose a problem if legislature proposes a different amount.

Response: This definition will be revised if legislation dictates another frequency for these generators.

360.2(b)(136) Historic Fill
Comment: Delete the 10-12-1962 date requirement in this definition. In many cases, a property owner or developer will not be able to identify when a certain portion of "fill" was "used" on a property. If fill material meets the other definitional requirements of this section, the 10-12-1962 date seems overly restrictive and essentially impossible to demonstrate in certain instances.

Response: The department has included this date as preceding most regulation of landfilling. Approximate dates of fill placement can be determined, in many instances, through review of aerial photographs and property records.

360,2(b)(136)
Comment: In this definition of historic fill, the characteristics of disturbed historic fill should be more important than when the material was placed. If disturbed material exhibits the characteristics of historic fill in the proposed regulation, it should be permissible to manage the material as historic fill if the date of placement is not known, or conversely if it is clean, to manage it as clean fill material regardless of placement date.

Response: The term “historic fill” is no longer used in the revised proposal, and waste soils are now characterized based on their characteristics.

Comment: Proven clean material must be exempt from regulation as historic fill.

Response: The department has substantially revised 360.13 to allow broad use of “clean” material, which may address this comment.

Comment: DEC should clarify how a contractor is to know where historic fill will be encountered. It should be designated in the plans and specifications by the public and private owners. This allows the contractors the ability to control risk and bid the work accordingly.

Response: The term “historic fill” is no longer used in the revised proposal, and waste soils are now characterized based on their characteristics.

Comment: What is the significance of the October 12, 1962 date in this definition?

Response: The term “historic fill” is no longer used in the revised proposal, and waste soils are now characterized based on their characteristics.

Comment: Historic fill does not include contaminated solid waste but no criteria or standards are provided. Contaminated to what degree? How will regulations require Historic Fill to be managed going forward? We also recommends DEC create an exemption allowing ash with a pH > 12.5 to be managed as MSW.

Response: The department has substantially revised express terms in 360.13 for management of waste soils from construction or maintenance and other excavated fill materials. The department cannot create an exclusion in Part 360 for a material that may be a hazardous waste by characteristic; if determined non-hazardous by methods approved in 6 NYCRR Part 371, ash could be managed as MSW.

Comment: While this definition is understandably broad it should nonetheless be tied to the soil cleanup standards in Part 375 to maximize the re-use of historic fill without re-introduction of potentially contaminated fill to the market.

Response: The department has substantially revised express terms in 360.13 for management of waste soils from construction or maintenance and other excavated fill materials.

Comment: Please verify that normal roadway materials are not intended to be defined as historic fill and that typical practices for identification of historic fill outside of known mapped areas are sufficient for addressing the potential for historic fill. Consideration should be given to a further definition or additional language within the regulation that would clarify that the intent of historic fill is not intended to include routine C&D materials commonly present in the roadway.

Response: The department has substantially revised express terms in Section 360.13 for management of waste soils from construction or maintenance and other excavated fill materials, and has added a definition of fill to 360.2 that together addresses this comment.

Comment: We suggest the following change to definition of historic fill:

“Historic fill” means solid waste including, but not limited to, coal ash, wood ash, municipal solid waste combustor ash, and railroad ballast, which was used before October 12, 1962 to create, or to subsequently function as, usable land by filling water bodies, wetlands or topographic depressions. Historic fill includes any soil or soil-like wastes excavated from any area, which is downstream up to a reasonable limiting distance from a known point of contamination listed in one of the previously referenced databases or which is known to have been filled using solid waste.

Response: The term “historic fill” is no longer used in the revised proposal, and waste soils are now characterized based on their characteristics.

Comment: This definition is potentially damaging to the State, its policy for reduction of landfill waste, Solid Waste Management Policy and would create potential for uncontrolled change order situations in virtually all infrastructure and construction work in any urban area or highway corridor.

Response: The revisions the department has made to Section 360.13 address this comment.

Comment: Statements are vague and not clear – for example "maps issued by local, state, federal government agency, or which is "otherwise known to have been filled using solid waste".

Response: The revised proposed regulations eliminates the term "historic fill" and waste soils from construction or maintenance outside of New York City only require testing when there is historical evidence of potential contamination, or other visual or physical indicators.

360.2(b)(136)
Comment: Much residential land in a Long Island Town is made up of casting material used in creating canals that would meet definition of historic fill. Many acres of land on the Town's south shore is designated Filled land dredge (Fd) and Filled sandy (Fs) on the Suffolk County Soil Survey. Common improvements such as installation of swimming pools would require expensive testing and disposal under the proposed regulations.

Response: The revised proposed regulations eliminates the term "historic fill" and waste soils from construction or maintenance outside of New York City only require testing when there is historical evidence of potential contamination, or other visual or physical indicators.

360.2(b)(137) Household
Comment: Hotels and motels are a commercial place of business and should be considered commercial waste. We suggest the following definition for "household": "Household" means single and multiple-family residences, bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds, and day use recreation areas.

Response: The waste generated from the hotel or motels rooms is similar in nature to that which is generated in households. The proposed definition has been retained.

360.2(b)(142) Human remains management waste
Comment: This definition should better correlate with the definition for Regulated Medical Waste, or be removed.

Response: The term has been deleted from the regulations and clarification of the specific biological agents of concern has been added.

360.2(b)(143) Humus
Comment: "Humus" is defined as "breaking down no further," but humic acids degrade in soils and other natural environments (very slowly in some environments, but they do degrade).

Response: The definition has been revised to address the concern raised in this comment.

Comment: A definition should be added for "hydraulic fracturing". Defining this term will improve the clarity of the proposed rules. The following definition is suggested: "Hydraulic Fracturing" means those operations conducted in an individual wellbore designed to increase the flow of hydrocarbons from the rock formation to the wellbore through modifying the permeability of reservoir rock by fracturing it by application of fluids under pressure.

Response: This term is not used in the proposal and therefore a definition is not necessary.

360.2(b)(145) Industrial waste
Comment: Industrial waste needs additional definition for non-hazardous industrial waste.

Response: The determination of whether or not a waste meets the definition of hazardous waste is beyond the scope of this rulemaking.

Comment: The definition of industrial waste is too broad.

Response: This term is intentionally broad in order to include any wastes generated by industrial or manufacturing processes.

Comment: The current definition provides a broad description of industrial waste. What is DEC's expectation for management of plant trash (i.e. non-recyclable packaging, empty containers, non-hazardous uncontaminated waste from the manufacturing facility that is not a process waste)? Is office waste or cafeteria waste generated at a manufacturing facility considered Industrial Waste or Commercial Waste? There are wastes generated at a manufacturing or industrial facilities that are not the result of a process that may be considered industrial waste.
Although Food Processing Facility is a separate defined term, would Food Processing residue be considered industrial waste?

Response: Waste that is not generated by industrial or manufacturing processes, such as cafeteria or office waste, is not considered industrial waste.

Comment: Industrial waste is essentially anything generated by an industrial process. Typically and historically, coal ash and cinders have been considered industrial waste when found mixed with soil or soil-like material. The definition of historic fill starts out with the inclusion of coal ash, wood ash, municipal solid waste combustor ash which are all industrial waste. Based on this, how can historic fill comprised with coal ash or mixed ash be historic fill if, historic fill cannot include industrial waste?

Response: A direct link cannot be made between ash or cinders that may be included in historic fill and a specific industrial process. In fact, a high proportion of ash and cinders in historic fill likely were generated from cooking, heating and trash incineration in residential, institutional and commercial buildings. Therefore, the waste is not considered industrial waste.

360.2(b)(146) Inert material
Comment: This definition of "inert material" should be expanded to include the nonputrescible ingredients from MSW, commercial waste, C&D and waste woods. This could include the inorganic fraction defined earlier and should all be recyclable.

Response: This term is used in relation to wastes which may be disposed of in landfills in Long Island. This definition is consistent with the Long Island Landfill Law and will therefore be retained.

360.2(b)(147) Infectious waste
Comment: The proposed definition of "infectious agent" should be revised to exclude biosafety level 1, 2 and include level 4 microorganisms and selected microorganisms for biosafety level 3. It should also be amended to read: "does not include organisms found in contaminated food waste or in food testing laboratories as these are regulated by the FDA and USDA."

Response: This provision is consistent with the NYSDOH requirements at 10 NYCRR Part 70. Biological safety levels are ranked one to four and are selected based on the infectious agents or organisms that are pathogenic to humans or animals on which research or work is being conducted. Each level up builds on the previous level of safety required and the risks posed by infectious agents within each group. Organisms included in the Biosafety level 2 group include infectious agents that generally pose a moderate hazard but are associated with human disease (i.e., HIV, Hepatitis, encephalitis, etc.). Therefore, because of their potential to cause human disease, precautions must be used to prevent exposure during waste handling and disposal procedures. The inclusion of biosafety level 2 organisms in the definitions is necessary and protective of public health and the environment.

360.2(b)(157) Leachate
Comment: Some NYSDEC regions consider water dripping from a walking floor trailer as "leachate" and have required containment for vehicle parking areas. The NYSDEC should clarify the status of water that drips from trailers and establish clear criteria for when drip pads are mandatory. A uniform policy is needed.

Response: Site-specific circumstances may require collection of leachate in vehicle parking areas at some solid waste management facilities and not at others. This is a site specific issue that would be addressed in the special permit conditions for the facility.

360.2(b)(159) Leak-proof
Comment: We suggest the following definition for "leak-proof": "Leak-proof" means designed and maintained to avoid the escape of contained liquids or other materials through implementation of best management practices. Although the industry makes a significant effort to prevent liquids from escaping containers or vehicles, it would be more appropriate to demonstrate leak-proof as a management practice.

Response: This term typically refers to containers which designed and constructed to retain liquids or other materials. While best management practices may also be used to retain liquids or other materials, that activity does not fall within the definition.

360.2(b)(160) Lift
Comment: Lift also applies to soil during construction, we suggest changing the title of this definition to "Lift of Waste"

Response: The definition has been adjusted.

360.2(b)(169) Metal processing and vehicle dismantling facility
Comment: Metal processing is not necessarily a vehicle dismantling facility. It appears these should have two different definitions to allow for metal processors that are not vehicle dismantling facilities. Metal sorted and separated out of C&D, MSW and commercial waste and waste wood should be specifically deleted from this definition.

Response: This definition has been removed.

360.2(b)(172) Mulch
Comment: The definition of mulch should be expanded to included wood derived from any unadulterated sources such as currently included as part of waste wood and should include wooden pallets, wood cable spools, C&D wood from floor, wall and ceiling joists.

Response: The definition includes "and other suitable materials". The Department recognizes that other clean wood sources can be made into mulch.

360.2(b)(175) Municipal solid waste processing facility
Comment: The definition of "MSW Processing Facility" should be expanded to include a biomass prepared fuel (BPF) for those technologies that are not a combustion process technology.

Response: The definition has been expanded.

Comment: The following definition of “municipal solid waste processing” should be included: “’Municipal solid waste processing facility’ means a facility that primarily performs post-collection separation and/or processing of municipal solid waste to recover recyclables or do produce a refuse-derived fuel.” If a transfer station were to elect to recover metal, it would not be a processing facility because that is not the transfer station's primary purpose. Alternatively, DEC could include a percentage, such as "greater than 10%" to differentiate these activities and facilities. Is volume reduction considered processing?

Response: The definition has been adjusted. Volume reduction is considered a form of processing.

Comment: The term "processing" should be more specifically defined for "municipal solid waste processing facilities" to exclude processing methods for size reduction, compaction, or consolidation (i.e., the methods commonly used by transfer stations). Otherwise, transfer facilities handling municipal solid waste would be subject to regulation as a "municipal solid waste processing facility" due to the ambiguous definition for processing.

Response: The definition has been adjusted to clarify that the primary objective of the facility is to either remove recyclables from waste or process waste into a fuel.

360.2(b)(179) Municipal solid waste
Comment: Municipal Solid Waste (MSW)-MSW & C&D should not be legally allowed to be commingled at a future date certain. Both of these waste-streams have organic biomass ingredients and recyclables within. The new regulations should encourage and eventually require these waste streams to go to a recycling processing facility where all organics and recyclables should be removed prior to landfill acceptance.

Response: The regulations provide regulatory pathways for the recovery of recyclable materials. Requiring that all MSW and C&D debris be processed at a recycling facility is beyond the statutory authority found in the Solid Waste Management Act.

Comment: The definition of “municipal solid waste” should include household waste.

Response: The definition includes residential waste, which is waste which is generated by a household. The term household waste is not used in this proposal.

Comment: The definition of MSW should include non-hazardous industrial waste definition also.

Response: Industrial waste is a separate material from municipal solid waste.

Comment: Include a definition of “navigational” that reads: “passable by floating vessel year round.”.

Response: The department did not adopt this meaning for navigational, since the type of dredging intended in the department's definition of navigational dredged material (NDM) is not limited to the dredging done in waters to accommodate vessels. Materials generated from dredging for aesthetic, recreational or habitat enhancement purposes, in addition to maintaining boating channels, are intended under the department's definition of NDM in Part 360. Navigational dredged material as defined in Part 360, importantly, is distinct from remedial dredged material in that NDM is not dredged to remove contamination from a waterway. NDM may or may not be contaminated, and could be suitable for beneficial use.

360.2(b)(180) Navigational dredged material
Comment: The proposal does not include a general definition of dredge material so material appears to all fall in a category of navigational dredge material. This could cause confusion as dredge plans for maintenance always reference levels of contamination in order to evaluate disposal options.

Response: The department disagrees that this change is needed. It is the purpose of dredging, not the presence or absence of contamination, that distinguishes navigational versus remedial dredging.

Comment: The definition does not state the purpose of navigational dredging, it states the physical end result. Therefore, it should be clarified that this end-result is necessary for "navigational safety" of federal channels and private facilities within state waters and for "economic development" of private facilities vital to the region (such as NYCEDC's Manhattan Cruise Terminal), hence the need for proactive dredged material management

Response: For purposes of Part 360, the definition of navigational dredged material encompasses a broader purpose, not limited to ensuring navigational safety or promoting economic development. This purpose is sufficiently clear in the present definition and was not modified in the revised proposal.

360.2(b)(182) On-site
Comment: Several terms used in the definition of "on-site" are not defined. The term control is not defined and therefore control can be a verbal agreement of use, etc. Crossing a public right of way is seemingly vague in that you cannot travel "along" a row but there could be requirements for short distances due to physical conditions etc. that would be unduly difficult to meet. Since accessing and crossing a public row is now acceptable there should be a precision for limited travel on that public row but vehicles should be properly loaded and identified in order to access a public row.

Response: The legal definition of control would not include a verbal agreement of use. Any transportation of waste on a public right of way may be subject to the Part 364 Waste Transporter provisions, so only crossing of the public right of way is considered to remain on-site under this definition.

360.2(b)(183) Operating cover
Comment: Operating Cover should include C&D ADC materials if NYS is going to encourage new C&D recycling developers to grow and expand.

Response: The requirements found in 363-6.21 govern this use of any waste, including C&D debris, as alternative operating cover.

Comment: Many permits and O&M Plans refer to this as application as daily cover or alternate daily cover (ADC). For clarification, DEC should acknowledge the change in terminology from daily cover to Operating Cover. Alternative Operating Cover, formerly known as Alternative Daily Cover (ADC) should also be included here. We suggest the following definition for "operating cover": Operating cover (formerly known as daily cover) means a compacted layer of soil or approved alternate (i.e. Alternative Operating Cover) is placed on all exposed waste at the end of each working day or where no additional waste will be deposited within a specified time period.

Response: The term includes what was formerly known as daily cover and what was formerly known as intermediate cover. Operating cover must be applied at the end of the operating day or when no additional waste will be placed within one year. Intermediate cover is the cover applied to all external slopes for every 20 feet of vertical rise.

360.2(b)(185) Operator
Comment: The term **"**operator" seems to be defined too loosely, as it appears that anyone whose actions or failure to act causes regulatory non-compliance will be held responsible; could include all workers at a facility; an operator should be someone with authority.

Response: The term describes the operator as a person responsible for overall operations and who has the authority to make and implement decisions.

Comment: The definition of "operator" is poor. For example, an owner with no real-world relationship to the facility is still "responsible" under a variety of statutes and may be strictly liable for various event, but such an owner is not an operator. It is dangerous to draft provisions that do not reflect the actual facts.

Response: The regulations allow for either the owner or the operator to control operations at a solid waste management facility, and both of these cases take place for existing facilities. The terms owner and operator, in most cases, appear together throughout Parts 360 through Part 365 which allows the Department to focus enforcement efforts on the correct party.

360.2(b)(186) Organic
Comment: The definition for "Organic Materials" should include a cross-reference to include Biomass prepared fuels (BPF) as a feedstock for innovative alternative energy technology that will help fulfill the Governor's 50% renewable electricity requirement by 2030.

Response: The definition for “organic” is general concerning the nature of the material, and is not specific to its origin.

Comment: “Organic” is defined as living matter or organisms: this seems to exclude compost and the degradable portion of solid waste.

Response: For the purposes of Part 360, the term “organic” characterizes the waste that would enter the compost facility and the compost is the stabilized product that results from processing. The definition of organics includes portions of the solid waste stream.

360.2(b)(188) Organics processing facility
Comment: The term "biodegradable organic" is used, but one of the words is redundant given 360.2(a)(186).

Response: The proposed regulations have been revised accordingly.

Comment: The definition for “Organics Processing Facility” should be expanded to include new facilities designed specifically to take in MSW, C&D and waste wood (WW) feedstock to prepare a specified biomass feedstock that will provide fuel for a new technology that will produce alternative and innovative energy products that will supplement and support the Governor's 50% by 2030 alternative energy mandate. There is no definition for a "Class A" process.

Response: Facilities that produce fuels are regulated under Part 362, instead of the provisions in Part 361-3 for organics processing facilities. Class A processes are listed in Part 361-3.

Comment: A definition of “placed in commerce” should be added. This phrase is used in Section 360.12 and the meaning is unclear.

Response: “Placed in commerce” is not present in the proposed 360.12.

360.2(b)(189) Owner
Comment: The definition of “owner” is poor. The term “legal title” is a legally meaningless phrase and, thus, dangerous. You cannot include “part thereof” as it extends far beyond what is intended. For example, it means that a relative in another country who has nothing to do with the facility but who will inherit the property one day in the future is deemed a current owner hereunder.

Response: The Department disagrees that “part thereof” imports concepts involving the rules of inheritance. The plain meaning of “thereof” is “of that.” Since it is possible for a person to own part of a solid waste management facility, and the existing definition presently reflects this notion, the new definition will retain this meaning. The Department also disagrees that “legal title” is meaningless. The ordinary meaning of

owner is one who has legal title to property. Nevertheless, the comment raises the concern that the addition of new language may have the unintentional effect of weakening the enforceability of the definition and contains redundant language. Therefore, the definition of owner has been revised in the proposal to retain the existing definition of owner.

360.2(b)(195) Person
Comment: Person should be expanded to include municipalities, legally recognized entities, etc.

Response: The definition includes both municipalities and other legal entities.

360.2(b)(196) Pharmaceutical waste
Comment: Combustion is the best disposal method for these wastes. They should be exempt from undue regulation. However, the collected wastes may include pharmaceuticals that are considered hazardous. We request moving the text from 360.14(c)(8) to a new definition under 360.2 , "Pharmaceutical take-back waste". This will allow referencing this waste stream in other locations in this Part.

Response: The combustion of pharmaceutical waste is regulated under Subpart 362-1. We require that all pharmaceuticals collected at household collection events in New York State be destroyed at permitted municipal waste combustion facilities if destroyed in New York State. However, pharmaceuticals generated by households and collected at pharmaceutical events are not considered hazardous waste under RCRA. We do not believe a separate definition of pharmaceutical take-back waste is warranted in the proposal since we do not reference this specific waste stream in other locations in this Part.

360.2(b)(197) Planning unit
Comment: The definition of planning unit does not mention towns on Long Island.

Response: The definition is derived from the definition found in Environmental Conservation Law 27-0107(1) and includes combinations of Towns and villages.

360.2(b)(198) Post-closure care period
Comment: It should be made clear that this definition only applies to disposal facilities**.** Other types of SWMF do not require post-closure care. It should be made clear that the custodial care period follows the post-closure care period.

Response: The language has been adjusted to address this concern.

360.2(b)(199) Primary container
Comment: The definition of “primary container” should not specifically refer to regulated medical waste. The definition of secondary container is general, and the definition for primary should be as well. We suggest the following definition:

“Primary container” means the inner packaging or containment system in direct contact with, holding and securing waste.

Response: The term is only used in the context of regulated medical waste in the regulations. Both definitions have been revised to clarify that they apply to regulated medical waste.

Comment: A distinction should be made between the Critical Stratigraphic Section (CSS) for the purposes of site characterization and the most effective locations for groundwater monitoring wells for operational water quality monitoring. Therefore, we recommend adding the following definition to 360.2(b):

“Primary pathway” means that portion of the Critical Stratigraphic Section where a release and migration of landfill-derived groundwater constituents will be detected at the earliest possible time, based on geologic and hydrogeologic properties of the subsurface water bearing units.

Response: We do not agree that it is necessary to define a “primary pathway” and add this to portions of 363-7 that discuss the critical stratigraphic section. The regulations already contain language stating that a primary objective of the site investigation report is to develop a thorough understanding of site hydrogeology such that the primary routes of potential contaminant migration are identified and monitored. Some examples of this type of language are contained in 363-7.3(a)(3), 363-7.3(b)(2), 363-7.3(b)(2)(ii), 363-7.4(b)(1) and 363-7.4(b)(1)(ii)(a).

360.2(b)(201) & (202) Processing
Comment: Definitions (201) and (202) both define "Processing" and reference the same Subpart 361-8**.** Is this correct? If so please explain and combine the two definitions into one definition for Processing as it relates to Subpart 361-8.

Response: Definition (201) defines the term for use in Subpart 361-8, while Definition (202) defines the term for use in all other Parts of this rulemaking.

Comment: There should not be two definitions for the same term, one should be a subset of the other, as proposed in red text:

(202) Processing means the use of a combination of structures, machinery or devices to alter the volume or the chemical or physical characteristics of solid waste.

(i) for the purposes of Subpart 361-8 of this Title, processing consists of filtration to remove food particles, heating to remove water, or any other physical separation process to purify waste cooking oil or yellow grease.

Response: This format was chosen to highlight the different uses of the term. The current format has been maintained.

360.2(b)(202)) Processing
Comment: In the event processing requires any review permit or other special effort this is going to significantly impact even the most basic construction efforts. This could create some confusion regarding construction sites screening material and being considered treatment or processing facilities.

Response: Processing of solid waste is an activity regulated under Part 360. In some cases, such as the processing of solid waste at the site of generation or at location under the same ownership or control as the site of waste generation, the activity is exempted from Part 360.

360.2(b)(204) Project engineer
Comment: The definition of "project engineer" is poor. It cannot be "responsible for certifying". It must be actually have so certified. "Official representative" should be defined.

Response: The definition has been adjusted.

360.2(b)(205) Public contact area
Comment: The term "public contact area", while defined, is not used in the regulation.

Response: The term is used in Part 361-2.

360.2(b)(208) Pulverized
Comment: In the definition of "Pulverized ", unaided visual observation should be capped at 2" or larger. Today's mechanical sorting and separating technology can identify particles down to 3/4" inch-size.

Response: The definition does not identify the limits of visual observation, but instead establishes that any processing beyond which the basic constituents can be identified is considered pulverizing. The size of waste particles which are recognizable will vary by waste type.

360.2(b)(209) Putrescible
Comment: In the definition of "putrescible", uncontaminated wood and paper can be putrescible and should not be exempted.

Response: Wood and paper are only excluded from the definition for use in the recyclables handling and recovery facilities and C&D debris processing facilities, where the materials would be directed for recycling and reuse.

360.2(b)(210) Qualified groundwater scientist
Comment: The term Qualified Groundwater Scientist is used only once in these regulations, a separate definition may not be necessary. However, if DEC elects to keep this term in 360.2, we propose the following revision:

"Qualified groundwater scientist" means a scientist or engineer who has received a baccalaureate or graduate degree in the natural sciences or engineering or equivalent, and has sufficient training and experience in groundwater hydrology and related fields to enable that individual to make sound professional judgments regarding hydrogeological investigations, groundwater monitoring, contaminant fate and transport, and corrective actions and corrective measures.

Response: The substance of the proposed definition has been incorporated into the proposed definition.

Comment: The definition of "qualified groundwater scientist" should also include the words and/or a licensed New York State Professional Geologist.

Response: The definition has been amended to include a licensed New York State Professional Geologist.

360.2(b)(213) Receiving facility

Comment: This definition is inferring that a hazardous waste management facility is not a solid waste management facility. We suggest the following definition: "Receiving facility" means the solid waste management facility authorized to accept the specified waste for transfer, storage, treatment or disposal.

Response: This term is used to identify facilities which receive wastes from waste transporters authorized under Part 364 of this title. Those wastes may be either solid wastes or hazardous wastes.

360.2(b)(214) Recognizable

Comment: The definition of "recognizable" should include a cap for size and should be legally binding as 2" plus which is visually recognizable unaided.

Response: The definition does not identify the limits of visual observation, but instead establishes what is recognizable based on unaided visual observation. The size of waste particles which are recognizable will vary by waste type.

Comment: In the definition of "recognizable," who is the person making the determination of whether a material is readily identified and at what point is this decision required to be made? Materials that have been processed at NYSDEC registered or permitted facilities may no longer be recognizable when incorporated into reuse sites. Obviously the recognizable standard cannot be applied to reuse of processed materials. The DEC concept that the scientific fact of the content of a material may be ignored because a DEC staff person can't determine the fact at a glance must be deleted as one of the more destructive provisions in the existing solid waste provisions. Material that is clean, for example sitting next to analyticals proving so, should never be treated as unclean, ever. To do otherwise distorts the entire waste stream and the cost structure beneath it.

Response: The department is ultimately responsible for determining the recognizability of a waste. Analytical results are preferable to simple visual identification techniques. In the absence of analytical data, however, visual identification to determine recognizability is an important tool the department uses to determine compliance with the regulations.

360.2(b)(216) Recyclable
Comment: The term “potential” as used in the definition of recyclable should be defined. Additionally what is “recyclable” will change back and forth over time. One set of years a component will have a market and in a second set of years, there will be no market. The component is recyclable only if it is actually recycled by the market.

Response: While the values associated with recyclables may vary, the markets which receive and find uses for the material remain relatively consistent over time. A recyclable is separated and collected because it has the potential to be recycled. It is not a recycled material until it actually used in a manufacturing process or similar recycling opportunity.

360.2(b)(217) Recyclables handling and recovery facility
Comment: Separation must be allowed to occur at any point prior to arrival at RHRF. There is no material that is recyclable and has an active market should be permitted to be processed as recyclables at a facility so long as they arrive separated.

Response: Pre-determined beneficial use determinations have been included in this proposal which allow the use of source-separated recyclables that have not been received by a recyclables handling and recovery facility. The handling of recyclables may only take place at a facility authorized under this proposal, which would include the site of generation of the waste as well as any exempt, registered or permitting facility as provided for under this proposal.

360.2(b)(218) Recyclables recovery equipment
Comment: In the definition of “Recyclables Recovery Equipment**”**, the last words "other than energy recovery**"** should be deleted as that is neither accurate nor attainable. Sorting, separating and recycling equipment lines are designed today to allow for the removal of recyclables, and can include unidentifiable (from 3/4" to 2" minus), as well as prepare the remaining feedstocks as a biomass prepared fuel.

Response: This term is used in Part 369 to help identify equipment which is eligible for reimbursement under the state assistance program. In order to be eligible for this program, the recyclables recovery program must be focused on purposes other than energy recovery, which is not considered recycling under this program.

360.2(b)(219) Recyclables recovery program
Comment: The proposed definition of “recyclables recovery program” appears to be not fully support "energy recovery." If favoritism is not to be legally allowed, then biomass gasification should be added to the list of favored uses.

Response: The department does not consider gasification or other thermal treatment methods to be recycling.

360.2(b)(220) Recycle
Comment: The definition of recycle should include biomass gasification thermal treatment and other disruptive, alternative technologies**.** The definition of "recycle" also goes on to prohibit "the use of waste as a fuel substitute or for energy production alternative daily cover or within the footprint of a landfill." This new stipulation prohibits all of the C&D recycling that includes ADC manufactured as an engineered specification product by recycled commodity manufacturers. The exclusion of Alternate Operating Cover from the definition of "Recycle" potentially will hurt some construction projects which apply the alternate use of contaminated soil as cover in landfills for LEED building certifications. We recommend Alternate Operating Cover be removed from the exclusion listing of this definition. The exclusion on materials used within the foot print of a landfill will mean common uses of glass and shredded tires on Long Island will no longer be counted as recycling.

Response: The department does not consider thermal treatment nor alternative operating cover to be recycling.

Comment: Alternate daily cover reference should be "Alternative Operating Cover" for consistency with the rest of the proposed regulation. In addition, a definition for Alternate Operating Cover should be added to Part 360.2.

Response: The definition has been adjusted to remove reference to alternative daily cover. Operating cover is defined in the proposal, and the approval process for alternative operating cover is described in Part 363.

Comment: The definition of “Recycle” excludes compost used for erosion control.

Response: The definition has been adjusted in the proposal.

Comment: We oppose the definition change to “Recycle” (Part 360.2(b)(220)) that excludes the use of waste within the footprint of a landfill, ostensibly by way of a Beneficial Use Determination. Materials that can be repurposed for a landfill include glass for pipe bedding, processed hard fill for landfill roads and tire chips for leachate collection systems, to name a few. Removing this metric from a generator’s recycling alternatives will add expense to generators in either finding more distant markets for these difficult materials or paying landfill disposal rates. In addition, credit for recycling tonnage is important to nearly every generator these days. It is suggested the phrase “…, or within the footprint of a landfill” be struck.

Response: The use of wastes to replace raw materials in landfill settings is encouraged. However, these uses are not considered recycling by the department.

Comment: Define the terms “raw materials”, “new products” and “soil amendment” as used in the definition of “recycle”.

Response: These terms are not explicit to this proposal, but are standard usage.

360.2(b)(222) Refuse-derived fuel
Comment: Waste feedstock should be permitted or another term developed such as biomass prepared fuel (BPF) that would provide clarification that provides the distinction term "refuse-derived fuel" does not include or represent biomass prepared fuel (BPF) waste that goes through an extremely capital cost intensive, labor intensive sorting, separating and recycling equipment lines which remove all recyclables, unidentifiable objects%" or smaller, and all inorganic materials like glass and metal that go to recycling, before the remaining biomass is placed into an alternative, renewable energy technology process.

Response: There is sufficient flexibility in the term and other terms, such as alternative fuel, to allow for the regulation of fuels developed from biomass under this proposal.

360.2(b)(223) Regulated medical waste
Comment: We recommend that waste from food and agricultural activities that are presently and safely exempt from RMW continue to be treated safely as domestic/household waste and not be considered a special category.

Response: This Part has been substantively revised and clarification of the specific biological agents of concern has been added.

360.2(b)(225) Representativeness
Comment: The definition is reasonable for use in explaining what the word means but if this term comes into discussion or there is disagreement with the limit of what is representative and what is not representative, there is no manner to make that determination here.

Response: As noted in the comment this definition explains the meaning of this term. However, any disagreement regarding whether a sample is representative or not must be determined on a case by case basis using valid sampling techniques and statistical analysis if necessary.

360.2(b)(226) Representative sample.
Comment: “Representative sample” is defined very loosely.

Response: The Department disagrees. The definition makes it clear that a “representative sample” must represent the “properties of the larger population”.

360.2(b)(227) Residence time
Comment: This term is used in the regulations for items other than RMW, and the definition should be applicable to other sections as follows:

“Residence time” means the time necessary for effective treatment of waste at a specific temperature, pressure, irradiation level or chemical concentration.

Response: The definition has been adjusted in the revised proposal.

360.2(b)(229) Residue
Comment: DEC treats all processed material as waste until paid for and received. Thus, every single cubic yard or material leaving any Fill or C & D facility is “residue”. That doesn’t work as a policy and contradicts a host of provisions in Part 360. The policy objective is unclear. If the issue is segregating out “unrecognizable” fines, this is not the way to do it.

Response: The proposal has been adjusted to differentiate recyclables from residues.

360.2(b)(230) Revenue-oriented municipal facility
Comment: "Revenue-Oriented Municipal Facility" does not make sense. Who determines what revenue is beyond "that necessary to operate" and how is that decision made? Will facilities need to provide financial statements?

Response: This term is specific to landfills. The definition has been adjusted accordingly. It is intended to differentiate municipally-owned, not-for-profit landfills that operate for the benefit of their residents from those which operate in a similar manner to private, for-profit facilities.

360.2(b)(234) Scrap metal processor
Comment: It is recommended that in the interests of consistency the Department amend the definition of “scrap metal processor” to mirror the definition set forth in the General Business Law, to read as follows:

“Scrap metal processing facility" shall mean an establishment engaged primarily in the purchase, processing and shipment of ferrous and/or non-ferrous scrap, the end product of which is the production of raw material for remelting purposes for steel mills, foundaries, (sic) smelters, refiners, and similar users.

Response: The definition has been adjusted.

360.2(b)(238) Service area
Comment: "Service area" is not a fixed geographic area. It changes with time and market conditions and can overlap with other service areas.

Response: The regulations allow facilities to amend their approvals to include new service areas.

360.2(b)(241) Sludge
Comment: This definition should be changed as follows:

(241) Sludge means a solid, semi-solid or liquid waste generated from a wastewater treatment plant, water supply treatment plant, industrial water or wastewater process, or wet air pollution control facility technology but does not include the treated effluent from a wastewater treatment plant.

Response: The definition of "sludge" has been changed in the revised proposal**.**

Comment: This definition should have more detail qualifying sludge generation, so that other wastewater treatment process media is not mischaracterized as sludge, as detailed below:

"Sludge" means solid, semi-solid or liquid waste generated by a process that partially or fully separates the liquid and solid fractions of the waste from a wastewater treatment plant, water supply treatment plant, industrial process, or air pollution control facility but does not include the treated effluent from a wastewater treatment plant.

Response: The definition of sludge has been changed in the revised proposal.

Comment: We recommend that this definition be changed as follows:
"Sludge" means a solid, semi-solid or liquid waste generated from a wastewater treatment plant, water supply treatment plant, industrial water or wastewater process, or wet air pollution control facility technology but does not include the treated effluent from a wastewater treatment plant.

Response: The definition of sludge has been changed in the revised proposal.

360.2(b)(242) Soil
Comment: This is an irrational result of a policy based on something other than the content of material. If soil or any material is perfectly clean it does not lose that factual status simply because once upon a time it was proximate to non-clean material. All regulation must be based upon actual content of material.

Response: The department disagrees; the plain meaning of this definition is that soil in contact with C&D debris or historic fill is likely to be or become mingled with these materials. It thereby does have its "actual content" altered and may no longer be "perfectly clean" chemically. More pertinently, it should not be sold or distributed as "soil" equivalent to native or quarried/mined soil, unless it is characterized (see revised Section 360.13).

Comment: A definition should be added for "soil amendment".

Response: The use of the term soil amendment is generally understood and is used in a way that it can be readily understood in the regulations.

Comment: Soil that has come into contact with C&D debris residue or historic fill is no longer considered soil regardless of any subsequent processing. What is it therefore

now considered to be if no longer “soil”? Additionally, what constitutes “contact” if source separation occurs on-site of generation?

Response: The department has addressed soils that may be impacted from any type of contaminant, chemical or physical, and their reuse as fill, in the revised 360.13.

Comment: This definition states that soil that has come into contact with C&D Debris Residue or Historic Fill is no longer soil, which is inaccurate, it would still be soil, but it would no longer be considered clean soil. Clarification revisions are proposed below. It is not clear from this definition that the term soil applies to in-situ soil in its natural state as well as excavated soil, please clarify.

“Soil” means a body of uncontaminated naturally occurring unconsolidated material consisting of variable proportions of rock fragments, sand, silt, clay and organic matter, the latter derived from plants and animals living within or upon the soil. Soil that has been mixed with, or come into contact with C&D debris residue or historic fill is no longer considered uncontaminated soil regardless of any subsequent processing and may require appropriate testing for the intended use of disposal.

Response: The second sentence, “Soil that has come into contact with C&D debris residue or historic fill…” has been removed from this definition.

Comment: The definition of “soil” at 360.2(b)(242) refers to natural deposits. This is much too restrictive. Many construction sites have soils which are no longer in a natural deposit, having been previously reworked and graded. Such soil should not be considered a potential waste by virtue of no longer being a natural deposit.

Response: The revised definition does not limit soil to natural deposits, but may include reworked native soils.

Comment: This definition is overly restrictive and does not allow for marginally contaminated soil that is below the Part 375 soil cleanup levels from ever being considered “soil” for whatever purpose, implying the existence of an inferior undefined soil-like material with no clear rules for its management. This creates ambiguity, and, to the extent the definition implies that material cannot be used in remediation and development projects. It further undermines sustainability principles and can potentially add exorbitant costs to material management. Soil should be considered soil for most uses if it does not have contaminants above the Part 375 standards. There needs to be clarity as to what it means for soil to “come into contact.” As written, huge amounts of soil in the vicinity of historic fill would have indeterminate status under this definition, and could potentially be sent to a landfill by definition, without good cause or any analytical data that indicates otherwise.

Response: In the revised definition of soil, the second sentence referring to “soil that has come into contact with…” has been removed. The department’s intention is to delineate soil as a naturally-occurring material, but not to limit use of “marginally

contaminated" soil, or as newly defined in Part 360, "fill material," from use in construction projects including remediation and development projects. Protocols for use of fill material have been included in revised Section 360.13.

Comment: Soil also exists in non-natural settings. Construction projects often include regrading of soil to balance cuts and fills. Such soil remains suitable for reuse. Please clarify. "Soil that has come into contact with C&D debris residue or historic fill is no longer considered soil". To what depth? Who determines? What criteria will be employed to determine when soil that contacted historic fill or C&D requires management as solid waste.

Response: The definition in 360.2(b)(242) does not confine soil to "natural settings"; material meeting this definition can be considered soil in any context. The department has created a definition of fill material in 360.2(b) and outlined protocols for reuse of fill material in revised Section 360.13.

Comment: This creates an issue regarding residue. In the event virgin soil is present at any depth with other non-virgin material above it. It could be virtually impossible to take a line across the native and non-native layers to say where residue contact begins and ends. There is no distinction of impacts, lack of impacts, and identification of defining what a residue is. Also during excavation shallow C&D or historic fill is very difficult to completely remove and therefore using this argument of contact or residue, native soil may continue to extend deeper as excavation continues. There is a limit to reasonable means and methods. This cannot be determined with definitions using terms like any and all.

Response: The department has revised Section 360.13 to develop protocols for evaluation and reuse of materials such as in this scenario, when incidental non-soil constituents may appear in soils despite efforts to segregate materials during site excavation. The department has revised the definition of soil by removing the sentence regarding contact with other materials and has added a definition of Fill Material to accommodate soil mixed with some residue.

360.2(b)(245) Source separation

Comment: This definition should not only apply to recyclables, but should be applicable to other components of the waste stream**.** Suggested definition: "Source separation" means the segregation of from the waste stream at the point of generation for separate collection, transportation, sale, recycling or other lawful management.

Response: This term is used in both statute and regulation to describe the separation of recyclables from the solid waste stream.

360.2(b)(246) Source separation equipment

Comment: Source Separation Equipment should be applicable to other sections beyond Part 369 as proposed below:
Source separation equipment means:

(i) containers for the source separation and temporary storage of recyclables by commercial, industrial and institutional generators, and for the source separation and temporary storage of recyclables by single-family and multiple family dwellings before collection;
(ii) add-ons or trailers designed to modify collection vehicles to allow sorting and separation of collected wastes held for the purpose of recycling;
(iii) bins, sheds or other facilities for the temporary storage of materials before transport for the purposes of recycling; and
(iv) collection vehicles specifically dedicated to holding and transporting source-separated recyclables for the useful life of the vehicles.
(v) for the purposes of Part 369 of this Title, Source Separation Equipment means municipally-owned.

Response: This term is used specifically to determine the eligibility of equipment for reimbursement under the state assistance program.

360.2(b)(247) Source-separated organics
Comment: "Source separated organics" is defined as "readily degradable organic" which seems very uncertain and may contradict 360.2(a)(186); not clear why biosolids, sludge, and septage are not possible as source-separated organics (they can be operationally excluded from facilities if that is the intent).

Response: The definition has been revised to remove "readily degradable" since the terminology is contained in the definition of "organic." Biosolids, sludge, and septage can be recycled but are governed by different regulatory criteria than source-separated organics, so are excluded from the definition.

Comment: separate definition of "Food Waste" may be helpful.

Response: The term is sufficiently self-explanatory.

360.2(b)(248) Source-separated recyclables
Comment: The proposed regulations only appear to regulate the disposal of recyclables, including organics, that are regulated by state or local law (pursuant to state or local law or ordinance 360.2(b)(248) defining "source-separated recyclables). In other words, where organic waste is voluntarily source-separated, it arguably does not fall within the definition of "source-separated recyclables," and therefore, would not be subject to the restrictions and requirements otherwise applicable to organic material that has been source separated. This outcome not only has a significant impact, but appears to be inconsistent with Proposed Regulations which consistently include organics in other definitions pertaining to recyclables without reference to other laws. *E.g.* 360.2(b) (defining "recyclables," "recycle," "source separation," and "source-separated organics," which specifically defines such materials based on their having "been separated at the point of generation"). In New York City, this impacts a large and fast-growing number of businesses and communities that are committed to voluntarily recycling organics. These businesses and communities contract with commercial waste management companies

at an additional cost for the collection and processing of source separated organics. The Proposed Regulations should protect these participants just as it does those separating organics pursuant to state or local law. CGC proposes that the DEC consider revising the definition of source-separated recyclables to either exclude the clause "pursuant to state or local law or ordinance," or add after that qualification an additional qualifying option including in the definition voluntarily source-separated materials collected pursuant to contracts with entities otherwise subject to Part 360.

Response: The department agrees that voluntary programs that include a contract with a hauler to manage as source-separated materials should be included in the definition. The definition has been revised accordingly.

Comment: This definition is in complete contraction to the definition of recyclables. The concept is the arrival of material at a certain place, at a certain point in time, as separated material to ensure the “cleanliness” of the facility. As the goal is the compliance of the facility, when the separation happened prior to its arrival is irrelevant. A truck of perfectly clean glass alone is good for recycling at a facility and it is irrelevant when it became separated.
Limiting it to generation unnecessarily burdens the ability to recycle. For example, there are a host of generation sites that will never permit separation at the source, e.g. Manhattan construction sites. If the market is willing to pay for separation at some point between the source of generation and the facility, a smart policy permits that. A policy which forever forbids these solutions to the market is unwise.

Response: Source-separation is intended to enhance and maintain the recyclability of the material, rather than to ensure the cleanliness of the facility. The processing and separation of wastes beyond the point of generation is not forbidden, but is regulated under this proposal through exempt, registered or permitted solid waste management facilities. However, source-separation of waste materials such as soils or soil-like materials is preferable do to the difficulty of separating them after they have been mixed.

Comment: This definition does not appear to be necessary, given that the regulations have defined the terms “Source Separated” and “Recyclables”.

Response: The definition is included for clarity and ease of use.

360.2(b)(256) Storage
Comment: What was the consideration for storing material less than 12 months but anything over 12 months must be disposed of? Part 361 reads that you can only hold 180 days.

Response: The definition is intended to set a maximum storage time for wastes which are not eligible for recycling or beneficial use, beyond which the waste is considered to have been disposed. This includes storage at the point of generation. Other more

specific storage limits are necessary in some cases, however, those limits have been adjusted.

Comment: Please change definition to: “Storage” means the temporary holding or containment of waste in a manner which does not constitute disposal, provided, however, that any waste retained onsite in excess of time specified by waste type with exemptions as specified in Subparts.

Response: The definition is intended to set a maximum storage time for wastes which are not eligible for recycling or beneficial use, beyond which the waste is considered to have been disposed. Therefore, a specific time frame is necessary.

Comment: Storage not to exceed 12 months may not be feasible in all situations. A longer period should be allowed for non-putrescible wastes and recyclables. Will commercial aggregate at a plant longer than 12 months require a disposal permit?

Response: Wastes which meet the requirements of a beneficial use under this proposal would no longer be a solid waste and therefore would not be held to this storage limit.

360.2(b)(257) Storage area
Comment: The definition of “storage area” should include a longer storage time than 12 months. Recycled aggregates (asphalt, brick and concrete) require longer than 12month storage capacity time. Storage time can easily run into two consecutive operational years.

Response: This is the default storage limit for any solid waste. Storage requirements related to specific solid waste management facilities are included in the appropriate Parts. Beneficial use materials are not solid wastes under this Part and are not subject to this definition unless the material has been disposed of rather than beneficially used.

Comment: This term should be applicable to other sections beyond Part 365, but could include a more specific definition under Part 365 as indicated by proposed language below:

“Storage area” means a room, delineated area or designated space designed for storage within a building, or within or on any permanent structure attached or unattached to a building, including a loading dock, situated on property owned by or under management of the facility operator. Storage area does not include a trailer, bulk outer container, and other transportable container or vehicle not owned by the facility but situated on a facility property. For the purposes of Part 365 of this Title, “storage area” means a room, delineated area or designated indoor space designed for storage of regulated medical waste or other biohazard waste.

Response: This definition does only apply to Part 365. It is derived from a similar definition in the New York State Department of Health regulated medical waste regulations. The definition has been revised to clarify that it only applies to Part 365.

360.2(b)(259) Surface impoundment
Comment: Surface impoundments are used for materials other than waste, such as stormwater, as proposed below:
Surface impoundment means a facility or part of one that is designed to hold semi- solid or liquid that is not an injection well or a tank.

Response: Surface impoundments considered under this proposal are for the management of wastes. The use of surface impoundments for management of other materials is outside the scope of this rulemaking.

360.2(b)(260) Surface water
Comment: The definition of "surface water" in 360.2(b)(260) should be corrected to include the current exemption for surface impoundments at solid waste management facilities'. As it reads now, a stormwater retention basin could be considered an artificial surface water body.

Response: Surface impoundments at solid waste management facilities are not considered surface water under this definition.

Comment: "Storage incidental to transport" should be defined.

Response: This term is not used in the proposal.

360.2(b)(262) Tank
Comment: Tanks are also used to store petroleum products as well as waste materials and/or leachate, as proposed below: "Tank" means a stationary device designed to contain an accumulation of product, waste or leachate which is constructed of non-earthen material that provides structural support.

Response: The use of tanks to store materials other than waste is outside the scope of this rulemaking.

Comment: Unlike the EPA and Pennsylvania and Ohio, New York proposes no definition of TENORM. Indeed, DEC has no guidance material or TOGS (Technical & Operational Guidance Series) to deal with radioactive material in drilling wastes. DEC should revise its regulations and include a clear definition of TENORM following EPA's model ordinance or the definitions of TENORM adopted by Pennsylvania and Ohio. This would ensure that New York does not become a dumping ground for radioactive waste.

Response: Regulations and definitions associated with NORM are found in 6 NYCRR Part 380.

360.2(b)(263) Thermal treatment
Comment: The definition of "thermal treatment" should not exempt anaerobic digesters from the terms and conditions required of thermal processes. Such exemption reflects

that landfills are the preferred disposal method in NYS, and are being given a free ride that is passed along to anaerobic digestion.

Response: Anaerobic digestion facilities are regulated under Part 361 of this proposal. Landfills are not considered anaerobic digestion facilities under this proposal.

360.2(b)(270) Transfer facility
Comment: There are places in the regulations where "convenience station" and "residential drop-off' are used, it may be beneficial to provide clarification. Terms are used in 360.16(4)(ii)(n), 360.19(c)(7) and 363-4.5(k). It also may be beneficial to define a "transfer activity".

Response: The term 'convenience station' has been removed from the proposal, and language has been added where the term 'residential drop-off area' is used to sufficiently describe the activity.

360.2(b)(275) Treated regulated medical waste
Comment: The term "regulated" is the term being described and should not be used within the definition. We propose: Treated regulated medical waste means medical waste and other biohazard waste that has been properly treated by authorized facilities in accordance with Part 365 of this Title.

Response: The term "regulated" is used because the authority in the Environmental Conservation Law specifically relates to "regulated medical waste", not just medical waste.

360.2(b)(276) Treatment
Comment: If there is a designation requiring registration, permitting, or some documentation because of "treatment" that could be a real problem. Also local municipal management of material can easily fall into the category of "treatment" so would this require construction sites to become TSDF? What now is the threshold for determining what may look like the definition of treatment but is not? Many roadway construction requires some form of grinding etc. This currently requires no permits (possible dust control but unlikely) would this be defined as treatment? If it is not, then it is reasonable to assume all sifting, grinding and crushing is not treatment. There have been situations where DEC has indicated a mechanical manipulation of material in changing the size etc. is treatment or processing.

Response: The generation of a solid waste, in a process such as road grinding, is not considered treatment of solid waste. The management of waste at the site of generation or at another site owned or controlled by the same entity as the site of generation is exempt under this proposal.

Comment: There should not be two definitions for the same term, one should be a subset of the other, as proposed in red text:

(276) “Treatment” means any method, technique, or process designed to change the chemical or biological character or composition of any waste to recover energy or materials from it, to render it safe to transport, store or dispose of or to make it amenable for reuse, recovery, storage, or reduction in volume.
(i) For the purposes of Part 365 of this Title, Treatment includes any method, technology or process designed to change the character or composition of any biohazard waste so that it no longer constitutes a threat to public health and the environment. Treatment does not include compaction or disinfection.

Response: This structure is used for this and other definitions in the proposal to distinguish between the use of a term in different regulatory contexts.

360.2(b)(279) Ultimate user
Comment: Please define controlled substance.

Response: This is a definition of common usage.

360.2(b)(281) Uncontaminated
Comment: We assume this determination can be made by visual inspection or generator knowledge. Is there an expectation that waste must be subjected to laboratory testing? If required, what standards are employed for decision making?

Response: Laboratory testing is not always a requirement. If it is required, it is specified in the appropriate location in the proposal.

Comment: This definition should be tied to the Part 375 standards when applied to materials that might be used as soil or clean fill, as discussed throughout these comments. Maybe Part 360 should have a definition for “Clean Fill” that other states have adopted. If clean fill is defined, and tied to a Part 375 soil cleanup standard, that may solve many problems.

Response: The beneficial use language in this proposal have been adjusted to take this into consideration.

Comment: While open ended, it is completely out of sync with later beneficial reuse and the application and comparison using defined terms is going to be very difficult and confusing. Part 375 indicates in its definition (375-1.2(a)(x) that historic fill was contaminated prior to placement and therefore assumes or indicates that there is some level of impact that is considered contamination.

Response: The beneficial use language in this proposal have been adjusted to take this into consideration.

Comment: The definition of “uncontaminated” is unworkable. For example, concrete debris may have paint on it, and these regulations do not make clear whether or not the concrete is “commingled” with the paint as “other waste”. This definition should be

narrowed and/or a de minimis exemption provided. The following definition of "uncontaminated" should be considered: "Uncontaminated" means not commingled with, and not containing, (i) petroleum and petroleum products, except those present solely as a result of normal use of vehicles on roadways or parking areas; (ii) pesticides except those present solely as a result of the proper application in normal agricultural or horticultural practices, and (iii) hazardous waste. De minimis amounts of other waste do not preclude solid waste from classification as "uncontaminated."

Response: The language has been adjusted in the proposal.

Comment: While the Revised Regulations define "uncontaminated", many of the definitions included within Part 360-2 include the word "contaminants", the delineation of which can have restrictive or expansive effects on the respective definition. As such, we suggest NYSDEC consider adding "contaminant" as a defined term.

Response: A definition of contaminant has been added in 360.2(b), "*Contaminant* means any physical or chemical constituent in a material that does not provide a useful contribution to the material, and which may adversely affect human health or the environment, or which may lead to failure of the material in use, when present in quantities or concentrations specified in this Title".

360.2(b)(281)(i)
Comment: This provision is very damaging. All material will contain a different material, at least de minimus, and will thus be contaminated. There is no such thing as a truckload of material that is 100% pure. The definition must be limited to a clear and objective standard that all know how to meet. A clear analytical standard is the best option. The failure to correct this error will significantly increase the cost of construction in NYS.

Response: The language has been adjusted in the proposal.

360.2(b)(282) Under the control
Comment: Please define the term "indirect" which is used in this definition. The law on the concept of control is very mature and comprehensive. The regulation should not muddy the waters with undefined terms.

Response: The use of "indirect", in the context of this regulation, enjoys its ordinary meaning.

Comment: Definition is okay with the exception of the last word. "Otherwise" is an open ended term and will work but in leaving this so open, it seems confusing to have the definition other than to actually have a very open-ended control term.

Response: The comment is noted.

360.2(b)(283) Underground tank

Comment: The definition of “underground tank” should be consistent with NYSDEC Bulk Storage Regulations (Part 613) stating “….has ten percent or more of its volume beneath the surface of the ground or is covered by materials.” The term “partially covered” is too general.

Response: The language has been adjusted in the revised proposal.

360.2(b)(290) Used cooking oil, (291) Used cooking oil and yellow grease processing facility, (308) Yellow grease
Comment: It seems unnecessary to have three separate definitions related to used cooking oil and yellow grease. Could these terms be consolidated?

Response: The term used cooking oil refers to waste that is liquid at room temperature, while the term yellow grease refers to a waste that is solid at room temperature. These differing substances require separation definitions.

360.2(b)(290) Used cooking oil
Comment: This definition should be broadened to include fats, oil, grease, and rendered animal parts

Response: These materials would be included in the definition if they have been used for cooking.

360.2(b)(291) Used cooking oil and yellow grease processing facility
Comment: It does not seem necessary to define this a separate type of processing facility. Processing facility should be its own defined term with different types.

Response: This type of facility has specific operating requirements included in Part 361 of this proposal. Therefore a specific definition of the facility type is appropriate.

360.2(b)(294) Vector
Comment: It does not seem necessary to define “vector attraction” if the term “vector” is already defined. Could the term “vector attraction” be omitted?

Response: Vector attraction is defined because 361-2 and 361-3 contain criteria for vector attraction reduction. The definition for vector attraction is equivalent to the federal definition found in 40 CFR Part 503.

360.2(b)(296) Vehicle
Comment: It seems redundant to have a definition for “transport vehicle” and “vehicle”. Throughout 364, the term "vehicle" should be changed to “transport vehicle” so that only one definition is necessary. We suggest that DEC eliminate the definition for “vehicle”.

Response: There are instances in Part 364 where the use of the term “vehicle” is used in place of the term “transport vehicle” to allow for more easily read sentences.

360.2(b)(297) Volatile Solids
Comment: This is using an EPA test method, the method should be referenced in the definition.

Response: The EPA test method is included in a table of all test methods and associated analytical information found in Part 361-3.

360.2(b)(298) Waste oil
Comment: Given there is only a slight difference in the definition of “used oil” and “waste oil”, could one definition be used for both terms? The term used throughout the regulations revised to match.

Response: These two term are distinct in federal and state regulations.

360.2(b)(302) Waste transporter
Comment: The definition for “waste transporter” needs more clarity. From the DEC presentation it does not seem that the intent of this provision is to include the individual movement of material between two buildings on the same property at a single institution on one property.

Response: ECL Article 27 Title 3 Waste Transporter Permits is the enabling legislation for Part 364. Section 27-0301 states that the intent and purpose of that Title is to protect the environment from the mishandling and mismanagement of all regulated wastes transported from the site of generation to the site of ultimate treatment, storage or disposal. As such, the on-site transportation of wastes are excluded from regulation under Part 364.

Comment: We understand that "regulated waste" is defined in Part 364; however, we recommend that the definition of "Regulated Waste" be added to Part 360.2.

Response: The definition has been added.

360.2(b)(304) Wood debris
Comment: Tree debris should be specifically excluded under this definition as proposed below:

“Wood debris” means unadulterated wood that originates from wood product manufacturing or other similar sources and does not include construction and demolition debris wood or tree debris.

Response: The relevant definition has been modified in the revised proposal.

360.2(b)(305) Wood debris and yard trimmings processing facility
Comment: If the terms Processing, Facility and the type of facility (i.e. Wood Debris) are defined separately, then they can be used together to define a facility such as Wood Debris & Yard Trimmings Processing Facility. In this case, separate definitions for each

type of processing facility would not be necessary. Definitions (278), (280), (304), (305) and (307) all relate to wood waste and yard waste. It seems unnecessary to have this many definitions and 'possible to consolidate.

Response: It is necessary to include specific definitions for specific facility types in order to ensure the regulations governing those facility types are clear and unambiguous. Additional definitions for terms such as 'processing' and 'facility' are necessary to identify requirement for facility types that are not explicitly identified in the regulations.

360.2(b)(306) Working face
Comment: The *working face* may refer to multiple sections of the landfill, which should be included in the definition. Please see proposed revision below:
"Working face" means that portion, or portions of a landfill where waste is deposited and compacted before placement of operating cover material.

Response: The language has been adjusted in the revised proposal.

Section 360.3 References

Comment: There is no reference to federal documents (The clean Railroad Act, FRA Regulations that pertain to Hazmat transport, the tariffs, and interchange rules of the region's railroads) that pertain to freight in the proposed regulations. Proposed regulations must be revised to include this information.

Response: The reference section only includes references to those documents which are referenced in the rule.

360.3(a)(7)(iii)
Comment: As currently drafted, proposed Subpart 360.3(a)(7)(iii) generally incorporates by reference a number of federal regulations, including USDOT' s regulations for the transport of hazardous materials, including used medical equipment (49 CFR 173.134). However, this reference is not expressly set forth in Proposed Part 365. The Proposed Part 365 regulations should unequivocally incorporate and cross-reference 49 CFR 173.134(b)(l2) to include the exceptions applicable to the shipment of used medical devices such that the equipment and devices listed in the exceptions may be permitted to ship without being subject to the hazardous materials regulations requirements typically applicable to the transport of infectious substances as well as any new provisions in the proposed regulations. This should clarify that "no change" will be required in current practices for the transport of used medical devices or used health care products intended for reprocessing and reuse, provided that they are consistent with the federal regulations and exceptions.

Response: The regulations have been revised to clarify that no change is intended with this revision as it applies to reprocessing of source-separated medical devices and health care products.

Section 360.4 Transition

360.4(a)
Comment: We believe that 180 days is a more reasonable timeframe in order to update plans, modify procedures, purchase equipment and complete training on the change in requirements. The Part 360 regulations as proposed, are a significant change from current requirements. We respectfully request that the 60 day compliance effective date under 360.4(a) be changed to 180 days.

Response: The provision under 360.4 has been amended to a 180 day compliance timeframe.

360.4(d)
Comment: Generally, the transition rules impose a number of difficult and frequently untenable timelines for compliance with the new rules, most frequently a 90- to 180-day timeframe. However, in discussions with consultants, it became apparent that the various requirements of new registrations or permit applications will require substantial investigations and testing. There is substantial concern over the ability to meet those onerous timelines. For example, a facility that is not currently required to register but will be required to receive a permit under the new regulations will have to conduct a full analysis, including the production of an engineering report, waste control plan, and a closure plan, within 180 days of the effective date of the rule. Given the depth of analysis required, we recommend extending the transition periods to permit the full range of analysis to occur.

Response: The transition period provided under 360.4(d) has been amended to allow an exempt facility now requiring a permit to have a complete application on file with the department within 365 days of the effective date of the rule.

360.4(b)(2)
Comment: This section specifies that existing permitted C&D facilities that will be required to move their processing operations indoors must be in compliance at the date of their existing permit renewal. It may take as long as two to four years to obtain NYSDEC approval to construct a building to house processing operations, to apply for and obtain a local building department Permit to construct the building, and to actually construct the building. Thus, it will be impossible for facilities that have a permit expiring within the next four years to be in compliance when their permit is due for renewal. We suggest the following change to 360.4(b)(2):

For existing permitted facilities, transporters and events, the permit in effect immediately before the effective date of this Part is continued until the expiration date of the permit, or 4 years from the effective date of this Part, whichever is later, and the facility must comply with the conditions of the permit and the solid waste management facility regulations in effect on the day when such permit was issued for the duration of that permit, or 4 years from the effective date of this Part, whichever is later, unless a

modification under Part 621 of this Title is approved or as otherwise specified in this section. At the time of permit renewal, or 4 years from the effective date of this Part, whichever is later, the facility, transporter or event must comply with the criteria as of the effective date of this Part and Parts 361, 362, 363, 364, 365, and Subpart 374-2 of this Title that pertain to the type of facility, transporter or event unless otherwise excluded under this section. Nothing in this paragraph shall be construed to limit or prohibit department-initiated modification of such permit under the provisions of Part 621 of this Title.

Response: The transition provisions of 360.4(b)(4) have been modified to clarify that retrofitting of existing registered and permitted facilities is not required in order to comply with applicable design and construction requirements.

360.4(b)(2)
Comment: 360.4(b)(2) transition rule regarding permit modification needs clarification and amendment. There should be no trigger of the transition rule for permit modifications triggered by requiring permitted facilities that also have current registrations to incorporate those registrations into their permit. See 360.15(a)(4). Further, other than for the physical expansion of a facility or tonnage increases, it is suggested that minor modifications such as updates to information in operations plans, additions and subtractions of monitoring wells, or other items that have no impact on the scope or environmentally sound operation of a facility should NOT trigger the transition clause.

Response: These are not transition issues. The department may require facilities which have current registrations to include those registrations in the permit. The criteria for which modifications are considered new applications are specified in Part 621 Uniform Procedures Act and section 360.16.

360.4(b)(2) & (b)(3)
Comment: There are two sections under 360.4 transition that are unclear. The sections are (b)(2) and (b)(3).
So it is unclear if a facility exists today without an enclosed building, whether an enclosed building will be required.

Response: These provisions have been modified to clarify that retrofitting is not required for existing facilities.

360.4(b)(3)
Comment: Section 360.4(b)(3) exempts from the new design and construction requirements those facilities that were permitted under the current regulations (although new structural components built after the new regulations become effective must meet the new design and construction standards). In contrast, 360.4(b)(1) requires all formerly exempt and registration facilities to comply with all new regulatory requirements, and do so within very short time frames. This is counterintuitive. In general, currently exempt or registered facilities should be a lower priority for retrofitting

because they pose less of an environmental risk. The Department should exempt the retrofitting of all facilities constructed prior to the passage of these regulations.

Response: These provisions have been modified to clarify that retrofitting is not required for existing facilities.

360.4(b)(c)&(d)
Comment: We request that the 60, 90, 120, and 180 day requirements be changed to 365 days. If facility needs to register under 360.4 requirements within a certain date, time period should run from date DEC notifies them that such a registration is required.

Response: The criteria have been revised to allow additional time for compliance.

360.4(c)&(p)
Comment: 360.4(c)(2) mentions registered facilities have 120 days to comply with all applicable requirements set for the in Part 361 and in subsection 360.4(p) Beneficial Use – which is a Pre-Determined beneficial use determination prior to the effective date of this Part or with 180 days of said… clarification needed…. does a registered facility have 3, 4, 5or 6 months to comply ?

Response: The timeframes for transition for beneficial use determinations and transition for registered facilities have been revised to be equivalent to facilitate smooth transition.

360.4(d)
Comment: We appreciate the Department's desire to enclose facilities…we suggest that the proposed time frame of 180 days for compliance is completely unworkable for improvements of such significance, especially in New York City. There are multiple city agencies involved, the practical requirements for covering a wide area are complicated and quite often the transfer stations are operating from old industrial sites that have a checkered history making the design and construction particularly challenging and certainly expensive. We suggest that a period of not less than 24 and probably more like 36 months is the minimum period of time that should be considered. Alternatively, the Department might consider linking the issuance of a second permit renewal to the existence of (not plans for) a covered facility.

Response: These provisions have been modified to clarify that retrofitting is not required for existing facilities.

360.4(f)
Comment: We believe the 180 day requirement is unrealistic as currently proposed. Please modify the draft regulation to eliminate the requirement for submittal of a "complete" application within a certain timeframe, and replace it with a requirement for submittal of an initial permit application within a certain timeframe.
If the above mentioned modification is not implemented, then the timeframe for submittal of a "complete" application should be doubled, to 360 days instead of 180, and the submittal deadline should be automatically suspended if the SEQRA prerequisites

for a completeness determination have not been completed at least 90 day prior to the regulatory submittal deadline.

Response: The timeframe has been revised to 365 days to provide ample opportunity for the facility to obtain a complete application.

Comment: As the regulations propose transitioning many facilities from a Registration to a Permit, there is not only the issue of cost to the facility owner/operator for environmental monitoring services to be imposed, which will be passed on as noted above, there is also the issue of monitor training and consistency among monitors applying present and new regulatory provisions. Similarly, Department regulatory and /or environmental monitoring staff should not be implementing or attempting to enforce any provision or compliance requirement of the proposed regulations unless and until such provision is formally adopted and the rulemaking process is complete. As an example, we note that inconsistent with past practice, the Department appears unwilling to issue a Registration to facilities that would have covered by a Registration, but such facilities are now being required to obtain a Permit. In addition, the focus in the proposed regulations and Department practices has been more on additional regulatory restrictions, obligations and costs on the participating "regulated community", those who seek and get Registrations, Permits and other appropriate authorizations, when additional attention needs to be given to others who may engage in regulated activities but seem to go unseen, because they are not under Permittee funded environmental monitoring services.

Response: Compliance with the proposed regulations is not required until the regulations are in effect.

Comment: The Proposed Regulations stating that compliance to the new regulations must occur within a varying period of 30 to 90 days post promulgation blueprints a systematic failure in transitioning before compliance can rationally be achieved. The Proposed Regulations create an impossible task of compliance to make effective all the newly promulgated parts of 360 - 365: some of which have never been applied to C&D debris transporters, producers and suppliers.

Response: The timeframes have been revised to allow additional time for facilities, transporters, and events to come into compliance with the new criteria.

Comment: It is impossible to expect that facility operators will be able to comply with the regulations within the proposed 30 to 90 day time period. In many instances, facilities will have to undertake their own construction renovations, within their local permit and construction process. Facility operators will also have to set up new record keeping systems as well as train their employees, and some facilities will have to substantially alter their work flow procedures. It is absolutely unrealistic to expect facility operators to engage in the very costly compliance effort until such time as the rules are finalized and promulgated. The time period is simply unrealistic and must be extended to a minimum of one year from the date the final rules are promulgated, distributed to

the industry and DEC has offered training sessions to answer questions and allow the industry to become familiar with the new requirements.

Response: The timeframes have been revised to allow additional time for facilities, transporters, and events to come into compliance with the new criteria.

360.4(j)(1)
Comment: Define “does not have a valid financial assurance mechanism”. There is no criteria for “required to obtain financial assurance”. There is no policy interest to support this destructive provision as there is not a single NYC example of a public clean up of a transfer station. DEC must exempt facilities already bonded by NYC.

Response: The term refers to facilities that were previously not required to have financial assurance but now are required to have it under this regulations. Provisions to prevent duplicate financial assurance instruments have been added to Section 360.22.

Comment: The requirement for a financial assurance plan within 3 years is not listed under financial effects on small business, yet this will add a large financial burden on these entities. This provision should be removed.

Response: The financial assurance requirement for registered C&D debris recycling facilities has been removed.

360.4(j)(2)&(3)

Comment: There must be a 3 year minimum time. DEC must exempt facilities already bonded by NYC.

Response: A provision has been added to the revised proposal that will allow the Department to take into account any financial assurance instruments already required by a municipality.

360.4(o)(1)
Comment: Two clarifications are suggested for 360.4(o)(1). The regulation should include a reference that subsequent construction of previously permitted, but unconstructed landfill cells must comply with the construction requirements of Part 363-6. However, completion of a permitted landfill cell construction started before these rules go into effect can be completed *with the previously approved plans. With these clarifications, (1) the operation requirements do not change just because of new* construction, unless other transition limits are reached, and (2) difficulties with joining or tying in differing components within one landfill cell can be avoided.

Response: The regulations have been revised to clarify this requirement.

360.4(o)(1)&(2)
Comment: These transition rules seem to contradict each other. It is clear that moving forward, existing facilities will become subject to the new regulations. However, the transition of existing facilities with pending permit applications is unclear. Structural

components for which approval has not yet been received at the time of the effective date of the new regulations must comply with the new regulations. However, it is unclear whether structural components which have been approved under the current regulations but not yet constructed prior to the effective date of the new regulations would need to be built in accordance with the proposed regulations. The Department should clearly state that approved but not yet constructed development plans will not need to be redesigned and resubmitted to the Department prior to construction if constructed after the effective date of the new regulations, so long as approval has already been received from the Department.

Response: The regulations have been revised to remove the contradiction.

360.4(p)
Comment: The staff has plenty of time to identify which Pre-Determined BUDs "are inconsistent" now and should do so. Define criteria for "inconsistent with this Part." Provide 180 days to file and the case-specific BUD remains effective until filing approved or denied by DEC. DEC will never complete review of these applications within 180 days within the context of the myriad of application.

Response: The express terms have been revised to replace the phrase "inconsistent with this Part" with "no longer included". The provisions of 360.12 lists all of the pre-determined BUDs allowed. Since existing case specific BUD petitions have already submitted information to the department, the issuance of a new case specific BUD should be straightforward.

Comment: Requiring case-specific BUD renewals every five years adds unnecessary strain to already stretched administrative resources.

Response: The Department is working of mechanisms to make submission and review of renewals easier such as using electronic submissions.

Comment: If all registrations are required to be resubmitted following the effective date of the new regulations, this could become difficult for the regional offices during the transitional period and in five (5) years when they require renewal. Are the regional offices prepared for this large quantity of registration submittals and approvals?

Response: The Department is working on a number of procedures to facilitate the review and validation of registration applications, including electronic submissions.

Comment: We support the five year limit on BUD approvals, as new information on public health and the environment dangers could require that the agency modify or prohibit the activity.

Response: The Department appreciates your support.

360.4(r)
Comment: Will the Department notify each grantee that they will need to resubmit their grant application because it has expired? Given the extended period of time that the grants have taken to be issued, the County requests a complete list of County projects on the Department's existing wait list prior to expiration.

Response: Yes, the Department intends to notify every municipality with a project on the current waiting list of the need to reapply. In accordance with the transition requirements, they will retain their current position on the wait list provided they reapply within the time frame specified.

Comment: We request that applicants have 90 days for resubmittal. OCRRA also requests that the Department provide notification of resubmittal requirements to applicants on the existing waiting list.

Response: The Department retained the 60 days timeframe in the revised proposal. In addition, notification will be provided by the Department.

Section 360.6 Submission requirements and use of professional engineers and certified laboratories

360.6(a)
Comment: As currently proposed, all documents except quarterly and annual reports will start requiring PE stamp and signature. As proposed, this would include both hard-copy submittals and electronic submittals. Covanta believes that this is overly inclusive; all documents would include Notifications, Emergency Reporting, Plans, Waste Stream Requests, etc. Covanta respectfully requests that the wording be changed to identify only those documents that will actually require a PE to review, for example; Permit Applications, Permit Modifications and Plan submittals for initial permit applications.

Response: Revised language added to the regulations.

Comment: The term "all documents" is too broad (even with the exception of quarterly and annual reports) and should be further clarified to specify the particular types of documents that require a professional engineer's certification. We recommend that "All documents, except quarterly and annual reports" be replaced with "Design, permitting and engineering related documents."

Response: The suggested language has been incorporated into the revised proposal.

Comment: The impact on costs will be astronomical. There is not a single policy reason to require an expensive engineer’s seal for every single filing. Examples of the types of filings that should never require an engineer’s seal are:
-the infinite number of housekeeping correspondence send to DEC staff
-letters correcting filings
-and the addition of equipment or vehicles to rosters on file

Engineer seals should be limited to a specific set of filings that have the policy justification to such an increase in costs.

Response: The regulations have been revised to clarify that the engineering certification is limited to design permitting and other engineering related documents. .

Comment: We interpret this to mean “registered” facilities will not require stamped documents. Additional clarification would be helpful.

Response: This provision only applies to permitted facilities, as specified.

Comment: The requirement for “all documents” to be submitted by a professional engineer in Part 360.6(a) is too broad. The suggested change is to revert back to the current Part 360-1.9(e) opening paragraph. Finally, using the DER-10 / Technical Guidance for Site Investigation and Remediation policy memorandum as a guide, it is suggested that only design plans, initial permitting documents and construction certification reports require submittal by a professional engineer. Other routine communications between the facility and the department where questions are posed and answered between the parties should not require a professional engineering submittal and pose an undue and unnecessary financial burden on a facility.

Response: The requirement language has been revised to be apply to specific engineering documents.

Comment: Please consider the following adjustment:

All documents, except quarterly and annual reports, submitted under any provision of this Part or of Parts 361, 362, 363, 365, or Subpart 374-2 of this Title for a permitted facility must be submitted under the stamp and signature of a professional engineer or professional geologist licensed and currently registered to practice in the State of New York

Response: The Department is obligated to follow the Education Law in the need for a professional engineer to certify documents.

360.6(b)
Comment: Consider an exemption for waste characterization, or provide flexibility to allow for laboratory testing outside of New York State, as suggested below:

Any laboratory tests or sample analyses required under this Part and Parts 361, 362, 363, and 365 of this Title for which the commissioner of the New York State Department of Health issues certificates of approval must be performed by a laboratory certified to perform those tests or analyses pursuant to the New York State Department of Health Environmental Laboratory Approval Program (ELAP) or Clinical Laboratory Evaluation Program (CLEP). Waste characterization analysis for waste generated outside New York State is exempt from this Part. OR Waste characterization analysis,

required under this Part and Parts 361, 362, 363, and 365 of this Title may be analyzed by a NELAP certified laboratory, a certification under the State of origin, or as approved by the Department.

Response: The requirement is limited to analyses that are certified by NYSDOH and would not cover other tests such as manual waste sorting and characterization. NYSDOH also provides certification for laboratories located outside New York State.

Section 360.7 Inspection

Comment: The Department must include language that requires Department personnel to abide by any and all safety requests and facility process and procedures applicable to visitors.

Response: This is outside the scope of these regulations.

Comment: While NYSDEC can inspect, the State should indemnify the owner for any injury or be prepared for inspectors to sign, review, and abide by all site specific health and safety requirements, training should the facility documentation require this in order for the facility to remain in compliance with their site plans.

Response: This is outside the scope of these regulations.

360.7(a)
Comment: This is a provision without a proper policy basis. Not even the NYC Fire Department in an actual emergency, such as a fire, has a provision that permits it to terminate any business because a citizen objected to a demand of its staff. It is facially unconstitutional to forbid a citizen from objecting to a DEC staff demand of its staff. Whatever actual policy concerns that may be relevant are protected by a host of other provisions. This appears to be an emotion based provision rather than policy.

Response: The commenter appears to have misread the regulation as the regulation does not indicate that revocation of a permit is automatic if the owner or operator refuses an inspection of a facility by Department staff. The language specifically indicates that a hearing is necessary to determine whether there has been a refusal to submit to an inspection. Even then, the regulation specifically notes that a permit "may" be revoked. Subdivision 360.7(a) does not forbid a citizen from refusing an inspection, but appropriately indicates that a refusal to submit to a Department inspection has a consequence, and may lead to an adjudicatory proceeding to revoke any Department-issued approval.

Section 360.8 Prohibited Siting

360.8(a)
Comment: The regulations should be revised to address the risks of future flooding on existing and proposed solid waste facilities. In particular, we recommend that the new

rules require that all existing solid waste facilities located in flood hazard areas be directed to come up with an emergency plan designed to reduce risks to the local community from inevitable flooding and storm surges that are likely to affect facility operations.

Response: The regulations contain both prohibitions and design and operating requirements that facilities must follow in order to respond to floods and other similar events.

Comment: A prohibition on construction or expansion of solid waste management facilities in special flood hazard areas has been proposed unless provisions have been made to prevent flooding. Four out of the 13 solid waste management facilities located in North Brooklyn are in designated high risk areas for flooding. Regardless of whether they expand, they should be required to have provisions in place to prevent flooding and prevent a repeat of what happened in Hurricane Sandy where the waste of these facilities flooded the streets.

Response: The regulations contain both prohibitions and design and operating requirements that facilities must follow in order to respond to floods and other similar events.

360.8(b)
Comment: It is illegal and unwise to attempt to write a regulation that provides that the addition to a solid waste facility that may save lives is per se forbidden because of a completely undefined level of "cause" or "contributes" to something as vague as "adverse modification" of habitat. It is far wiser to rely upon the very comprehensive existing statutory and regulatory framework protecting endangered species. The provision will only be used by those who use it improperly to delay needed capacity for reasons that have nothing to do with endangered species.

Response: This siting prohibition exists in the current Part 360 regulations.

360.8(c)
Comment: "Appropriate" is an undefined and even if defined, terrible word for regulatory policy. The most obvious replacement candidate is "required".

Response: The term "appropriate" has been revised to "required" in 360.8.

Comment: Wetlands are already regulated by other entities and therefore this provision is redundant. Moreover, if a violation occurs it places permittees in violation of wetlands regulations and Part 360. Part 360 should regulate solid waste only.

Response: The requirement may overlap other regulations, it is an issue that commonly is raised during the siting process for landfills.

Section 360.9 Prohibited Activities

Comment: Sound waste management must be based on an even-handed application of technical criteria and operations practices that provide consistent results under a variety of situations and for a variety of waste streams. The use of arbitrary exclusions or prohibitions that are not supported by a sound technical or scientific basis is not appropriate for these regulations.

Response: The comment did not specify which exclusions or prohibitions are at issue. Nevertheless, the Department agrees that even-handed application of technical criteria is important and that decisions by the Department should not be arbitrary.

360.9(a)(1)
Comment: There is no definition of what will be required to avoid violating the provision. It must provide that one cannot operate "contrary" to legal requirements. This will provide a clear criteria for behavior and limit ad hoc staff enforcement.

Response: The Department disagrees that additional language is needed in proposed 360.9(a)(1). This paragraph specifies in plain language that no person shall construct or operate a facility except in accordance with registration or permit issued by the Department. As written, the language makes clear that the only allowable conduct is conduct that complies with such registration or permit, as applicable. However, the Department proposes to revise "pursuant to this Part" to "by the department" to make the language consistent with 360.9(a)(2) and to reflect that permitting requirements are found in more than one Part of the regulations.

360.9(a)(1)&(2)
Comment: Please add language to clarify that this prohibition applies only to waste handling aspects of a facility.

Response: These provisions only apply to those activities that are subject to these regulations.

360.9(a)(2)
Comment: Unless a competent definition of "modify" or "expand" is provided, it must provide that one cannot operate "contrary" to approval.

Response: The proposed regulations did propose a definition of expansion which read: "[] an increase in the approved design capacity or throughput beyond the limits approved in the permit for a facility. In the case of landfills, *expansion* also means a lateral or vertical increase in size beyond the limits approved in the permit." The Department agrees that the proposal could be clarified, as the language of 360.9(a)(2) could be read to include facilities that did not require a Department-issued approval. In addition, some violations could violate both 360.9(a)(1) and 360.9(a)(2) simultaneously. To address this redundancy, 360.9(a)(2) was modified in the revised rulemaking to clarify that expansions are prohibited unless a modified permit is issued by the Department.

360.9(b)(1)(i)
Comment: If management of waste is to be done in compliance with "other applicable statue or regulation": does that include local laws, zoning, etc.?

Response: Since the subject language could be read to include laws and regulations not administered by the Department, the regulation was revised to delete this reference.

360.9(c)
Comment: We request that the Department add "repeated or intentional" before the word "violation."

Response: The provision already includes discretion for the department to enforce penalties as specified by the word “may”.

360.9(d)
Comment: This permits any staff person to threaten to close a facility because of a single, admittedly de minimus violation. Providing low level staff with this authority is extraordinarily unwise. There must be a defined threshold below which a facility may not be closed.

Response: Subdivision 360.9(d) does not authorize the conduct raised in the comment. The proposed regulation also provides a right of hearing and review, and the hearing is the forum to determine the appropriateness of any penalty or relief requested by the Department.

360.9(e)
Comment: This is an unwise provision as the law already provides comprehensive guidance of when an agency is able to obtain multiple fines for a single action. To include this language materially muddys otherwise clear law.

Response: The Department disagrees with this comment. Subdivision 360.9(e) does not concern the imposition of multiple fines for a single action. To the contrary, the language makes clear that when a person fails to obtain approval to operate a facility or event, that person is also responsible for complying with other regulatory obligations applicable to registered or permitted facilities and events, which are separate and apart from the obligation to obtain a registration or permit. The comment did not include a reference to the law(s) that provide “comprehensive guidance” but in general, the department agrees that the law, including Environmental Conservation Law Article 71, already provides the Department with the authority to assess violations for each separate violation. However, the proposed subdivision 360.9(e) puts the regulated community on notice of the specific conduct that would allow the department to assess separate penalties for each separate violation. The subdivision is thus consistent with the authorizing legislation for the program.

360.10 Variances

Comment: Include general language allowing for variances to the operating regulations, approved by the respective regional and local authorities, for individual permitted sites.

Response: The department is the only regulating agency that can issue variances to these regulations. Internal departmental procedures for the review and approval of variances are not included in the regulations.

360.10(b)(2)&(3)
Comment: We strongly object to this provision. At the very least the requirement for a public hearing should be included if a variance is contemplated by the DEC.

Response: A variance request is part of the public record associated with a permit application or modification. The permit proceeding is subject to a potential hearing in accordance with Uniform Procedures regulations.

Comment: These regulations do not address granting variances during emergencies. We suggest that provisions be included outlining the criteria for granting variances in an emergency involving a major public health hazard, for example a wide-area biological contaminating incident involving Bacillus anthracis (B.a.).

Response: The Department has separate regulations for emergency permits, found in the Part 621 of the Department's regulations that implement the Uniform Procedures Act.

Comment: Demonstration of compliance would on site-specific conditions impose an unreasonable burden - The determination of hardship, definition of limits in that it satisfies a subjective "demonstration" is difficult to state. Additionally demonstrating the variance will result in "equivalent environmental performance" is not elaborated on. Performance is extremely subjective and if a presentation is all that is required for a variance, this is one thing, but if the Department has an understanding of what is acceptable performance and what is unacceptable or insufficient that is completely different. Also if different regions within DEC have different definitions of acceptable presentations of this information, it makes all applications inconsistent.

Response: Variances, by their nature, tend to be case-specific and site-specific and the Department requires detailed information for every variance application to justify an alteration of the criteria that have already been established in regulation. The Department has internal procedures to help ensure consistency across regions in the State.

Section 360-11 Comprehensive Recycling Analysis

360.11- General

Comment: The requirement of a Comprehensive Recycling Analysis (CRA) is an expensive unfunded mandate on municipalities.

Response: CRAs or LSWMPs have been a required component of permit applications since 1988. The revised regulations retain the CRA requirements for any municipalities that are not included in a department-approved LSWMP and ensure that waste reduction, reuse and recycling programs are included in all municipalities across the state.

Comment: Due to the changing nature of the legislative and operational aspects of solid waste management such as EPR legislation and other initiatives, requiring a CRA seems to be onerous.

Response: CRAs or LSWMPs have been a required component of permit applications since 1988. The revised regulations retain the CRA requirements for any municipalities that are not included in a department-approved LSWMP and ensure that waste reduction, reuse and recycling programs are included in all municipalities across the state.

Comment: The requirement that the CRA must "reflect the goals and objectives of the current solid waste management plan" should not be included as there are alternative ways to select waste management options, where the best option that is identified may not reflect the goals and objectives of the State SWMP but still provide great (or greater) environmental benefits.

Response: The regulations have been revised to address this concern.

Comment: Requiring municipalities to prepare a CRA seems backwards given the significant consolidation that has occurred in the waste industry over the last 30 years. Recycling trends and market influences are national if not global in scale. Requiring municipalities to undertake a CRA makes no sense and should instead be done on a statewide basis where there is a better likelihood of understanding the market dynamics that affect regions within the state.

Response: Solid waste management planning is a state-local partnership as identified in the ECL. The state, through the state solid waste management plan, and the local municipalities, through local solid waste management plans, together provide for proper solid waste management across the State. CRAs or LSWMPs have been a required component of permit applications since 1988. The revised regulations retain the CRA requirements for any municipalities that are not included in a department-approved LSWMP and ensure that waste reduction, reuse and recycling programs are included in all municipalities across the state.

360.11(a)(1)(i)
Comment: A CRA still requires a ten year, year-by-year estimate of waste generation which has always just been a bookkeeping exercise with no real purpose.

Response: Waste generation is a key component when determining facility development and other activities in the Planning Unit.

Comment: "Seasonal variations" need to be accounted for in a CRA but it is not clear how this can be done in an annual accounting.

Response: For calculation purposes, estimates of the effects of seasonal variations are to be applied on an annual basis.

360.11(a)(1)(ii)
Comment: "The application" is referred to although a CRA is not required for permit applications.

Response: The location where the word application was used has been revised.

Comment: Combustion facility residues are identified as needing characterization as to whether they can be composted or recycled however it is not clear any residue from a combustion facility can be composted. The intent may be to identify metals recovery potential for WTE facilities, or to include residues from pyrolysis or gasification plants as recyclables but these facilities are identified as thermal treatment facilities.

Response: The regulations have been revised to address this concern.

360.11(a)(1)(iii)
Comment: The CRA requires identification of strategies to recover industrial wastes which is an expansion of scope of existing CRA requirements.

Response: This is not a new requirement, it exists under the current CRA criteria.

Comment: Intermediate processing is an undefined term that could unreasonably expand the scope of the recovery chain.

Response: The regulations have been revised to address this concern.

360.11(a)(2)(i)
Comment: CRAs need to evaluate existing commercial, institutional, and private efforts to recover recyclables (quantities, types, and descriptions of the programs) which is something that is typically infeasible in the downstate region.

Response: This is not a new requirement, it exists under the current CRA criteria.

360.11(a)(3)
Comment: The CRA continues the existing requirements for market identification, including literature searches, surveys of potential markets, identification of processing required to meet market specifications, services available to assist in marketing, current

and future restrictions to markets in CRAs. Given the 20+ year existence of recovery programs, why is this necessary?

Response: Market information is important to evaluate when evaluating the potential introduction of new materials to a program or expansion of existing recycling programs. However, while market information will still be required, the regulations have been revised to address portions of the concerns expressed.

360.11(a)(5)(i)
Comment: CRAs need to include detailed descriptions of recyclables recovery programs but the scope of these has been expanded from the current requirements, and now includes residential plus commercial, institutional, industrial and private efforts. This is unreasonable.

Response: This is not a new requirement, it exists under the current CRA criteria.

360.11(a)(5)(iii)
Comment: CRAs must include progressively increasing recovery percentages although the current State SWMP focuses on decreasing disposal rates. Waste minimization and changes in waste stream qualities can lead to an inability to recycle greater percentages of the waste stream.

Response: The regulations have been revised to only use the reporting metric identified in the state solid waste management plan (*Beyond Waste*) of measuring for a decrease in the amount of waste managed through thermal treatment and disposal.

360.11(a)(5)(iv)
Comment: CRAs require a description of "development and enhancement of economic markets" which is in the beyond the reach of most municipalities or planning units.

Response: While market information will still be required, the regulations have been revised to clarify expectations with regard to market information and data gathering.

Section 360.12 Beneficial Use

Comment 360.4(p) Transition: The proposed transition rule extinguishing existing BUDs should be deleted and all existing BUDs should remain in full force and effect.

Response: The Department anticipates streamlining the renewal process, but believes it is worthwhile to review the basis and applicability of all existing BUDs.

Comment 360.12 General: Proposed draft beneficial use regulations are more restrictive than the current 360 and could deter reuse/recycling of waste material.

Response: The proposed draft regulations address ambiguities in the current beneficial use regulations, adding pre-determined BUDs and making clearer the requirements for other materials and for case-specific petitions. In so doing, the proposed 360.12 will promote more reuse and recycling of byproducts and wastes.

360.12
Comment: The approach to regulation of beneficial use in the proposed 360.12 does not fulfill the objectives set forth in the 2010 State Solid Waste Management Plan, *Beyond Waste*, to increase the beneficial use (versus disposal) of materials through the streamlining of the BUD process. The overhaul of the solid waste regulations is supposed to be based on recommendations in *Beyond Waste* and falls short of this essential goal of the plan.

Response: The Department has responded to the goals of *Beyond Waste* in creating pre-determined BUDs and self-implementing paths to evaluate and beneficially use various materials that previously required the Department's case-by case review. *Beyond Waste*, however, also discusses the critical need for beneficial use of materials to protect human health, the environment, and natural resources. Codifying the use of appropriate Part 375 Soil Cleanup Objectives, and stricter requirements for BUDs in other proposed terms, advance the goal of *Beyond Waste* to SAFELY reuse materials.

Comment: 360.12 should not allow the placement of demolished asphalt pavement on residential property.

Response: Section 360.12 does not address disposal of demolition debris. Instead, Section 360.12 addresses how material, which ordinarily be considered a solid waste, can be processed and used as a substitute for raw material. This may be the case with recycled asphalt. Since driveways are constructed on residential property, it is unreasonable to forbid material which may be appropriate for that use. In any case, Section 360.12 does not allow a use which constitutes disposal, and if a material is not appropriate for the use for which it is intended, or if it is not used within an appropriate period of time after delivery, then disposal of the subject material is addressed under proposed Part 363.

360.12(a)
Comment: Beneficial use determinations must be applied only to materials that constitute solid waste at the time they become solid waste.

Response: The provision that a material is considered "discarded" applies also to materials that are "accumulated…instead of or before being processed or disposed". A waste has to do not only with the current status of a material, but its intrinsic characteristics. If a material is not intentionally created by an industrial process, but rather is a byproduct, and further if it is not usable without processing or decontamination, or if it does not have an established market, it is appropriate to

consider such a material discarded even if still on the premises of or in possession of the generator.

360.12(a)(1)
Comment: What are some examples of "waste use that constitutes disposal"?

Response: Use constituting disposal consists of any use or land placement of a material that serves no justifiable purpose or benefit. Often materials so placed are questionable in quality and cannot be sold on the market, and may contain substances harmful to the environment. Examples include excess fill material or spoil mounded on land or used to fill in a depression, without development plans, drawings and elevations to show the need for grading fill. Another example of use constituting disposal is the metering in of a poor-quality waste mineral or granular material into a concrete or flowable fill mixture at a low rate to avoid adversely affecting the quality of the concrete or other mixture – to "lose" or "get rid of" the material through dilution. If the proposed waste additive were shown to benefit the mixture, or could be added at similar rates to conventional ingredients, its use would not constitute disposal.

360.12(a)(1)
Comment: Language at the end "as determined by the Department" is open ended and cannot be reasonably determined in a consistent manner across Regions. This should include, as other categories to either include the types of material included or materials excluded.

Response: This provision states the general applicability of the section and cannot detail specific materials or types of materials. BUDs are reviewed both in the Regions and by the Central Office to help ensure consistency in review.

360.12(a)(2)
Comment: The provision that the Department can require a permit pursuant to 360.17 for land placement of materials in place of a BUD, must be based on objective criteria and not left to the authority of Department staff.

Response: The Department must retain the ability to require a permit for fill projects since these have a potential to become, in effect, unpermitted landfills with a potential to pose a threat to public health and the environment. The criteria to determine what constitutes a threat to public health and the environment will depend on case-specific factors such as the environmental media affected and the consistency of the activities with any Department-approval, such as a mined land reclamation plan.

360.12(a)(2)
Comment: Add to this provision, "except at those facilities operating pursuant to a valid Mined Land Reclamation Permit, the department reserves…" Many mine permits contain special conditions allowing the importation of "RUCARBS" as fill and this practice should continue to be allowed if not here then under an exclusion or pre-determined BUD.

Response: The Department elects not to add the suggested language, and reserves the right as stated to require a solid waste management facility permit, in addition to a Mined Land Reclamation Permit, if necessary to protect public health and the environment.

360.12(a)(2)
Comment: The regulations must identify the process and the criteria that will be used to decide if a permit or a BUD is necessary for land disposal applications. The regulations must also clarify whether the burden to demonstrate adverse impact is on the applicant or the NYSDEC. Further, once a permit or BUD is granted for a given application, please clarify if the action only covers a single event or may be applied to similar activities. There are many routine solid waste activities that would be more efficiently managed administratively by blanket coverage. A streamlined administrative approach that encourages reuse rather than disposal whenever possible is more in keeping with the NYSDEC waste management objectives.

Response: These provisions in the proposed regulations allowing the department to require a permit, in place of a BUD, for land placement of fill material have become necessary due to the abuse of BUDs to circumvent adverse impacts from large fill projects – many of these becoming, in effect, landfills without a permit and no opportunity for review by the affected public. More control over land disposal projects, not less, is needed. The regulations state a petitioner for a BUD must demonstrate no adverse effect from use of a material through meeting pre-determined BUD criteria or through a case-specific BUD petition. As for a permit or BUD granted to a specific entity, that permit or BUD is only for the applicant or petitioner and does not cover other events or similar activities, unless stated in the permit or BUD. In an effort to encourage appropriate use of fill material, the department has addressed many scenarios in Section 360.13 in which fill materials can be used beneficially without case-by-case department evaluation.

360.12(a)(3)
Comment: The second clause of 360.12(a)(3) requires that at least 75% of the material produced at a site must leave the site for beneficial use or disposal. Recognizing that this is intended to prevent parties from storing waste material on their site for too long, it is superfluous if the regulation limits the time allowed for storage. Furthermore, the requirement to “show” that during a calendar year 75% of the material for beneficial reuse or even disposal was produced that year, appears to make some reference to the requirement that the calendar year generation will remove 75% of the material generated. This is extremely difficult under contractual terms to manage on a capital construction taxpayer-funded construction project. This clause should be removed altogether.

Response: The department has removed the 75 percent removal requirement from this clause, and has also increase storage time to 365 days.

360.12(b)
Comment: Prohibited uses should also include combustor (incinerator) ash and petroleum-contaminated soil (including for landfill cover).

Response: The Department acknowledges these waste streams pose many concerns for beneficial use. However, with appropriate treatment, incinerator ash could function as a useful aggregate substitute in concrete block or pavement. The Department continues to review treatment technologies for this material. Petroleum-contaminated soil, if it meets functional criteria for alternative operating cover in 363-6.21, following treatment if necessary, typically poses in this use the least potential for human health or environmental impact. Fully-treated petroleum-contaminated soil often functions well as needed backfill for a petroleum cleanup site. The Department's Division of Environmental Remediation (DER) has published detailed standards for treatment and reuse of petroleum-contaminated soil.

360.12(b)
Comment: Proposed Unacceptable Beneficial Uses should include "Any wastes generated through the exploration, drilling, and production of oil and natural gas that are clarified and managed as solid waste, including but not limited to drill cuttings, muds, sludges and fluids".

Response: The Department will not include these wastes in Unacceptable Beneficial Uses, but will require these materials to be reviewed for any proposed beneficial use on a case-specific basis in accordance with 360.12(d) and 360.12(f).

360.12(b)
Comment: Into Unacceptable Uses, add combustion fly ash; flue gas desulfurization or other gas-scrubbing byproducts; and residue from any air pollution control device.

Response: Some uses of coal combustion residuals continue to be beneficial, such as the use of fly ash to strengthen concrete, and have not been shown to adversely affect the environment. It would not be reasonable or necessary, therefore, to prohibit any and all use of coal combustion residuals.

360.12(c)
Comment: This subdivision is missing the pre-determined BUD (360-1.15(b)(8) in current regulation) for relocation of contaminated soil on the same construction site; please reinstate this pre-determined BUD. This pre-determined BUD is especially important for utility maintenance in public rights-of-way.

Response: The Department has restored this BUD in revised 360.13.

360.12(c)
Comment: A pre-determined BUD should be created for navigational dredged material that meets the stringent federal criteria for ocean placement as cover for the Historic Area Remediation Site (HARS), to also be allowed for most upland uses.

Response: The Department acknowledges that NDM approved for HARS cover material would be suitable for most upland uses. While the Department does not elect to adopt the federal criteria for the HARS and apply it to upland uses, the Department agrees that HARS-suitable material is likely to meet criteria proposed in the Department's NDM predetermined BUD in 360.12(e)(2). Those criteria are now located in 360.12(c)(2).

360.12(c)
Comment: Where there is an established and sound use for surplus materials on public construction and maintenance projects, regulatory approval of such use should be automatic. An example is the use of demolished concrete and other road materials in place of fill or subbase. Any restrictions on use of surplus materials may impact the bidding of projects. Such uses of materials would be subject to NYSDOT or NYS Thruway Authority specifications and practices.

Response: The proposed regulations address this concern through pre-determined BUDs and a revised provision for registration in Part 361 for entities storing, processing and using these materials.

360.12(c)
Comment: DMM should work with DER (Division of Environmental Remediation) to create pre-determined BUD(s) for marsh islands. Although Part 360 doesn't apply, NYSDEC Section 25 for tidal wetlands does apply, and DER is responsible for Section 25 BUDs. (*sic*)

Response: It is not DER who regulates ECL Article 25 tidal wetland sites, but DEC Division of Marine Resources. Materials generated at or placed at this type of site would likely come under the exclusion in 360.2(a)(3)(xi) for dredged material managed under an ECL Article 25 permit.

360.12(c)
Comment: A pre-determined BUD should be included in 360.12 for manufacturing by-products when handled as a commodity and marketed successfully in place of conventional materials.

Response: Handling of a by-product as a commodity and demonstrating a market are important to show legitimate use, especially under a pre-determined BUD. However, for by-products used under a pre-determined BUD, especially when such a BUD would encompass use "on the land" in construction projects or agricultural land application, must be demonstrated not to adversely affect human health and the environment in a broad case scenario of unlimited use, including misuse. Not all manufacturing byproducts have been demonstrated to meet this principle, regardless of whether they are handled as a commodity.

360.12(c)
Comment: The proposed rules appear to have eliminated the predetermined BUD in current regulation for RU-CARBS as aggregate. This omission will have negative consequences, forcing facilities to obtain permits to process RU-CARBS as solid waste, discourage their reuse and recycling, take up disposal volume in solid waste landfills unnecessarily, and burden DEC with numerous additional case-specific petitions.

Response: This predetermined BUD has not been removed in the draft but was instead proposed to be included in Part 361**.** In the revised draft, pre-determined BUDs for concrete, masonry products, and rock, and for asphalt pavement, have been included in Section 360.12(c)(3). Reuse of soil is addressed in 360.12(c)(1) and in Section 360.13.

360.12(c)
Comment: By eliminating several pre-determined BUDs in current regulation, such as for petroleum contaminated soil as fill, DEC will be burdened with many additional case-specific petitions.

Response: The former pre-determined BUDs for petroleum contaminated soil in 360-1.15(b)(9) and (b)(12) were infrequently used. In many cases it was more useful to both the Department and the PCS processor or user to proceed under a case-specific BUD. These pre-determined BUDs have therefore been eliminated in the proposed 360.

360.12(c)
Comment: Why do asphalt millings (RAP) cease to be considered waste at the point of use, whereas other construction materials, street sweepings, and even coal combustion bottom ash, cease to be waste when meeting technical requirements? RAP poses less impact to the environment than other materials.

Response: RAP is a highly recyclable material, but can be misused particularly though mixing with soil into an unrecognizable mixture that has been distributed as “clean fill” or even “topsoil”. While inert in its use in pavements or highway construction applications, the polycyclic aromatic hydrocarbons (PAHs) in RAP could pose harm to human health and the environment if RAP were to be mixed with soil and used as soil. The point of waste cessation will help ensure RAP is used only in recycling into pavements or in highway construction.

360.12(c)
Comment: Petroleum contaminated soil from virgin spills could be included as a BUD.

Response: PCS can be used as fill, but only following treatment to desorb or destroy the potentially harmful petroleum hydrocarbons in the soil.

360.12(c)
Comment: A predetermined BUD should be included for historic fill in mine reclamation and for filling under foundations or pavements, and in demonstration projects.

Response: Section 360.13 has been significantly revised to include procedures for evaluating and using all types of excavated soil or soil-like materials (now defined as "fill material" as grade adjustment fill or subgrade.

360.12(c)
Comment: Include a pre-determined BUD for steel and other metals when used in appropriate products and uses.

Response: Scrap steel and metals destined for reuse are excluded or exempted in both hazardous waste regulations and Part 360; no predetermined BUDs are necessary to authorize this activity.

360.12(c)
Comment: The Department must consider an overall general Beneficial Use Determination (BUD) for recognizable and uncontaminated rock, brick, concrete, asphalt pavement, and soil, removing them from the waste category at the earliest possible time generation, thereby minimizing any related timeframes, stockpile size/configuration restrictions and foster reuse and recycling. This type of BUD should also be consistent with Long Island Landfill Law "clean fill" restrictions.

Response: A pre-determined beneficial use determinations for these materials has been incorporated into revised 360.12(c).

360.12(c)(1)
Comment: The following pre-determined BUD should be added in 360.12(c)(1) for "recognizable uncontaminated concrete and concrete products, asphalt pavement, brick, glass, soil and rock used as a substitute for conventional aggregate within NYSDOT or NYSTA rights-of-way or properties owned or under control of these transportation agencies."

Response: The department disagrees, and has chosen to allow these materials to be used pursuant to pre-determined BUDs based on material characteristics, rather than where or by whom generated.

360.12(c)(1)(ii)
Comment: Proposed 360.12(c)(1)(ii) significantly limits soil reuse on a construction project, compared to existing 360-1.15(b)(8). The requirement for soils to meet unrestricted-use SCOs for reuse will result in unnecessary movement and disposal of soils off site that could be used on-site as backfill.

Response: This provision was not intended to replace 360-1.15(b)(8), but rather 360-1.15(b)(7). Paragraph 360-1.15(b)(8) has been reinstated in revised Section 360.13, and the replacement for 360-1.15(b)(7) has been revised and moved to Section 360.13 as well.

360.12(c)(1)(ii)
Comment: It is confusing to allow soil with contamination due to human activity in an unrestricted manner and yet require that it meet unrestricted-use SCOs. Unrestricted-use SCOs imply no contamination or impact. Isn't uncontaminated soil already addressed by the exclusion in proposed 360.2(a)(3)(viii)?

Response: The revised draft has replaced both the exclusion in 360.2 for clean soil, and this pre-determined BUD, with new pre-determined BUDs in Section 360.13 which address all soils, including those which may be un-impacted by human activity and also those which may be impacted but at a minimal level which would not preclude their use in general construction as fill.

360.12(c)(2)
Comment: Add to this paragraph, "Recognizable, uncontaminated concrete and concrete products, asphalt pavement, brick, glass, rock and soil when used by the owner or placed in commerce for service as a substitute for conventional aggregate". This pre-determined BUD is missing from the proposed regulations and should be reinstated.

Response: This predetermined BUD has not been removed in the draft but was instead proposed to be included in Part 361**.** In the revised draft, pre-determined BUDs for these materials have been included in Section 360.12(c)(3). Separate BUDs are stated for use of concrete, masonry products, and rock as general-use construction aggregate, and for asphalt pavement as aggregate in road construction. Glass as aggregate appears in the predetermined BUD in 360.12(c)(4).

360.12(c)(2)(i)
Comment: The pre-determined BUD should not only included paper for animal bedding, but also OCC (corrugated) and similar box paper to make new paper products.

Response: Use of corrugated and other box paper is an "industrial waste historically used as an ingredient in a manufacturing process" and ceases to be waste when used to make new paper products, in accordance with 360.12(c)(3)(iii).

360.12(c)(2)(iii)
Comment: Expand this pre-determined BUD for street sweepings, car wash grit, etc., to any uncontaminated aggregate.

Response: The department has placed street sweepings and car wash grit under a separate predetermined BUD due to the need to examine these materials for typical contaminants such as trash or oil runoff. Other aggregates do not require this examination as condition for use, and are best addressed under a different pre-determined BUD.

360.12(c)(2)(iii)
Comment: This pre-determined BUD for car wash grit is a welcome addition. Use as commercial fill or aggregate is better than disposal as industrial waste and is supported by analytical data we have seen for this material.

Response: This comment is acknowledged.

360.12(c)(2)(iii)
Comment: The term "uncontaminated" used for the materials in this pre-determined BUD for street sweepings, car wash grit and catch basin cleanout material does not make sense. Street sweepings will typically include detectable compounds from roadway asphalt, rubber ties, petroleum from vehicles, exhaust, brake linings, etc. It also can contain trash, paper cigarette butts, etc. Further the qualitative restriction of "objectionable" odors is subjective and not possible to properly manage, document, and to provide any certification that this criterion has been met. Calling these materials "uncontaminated" without further clarification and allowing it to be used without any documentation will create more environmental risk than it will solve. These inconsistent, qualitative and subjective criteria also create difficulties on public or private construction jobs with contractors and creating specifications for waste management on these projects.

Response: In the Department's experience, these materials can be used in the restricted manner described in the pre-determined BUD, following inspection for and removal of the contaminants described (if feasible). Entities letting projects for bid are free to require more stringent testing and handling of these materials in contract specifications.

360.12(c)(2)(iv)
Comment: Limiting the number of tires to 1,000 per bunker will result in negative consequences on agricultural operations. Farms, particularly dairy farms, utilize bunkers or piles to store animal feeds on farms for many months, often over a year and often use more than 1,000 tires per bunker. No limit should be set on the number of tires that can be utilized per bunker on a farm – this is a valuable reuse of tires. Farms furthermore are not waste tire facilities, and in particular family farms should never be required to obtain permits as such.

Response: The limit on number of tires used at farms has been revised.

360.12(c)(3)
Comment: This provision states that "the following cease to be waste when the material meets the technical requirements for the intended use identified in this paragraph." Yet none of the options indicate any "technical requirements," and some of the options, such as "fats, oil, grease, and rendered animal parts" don't indicate a particular use. DEC must clarify these technical requirements.

Response: The Department does not need to clarify the technical requirements; they are clarified as those developed by industry for the particular products. These predetermined BUDs clarify that these materials cease to be solid waste when used in accordance with industry requirements.

360.12(c)(3)(ii)
Comment: Unadulterated wood combustion ash should be allowed not only as a soil amendment but as a soil amendment *component*, and in other agricultural products, such as animal bedding.

Response: The Department has found that wood ash should be considered on a case by case basis for uses other than described in the predetermined BUD.

360.12(c)(3)(iii)
Comment: Define "manufacturing process".

Response: This definition further reflects a general dictionary definition of manufacturing; no further definition is necessary in the regulation. The processing of wastes, to be considered "manufacturing", must add value to the wastes, producing a product with a real market based on its being an effective substitute for a conventional material or being a useful ingredient in the making of a marketable product.

360.12(c)(3)(i) and (c)(4)(i)
Comment: The phrase "acceptable to the department" is of concern in these pre-determined BUDs. Instead of this phrase, there should be objective criteria to avoid inconsistent or unfair determinations by DEC staff. This wording is also probably unconstitutional based on case law.

Response: "Acceptable to the Department" is used throughout the current regulations. It allows for review of unique situations without eliminating the possibility of material beneficial use altogether.

360.12(c)(3)(v) and (vi)
Comment: Delete these pre-determined BUDs; there should be no pre-determined use of coal combustion fly ash or byproducts of flue gas scrubbing.

Response: These uses of coal combustion residuals have been demonstrated to benefit the quality of products made with them, reduce environmental impacts from mining of virgin ingredients they are replacing, and do not adversely affect the environment in these specific uses.

360.12(c)(3)(vii)
Comment: Would DEC consider adding processed MSW ash for use as an aggregate in the products listed in this pre-determined BUD?

Response: MSW combustor ash, compared to coal combustion ash, can contain high concentrations of metals that could adversely affect the environment in beneficial use, even in bound products such as concrete. The Department is reviewing use of MSW ash on a case by case basis, particularly when ash can be processed or treated to reduce the concentration and/or leachability of these metals.

360.12(c)(4)
Comment: Are materials that go from storage to aggregate use (not through a facility) unregulated, for example, asphalt pavement millings from a construction project?

Response: The regulations have been revised to allow for direct haul of these materials.

360.12(c)(4)
Comment: Why do predetermined Beneficial Use materials listed in 360.12(c)(4) lose their predetermined status if used at another solid waste management facility? Does that mean that a case-specific determination process described in 360.12(d) must be followed in these cases? This differentiation between users is unwarranted and results in additional cost to the generators of the materials. Suggest that the second sentence in 360.12(c)(4) be struck.

Response: This provision is necessary for materials that are never used in accordance with the pre-determined BUDs and which remain wastes requiring storage, treatment or disposal.

360.12(c)(4)(i)
Comment: This pre-determined BUD addresses "materials produced by a recyclables handling and recovery facility for use as an ingredient in a manufacturing process ….". As a paper manufacturer, this BUD does not cover all of our suppliers of recycled fiber; would we need to obtain a case-specific BUD for fiber from suppliers who are not RHRFs?

Response: These materials cease to be waste pursuant to 360.12(c)(3)(iii).

360.12(c)(4)(i)
Comment: If glass aggregate meets NYSDOT Standard Specification (5% by volume non-glass contamination), is the NYSDEC requiring a more stringent spec? The requirement that uncontaminated glass aggregate meeting a governmental or industry specification acceptable to the Department indicates the Department does not currently have a spec, and therefore a user of glass has no confidence of what is approvable as well as if this will be consistently applied throughout the state. If there is a state specification, that should be referenced. Finally, the mass-based contaminant limits would be very hard to measure.

Response: This pre-determined BUD has been changed to allow either a volume-based 5 percent of non-glass contamination, or the weight-based equivalent previously

stated in this BUD. There is no state specification other than this contaminant maximum. The omission of any other specific standard is intentional, to promote broader use of glass aggregate in many applications.

360.12(c)(4)(i)
Comment: A commenter explained that his facility accepts only concrete, asphalt pavement, and brick for processing into NYSDOT-specification aggregate, and thus the facility should be exempt pursuant to the new Parts 360 and 361. Why should DEC impose the same requirements on this type of facility as on a transfer station?

Response: Site-specific inquiries will be reviewed by the Department on a case-by-case basis.

360.12(c)(4)(ii)
Comment: Regarding the pre-determined BUD for wastes after processing at a facility: "soil conditioning products" are mentioned; previously, “soil amendments” was used; what are the definitions of these terms?

Response: These terms have their commonly-understood meaning and are not further defined in Part 360.

360.12(c)(4)(iv)
Comment: We observe that the pre-determined BUD for C&D debris (RUCARBS) as aggregate, subbase or fill has been changed in the proposed regulation to require that materials considered for beneficial use must first pass through a permitted or registered facility and then be subject to strict storage timeframes and stockpile limitations. These proposed limitations make it extremely difficult to beneficially reuse materials and create significant business risks to generators and users of construction materials. The proposed limitations also change the point at which the BUD applies (i.e., placed in commerce vs. when at the final use destination). Effective beneficial use requires the ability to move and temporarily store materials as is the case with other marketable commodities. For these reasons, we strongly recommend the existing predetermined BUD provisions of 6 NYCRR 360-1.15(b) be retained.

Response: Subdivision 360.12(c) has been revised to allow for direct haul of materials meeting this pre-determined BUD.

360.12(c)(4)(iv)
Comment: This pre-determined BUD for C&D debris does not appear to offer contractors any help to reuse materials and will force us to place more material in landfills. It does not exempt us from site permits, financial assurance, transportation requirements and other burdens. These materials have been recycled for decades and now DEC is creating barriers not previously exist through the proposed regulations.

Response: The predetermined BUD is only intended to provide waste cessation for C&D debris products leaving a processing facility; these concerns can only be considered in context of relevant proposed terms in Part 361.

360.12(c)(4)(iv)
Comment: The origin of clean concrete or stone, for purposes of its reuse, should not matter, only its content.

Response: Where the origin of a material is stated in the proposed regulations as a condition for a pre-determined beneficial use, it is relevant because knowledge of the material – particularly its source – allows the Department to waive sampling, analysis or other requirements for reuse of the particular material.

360.12(c)(4)(iv)
Comment: A number of existing predetermined BUDs have been eliminated which runs counter to encouraging beneficial use. For example, existing predetermined BUD 360-1.15(b)(11) replaced with a more restrictive BUD at 360.12(c) which now states that the beneficial use of certain identified materials can only be considered if the material is received and/or processed at a NYSDEC registered or permitted C&D facility. This is wholly unworkable. The construction industry has a base of experience with the existing predetermined BUD allowing construction materials to be placed in commerce for reuse. Uncontaminated soil, rock, concrete, brick, asphalt pavement, etc., are routinely redistributed and reused successfully. Road construction contractors routinely mill asphalt pavement for reuse in the manufacturing of new pavement. Other construction debris such as concrete pavement, pavement subbase, embankment fill, etc. are routinely reused as an unregulated construction aggregate and fill material. Contractors routinely use surplus material from one project for reuse on other projects. Often, this includes temporary stockpile of materials to accommodate project schedules. Similarly, at general construction sites surplus construction and demolition materials such as concrete, block, brick, stone, soil, rock, etc. in excess of the project need is typically taken to other sites for reuse pursuant to existing predetermined BUD 6 NYCRR 360-1.15(b)(11). This class of construction material does not require and should not be regulated as a solid waste. Furthermore, arbitrary timeframes have been incorporated.

Response: The pre-determined BUD for recycled concrete, aggregate, bricks, rocks and soil has been relocated from Part 361 to Subdivision 360.12(c), which should address the concerns raised in the comment.

360.12(c)(4)(v)
Comment: The pre-determined BUD in current regulation for tire-derived aggregate use in leachate collection systems in place of natural stone materials, a practice which has existed in New York since 1991, is missing from the proposed regulations. Will this practice now require a case-specific determination? The following language could be added here, "(*d*) landfill leachate, condensate, or landfill gas drainage media used within the lined footprint of the landfill".

Response: Use of tire-derived aggregate is authorized and addressed in detail in proposed 363-6.21 rather than in a pre-determined BUD.

360.12(c)(4)(ix)
Comment: For soils and other materials eligible for use as alternate operating cover at solid waste landfills, DEC has had variability in the Regional evaluation and approval process. To maintain a level playing field, there should be consistent standards for acceptance applied across the State.

Response: This pre-determined BUD has been removed. Criteria for alternate operating cover must meet criteria in 363-6.12(c) regardless where the landfill is located in the State.

360.12(c)(4)(ix)
Comment: This provision for landfill alternative daily cover conflicts with the opening paragraph of 360.12(c)(4), which states the pre-determined BUDs do not apply for materials going to another solid waste facility.

Response: The department agrees and has deleted this pre-determined BUD since this use is addressed in proposed 363-6.21.

360.12(c)(5)
Comment: The Department should not rescind pre-determined BUDs without adhering to all requirements of SAPA; notice in the ENB is insufficient. Furthermore, "sole discretion" is improperly used here with reference to DEC's authority. Objective criteria must be stated for this action to avoid arbitrary decisions by DEC staff. This provision may be unconstitutional based on case law.

Response: This provision has been removed from this subdivision. If revocation of a pre-determined BUD is considered or required, the Department will comply with all applicable rules and regulations.

360.12(c)(6)
Comment: Clarifications are needed for annual reporting for threshold quantities of materials used under pre-determined BUDs: Who must make the reports, and are they by generator or user/ distributor/ end use site?

Response: This person who distributes the material ensure that the report is made to the Department.

360.12(c)(6)
Comment: What is the value of annual beneficial use reporting for pre-determined BUDs? This is administratively onerous, and how was the 10,000 ton threshold determined? A single highway construction project could easily exceed it. Materials that are already deemed safe enough for a pre-determined BUD should not require

additional reporting. This added paperwork could discourage use of materials like asphalt millings (RAP). It also is not clear who is responsible to report quantities; the generator, transporter, or both? This requirement should not apply to materials used as alternate daily cover since quantities are already recorded by the landfill user.

Response: The department agrees this requirement provides insufficient benefit to the department in terms of tracking how much material is being recycled, versus the burden to material users. This requirement for reporting of material quantities used under pre-determined BUDs has been removed.

360.12(d)
Comment: The case-specific BUD process appears onerous for small volume projects. Would the Department consider a mechanism for blanket coverage of recurrent small activities by one company, such as reuse of utility cut materials?

Response: In nearly all instances, reuse of utility-cut materials should be possible under a pre-determined BUD or under self-approval procedures in proposed 360.13. A case-specific BUD would rarely be necessary.

360.12(d)((2)(vii)(*a*)(*2*)
360.12(a)(3)
Comment: Several comments were received regarding the maximum storage time limit of 180 days under 360.12(a)(3):

- Accumulation and storage of uncontaminated C&D materials limited to 180 days may not be of sufficient volume for economic transport. The regulations should extend this time limit if the materials are stored under full control on company-owned property. Will the 180-day storage limit apply also to existing stored materials? - it is recommended the accumulation time begin with the effective date of this revised rule.

- Extend the 180 day storage limit to one year to facilitate accumulation of materials during the off-seasons or prior to approved use on a remedial project. Also, this period is too short for many low-density municipalities or institutions who collect material at a slow rate. For pre-determined BUD materials that are properly stored (e.g., with erosion control), there should be no limit on storage.

- Proposed provisions limiting the storage of waste to no more than 180 days are unnecessary and inconsistent with state and federal rules (6 NYCRR 371.1(a)(1) and 40 CFR 260.31, respectively).

Response: Many commenters have expressed that this time limit is too short. The Department maintains that a time limit is necessary for many materials to prevent speculative accumulation. To address the concerns raised about the specified time period, the storage limit was extended to 365 days. If materials cannot be used within a year, then a legitimate reuse market may not exist. Provisions of 360.12(d) allow that

the Department can extend this limit with justification for unique materials, particularly those being used on long-term construction or maintenance projects with seasonal interruption, for example. The storage time at a specific facility may also be extended through that facility's registration or permit, if so authorized, as stated in 360.12(a)(3).

360.12(d)(3)(vi)
Comment: The proposed application of Part 375 Soil Cleanup Objectives (SCOs) to non-waste materials should be deleted, for the following reasons: there is no reasoned basis for applying SCOs to beneficial use products; the proposed rule improperly applies the SCOs; SCOs cannot apply to BUDs as they are applied based on use of a remedial site; SCOs cannot universally apply to BUDs because SCOs can be modified for remedial programs and the proposed rule fails to provide for similar treatment for BUDs; the Department has improperly incorporated by reference various sections of 6 NYCRR Part 375, including but not limited to, the SCOs; the proposed rule fails to define "ecologically sensitive areas"; and finally, the proposed rule violates the "Fair Notice Doctrine" for applying SCOs to BUDs.

Response: It is unclear how the proposed rules violates the notion of fair notice when the proposed rulemaking, itself, is notice to the regulated community that the Department will use the SCOs as a tool in the approval of beneficial use determinations in the future. In addition, the inclusion of screening values does not deprive those subject to these regulations of any right, nor does it make any conduct unlawful. To the contrary, the use of screening values is intended to facilitate the review of projects to increase the amount of material that may be reused and decrease the amount of waste that is landfilled. This is consistent with the State's Solid Waste Management Plan, *Beyond Waste* The Department disagrees that the Part 375 SCOs cannot be applied to the BUD program. The principles of the Part 375 SCOs, in particular applied to human health effects, are highly relevant to beneficial use. The rural state background as a statutory . To address the concern raised about the definition of ecologically sensitive areas, a definition has been included in the revised proposal.

360.12(d)(3)(vi)
Comment: The proposed rule fails to define "soil-like" application of the SCOs to non-soil-like materials as being contrary to accepted scientific principles. Soil is distinct from aggregates in that particle size distribution is a critical aspect of soil that dictates exposure potential, and particle size also dictates inhalation potential. In addition, the dietary factor incorporated into the SCOs is not applicable to coarse aggregate materials that would not be used in garden soil.

Response: The Part 375 SCOs provide a measure of whether a granular or soil-like material, in particular one that is intended for placement on the land in beneficial use, is protective of human health, the environment and natural resources (including groundwater). Granular materials that may consist of large stone-like particles will, over time, weather into smaller particles that can be transported by water, wind or human activity, or leach more readily to groundwater. Even if a material is physically unsuited to use in gardens, a granular material with the appearance of stone at some point may be

excavated from its place in a path or driveway, and unknowingly incorporated into portion of a residential property used for gardening.

360.12(d)(4)
Comment: The proposed default position that a material remains a waste until it is "received" for a designated beneficial use imposes an undue burden on the regulated community.

Response: The Department acknowledges that unique situations exist when materials do not pose an environmental threat or significant possibility of diversion and misuse during storage or transport to locations of use, and allows for these situations by designating other defaults in pre-determined BUDs and the opportunity for petitioners to request a different point of waste cessation in case-specific BUDs. The default position is necessary to ensure protection of human health, the environment and natural resources.

360.12(d)(7)
Comment: BUDs should not be time-limited to a mandatory renewal every five years. This will strain DEC's already stretched administrative resources. Many types of materials should be approved for longer terms, or even classed as pre-determined uses; if DEC is concerned about changes in materials or standards, the proposed regulation already gives the agency authority to modify or rescind both pre-determined and case-specific BUDs. If time limitations will be imposed on BUDs in this regulation, they should be made specific to BUDs for materials whose characteristics are anticipated to change within a five-year term. The more stringent review in these proposed regulations for initial BUD petitions, supports a longer-term approval, or no limitation on the term of approval, for materials which will not change in nature.

Response: The Department anticipates streamlining the renewal process but believes it is worthwhile to review the basis and applicability of BUD requests every 5 years.

360.12(d)(8)
Comment: Every existing BUD holder should be afforded the procedural benefits of Part 621 that permit applicants are given.

Response: The procedural benefits referenced in the comment were not specified. However, pre-determined BUDs are not processed under Part 621 since no permit or other discretionary approval is issued. For case-specific BUDs, the process is designed to relieve applicants of the process required by 621 since the ultimate determination is whether a particular material should be regulated by the Department as a waste and if not, the cost and expense of a 621 permit process is not warranted.

360.12(d)(8)

Comment: Administrative procedural fairness and due process require that the provisions of Part 624 apply to any Department action proposing to amend or rescind an existing BUD, or to decline to renew a BUD if periodic renewal is required.

Response: The Department acknowledges that the revocation of a case-specific BUD should be accompanied by a opportunity to request a hearing.

360.12(e)
Comment: Management of dredged material is critical to ensuring timely dredging and maintenance of waterways for commerce, recreation and public safety in New York State. The proposed regulations need to facilitate a market-driven solution for NDM. One way to do this is by defining NDM as a construction commodity. Regulations should not hinder logistics needed to match dredging projects with sites of NDM fill or aggregate use.

Response: The Department disagrees that the mere exclusion of navigational dredged material from the definition of solid waste will reduce the burden on dredging stakeholders to characterize material and to find appropriate placement locations. Where NDM has been excluded under New York's Part 360, and in New Jersey, this measure has allowed other entities than DEC's Materials Management program to review dredged material management, in some cases streamlining approval for placement. Having no institutional structure to oversee NDM other than DEC's Materials Management program, New York chooses to keep NDM classified as a solid waste, but to streamline procedures where possible for NDM to exit solid waste regulation through BUDs.

360.12(e)
Comment: Could the Department adopt the US Army Corps of Engineers New York District Regional Testing Protocols as part of the NDM beneficial use regulations that would address the specific needs of different regions of the state? These protocols are better suited to the unique circumstances of New York Harbor navigational dredging, and also are consistent with New Jersey protocols for beneficial use review.

Response: Regulations must address the entire state uniformly unless there is a clearly-defined technical reason or statutory authorization for regional variation. In addition, federal Regional Testing Protocols are subject to modification and the regulation would be restricted to referencing the current versions only.

360.12(e)
Comment: In the New York/New Jersey Harbor, where a dredging area crosses boundaries of New York and New Jersey, it would reduce costs for NDM generators, processors and users if New York would adopt the same NDM sampling, analysis and reuse criteria as New Jersey.

Response: Regulations must address the entire state uniformly unless there is a clearly-defined technical reason or statutory authorization for regional variation. Where

New Jersey's protocols might be implementable for Harbor projects, they would be unnecessary and in many cases prohibitively costly for dredging projects upstate.

360.12(e)
Comment: This subdivision pertaining to navigational dredged materials is too short and does not provide an applicant with adequate information concerning how to petition for a BUD. Specific instructions for petitioning or references to documentation and forms should be included in this subdivision.

Response: The intent of the proposed regulations is to provide a concise description of the requirements for a BUD. For case-specific BUDs, the nature of the information needed to demonstrate that a material should not be considered a waste varies and therefore it is not practical to prescribe the exact form that such information should take in the application process. However, more information about the BUD process is available on the Department's website.

360.12(e)
Comment: Clean NDM for uncontaminated regions should be exempt from regulation, including pre-determined BUD standards.

Response: NDM needs some degree of evaluation to confirm that it is "clean" before it can be deemed unregulated. For this reason, the procedures for using uncontaminated NDM without need for Department approval are housed in a pre-determined BUD.

360.12(e)
Comment: This subdivision section refers to dredging permits or other applicable permits that are specified in subparagraph 360.2(a)(4)(viii) – this appears to be an error with the appropriate reference being 360.2(a)(4)(xi).

Response: The Department acknowledges this error and has made the correction to the reference.

360.12(e)
Comment: Understanding how these regulations apply to stream stabilization and flood mitigation projects is difficult as the regulations are currently organized. It would be helpful to have a summary of the applicable regulations and thresholds in one place.

Response: The Department acknowledges this concern and will plan to develop a cross-program guidance that incorporates not only 360-Series, but all Department requirements pertaining to dredging and related waterway improvement projects.

Comment: Recommendations were made for displaying metrics for NDM BUDs on the Department's BUD webpage and implementing online petitioning for BUDs (with aim to reduce BUD petition review times).

Response: These changes are outside of the scope of this rulemaking, but the Department will consider them to help entities petition for NDM BUDs and to disseminate statistics on NDM beneficial use.

360.12(e)(1)
Comment: NDM projects that have been approved for funding on or before the adoption of the proposed regulations should be grandfathered and not subject to the new regulations.

Response: The department disagrees that such projects would be impacted greatly by 360.12(e) requirements and will not exempt planned dredging projects that may start after adoption of Part 360.

360.12(e)(2)
Comment: A pre-determined BUD should be created for navigational dredged material consisting of Pleistocene red clay or glacial till excavated to deepen channels in New York Harbor. These Pleistocene materials underlie deposits of sediment from recent centuries and are unlikely to contain any chemical contamination. Such material is allowed to be used to cover the HARS without testing, provided it has been separated using an approved procedure from any overlying sediment. The pre-determined BUD could similarly allow use of Pleistocene NDM as fill without testing, upon separation from overlying sediment.

Response: Subdivision 360.12(c) has been revised to include a pre-determined BUD for underlying native soils or rock removed for channel deepening or maintenance, for use as fill or aggregate, when these materials are separated from overlying sediment.

Comment 360.12(e)(2): How does an entity go about obtaining the self-implementing approvals in this paragraph? More details and steps are needed.

Response: The department has included sufficient detail for an entity to determine whether navigational dredged material can be used pursuant to this pre-determined BUD, which has been moved to 360.12(c). Material which qualifies for a pre-determined BUD does not require Department approval prior to use.

360.12(e)(2)(i)
Comment: A definition of “ecologically sensitive areas” is needed.

Response: A new definition in 360.2 has been added,” *Ecologically sensitive area* means any land designated as habitat for threatened or endangered species; or area intended to encourage natural habitat development by federal, state or local government.

360.12(e)(2)(i)(a)

Comment: This clause states, “the NDM originates from lands underlying waters in which there has not been a direct historic or current industrial discharge, and in which no spills or discharges of pollutants have occurred, in the last ten years which may have impacted sediment quality”, this should further stipulate that determination of discharge and spills reference the NYSDER (*sic*) Project Identification and NYSDEC Environmental Site Remediation database.

Response: The Department agrees with these suggestions and notes that there are other resources available to evaluate this pre-determined BUD criterion. However, such resources are best referenced in a guidance document, not a rule.

360.12 (e)(3)(v)(*a*)
Comment: DEC is urged to continue coordination with the NJDEP in requirements for NDM sampling and testing for disposal and beneficial use in the NY/NJ Harbor. This requirement for testing of the NDM at intervals during/ after excavation and processing will create significant logistical problems and costs for dredging projects and will discourage the reuse of NDM. Confirmatory sampling has not uncovered any differences from initial in-situ sediment testing and we ask that it be dropped altogether as a requirement. If certain dredging areas pose historical concerns for DEC such that DEC believes confirmatory testing is appropriate, these areas should be identified to Harbor stakeholders. As an alternative, thorough characterization in situ of the sediment to be excavated, along with a robust bench scale testing of the product of amendment or processing steps would provide sufficient prior certainty to all entities that the NDM is appropriate for reuse.

Response: The requirement for post-processing confirmatory sampling has been removed. This requirement reflects typical requirements for any beneficially-used material, but the Department agrees that when typical in-situ sampling prior to dredging does not show any results of concern for beneficial use, confirmatory sampling is not necessary for NDM.

360.12(d)(2)(iv)
Comment: This proposed frequency of sampling and analysis for a material for use under a case-specific BUD will be excessive in many cases; for example, a typical quantity of minimally-contaminated soil on a construction project, over 10,000 cubic yards, would require ten samples or more. Would a soil or RUCARBS processor be required to perform this sampling? Laboratory fees could exceed $0.5 million annually – a cost that would have to be borne by the processor or passed on to purchasers of aggregate materials.

Response: The specific sampling frequency required for case-specific BUDs has been removed. RUCARBS processors, in any case, would not be required to sample and analyze their outgoing aggregate/subbase for use under the predetermined BUD in 360.12(c)(3)(viii).

360.12(d)(2)(vii)(a)(4), 360.12(d)(2)(vii)(b), 360.12(d)(2)(vii)(c)

Comment: These provisions must be more specific as to what must be submitted in a case-specific BUD petition to demonstrate no adverse effects from use of a material. More specific requirements here, and approval criteria, will lead to more complete petitions that can be reviewed faster and will more consistent review across all DEC regions.

Response: It is not practical to be more specific or prescriptive in paragraph 360.12(d), since case-specific BUD petitions will be as varied and unique as the universe of potential materials that may be proposed for beneficial use.

360.12(d)(3)(ii)
Comment: "The essential nature of the proposed use under review constitutes use rather than disposal" – this requirement poses several concerns. The term "essential" is a subjective, legally meaningless and regulatorily unproductive word and likely unconstitutional under case law. Objective criteria for this requirement must be provided to prevent arbitrary or inconsistent decisions by DEC staff. In addition, the definition of *disposal* in this revision is so broad as to include placement virtually all material use in construction, making it unrealistic and problematic.

Response: "Essential" is to be understood in its plain language meaning, and provides an allowance that a petition need not be a perfect submittal. Criteria to show beneficial use versus disposal are given in the previous submittal items in 360.12(d). Material placed on the land in construction can be demonstrated use, not disposal, through showing the need for fill to bring a site up to necessary elevation for development, that the material meets geotechnical criteria, that it does not leach harmful constituents to groundwater, and other factors.

360.12(d)(3)(iii)
Comment: Define "managed as a commodity", "effective substitute", and "analogous commercial [product or raw material]". The terms are unclear and in effect allows staff to act arbitrarily without objective criteria.

Response: These terms are similar to those used by USEPA in its 40 CFR Parts 260 and 261 or have been used under New York State regulation since 1993 and apply to solid wastes in beneficial use. The proposed regulations in 360.12 provide types of documentation that can be submitted with a petition to demonstrate that these criteria are met.

360.12(d)(3)(iv)
Comment: If the market finds it more efficient to "process" either for the first time or a second or third time at the point of use, DEC should get out of the way and permit re-use or recycling to occur. There is no reason to limit processing to a point in the past. That the waste will not need other processing is a restriction that should be removed. Material often requires screening for gradation, size, compaction, and engineering requirements. Are materials not allowed to be processed at the generation site?

Response: A material cannot be granted a BUD if the material requires decontamination or processing before it can be used in a manufacturing process or as a substitute for a conventional material. A BUD cannot authorize a decontamination process or other process to take the material from waste to ingredient or product; these processes require a solid waste management facility registration or permit. Processing or decontamination is exempt on the site of waste generation pursuant to 360.14(c)(1).

360.12(d)(3)(vi)
Comment: This is completely inconsistent with other definitions and statements in this Section as well as existing programs. The reuse of soil and soil-like material throughout the state in this manner is more restrictive than cleanup of impacted sites under the BCP and under Superfund. In addition, NYSDEC has historically had great difficulty in making determinations of natural background for metals and this is often found to be a range.

Response: Reuse of soil has been moved to Section 360.13 and reflects a model of use of excavated soil and soil-like materials on sites with similar soils and land use.

360.12(d)(3)(vii)
Comment: Disagree with this requirement. All materials and uses of materials can have adverse effects on human health and the environment; the issue is whether use of the material has a net positive effect on human health and environment. Re-draft to permit cost-benefit analysis by the Department.

Response: The Department's duty is to minimize adverse effects, even from materials which may confer a benefit. An example is the use of coal combustion fly ash in concrete. Fly ash contains constituents at levels of concern if released into the environment but constitutes a beneficial use as an additive in concrete. The fly ash improves concrete strength, and since the waste constituents are bound in the concrete matrix, they will be prevented from entering the environment.

360.12(d)(4)
Comment: This requirement runs counter to the purpose of the new Part 360, which is to legally define waste. This provision bases the definition not upon the fact as applied to the law, but upon the subjective opinion of staff. The law already defines the point at which waste ceases to be waste, for example. This new provision must be deleted, or else there must be criteria that limit what the staff thinks of as a "necessary" condition.

Response: The law and 360.2(a) define solid waste but not when a material ceases to be a solid waste pursuant to a case-specific BUD, which is the purpose of this provision. Conditions added to a BUD are kept to a minimum and typically re-state requirements for BUDs in this subdivision.

360.12(d)(5)

Comment: Provide objective criteria for modification, suspension or revocation of a BUD under this provision. It gives staff unwarranted authority without criteria for exercising this authority. The undefined terms “no longer valid” or “incorrect” are meaningless unless linked to impact. Change “or” in “determination, or if necessary” to “and”.

Response: The Department will keep the wording of this provision without change, as it is necessary to protect public health and the environment.

360.12(d)(7)
Comment: We agree with DEC’s restricting case-specific BUDs to no more than five-year increments, and requiring additional approval to extend the time frame for the BUD. Is the renewed timeframe also limited to 5 years and is there a restriction on number of renewals that can be obtained?

Response: A renewal can only be issued for up to five years, but there is no restriction on the number of renewals that can be obtained.

Comment 360.12 General: The proposed regulations (360.12) significantly improve the BUD program; the commenter affirms specific inclusions and suggests additions.

Response: The Department acknowledges this comment and has addressed specific items elsewhere in this Responsiveness Summary.

360.12(d)(7)
Comment: Case specific buds are reviewed and renewed every THREE years, not five.

Response: The Department believes a five year period is appropriate for renewal.

Comment 360.2(a)(4)(xi) Definitions: This definition should specify that dredged materials not subject to the 360 Series include those placed in open water or in the riparian zone.

Response: It would be counter-productive to specify these locations in the exclusion since situations may occur, particularly in what may otherwise be considered a riparian zone placement, where Department Permitting or Water staff determine a BUD must be reviewed for placement of NDM. The current wording that placement must be included in the dredging permit or water quality certification is preferred by Department staff in these programs**.**

360.12(e)(2)(i)

Comment: It needs to be more clearly stated here that this provision constitutes a pre-determined BUD, and as long as the dredger or permittee has determined the material meets the requirements they need not petition the Department for approval.

Response: The Department agrees that this paragraph belongs in 360.12(c) to clarify its intent as a self-implementing, predetermined BUD; it has been relocated to 360.12(c)(2).

360.12(e)(2)(i)
Comment: Can the criteria for this approval be harmonized with DEC dredging permits guidance (TOGS 5.1.9)? for example, the minimum content of sand and gravel in this provision states "... more than 90% sand and gravel", whereas the TOGS states or "equal to or more than" 90% sand and gravel.

Response: This change has been made.

360.12(e)(2)(i)(*a*)
Comment: Could this provision be revised to read:" the NDM originates from lands underlying waters within a reasonable limiting distance downstream from a known point of contamination found in a NYSDEC database, and in which no discharges of pollutants have occurred, in the last ten years which may have impacted sediment quality"? As currently written, this statement is impossible to demonstrate or defend, in part due to the myriad interconnections of water bodies and movement of pollutants as a result of weather events. In regard to the NY/NJ Harbor, here is probably no portion of this water body that hasn't had some kind of minor or major spill in the last ten years. Can more specific information as to acceptable documentation, e.g., previous sampling results, be included here? It would be helpful to have more specificity, for instance, no reportable spills, no listing on a spills registry, no presence of certain industries, etc.

Response: The Department agrees with the need to point applicants to resources to help implement this pre-determined BUD for NDM. Since such resources are constantly changing, it would be better to include them in a guidance or on DEC's website.

360.12(e)(2)(i)(*b*)
Comment: This sentence should be broken up for clarity of reading, and it does not appear to be appropriate as a condition of a pre-determined BUD.

Response: This item will be reworded for clarity. However, sampling and analysis should remain in this self-implementing BUD to provide an alternative means of documentation if the originating water body cannot be otherwise documented as "unimpacted".

360.12(e)(3)
Comment: The term "dredge materials" should be replaced with "dredged materials" ("dredge" can refer to equipment used for dredging).

Response: The department agrees and has made this correction throughout the proposed regulations.

360.12(e)(3)(iii)
Comment: It is not clear what "subdivision (d) of this section" refers to here?

Response: This item has been removed from 360.12(e)(3).

Comment 360.12 (e)(3)(v)(*a*): DEC is urged to continue coordination with the NJDEP in requirements for NDM sampling and testing for disposal and beneficial use in the NY/NJ Harbor. This requirement for testing of the NDM at intervals during/ after excavation and processing will create significant logistical problems and costs for dredging projects and will discourage the reuse of NDM. Confirmatory sampling has not uncovered any differences from initial in-situ sediment testing and we ask that it be dropped altogether as a requirement. If certain dredging areas pose historical concerns for DEC such that DEC believes confirmatory testing is appropriate, these areas should be identified in the regulations. As an alternative, thorough characterization in situ of the sediment to be excavated, along with a robust bench scale testing of the product of amendment or processing steps would provide sufficient prior certainty to all entities that the NDM is appropriate for reuse.

Response: The requirement for post-processing confirmatory sampling reflects typical requirements for any beneficially-used material, but Department agrees that when typical in-situ sampling prior to dredging does not show any results of concern for beneficial use, confirmatory sampling is not necessary for NDM. This paragraph has been revised accordingly.

360.12(e)(3)(v)(*b*)
Comment: Make it clear that this provision refers to waste from the processing of NDM and not the NDM itself.

Response: The words, "…use or…" have been removed from this clause.

360.12(e)(3)(v)(*c*)
Comment: Due to the logistics of most dredging projects, DEC should extend this storage time for dredged material that is usable under a BUD, to 180 days or even one year.

Response: This time frame has been changed to 365 days to coincide with allowable storage for other materials pursuant to BUDs.

360.12(e)(3)(v)(*f*)
Comment: It is unnecessary and problematic to include precise engineering requirements here for dredged material to be used as fill. It is not clear why these

numbers were chosen, nor why, if a use that did not require those constraints was identified, failure to meet these constraints would preclude that use.

Response: The department agrees and has reworded these requirements to state that NDM must meet project fill requirements when received at the site of placement or within reasonable staging times before final placement and compaction.

360.12(e)(3)(vi)
Comment: Consider inserting the definition of "amendment" here, rather than including the definition in 360.2(b).

Response: For reasons explained in the DGEIS, the Department has placed all definitions in one location in the regulations, Section 360.2.

360.12(e)(4)(ii)
Comment: Clarify at what point in the regulatory process does the NDM cease to be a solid waste and when does the clock start for BUD requirements, particularly storage? NYSDEC needs to relate this provision to common points of the dredging approval process such as issuance of a permit, water quality certification, or a BUD. It is also confusing that 360.12(e)(2) appears to address waste cessation for NDM, so why is it discussed here?

Response: The provision in 360.12(e)(2) refers to coarse-grained NDM and is intended to be a pre-determined BUD. It has been moved to Subdivision 360.12(c). It is not appropriate to have NDM cease to be solid waste based on a project approval, but rather it must be tied to physical and chemical readiness of the NDM for fill or other beneficial use ("meets the technical requirements or specifications for the intended end use").

360.12(e)(5)(ii)
Comment: There is a discrepancy between frequency of sampling in this provision in Part 360 versus how it is referenced within NYS DEC's website and guidance such as TOGS 5.1.9. Most in-situ sampling guidance, in particular DEC's, is based on cores spaced by area throughout the dredging area, not on a per-volume basis as for other BUD materials or dredged materials in stockpile. It is recommended NYSDEC specify this area-based in-situ sampling instead of the current per-volume model. Even changing the term "grabs" to "cores to project depth" or to composites of cores would make this requirement relate better to actual in-situ sampling practices in New York. (508, 509, 510,

Response: Characterization of material for beneficial use, particularly a soil-like material used as fill, must be based on a per-volume or per-mass basis. It has been the Department's experience that areal-based in-situ sampling in accordance with TOGS 5.1.9 has yielded sample frequencies equivalent to the frequencies specified in the proposed regulations, or otherwise acceptable to the Division of Materials Management for review of a BUD. In addition, the proposed regulation clearly states

that petitioners may submit “analytical results generated for another purpose, including *in-situ* sediment sampling performed in support of a state or federal permit to dredge.” Since guidance may change, the Department opted not to refer to TOGS or other manuals or guidance specifically in the proposed 360.12(e)(5).

360.12(f)
Comment: Agree with DEC’s banning of the use of brine from the Marcellus formation for road treatment, but DEC does not justify why the regulations will allow brine from conventional and Utica shale wells for road treatment use when these formations contain many of the same contaminants. In addition, there is no assurance Marcellus Shale brine from out of state wells may not be mixed with brine obtained through distributors from multiple sources. Non-Marcellus brines also contain significant concentrations of chlorides, petroleum hydrocarbons and NORM. The preferred action is to prohibit all gas storage and oil/gas production brine from road treatment use.

Response: The Department has specifically prohibited brine from the Marcellus formation due to its higher NORM concentration and poor quality (excessive barium, strontium, and sulfate) for road use. At such time as the Utica Shale formation is developed for natural gas, its production brine will be evaluated as to whether it can be used for road treatment. Brine from conventional sources contains relatively low NORM and petroleum hydrocarbons along with beneficial concentrations of chlorides (salt). The salt content provides the benefit of dust control, road stabilization and de-icing, the same as rock salt or commercially-blended salt brine. Applied at proper rates, sodium and calcium chloride enhance road safety and air quality while minimizing environmental harm through runoff.

360.12(f)
Comment: 6 NYCRR 360 should prohibit use of gas and oil well brine to treat road surfaces, or for any other beneficial use. These brines contain many of the same chemical constituents as wastes produced by high-volume hydraulic fracturing, a practice which NYS has banned. There is no acceptable concentration of many brine constituents, including but not limited to benzene, heavy metals, and radium isotopes, for use in road treatment. Only a ban on use of oil and gas well brine can guarantee protection of public health. DEC is not obligated to help the gas industry dispose of harmful waste products under the guise of beneficial use.

Response: The use – not disposal – of brine to de-ice winter roads helps small municipalities meet this critical need of public safety. In addition, residents on unpaved roads want control of nuisance dust and good air quality; beneficial use of brine helps town highway departments meet this demand. The NYS prohibition on gas development through high-volume hydraulic fracturing does not imply that conventional gas well brine is unsafe for road treatment, particularly under the requirements in proposed 360.12(f).

360.12(f)
Comment: In this subdivision, DEC has taken steps to make gas storage and production brine spreading safer for the environment and communities in which it takes place. However, DEC will not have adequate resources to enforce these regulations or BUD conditions, and remains completely reliant on information submitted in BUD petitions with little ability to verify the information. The regulations will not ensure adequate tracking of brine use or that misuse of brine is not occurring.

Response: The proposed regulations represent more documentation and opportunity to inspect and verify use of gas and oil byproducts, than is now available to DEC.

360.12(f)(2)(v)
Comment: The requirement for oil/water separation is welcome but is too vague. Specific technologies can and should be specified here with requirements for monitoring and enforcement.

Response: Oil/water separation methods currently employed by municipal highway departments for maintenance garage fluids and runoff, are adequate for this purpose and do not need to be specified further in the regulation.

360.12(f)(2)(vi)
Comment: DEC has proposed to continue authorizing BUDs based on one "representative" brine sample, rather than a sampling of all well sources that will be mixed and applied to roads, which better reflects the actual brine mixture that will be applied. Another better representative approach is to sample often from the actual point where brine is placed in vehicles for spreading. Concentrations of potentially harmful constituents can vary significantly from well to well and over time.

Response: A change has been made to clarify that brine should be sampled at the point of use. At this time, sampling is not being required other than at the time of petitioning and annually thereafter.

360.12(f)(3)
Comment: The commenter supports the prohibitions on fluids other than brine, e.g., flowback water, drilling fluids, or plugging fluids from any oil or gas well for road treatment use.

Response: The Department acknowledges this comment.

360.12(f)(3)
Comment: If DEC will not prohibit gas and oil well brines for road treatment, the Department can lower the impact of brine spreading by prohibiting the application of brine within 100 feet (not 50 feet) of a water body or wetland. One hundred feet is a widely recognized buffer for wetlands, and Pennsylvania prohibits application of brine within 150 feet of a water body. Ephemeral pools should also be included in protected water bodies; maps of these pools are available to municipalities.

Response: The existing distance of 50 feet is adequately protective given other provisions to limit the quantity of brine spread, and is realistic given the presence of water bodies near many roads.

360.12(f)(3)(i)
Comment: This provision arbitrarily prohibits the beneficial use of any production brine from the Marcellus Shale formation for dust control by road spreading or de-icing. The prohibition is made without consideration of the technical criteria of this section for their potential acceptability, which is contrary to the BUD process.

Response: The Marcellus Shale formation brine is markedly higher in naturally-occurring radioactive material (NORM) than conventional sandstone gas-bearing formations. In addition, due to its depth, heat and pressure cause the dissolution of excessive, non-beneficial minerals such as barium, strontium and sulfates into the brine. Finally, due to the formation's low permeability, well advancement fluids are poorly eliminated from a Marcellus horizontal well, and may continue to be present in the brine for a long period after the well enters the production phase. Overall, the Marcellus brine is of poor quality for road treatment use and poses too great an environmental hazard to use in road treatment.

360.12(f)(3)(i)
Comment: This prohibition should also include brine from the Utica Shale.

Response: At such time as the Utica Shale formation is developed for natural gas, its production brine will be evaluated as to whether it can be used for road treatment.

360.12(f)(3)(ii)
Comment: Why do criteria for some allowable constituents in brine for road treatment exceed safe drinking water standards? Lead and benzene exceed standards by two orders of magnitude. There is a correlation between total dissolved solids concentration and radium-226 concentrations in conventional gas well brines; for this reason the high allowable TDS is of concern. DEC should also be requiring testing for radiological gross alpha activity by EPA Method 900.1 and Ra-226 concentration by EPA Method 901.1 on this table of parameters (these specific methods minimize potential interferences from high TDS in brine). Also, do these allowable concentrations consider the potential accumulation of chemical species on road surfaces or in groundwater?

Response: Drinking water standards cannot be used to assess the safety and effectiveness of a material that relies on a high concentration of salt to work, and which cannot be expected to meet drinking water criteria. Typical radioactive constituent concentrations in brine from conventional gas-bearing formations are well understood, and little information is to be gained from alpha activity testing for every BUD source. DEC and NYSDOH examined the health risk from brine use for de-icing in a 1999 study and found it to be inconsequential. The use of brine for dust control has not been as

well studied, but BUDs restrict the number of applications per season to control accumulation of brine constituents in road surface soils.

360.12(f)(3)(ii)
Comment: This provision arbitrarily prohibits the beneficial use of any road spreading of drilling fluids, flowback water and plugging fluids. The prohibition is made without consideration of the technical criteria of this section for their potential acceptability, which is contrary to the BUD process.

Response: The prohibition is based on the lack of functional characteristics of any of the listed fluids for road treatment, unlike production brine.

360.12(f)(3)(iii)
Comment: "Methods must be employed" – this wording is too vague; DEC can and should specify technologies or practices to minimize hydrocarbons in the brine.

Response: This item has not been changed; many methods are employed which would be acceptable and the Department does not deem it appropriate to specify the methods here.

360.12(f)(3)(viii)
Comment: One analysis in three years is inadequate. Testing should be required at least annually (to reflect seasonal re-stocking of municipal storage tanks) or even semi-annually. All existing brine BUD holders, in fact, should be required to re-test their sources since drilling technologies have changed in recent years and the Department may find that matters serving as the basis for some existing BUDs are no longer valid.

Response: The sample frequency has been increased to annual.

360.12(f)(3)((ix)
Comment: The requirement for annual reporting under brine road treatment BUDs is welcome, but the information required is very limited. In addition to items stated here, the annual report should also include a description of how the brine was applied; a legible map of municipalities identifying the areas that have received brine; (for all brine holders) a chemical analysis of the brine; daily operation records kept by transporters; the width of the spreader bar; and the width of the roadway treated. There should be monthly reporting of these metrics to DEC in addition to the annual report.

Response: The information listed is only necessary in an initial petition or in a request to modify a BUD. Monthly reporting is not necessary.

360.12(f)(5)
Comment: For ice and snow reduction, Part 360 states that brine application must not be used at a rate greater than needed for snow and ice to control. This definition for allowable application is vague and subjective and can result in excess brine and contaminants it contains to be spread.

Response: Detailed guidance and best management practices have been published by NYSDOT for ice and snow control, incorporating DOT's long experience in efficient use of salt in various forms to minimize the amount placed and prevent excess run-off.

Comment 363 Landfilling of cuttings: It is important to evaluate the mass of Radium-226 and -228 discharged to New York waters as a result of landfilling drilling wastes, in contrast to its concentration, which is generally low. The concentrations of total Radium (Ra-226 + Ra-228) discharged from a wastewater treatment plant that accepts leachate from a landfill is not close to the limit of 60 pCi/L to which such treatment plants are subject. However, the total mass of radium discharged over time is much more important because radium in the discharge is both persistent and bioaccumulative. Therefore, the concentration in fish for consumption can be expected to be orders of magnitude higher than the discharge (and higher than 60 pCi/L). And that's significant because, among other reasons, it violates the law, which says water bodies must be protected for their best use--fishing. The DEC-designated best use of all NY water bodies receiving treated landfill leachate includes fishing. Allowing the continued discharge of low levels of radium therefore has the potential to destroy the use of the stream or river that receives it for fishing.

Response: The regulations have been revised to require analysis of radium-226 and radium-228 in landfill leachate and in groundwater surrounding landfills. The regulations associated with discharge from wastewater treatment plants is outside the scope of this rulemaking.

Comment landfill disposal of drilling wastes and DGEIS: The GEIS acknowledges that oil and gas brine is "not clearly addressed in current Part 360", but the proposed amendments suffer from the same infirmity. Some of the state's largest landfills take as much as 50% of their waste by weight from drilling into shale formations that are much more radioactive than background at the surface. Because drilling wastes hauled to New York landfills is wet with formation brine, and other solid waste streams generated during the production phase are hauled to New York landfills—generally sludge from wastewater treatment, and frack fluid storage pit bottoms—the proposed amendments should address whether this practice should continue, and if so whether additional requirements to ensure brine and other liquid components of drilling waste streams are not landfilled in New York. The GEIS and the proposed amendments are silent on this subject.

Response: Landfills in New York State are restricted from accepting regulated radioactive wastes, which include sludges from the treatment of flowback water and other materials. The regulations have been revised to explicitly prohibit flowback water and production brine from disposal. However, this prohibit the disposal of drill cuttings, as liquids which are found in drilling wastes are not formation brine but instead are primarily drilling fluids introduced during the drilling process.

Comment landfill disposal of drilling wastes: The proposed amendments make radioactive portal monitors a requirement for all New York landfills. This, however, is not sufficiently protective. Radiation portal monitors at landfill gates are required under the proposed regulations, but these monitors are not designed to detect non-uniform loads with a high liquid content, where the radioactivity in the load is largely found in the liquid component of the waste. Unrealistically, the Department has previously rejected these concerns by relying on one analysis of five samples of Marcellus Shale drill cuttings washed prior to analysis. The analysis found that washed Marcellus shale drill cuttings emit gamma radiation at levels slightly above background. However, no landfill in New York disposes washed drill cuttings. The real-world circumstances of disposal of these wastes make clear that the potential for disposal of substantial volumes of liquid waste accompany wastes from the Marcellus Shale play in Pennsylvania. However, the Department has not acknowledged this fact and accordingly it has no analysis of the volume and environmental and health impacts of managing these wastes in New York. Relying on the oil and gas industry to self-report and self-regulate is not sufficiently protective of health and the environment. The Department should instead assess and curb risks from exposure to the waste, which can remain radioactive for millennia. Unfortunately, the Department's responses to concerns about the impacts of continued disposal of this material has relied on the 5 pCi/L number. This is based on one sample, washed and dried before analysis, performed by a non-certified lab. This is not a rational basis on which to base the Department's policy regarding these materials because it does not reflect reality. No one disposes washed and dried drill cuttings.
If drill cuttings actually being disposed at New York landfills was about 5 pCi/L, it would not be possible for the leachate in the landfill to reach 14 pCi/L. That is not what's happening. Either the cuttings exhibit much higher radioactivity levels in situ, or normal accidents results in liquids being dumped into the landfills, or both are occurring.
In addition to direct disposal, the Department currently allows thousands of tons contaminated soil and sludge from Pennsylvania to be stockpiled on the ground at the Chemung County Landfill, to be used as landfill cover and ultimately disposed in the landfill. Runoff from such stockpiles can be expected to contaminate groundwater. The Department's standard for releases to groundwater of radium is 5 pCi/L to total Radium and 3 pCi/L for Radium-226. See 6 NYCRR § 703.5. The risks to groundwater are particularly significant at Chemung County Landfill, because the landfill sits over a primary aquifer. However, it unclear whether the Department any information on the source of these openly stockpiled materials and their radioactivity.

Response: Landfill regulations require that material stockpiled for use as alternative operating cover must be stored in a lined area of the landfill and run-off from the material must be managed as leachate. Further, the Department has concluded that drill cuttings typically contain radioactivity which is similar to typical background radioactivity in the environment. Landfills are also prohibited from accepting any waste which exhibit free liquids or which contain less than 20 percent solids. In addition, the trigger setting of between two to five times background is a low trigger which is intended to ensure that any significant concentrations of radioactive material are identified and evaluated.

Comment DGEIS: Inadequate discussion of impacts to human health and the environment, from road-spreading of gas and oil well brine, is provided in the DGEIS for the proposed regulations.

Response: More discussion has been added to the DGEIS to address this concern.

Section 360.13 Special requirements for historic fill

360.13
Comment: Historic fill should be regulated regionally, not statewide. One way to do this would be for DEC to delegate regulation to counties who generate the fill. If historic fill is largely a New York City phenomenon, perhaps it is better to restrict Section 360.13 to New York City and not the entire State.

Response: The revised regulations, pursuant to ECL 27-0703 can regionally regulate facilities and materials, but differences in regulation must have technical justification and not unfairly subject populations in one part of the state to environmental impacts versus another part of the state. Local regulation may be efficient and could be facilitated by a memorandum of understanding (MOU) with a county or city who can manage fill materials at the points of generation. However, these regulations cannot delegate this authority. Instead, this section has been revised to better address "fill material", a term that includes historic fill, consistently across the state but also with recognition that fill material movement poses the most problems for tracking and misuse in New York City and surrounding counties. This section has been revised to better address all types of excavated fill ("fill material") on a statewide basis.

360.13
Comment: How does the local landowner, NYSDOT, NYSTA, or other private/public entity identify where historic fill exists? DEC needs to provide guidance and maps. DEC needs to clarify, does "historic fill" mean "any area historically filled in"?

Response: This section has been substantially revised to include "historic fill" as a subset of a larger category of "fill material" or excavated materials that all construction projects may generate and typically manage.

360.13
Comment: While a clear definition and method of handling historic fill is warranted statewide to address the concerns raised over improper disposal as C&D debris, the requirements for on-site reuse of these materials seem very limiting. Compliance with the numerous proposed requirements in this section will likely discourage on-site reuse and result in widespread off-site transportation and disposal with economic and environmental consequences. Consider revising the requirements in this section to allow greater on-site reuse.

Response: This section has been substantially revised to streamline and allow broader on-site reuse of excavated materials.

360.13
Comment: State and local transportation projects overall need little or no imported fill and will not provide much capacity to receive historic fill even if this use is approved by DEC. Furthermore, the restrictions on its use and concern whether it would meet engineering criteria, would make it difficult to let projects for competitive bidding.

Response: The revisions to this section may address concerns for both on- and off-site reuse of fill material generated on transportation projects.

360.13
Comment: Could in-state or neighboring state abandoned mines receive historic fill for reclamation use or for disposal?

Response: Any mine filling or reclamation must use materials that will not threaten water quality through leaching. Historic fill varies in composition and may not be suitable for placement in mines due to this concern. Therefore, its use must be reviewed on a case-by-case basis pursuant to Section 360.12. The regulation of mines in neighboring states is beyond the jurisdiction of the Department.

360.13 and 360.2(b)(136)
Comment: From the definition of historic fill and requirements in this section, we are concerned that many typical materials encountered in transportation rights-of-way could be classed as historic fill. Inert materials (RUCARBS) should not be included in the definition of historic fill. Investigations to rule out apparent historic fill as containing only RUCARBS would be costly and time-consuming on every individual maintenance or construction project in a right-of-way.

Response: The revisions to this section may address concerns for both on- and off-site reuse of fill material generated on transportation projects.

360.13(a)(1) and 360.2(b)(136)
Comment: Since soils are allowed as cover over historic fill as long as they do not contain pollutants as described in this subdivision, could the definition of historic fill and/or this section exclude fill that does not exceed these pollutant criteria from being regulated as historic fill?

Response: This section has been revised substantially and the term “historic fill” has been eliminated and encompassed by the term “fill material” to include all types of soil or fill excavated for purposes of construction or maintenance. Any fill material, regardless of location or designation as “historic fill” can be evaluated by the generator, user or contractor for reuse based on chemical analysis and physical characteristics. Materials allowed as “General Fill” must, in addition to meeting chemical pollutant criteria, must be free of physical contaminants such as ash or refuse.

360.13 also C&D debris and organic waste in 361
Comment: No active or former sand mine in a sole-source aquifer region should be allowed to receive, store or process C&D debris, historic fill or vegetative waste.

Response: Section 360.13 in the revised draft has been expanded to address the characterization of fill material, not just historic fill which is found primarily in New York City. Otherwise, the comment is noted.

360.13(b)
Comment: Requiring disposal of historic fill in double-lined landfills is inconsistent with the way soils from Superfund and Brownfield sites are managed pursuant to 6 NYCRR Part 375. If these soils meet appropriate 375 soil cleanup objectives, they should not be required to be disposed in landfills. This requirement that will have unintended consequences including taking up valuable disposal space in landfills and discouraging safe reuse of "historic fill". An exception should be included should technologies be developed to cost-effectively treat these fill materials for reuse.

Response: The proposed revisions to Section 360.13 better take into account the wide variation in composition of "historic fill" as defined in 360.2(b) and also the need to verify other types of fill material for suitability as fill or cover. The Department agrees that many types of fill material are suitable for reuse, especially on the site of generation, or off-site if the fill material meet specific criteria. Landfill disposal will hopefully become a rarely needed option for fill material.

360.13(b)
Comment: Disposal at a landfill with a double composite liner should not be required for disturbed historic fill which cannot be reused on a property. Disposal should be permitted at any facility which is permitted to accept the historic fill based on waste characteristics, as is standard for other wastes.

Response: Fill material, rarely, may contain consequential amounts of putrescible material, refuse, or other wastes that do not come within the definition of C&D debris. This type of fill material cannot be placed in a C&D debris landfill and disposal in an MSW landfill will ordinarily be required. Nonetheless this provision has been revised to state that unacceptable or otherwise unusable spoil must be managed at an authorized facility.

360.13
Comment: The proposed regulation is silent on any due diligence requirements, sampling protocols, threshold volumes for small projects, and the list of target contaminants for sampling. What reference values are available for comparison? These requirements will be burdensome and discourage not only new construction but routine maintenance of utilities in suspect historic fill zones.

Response: The Department agrees that many of these details are needed and has revised this Section to include them to the extent possible, and also to make evaluation and approval of fill material reuse self-implementing.

360.13
Comment: The approach to the management of fill at a construction site in this section would require a job to stop while the developer undertook the functional equivalent of a remedial investigation. Pre-characterization of a site is not an answer, as many (if not the vast majority) of urban redevelopment sites are already occupied by buildings and other structures, and development follows on the heels of demolition. There is no place to "pause" for a remedial investigation for the purpose of proving that historic fill can be reused from one part of a development site to a different area of the same site. The characterization criteria for historic fill cut and fill areas are unclear and may not work well for historic fill due to its heterogeneous nature. Subdivision (a) provides that historic fill may be used "on areas of the project property where all individual chemical levels in the placement locations are equal to or greater than that of the historic fill"; the rule does not, however, indicate the size of these "areas" where chemical levels are equal. Since historic fill is heterogeneous, larger "areas" can unnecessarily reduce the viability of reuse. The section also requires that the "area" have lower levels of "all individual chemical levels," not limiting this to contaminants or pollutants of concern.

Response: Subdivision 360.13(a) has been substantially revised to allow reuse of fill material, including historic fill, on the same construction site without pre-characterization and in most instances, on the basis of knowledge of the material or visual observation.

360.13
Comment: The acceptance criterion, 90th percentile of results, is based on how many samples, tested for what parameters? The regulations should specify decision criteria for onsite and offsite management. The 90 percent requirement for surrounding chemical concentrations to exceed historic fill concentrations is too restrictive. A less quantitative, more qualitative comparison of cut and fill areas on the same urban site is more realistic. Lowering the percentile for results higher in surrounding material, may also allow more on-site reuse.

Response: Subdivision 360.13(a) has been substantially revised to allow reuse of fill material, including historic fill, on the same construction site without pre-characterization and in most instances, on the basis of knowledge of the material or visual observation. The percentile requirement has been removed, and criteria are now included for off-site reuse of fill material, including historic fill.

360.13
Comment: This section does not detail any record-keeping or reporting requirements for historic fill management.

Response: The proposed revisions to this section include record-keeping requirements, though not reporting to the Department; records must be made available

to the Department on request. With the proposed self-implementing evaluation and approval procedures it is essential for entities responsible for fill material management to keep records of sampling and/or site investigation in case of Department inquiries.

360.13 and 360.9
Comment 360.13 and 360.9: This section should be amended to allow the use of contaminated non-hazardous historic fill for grading anywhere in a city of over 1 million residents so long as: (1) it has a cap or other barrier to protect the public health, (2) the site will not be used for single family housing, and (3) the fill material will not cause a violation of applicable water quality standards. This would promote reuse, reduce waste and have positive economic effects by decreasing construction costs, reducing truck traffic and highway and road strain, and it would also aid in coastal resiliency by providing a local source of fill for raising waterfront properties above base flood elevation. The regulations can curb the potential for abuse by adding a clause in the prohibited activities section (360.9) to prohibit any person from accepting payment to dispose of historic fill on an unregulated property.

Response: The revised section incorporates land-use restrictions similar to those described here.

360.13
Comment: Local jurisdictions should be notified so that Site Plan Approval and Building Permits establish that excavation surplus materials be managed as historic fill. The current proposed regulation is unclear as to who is responsible to determine the presence of historic fill. Also, how are facility managers up the solid waste system to know what materials are or are not historic fill?

Response: Notification of local jurisdictions is an important step but is outside the scope of these regulations. This section has been revised to state the generator of fill material – or processor if fill material is sold or distributed from a Part 361-authorized Fill Management Facility – is responsible for keeping records concerning its characterization for reuse.

360.13
Comment: It is unclear in this section how these provisions apply to filling contaminated farmland or to filling in wetlands; are these activities exempt because filling took place in the 1960s?

Response: The concept and definition of “historic fill” are not intended to confer an exemption on any landfilling that may have taken place prior to modern regulation of waste disposal or wetland protection. This section proposes to regulate historic fill – and other materials – excavated in the present day from construction or maintenance projects and relocated for use as fill on the same site or elsewhere.

360.13(b)
Comment: If the Department mandates that historic fill be delivered directly to out of state landfills from construction sites, this would adversely affect the cost of construction, create additional traffic, and delay major construction projects. Instead, the Department should allow the use of local, DEC-authorized transfer facilities which are already approved to manage solid waste materials.

Response: Local, DEC-registered C&D debris sites do currently manage fill material from urban construction sites, including historic fill. The danger has been these materials may contain physical contamination, e.g., with incinerator ash or old refuse, and/or elevated chemical contamination, and yet they are processed and sold or distributed as commercial fill without restriction, perhaps being used to backfill an excavation on a residential property where their use is inappropriate and possibly harmful. This proposed revised section and a new section in Part 361 for Fill Management Facilities is intended to address fill material and assure it is reused appropriately based on the receiving site's land use.

360.13(a)
Comment: The final regulations should significantly limit the use of historic fill. 360.13(a) supports this by allowing for historic fill to be used on the site it is excavated from, but only if it is covered or capped, and only if the chemical levels in the placement locations are equal to or greater than that of the fill. The commenter agreed with the requirement that any other use of historic fill be only pursuant to a case-specific BUD.

Response: This section has been substantially revised to impose less stringent restriction on reuse of excavated materials (fill material), including historic fill, on the site of generation. Revised proposed terms, while allowing use on other sites, will restrict such use based on fill character and land use at the receiving site. The approval process will be self-implementing, which the Department anticipates will reduce barriers to appropriate reuse of fill material and discourage improper disposal on clean properties.

360.13
Comment: This section is unprecedented in controlling the movement of fill materials through a combination of restrictive criteria but no guidance on data collection; it does not consider any of the logistics of an urban construction project. These requirements will result in high construction costs as most suspect materials will need to go to landfill.

Response: The Department acknowledges these concerns and has substantially revised this section to provide self-evaluation and approval protocols for fill material from construction or maintenance projects, including urban projects.

360.13(a)(i)
Comment: Cover soils on a commercial or industrial use site should not be required to meet residential SCOs, but rather the lower of the SCO pertinent to the site use and the

Groundwater Protection SCO. Further, the Groundwater Protection SCOs should not have to be met if the site meets exemptions in 6 NYCRR 375-6.5(a)(1) and (2).

Response: This section has been revised to remove the cover requirement, except for Limited Use fill material which can only be placed on certain sites under a pavement or building foundation.

360.13(a)
Comment: Re-filling a trench or excavation with historic fill should always be allowed when the surrounding material is the same fill, without sampling or having to meet criteria (unless there is evidence of significantly contaminated material).

Response: The Department agrees and has revised 360.13(a) to reflect unrestricted use of non-hazardous historic fill, or any other non-hazardous fill material, as backfill in the same excavation.

360.13
Comment: These requirements while appearing to be protective in that they describe a number of steps and stages, each requiring further limitations and criteria (each seemingly more stringent than the next) are in fact more restrictive than actual Brownfield Cleanup Program procedures that have been followed and approved by NYSDEC and NYSDOH since the inception of the Program in 2006. The final issue regarding these requirements that contain little engineering and scientific logic would be that they are so onerous, it is clear that disposal will be the easiest option. What is troubling with these requirements is that they clearly indicate that the Department is not apparently concerned with accepting or looking at meeting the long standing Solid Waste Management Policy of the State.

Response: This section was proposed based on material that presumably would consist of soil mixed with significant amounts of ash or refuse, and which, once excavated, would not have been acceptable for reuse as imported fill or cover under the Brownfield program and to which Brownfield standards could not be applied. The revisions to this section incorporate a broader understanding of fill material as a material that may contain ash or refuse or may be relatively free of non-soil constituents, low in chemical contamination, and widely suitable for reuse under self-implementing procedures the Department proposes in the revised rulemaking.

360.13(a)(2)
Comment: The proposed requirement that historic fill be placed at an elevation that does not exceed surrounding properties is vague and could lead to confusion and misinterpretation. No rationale is given for this requirement, which should be based on preventing migration of contaminants associated with fill elevation. Would this affect placement of historic fill below the elevation of surrounding lands, say to fill under a foundation? Please clarify or consider removing this requirement entirely.

Response: This requirement has been removed in the revised 360.13.

Comment 360,2(b)(136): In this definition of historic fill, the characteristics of disturbed historic fill should be more important than when the material was placed. If disturbed material exhibits the characteristics of historic fill in the proposed regulation, it should be permissible to manage the material as historic fill if the date of placement is not known, or conversely if it is clean, to manage it as clean fill material regardless of placement date.

Response: The date of placement of historic fill is meaningful insofar as it predates regulation of disposal of municipal waste and therefore is unique in composition. In the revised terms, however, historic fill is now a subset of Fill Material as defined in 360.12, and management protocols are outlined in 360.13 for fill material that are based more upon the characteristics of the material than its origin.

360.13(b)
Comment: Criteria for being able to move historic fill seem less based on scientific criteria than on making contractors jump through financial and time hoops. They grant DEC staff too much authority in the approval decision. It is better to specify the minimum analytics that are required.

Response: Revisions to this section allow contractors' self-evaluation of excess fill material, including historic fill, to determine where it can be taken. These procedures include specific direction for sampling and analysis when necessary.

360.13(b)
Comment: One suggestion could be to adopt separate rules for historic fill that is managed on-site and historic fill that is to be shipped off-site. If analytical waste classification sampling has been performed on the historic fill and the material is found to be within the numerical soil standards set forth in 6 NYCRR 375, it may be used as fill material in the same manner as soils meeting such standards under 6 NYCRR 375.

Response: The Department has revised Section 360.13 to outline separate approval criteria for fill material, including historic fill, which is managed on the site of generation versus off site. The revisions make some use of Part 375 SCOs, but since SCOs are cleanup criteria, not use criteria, they are not always appropriate to guide where soil can be placed.

360.13(b)
Comment: This is an unresolved potential loophole with respect to managing soil. Historic fill that "contains only uncontaminated soil, recognizable concrete, concrete products, asphalt pavement, brick, glass, and rock" can be managed as C&D debris. This would mean that soil can be assumed to be uncontaminated and potentially be treated in a traditional RUCARBS facility and redistributed into commerce without sampling. There are two issues with this paragraph. The first issue is that "uncontaminated soil" has no correlation to specific soil cleanup levels in Part 375. The second issue is that the lack of a correlation of uncontaminated soil to Part 375 cleanup

levels could potentially result in contaminated soil (lawfully processed as assumed uncontaminated soil) being redistributed back into the economy.

Response: Uncontaminated soil in Part 360 has the meaning specified in 360.2(b)(281), which does not mention nor is dependent on Part 375 SCOs. If soil cannot be determined uncontaminated by knowledge, site history, or visual observation, it may require sampling and analysis, with categorization and allowable reuses outlined in revised Subdivision 360.13(b). These revisions are intended to prevent the uncontrolled distribution of contaminated soil to inappropriate sites of use.

360.13(b)
Comment: Clarify "demonstration to Dept's satisfaction"- what supporting information would be needed for this demonstration? If DEC deems it "RUCARBS", is it exempt under 363-2(h)?

Response: The exclusion for "RUCARBS" in this subdivision has been removed; it is no longer relevant or necessary in context of the revisions to this section.

Comment Definitions: **Navigational dredge material** and **historic fill** regulations may unintentionally impede stream bank stabilization, flood mitigation efforts, and bridge maintenance/repair activities necessitating greater clarity of regulatory applicability for environmentally compromised locations versus areas lacking know violations or infrastructural opportunities warranting concern of contamination.

Refinement in the definition of **industrial discharge** and **navigable waters** is recommended.

Response: Historic fill regulations have been substantially revised and expanded in Section 360.13, which may address these concerns with respect to fill materials encountered during construction efforts such as those the commenter describes. The revised regulations prescribe sampling and analysis of fill material only at locations where there is known or suspected environmental contamination. Furthermore, the revisions allow self-evaluation and reuse of fill material, without Department review, on the same site and in many instances off-site. Navigational dredged materials require more sampling and review, but the revised regulations provide more direction to streamline the review of beneficial use of dredged material. A pre-determined BUD is included for sandy dredged material from waterways without industrial discharges, spills or other known contamination. "Industrial discharge" and "navigable waters" have their commonly-understood meanings and are not further defined in these regulations.

Section 360.14 Exempt Facilities

Comment: 360.14 is being changed to eliminate historical exemptions for single family residences, roadkill disposal areas, and farm disposal areas. When the 360 regulations were first proposed, municipalities complained there was no provision for legally disposing of road-killed animal carcasses. This was addressed, albeit a bit ambiguously

and now the move seems to be to make a squashed raccoon into toxic waste from a regulatory function standpoint. All three of these exemptions relate very specifically to rural areas and eliminating them will put a significant burden on residents of an area like Washington County while adding nothing to the protection of human health.

Response: All exemptions related to disposal have been moved to Part 363.

Comment: Where HHW collection sites are operated only periodically, say once or up to half a dozen days per year, the state should consider exempting those operations. In the case of agricultural disposal areas and waste from single family residences, consideration should be given to establishing a tonnage threshold under which the site would be exempt.

Response: Due to the nature of the material being managed at HHW collection sites, a registration or permit is required. Disposal in agricultural areas or at single family residences is restricted by the type of material as described in the exemption, and therefore a tonnage threshold is not necessary.

360.14(a)
Comment: This provision gives undefined, limitless authority over undefined and unlimited citizen activity. Does it mean that staff can tell a citizen what to read when reading while standing next to exempt activity? If an activity of a citizen is exempt from control by staff, how does it make sense to give staff blanket authority over non-solid waste activity adjacent to the exempt activity? What is the point?

Response: This provision simply advises that exemptions provided in Parts 360-365 pertain only to solid waste management activities, and do not provide relief from other programs administered by the Department.

360.14(b)
Comment: The provision initially omits the typical error or blind authority to staff resulting in the opposite flaw: Binary compliance without reference to impact of policy. The provision is absolute in language: “is no longer considered an exempt facility”. There is no room for judgment or review of the “public health”. And what is the absolute binary test that is imposed: has there been any operational condition, no matter how minor. Thus, a dirty driveway tracking into the street of one day delay in removal of residue legally requires the permanent closure of the facility. Closure is required even if DEC does not believe closure is in the public interest. The alternative requirement is repeated weakness of these regulations to permit staff to have unrestricted power to close a facility for an undefined reason. It is terrible policy to give low level staff carte blanche authority without criteria for the exercise of that authority. There must be a definition of a criteria for “adverse impact” as all activity has some adverse impact.

Response: This provision has been deleted.

360.14(c)
Comment: This should be amended to include an exemption for transfer facilities that only transfer sealed or unopened containers. If the containers are sealed or unopened, they do not pose a threat to the environment and should be treated like any other commodity for transfer.

Recommended Change: (c) General exemptions. In addition to exemptions provided in Parts 361 to 365 of this Title, the following facilities are exempt from this Part: …

(9) A solid waste transfer facility that only transfers sealed or unopened containers.

Response: An exemption is provided under subdivision 362-3.2(a) when certain conditions are met.

360.14(c)(1)
Comment: Please confirm that this exemption includes transportation maintenance facilities.

Response: Yes, provided the criteria in this provision are met.

360.14(c)(1)
Comment: What are examples of transfer, storage, treatment, processing, or combustion facility at site of generation or owned/controlled by owner of site of generation? Does this exemption include a contractor generating waste and bringing to his own site? Does it include a contractor generating waste on a DOT job and bringing back to DOT site?

Response: Examples of this exemption would include, for example, waste generated at multiple campuses of a university that were consolidated at one of the campuses before being sent off for disposal. In the examples cited here, the exemptions does not include a contractor transporting waste to their own site, but it does include a contractor generating wastes at a DOT-owned or controlled locations and transporting waste to another DOT location.

360.14(c)(1)(i-x)
Comment: Please confirm that transfer, storage, treatment, processing or combustion facilities at the site of generation is exempt and that the site of waste generation is not subject to the conditions listed at 360.14(c)(i)(i-x).

Response: These on-site operation are exempt except for those operations specified in 360.14(c)(1)(i-x).

360.14(c)(1)(i)
Comment: How was the 250 ton value established? This is a very small amount and therefore covers just about any generating activity or stockpile. Is it 250 tons per day, or per operation?

Response: This provision has been removed from the revised draft regulations.

Comment: The new permitting requirement for recycling facilities is undermined by exempting the many recycling facilities handling less than 250 tons per day; the proposed new 250-ton threshold for requiring a permit will allow all but three of the 22 registered recycling facilities in NYC to continue to bypass the more rigorous permitting process. While the 250 tons per day threshold requirement might make sense in more rural areas, in dense urban environments like New York City where facilities are clustered in EJ communities, the new regulation has no actual effect.

Response: This provision does not affect transfer of waste generated at locations which are not under control of the facility. Most recycling facilities will be accepting waste from multiple off-site sources and this exemption would not apply. The 250 ton per day is a new provision; under the existing regulations there are no quantity limitations for these activities.

360.14(c)(3)&(4)
Comment: Some recognition of the need to store incidental to transportation and vehicular breakdowns should be made.

Response: The exemptions provide for on-vehicle storage of solid waste during transport. The Department has concluded that storage of solid waste off of the vehicle is not appropriate under an exemption. Unusual circumstances such as vehicle breakdown are handled on a case-specific basis. The Department will utilize discretion in these circumstances as appropriate.

Comment: The requirements for on-vehicle storage of waste outlined in 360.14(c)(3) and (4) are unreasonable. Specifically, it is unreasonable to require that storage occurs on property either owned or leased by the transporter. Vehicle breakdowns occur anywhere, anytime. Overnight driver breaks must be taken whenever the time limit is reached. Suggest that the definition of storage incidental to transport definition in the current Part 364.1(c)(12) be applied instead.

Response: The requirement that the property where storage occurs be owned or leased by the transporter has been removed.

360.14(c)(3)(ii)
Comment: If 10 days is acceptable for a container, the requirement of being attached to the transporting vehicle is without a rational basis.

Response: The Department has concluded that storage of solid waste off of the vehicle is not appropriate under an exemption**.**

360.14(c)(3)(iii)
Comment: The requirement in 360.14(c)(3)(iii) for keeping containers and roll-offs attached to the vehicles that transported them is too restrictive. There should be allowances for transferring the sealed containers in case of vehicle breakdown and there should be allowances for temporary, time limited, storage of containers, at least at their final disposal destination.

Response: The transfer of closed containers between vehicles is exempt under subdivision 362-3.2(a).

360.14(c)(4)
Comment: If waste is collected on a haul route on Friday and the disposal facility is not open over the weekend, the truck could require storage until the disposal facility opens on Monday. A longer time-period may be necessary for a transit trailer for a broken-down truck. Would DEC provide an exemption in such situations?

Response: Unusual circumstances such as vehicle breakdown are handled on a case-specific basis. The Department will utilize discretion in these circumstances as appropriate.

360.15 Registered facilities, transporters and events
Comment: The registration provisions set forth in section 360.15 are silent on the issue of compliance with local zoning provisions. We think and strongly believe that any regulations should take into account local zoning regulations. Land use exists for a very specific reason. For the state to ignore land use regulations, I think is a mistake.

Response: Compliance and enforcement of local zoning are the responsibility of the appropriate local authorities.

360.15(a)(3)
Comment: It is probably unconstitutional to deny an owner of a registered facility the protection of the law because he or she owns another registered facility somewhere in the state. What is the policy benefit of denying a citizen the same benefits enjoyed by other citizens because they own more than one registered facility? How does it help the public? If a facility meets the legal definition of registration, what is the policy reason for abandoning the law and allowing staff to "wing it"? There must be a criteria for staff action.

Response: Paragraph 360.15(a)(3) addresses the scenario where several registered facilities are co-located on geographically contiguous land under the ownership or control of the same person. The proposed regulation does not indicate that citizens will be denied benefits because they own more than one registered facility. Nor does the regulation authorize Department staff to "wing it." The intent of the regulation is to prevent cases where owners restrict the size of several different types of operations in a geographically contiguous location, and thereby segment the operation in order to avoid the environmental and regulatory review of a larger single operation. While registrations

are ministerial actions under the State Environmental Quality Review Act, the operation of several separate registered solid waste management facilities at the same location may result in impacts more appropriately regulated under a permit. Nevertheless, to address the concern raised in the comment, additional language was added to paragraph 360.15(a)(3) to further specify when a permit may be required.

360.15(a)(3)
Comment: This language needs to be expanded to cover the entirety of the environmental justice areas rather than constrained to contiguous parcels under common ownership.

Response: The Department will follow procedures outlined under policy CP-29 Environmental Justice and Permitting when evaluating permits issued in environmental justice areas.

360.15(a)(3)&(4)
Comment: A Household Hazardous Waste (HHW) collection day held annually at a landfill would now be required to be permitted with the landfill permit instead of separately. This seems an undue burden in order to plan for an effective event that it is held annually on the landfill property and the county is currently considering expanding to additional sites to ensure that residents from all parts of the county have access to. There are no guidelines as to whether amending a permit to add such activities will be considered a minor modification. In the case of the annual HHW collection day at a landfill adding this activity to the permit would not increase the data collected or reported to DEC, as the HHW event is fully documented and reported to DEC under the existing regulations. There are no guidelines established for making such a determination whether otherwise exempt activities or those subject to just registration must now be included on the facility's permit. For example, if a municipality operates a composting activity or yard waste chipping operation requiring registration due to the size of the operation, but it is on the same property as their transfer station, they may need to include that operation on their transfer station permit. During some of the public workshops, DEC staff stated that this was done so they could capture more data on the operations that exist. The County regularly collects and reports this data as part of its progress report on the implementation of its Solid Waste Management Plan. If adopted, the draft requirement would place a burden on small municipalities that have effective composting and chipping operations that should remain exempt from permitting requirements.

Response: As written, the proposed regulations would not have automatically required a facility's permit to be modified if a registered activity also took place on the same site covered by a permit. The proposed regulation indicated that a permit may be modified in this scenario. The purpose of this provision is to prevent co-located facilities from collectively causing significant adverse environmental impacts. The comment also raises a concern about exempt facilities being subject to a permit modification as well. However, Section 360.15 pertains to registered facilities, transporters and collection events.

360.15(a)(4)
Comment: This provision provides no guidelines in making such a determination whether otherwise exempt activities, or those subject to just registration, must now be included on the facility's permit. This is a concern if a municipality has a transfer station on the same site or proximate to their highway department where they want to store millings, or have a yard waste chipping operation. We do not agree that these minor individual operations should require a permit. There must be objective criteria included if this provision remains.

Response: Section 360.15 applies to registered facilities, transporters and collection events and does not address exempt facilities. Instead, exempt facilities are addressed in Section 360.14. The proposed regulations and the revised proposal would not require exempt facilities to be incorporated into a permit.

Comment: 360.15(a)(4) is inconsistent with 360.16(f)(2). The former states that a permit modification "may be required" to incorporate registered activities in its permit while the latter states a permit modification "is required". The suggested preference is to eliminate 360.16(f)(2) and simply require any registration at a permitted facility be incorporated by reference into that facility's permit either at the next renewal or next permit modification. Specifically, do not require a permit modification just for a registration.

Response: The comment is correct and the inconsistency was addressed in the revised proposal.

360.15(b)
Comment: These provision allow "unsuitability" to be based upon a single de minimus violation, in effect "unsuitability" is actually just the "opinion of the department". This type of character regulation is typically limited to law enforcement agencies with experience with and access to background checks, integrity review procedures, etc. DEC has not experience or capability in this area. Thus, in actual effect this provision will devolve into the determination by the Regional Engineer or Director of who annoys them the most. The history of similar power in the NYC Business Integrity Commission proves that there will be no effective review. Over the years staff will learn that it can do what it likes with this power.

Response: The commenter is incorrect that the suitability of a registrant would be based on a single de minimus violation. The language of the regulation provides the criteria that may be considered by the Department and references the applicable provisions of both the Uniform Procedures Act and the Corrections Law. The Uniform Procedures Act and its implementing regulations provide applicants with due process, including the right to a hearing, and the Corrections Law provides additional criteria that may be used to review the compliance history of an applicant. The Department also disagrees that the proposed language will be abused by Department staff. Therefore, no changes were made to the proposal as a result of this comment.

360.15(c)(2)
Comment: The information requested to be furnished under this provision should be limited to information reasonably related to the determination of compliance.

Response: The provision limits the determination of compliance to information related to the registration requirements only.

360.15(e)
Comment: The term "validated" as used in this provision should be defined.

Response: The term is explained in the context of this requirement.

Comment: Consider including a timeframe for response/issuance or otherwise approved. For example, if DEC does not approve or deny the registration within 20 days of receipt by the Department, the applicant may proceed as approved.

Response: The department is working on developing procedures to facilitate the submission and review of registrations in a timely manner.

360.15(f)
Comment: The term of a validated registration must be 10 years to justify capital investment involved. The provision must define criteria for the determination of "otherwise specified registration term."

Response: Revisiting registration every 5 years allows the Department to evaluate the status of the facility in depth and to evaluate all operating criteria. The phrase "otherwise specified registration term" has been removed".

Comment: If all registrations are required to be resubmitted following the effective date of the new regulations, this could become difficult for the regional offices during the transitional period and in 5 years when they require renewal. Are the regional offices prepared for this large quantity of registration submittals and approvals?

Response: All existing registered facilities, transporters, and events will be required to comply with the registration notification requirement of section 360.15 within 180 of promulgation of the new rule. The Department is working on methods such as electronic submission to facilitate the anticipated workload of large quantities of registration submissions.

Comment: Our current registration is "valid for the life of the registered facility" (360-1.8(h)(6)). The proposed revision to change the duration of a registration to no more than 5 years is drastic. We have been providing services and materials to our local community and the surrounding region for more than 80 years with a stellar reputation among our customers and the regulatory bodies, on all levels, that oversee our operations. There should only be a need for re-application for registration when the

ownership or management of the facility changes. I am not implying that the duration of registration be based on a facility's reputation, on the other hand, there should not be a short term duration for a registered facility that has never had issues with adhering to the Part 360 guidelines nor any other regulations put in place on the town, county or state levels.

Response: Similar to permits and other regulatory mechanisms, the Department has determined that registrations require periodic review. For facilities that have been operating for a significant period of time, and are in compliance with the terms of the regulations, registration renewal should be routine.

Comment: During the information sessions on the Part 360 revisions, Department staff stated that one of the reasons that a registration term was being placed on registrations was because the Department wanted to know "whether the facility is still in operation". This doesn't make sense in lieu of technology such as Google Maps which would allow a person could look up every facility and timeline it to see if any activity has taken place.

Response: There are multiple reasons for requiring renewal of registrations every five years, and determining whether a facility is still operating is only one of those.

Comment: Limiting the duration of registrations to a maximum of 5 years will further discourage mine operators from obtaining a Part 360 permit, causing landfills to fill up rather than allow for reuse in mine reclamation.

Response: The Department does not agree that limiting the duration of registrations to a maximum of 5 years will have this causal effect.

Comment: Five years is too long of a term for registration, we request that the time period be reduced from 5 to 3 years. This will allow the Department to revisit these operations periodically and correct any issues that may have been unanticipated at the time of granting the BUD or registration.

Response: The Department believes the annual reporting requirement for all registered facilities allows the department opportunity to review the operations all facilities on an annual basis to ensure that the facilities are operating within the requirements of their registrations. Furthermore, the provision allows for a shorter registration term if the Department determines it is necessary.

360.15(g)
Comment: Beneficial constructions, such as the enclosure of C&D transferring activities, should not require a registration modification because they do not increase the throughput of the facility and they further the department's policy goals. The new elements may be identified on registration renewal. Recommended change:

(g) Registration modification. The owner or operator of a registered facility or event or transporter must submit a new registration modification to the department when there is

a proposed change in any information provided on any prior registration notification submitted to the department. The modification cannot be implemented until the owner or operator receives a validated copy of the modified registration from the department. The construction of modifications that do not increase the facility's throughput do not require the submission of a registration modification.

Response: Any modification of a registration will require the department to evaluate whether it invalidates the registration in any manner.

Comment: There is no policy benefit for requiring a complete modification for any de minimus change of information, such as an additional vehicle or correction of an address. If the point is to generate fees, DEC can still charge fees for the changes, just don't deem them modification of the actual registration.

Response: There are no fees associated with a registration. The department will implement procedures to expedite minor changes to registrations.

360.15(h)
Comment: The provision allows the DEC staff to decide that the law of registration applicable to all citizens, should not apply to a particular citizen even though the citizen has met all the legal requirements for registration. This carte blanche staff authority is unguided by any restrictive criteria. There is no policy justification for this unconstitutional provision. If there is a policy justification such as too much "volume" or "size" then redraft the requirements of "registration" to specify what is "too much" and delete this terrible provision. This provision requires that for some citizens compliance with an objective regulatory standard of "registration" is not the test. The test is the nature of the burden of the hoops chosen by staff. If it is not deleted, this provision must have comprehensive and clear standards. It is terrible policy to give low level staff carte blanche authority without criteria for the exercise of that authority.

Response: The intent of the regulation was to address instances where, for example, the location of a registered facility posed a potential impact to a sensitive environment and the regulations did not contain an applicable setback. However, unlike 360.15(a)(3), subdivision (h) was not limited to facilities registered by the same person and could undermine the regulatory certainty derived from the thresholds for a registration in the remaining Parts of the regulations. Since this provision requires additional consideration before promulgation, subdivision 360.15(h) was deleted from the revised rulemaking.

Comment: This section requires a permit for a facility that would otherwise require only a registration "when the department determines…an activity will negatively impact the environment." This vague provision would allow unbridled discretion to the regulator that could be exercised too broadly as it may sweep into a permitting regime facilities that have even minor or de minimis environmental impacts. The Department should incorporate the State Environmental Quality Review Act (Part 617) standard and only exercise this discretion where a facility would be presumptively subject to environmental

impact statement review, or would otherwise have a significant adverse environmental impact. Recommended change:

(h) The department may require the owner or operator of a facility or event or the transporter that may qualify for registration to apply for and obtain a permit when the department determines that the location, volume of material, or size of the project, or another aspect of the activity will have a significant negative environmental impact. Where the department imposes such a requirement on an owner or operator, the department must do so in writing and must state the reason for imposing the requirement.

Response: The Department agrees that this provision needs further consideration. Therefore, the subdivision was deleted from the revised proposal.

360.16 Permit application requirement and permit provisions

Comment 360.16: DEC should amend Part 360.16, Section 4(h)(2) to require characterization procedures and timeframes for E&P wastes specifically. These revisions should include consistent, binding protocols for the testing and characterization of both raw and solidified waste. Protocols should address chemical and radiological parameters for testing; frequency of testing; and the origin and maximum volume of E&P wastes that can be tested as a "representative sample".

Response: The provisions of Part 360.16 and the specific permit and operating requirement identified for facilities that may receive drill cuttings are appropriate and sufficient. The regulations in Part 363 have been revised to clarify the prohibition of the receipt for disposal of production brine and flowback water.

Comment: Any facility sited within a DEC-designated Potential EJ community should be required to apply for a permit, rather than registration, regardless of size or throughput. This would appropriately recognize the cumulative impacts of these facilities in overburdened communities.

Response: The department will follow procedures outlined under policy CP-29 *Environmental Justice and Permitting* when evaluating permits issued in environmental justice areas.

Comment: Any facility owned or operated by a company or parent corporation that owns multiple facilities within a single DEC region should be required to apply for a permit for each facility, irrespective of size or throughput. This appropriately recognizes that many facilities falling below the proposed threshold are operated by companies or conglomerates which operate multiple transfer, processing, and recycling facilities that together have significant community impacts.

Response: Under 360.15(a)(3), the department may require a permit if multiple registered facilities are located in close proximity.

Comment: A permit should be required for any facility that is found to violate an existing DEC or NYS Department of Labor regulation.

Response: The department has multiple means to enforce against violations at solid waste facilities, including requiring a permit. The department does not enforce Department of Labor regulations.

Comment: Permit applications must include a transportation plan for waste-by-rail projects.

Response: All permit applications must include a description of the transportation methods to be used at the facility, including the use of rail.

360.16(b)
Comment: We request that the phrase "construction-level detail" in Part 360.16(b) be deleted in its entirety. This will require the drawings and engineering reports to be highly detailed but not construction level detail. Specifically, we understand that liner system grades, closure grades, and pipe layouts need to be highly detailed. Building and tank plans, for instance, do not require as high a level of detail in a permit application.

Response: The suggested revision has been made.

360.16(c)(5)(iii)
Comment: The final regulation should strengthen the connection between local solid waste management planning and permitting by requiring all permit applications to demonstrate consistency with the plans for the municipalities in their service area.

Response: A demonstration that the facility is consistent with the goals and objectives of the local solid waste management plan in effect for the municipalities in the facility's service area provides a strong connection that does not currently exist under existing regulation and provides a valuable but manageable link between permitting and local planning.

Comment: Please explain how a facility must demonstrate consistency with the goals of the Local Solid Waste Management Plan. Does this mean the local planning unit can refuse to allow the development of a new facility
if they do not want it? Who decides this issue?

Response: The permit application must demonstrate consistency with the goals and objectives of a LSWMP. The department makes the consistency determination and it will be based on whether or not, the facility type and practices are identified within the LSWMP in a manner that is consistent with the LSWMPs overarching goals and objectives.

360.16(c)
Comment: Please add the following noise assessment language for new permit applications under 360.16(c):

Noise. The applicate shall include a noise assessment to demonstrate compliance with the Leq Energy Equivalent Sound levels per 360.19(j).

(1) If the Leq sound level measured at the facility property line (or approved easement property line) in the absence of sound produced by equipment operated at the facility exceeds these limits, the facility must not produce an Leq that is more than 3 decibels (A) exceeding that background.

(2) The background sound level, measured as Leq, is the existing ambient sound level measured at the property line (or noise easement property line) during a period of peak acoustical energy measured in the absence of sound produced by equipment or operations at the facility. A background sound level monitoring protocol must be submitted to the Department for approval prior to conducting background measurements.

(3) The Leq sound level must be the weighted sound pressure level measured with the slow metering characteristic and A-weighted. During the measurement period no precipitation shall occur and wind speeds shall be 12 mph or less.

(4) Measuring instruments must be Type 1 general purpose sound level meters, Type 2, or corresponding special sound level meters Type SIA or S2A.

(5) Noise assessments shall be conducted in accordance with the current version of NYSDEC Program Policy DEP-00-1. Assessments shall include details of the attenuation factors utilized in the assessment and attenuation calculations utilized. Noise assessment calculations shall be permitted to utilize average annual conditions when calculating atmospheric attenuation.

If the noise assessment indicates the Leq Energy Equivalent Sound Levels may not be met, an operational noise monitoring and control plan to mitigate or monitor sound levels to meet required levels shall be prepared as part of the application. The operational noise monitoring and control plan shall include:

a. Description of fill areas where noise propagation off site is most probable to occur.
b. Mitigation measures to be enacted (ex. real-time monitoring system, noise barriers) or modified operational controls utilized to mitigate facility noise when operations are occurring (i.e. reduced equipment operation, limiting trucks tipping in the specified area, limited hours of operation).
c. Protocol for noise monitoring including monitoring locations, methods and equipment, monitoring frequency and duration, and action levels.
d. Criteria for discontinuing the noise monitoring and control plan.

The following language should be added to the requirements of a facility manual:

(vi) Noise assessments shall be conducted in accordance with the current version of NYSDEC Program Policy DEP-00-1. Assessments shall include details of the attenuation factors utilized in the assessment and attenuation calculations utilized. Noise assessment calculations shall be permitted to utilize average annual conditions when calculating atmospheric attenuation. If the noise assessment indicates the A weighted Leg Equivalent Sound Levels per 360.19 (j) will not be met, an operational noise monitoring and control plan to mitigate, monitor and manage sound levels to meet required levels shall be prepared as part of the application and included in the facility's Operations and Maintenance Plan per 360.16(a)(4)(ii)(o) below.

Response: The regulations have been revised to require a noise assessment in the permit application and, if necessary, a noise monitoring and control plan in the facility manual.

360.16(c)(2)(iii)
Comment: This requirement is excessive for land application projects. We propose that ten-foot contour intervals for these facilities be required instead.

Response: The Department agrees and the suggested revision has been made.

360.16(c)(4)
Comment: The requirement for a facility manual in Part 360.16(c)(4) is a good idea. However, it is too large to be useful in the field as the draft regulation is looking for too much information to be compiled in one document. It is suggested the requirements in subparagraphs (i)(a) and (b) be eliminated. In their place, a simple description of the types of wastes accepted, types of wastes prohibited and any maximum tonnage limits imposed on the facility by its permit would be included. The need to include the Closure Plan is unnecessary; it is not routine information and is subject to change once that time comes. Likewise, it is preferable to have any kind of Emergency Response Plan as a separate document so that it is easily accessed and referenced in times of emergency rather than this bulky document. Note the facility service area information desired in 360.16(c)(4)(i)(a) can be incorporated in the Engineering Report.

Response: The facility manual is not required to be maintained as one physical document. The regulations establishes the structure and contents necessary in the manual. Individual plans can be maintained as separate documents based on the needs of the facility.

360.16(c)(4)(i)(a)
Comment: A facility waste control plan (new applications) must describe all service areas where waste may come from to the planning unit within New York, and the county outside of New York; for facilities located downstate with any sort of spot market capacity, this is a difficult point to comply with.

Response: It is reasonable for a facility to identify the location where waste which is receives is generated.

360.16(c)(4)(i)(b)
Comment: Revise the Model Waste Control Plan (Guidance Document) to include a requirement for analytical sampling for soil that is proposed to be disposed at a C&D processing facility, similar to the requirements of that stated for Historic Fill (in the Model Plan). An alternative suggestion could be to add a requirement for analytical sampling for any large volumes of soil being proposed to be disposed of at a C&D/RUCARBS facility in the proposed Subpart 361-5. Another suggestion would be to omit the "S" from RUCARBS and not allow soil to be processed at a C&D facility. Or you can allow a small, incidental percentage per load.

Response: All requirements for C&D processing are found in Subpart 361-5. This Subpart has been substantially revised to incorporate separate requirements for various waste types and require analytical results when warranted.

Comment: The waste control plan must identify type, source and quantity (including, potentially, analytical results if required under the facility rules) of all wastes that may be received. This is generally infeasible, as it would require permit amendments each time a new source of waste is accessed.

Response: The waste control plan does not specifically require specifying a given generator. The service area, as well as the source and quantity may be sufficient depending upon the type of facility.

360.16(c)(4)(i)(f)
Comment: Recyclables "disposition" must be pre-determined; but markets are not fixed. Good marketing practices may lead to long-term contracts, making this something to comply with, or a better strategy may be to access a spot market.

Response: This provision only applies to permitted facilities. Most recyclable handling facilities qualify for registration under Subpart 361-1. If a permit is required, the application can include a discussion of how recyclables will be marketed. It does not obligate the facility to long-term contracts or commitments.

360.16(c)(4)(i)(h)(2)
Comment: The citation regarding waste characterization studies in Part 360.16(c)(4)(i)(h)(2) is too vague. There is no frequency discussed or any idea of the scope of the study. Health and safety aspects have not been discussed with the landfill facilities. Until such time as guidance is developed regarding these issues, this item should be stricken.

Response: The requirement provides broad flexibility as to the scope and frequency of the waste characterization study in order to allow the facility to tailor the study based on facility-specific needs and circumstances.

Comment: Waste plans for landfills, combustors and transfer facilities must "describe procedures and time frames for conducting periodic waste characterization surveys," implying a new requirement to sort wastes at these facilities. What is the purpose of this? Efforts to adequately describe waste variations can be immense, and in our case we sorted wastes and found differences across Mon/Thursday deliveries, and across waste districts. We found significant waste stream differences across two year sampling periods. This proposed regulation is ill-defined, and its purpose is unclear.

Response: The language sets no requirements for waste characterization surveys. Rather, it asks for information related to waste characterization surveys that may be pursued as part of the facility's operations.

360.16(c)(5)

Comment: The proposed regulatory language, therefore, plainly imposes a new substantive requirement on private operators/applicants; and, for a number of reasons, this language would benefit from reconsideration, clarification or revision. First, the meaning of LSWMP "consistency" should be clarified. It is unclear whether a demonstration of "consistency" requires the LSWMP to identify or reference the private solid waste management facility with specificity, or, alternatively, simply contemplate continued landfilling and use of private facilities generally. If reference to the specific facility is necessary to demonstrate LSWMP "consistency," then this requirement should be eliminated altogether, or municipalities in the facility's service area should be required to reference already-existing facilities in their respective LSWMPs. To do otherwise - i.e., require LSWMP "consistency" but accord municipalities the unbridled discretion to recognize or not recognize already-existing facilities - would effectively allow municipalities to put established facilities out of business. Such would violate the facilities' vested rights and give rise to regulatory takings claims. Further, according municipalities to unilaterally shutdown existing businesses and thereby destroy extant property rights does not appear consistent with the authority in ECL Article 27, title 7, or elsewhere).

Response: Consistency with the goals and objectives does not mean identification or reference of each specific facility within the LSWMP. The department makes the consistency determination and it will be based on whether or not, the facility type and practices are identified within the LSWMP in a manner that is consistent with the LSWMPs overarching goals and objectives.

Comment: The language requiring a permit applicant to review and assess the LSWMP's of every planning unit from which they receive solid waste is the single most onerous requirement contained in the proposed regulations, and our County strongly opposes it. It is not the County's, or any single facility permit holder's responsibility to assess the LSWMP of another planning unit, this is DEC's responsibility and the burden should be borne by DEC.

Response: To require facilities to know the planning status of each of the planning units they plan to receive waste from at the time of permit application is not viewed as an unreasonable expectation. The Department will of course have planning status information available to assist a permit application with the required determinations.

Comment: To the extent that a demonstration of "consistency" requires any level of discretionary approval or sanction by municipalities in the private facility's service area, such also impedes free market competition, as municipalities, in certain circumstances, may seek to secure waste flow for their own facilities even if processing/management is at a greater cost than could be provided by private facilities. The stifling effect of this type of restraint stands to result in higher waste management costs, reduced efficiency, and decreased innovation. Finally, the need to demonstrate consistency with the LSWMPs of each municipality in a private facility's service area places an undue burden on municipalities. If the proposed regulation requires facility-specific reference in order to demonstrate "consistency," municipalities seeking cost-effective waste management solutions would need to update their respective LSWMPs every time they wish to enter into a contract with a new waste processor. This will surely have a chilling effect on competition.

Response: Consistency with the goals and objectives does not mean identification or reference of each specific facility within the LSWMP. The department makes the consistency determination and it will be based on whether or not, the facility type and practices are identified within the LSWMP in a manner that is consistent with the LSWMPs overarching goals and objectives.

Comment: This provision should include a requirement to comply with local zoning or other local laws and regulations.

Response: Facilities are required to comply with local zoning and other local laws. The inclusion of this requirement in this section does not appear necessary or appropriate.

360.16(c)(5)(i)
Comment: There should be an “except for landfills and thermal treatment facilities” added to Part 360.16(c)(5)(i) since those particular facilities will have a very hard time emphasizing diversion from themselves. These facilities are the end of the line, after everybody else has already done as much “diversion” as possible.

Response: Thermal treatment and disposal facilities can certainly demonstrate consistency with the state solid waste management policy regardless of their location on the hierarchy of waste management.

360.16(c)(5)(iii)
Comment: We disagree with the need to “demonstrate” consistency with local solid waste management plans in effect within a facility’s service area. A large facility’s

service area will change as municipal contracts are won or lost. Additionally, a service area can expand or contract just based on expansion or loss of commercial or industrial business. This requirement most likely would require difficult-to-track annual updating. Finally, local solid waste management plans can change after a facility has entered into a service area, potentially causing more problems at a permit renewal or modification time. The greatest problem is the inability of a facility to receive a permit from the department unless it flow controls itself away from the plan areas with which the department says it is not consistent. That seems rather discriminatory, anti-competitive and in the end, more expensive for residents and businesses. Rather, this requirement should read "a discussion of the facility's role or impact on a local solid waste management plan in effect where the facility is located." This proposed requirement is especially problematic for private facilities as it creates an anticompetitive climate with publically owned facilities who can easily legislate a private company out of business or out of a particular market.

Response: Consistency with the goals and objectives does not mean identification or reference of each specific facility within the LSWMP. The department makes the consistency determination and it will be based on whether or not, the facility type and practices are identified within the LSWMP in a manner that is consistent with the LSWMPs overarching goals and objectives. To require facilities to know the planning status of each of the planning units they plan to receive waste from at the time of permit application is not viewed as an unreasonable expectation. The department will of course have planning status information available to assist a permit application with the required determinations.

Comment: The requirement that all permits must be in compliance with local SWMPs not only for the planning unit in which it is located, but all planning units in the service area; may result in conflicting requirements. Consider a transfer station servicing two different planning units, and it is located in a third: which planning unit should its recyclables recovery follow?

Response: The requirement is a demonstration of consistency with the goals and objectives of a LSWMP, not compliance with a LSWMP. This does not mean identification or reference of each specific facility within the LSWMP. The department makes the consistency determination and it will be based on whether or not, the facility type and practices are identified within the LSWMP in a manner that is consistent with the LSWMPs overarching goals and objectives.

360.16(c)(6)
Comment: Define the term "include" as it used in the provision.

Response: The provision has been revised to add clarity.

360.16(d)
Comment: Department approved LSWMPs are currently only required to obtain a completeness notice for a 6 NYCRR Part 360 construction permit, per 360-l .8(g).

However, the proposed regulations would expand this requirement to include any solid waste permit application (including renewals) for landfills, transfer stations, combustion facilities and HHW facilities. The law does not explicitly extend this LSWMP related completeness requirement to other solid waste facility permit applications. The proposed regulations are going beyond this statutory requirement that is only applicable to applications for solid waste facility construction permits.

Response: The Department formerly issued separate construction and operation permits for solid waste management facilities. That structure and practice has long been revised and only a single permit that covers construction and operation is issued. Accordingly, the language is reflective of the actual long-standing circumstances and practice and is within the statutory authority conferred upon the department in Article 27 of the ECL

Comment: This proposed change would expand a mandate on local governments that goes beyond what has been explicitly authorized by the state legislature and current regulations. This will result in an even greater imbalance between public and private permit applicants, since there will be significant delays in the DEC's processing of permit applications submitted by or on behalf of a municipality, based upon the DEC track record of failing to comply with the LSWMP review times set forth in the current regulations.

Response: The department formerly issued separate construction and operation permits for solid waste management facilities. That structure and practice has long been revised and only a single permit that covers construction and operation is issued. Accordingly, the language is reflective of the actual long-standing circumstances and practice. The LSWMP regulations in Part 366 have been revised to incorporate time frames for review of LSWMPs.

360.16(e)
Comment: As every single permittee, registrant and applicant with any experience will have committed some de minimus violation, in effect staff may deny any and all at the sole discretion of the staff without review. There must be a very comprehensive and clear criteria for "potential for significant adverse impacts". The phrase "opinion of the department" must be deleted. That phrase accomplishes only the eviscerating of any clear legal standard established by the remaining language. Moreover, it is an open invitation to permit a court to sustain extreme conduct by staff. Delete "or represents a pattern of noncompliance". If there is no "potential for significant adverse impacts", and the application otherwise meets all the legal criteria, the application must be granted. If the prior pattern of non-compliance did not result in any enforcement such as suspension or revocation which would form a proper basis for denial, then the pattern cannot properly by used for denial later.

Response: The suitability of the owner or operator of a solid waste management facility is a valid consideration for the Department in determining whether a permit should be denied or revoked.

360.16(f)

Comment: The proposals to require any horizontal or vertical increase in a landfill's size, and any expansion or acceptance rate increase for other designated types of facilities, to be treated as applications for new permits is overly burdensome to the regulatory community and imposes an unnecessary strain upon the department's limited staff resources. The regulations should not force department staff and applicants for every such permit modification to expend the time and effort involved with preparation and review of a new permit application, even when the department and the applicant recognize that potential adverse environmental impacts associated with such proposed modifications are non-existent, negligible, or insignificant. Applications for permit modifications that do not get treated as new permit applications are still subject to a technical review by department staff prior to issuance of any such permit modification, and compliance with the requirements of the State Environmental Quality Review Act also applies. Part 621 and other department regulations include various thresholds for determining when permit modifications must be handled as new permit applications. Those thresholds have been put in place for a reason, not the least of which is to avoid unnecessary burdens upon the regulatory community, the department, and state taxpayers. We see no environmental benefit or other reason for removing such thresholds as proposed in these draft regulations. To do so would create an arbitrary and undue burden upon the department, the regulated community, and state taxpayers.

Response: While permit modifications which are not considered new applications receive technical review by the Department, they may not be subject to the State Environmental Quality Review Act (SEQRA) review. Any increase to the acceptance rate or disposal capacity of a landfill or other solid waste management facility may impact the surrounding community in ways that were not addressed in previous SEQRA and therefore addition evaluation under this act is necessary. This provision is consistent with department Policy DMM-SW-09-01 Solid Waste Management Facility Permitting.

360.16(f)(1)(i)

Comment: We disagree with the absolute statement that any vertical or horizontal increase in size of a landfill will trigger a new application designation as stated in 360.16(f)(1)(i). There is no discretion to judge whether the physical change is truly significant or not. For example, a landfill may propose a different final cover configuration that may alter the facility only a few feet here or there in order to promote better drainage, accommodate other operational objectives, etc. A facility that is 150 feet high and gains another 10 feet will not be noticed. A facility that is 50 feet high and gains another 100 would be. Part 621 allows for a major modification designation where those kinds of more obvious impacts can be evaluated.

Response: This provision is consistent with department Policy DMM-SW-09-01 Solid Waste Management Facility Permitting.

360.16(f)(1)(ii)

Comment: We disagree with the absolute statement regarding acceptance rate increases “at any facility” in 360.16(f)(1)(ii). Not only are the same judgment principles removed from an evaluation of the potential impacts, the effect of this regulation also hurts operations such as recycling and composting. Incremental increases in these types of operations that are more favored by New York State should not be burdened by the cost and difficulty associated with the new application process. Use a benchmark of 50 percent of the original approved rate before deciding on a new application process for any facility. Likewise, in the initial new application, have the applicant discuss the impact of an increase, or incremental increases, up to 50 percent of the proposed initial acceptance rate.

Response: Any increase to the acceptance rate or disposal capacity of a landfill or other solid waste management facility may impact the surrounding community in ways that were not addressed in previous SEQRA reviews and therefore addition evaluation under this act is necessary.

360.16(g)(2)(ii)
Comment: Permit renewals must demonstrate consistency with the waste hierarchy and the State SWMP, and it is noted especially, "diversion from thermal treatment and disposal;" it is far from clear that (say) composting food waste is better for the environment than gasification of the same waste.

Response: Comment noted.

360.16(h)(1)
Comment: Please consider the following language change to this provision:

If a facility permitted under this Part is proposed to be located at or within 150 feet of the boundary of a site undergoing a remedial program, the applicant must submit a Potential Contaminant Threat Evaluation Report that discusses….

Response: The current language is sufficient to describe that necessary information in the report and has been retained.

DGEIS
Comment: In the DGEIS, the proposed revision discussion on 360.16 regarding landfill expansions should be corrected to state ALL will be treated as new applications under Part 621.

Response: The DGEIS has been revised.

Comment: The discussion section on 360.16 is inadequate. The proposed changes requiring new applications do not streamline the permitting process. It is a start over for the applicant. There is absolutely no discussion of the impact to private facilities to demonstrate consistency with a local solid waste management plan at any location within that facility’s service area. The consistency determination requirement is a

significant, potentially harmful impact for those facilities. There seems to be a complete disregard for Part 617 which allows the department or any regulating agency to "incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of state, regional and local government agencies…". The discussion in the Alternative section would indicate there is no such mechanism since the No Action alternative was rejected.

Response: The proposed revisions require that a private facility demonstrate consistency with the goals and objectives of the appropriate planning unit, which is a minimum requirement that should not significantly impact the facilities.

360.17 Non-specific facilities

Comment: If not specified under 360, 361, 362, 363, or 365 then must you obtain a permit? How is this even practical?

Response: This is not a new provision in Part 360. It has been in the regulations for decades and has been used for solid waste facilities that do not fall under the specific types outlined in the regulations.

360.18 Research, development, and demonstration registrations and permits

360.18(b)(5)

Comment: Since "landowner" is not a defined term in Part 360 and our company ships almost exclusively by rail, we have a particular concern regarding this new requirement for RD&D permits. One of our company's facilities operates on a parcel of land owned in fee by an abutter, but which has been under lease to The Long Island Railroad since 1904 and which leasehold terminates in November 2102. This land "ownership" structure is typical of many of the properties included in our national rail system, where the licensed rail carrier has, under federal and state law, absolute control of property, but is not the fee title simple owner thereof. In order to avoid discriminating against solid waste rail facilities that may see RD&D permits, we suggest the language be modified as follows,

(5) if the applicant does not control, through ownership or a leasehold with five or more years remaining, the land on which the RD&D project is proposed to be performed, include written permission of all landowners or lessors to use the land for the project;

Response: The relevant paragraph has been amended in the revised proposal to require the applicant to include a statement on the status of whether the site is under the applicant's ownership or control. The reference to control should provide sufficient flexibility to address situations, like those referenced in the comment, where the land is leased.

360.19 Operating Requirements

360.19(c)(1)

Comment: There are no requirements for analytical sampling to determine if soil that is being disposed of at a C&D Processing Facility is actually uncontaminated.

Response: Requirements for sampling C&D debris are found in Subpart 361-5.

360.19(c)(2)
Comment: This proposed regulation requires reconsideration/elimination or, alternatively, specificity and
clarity as to its administration and enforcement. Disposal facility operators are not in a position to administer and oversee whether or not incoming waste is being received from a municipality or planning unit that is in compliance with this requirement. For private disposal facilities, in most instances, waste is being received directly from private generators, making the private disposal facility operator's dealings one step removed from the municipality or planning unit. Additionally, the CRA is an ongoing requirement, and, likewise, a municipality's compliance with its LSWMP is a day-to-day issue. For cause, the Department may disapprove a municipality's LSWMP at any time. A facility operator cannot know if incoming waste on any given day may have been generated in a municipality that does not have a department-approved CRA or LSWMP. Accordingly, this provision should be clarified to specify that it is the Department's responsibility to administer and enforce municipal compliance with CRA and LSWMP requirements. And, Department enforcement of this provision against the disposal facility operator can be had only if the Department notifies the operator by letter that a particular municipality is out of compliance and that, therefore, acceptance of waste from within that municipality is precluded until further notice. Absent this specification, this provision should be eliminated.

Response: This is an existing requirement in place since 1988 and the CRA and LSWMP approval status information is readily available.

Comment: In order to be able to take out-of-state waste, we respectfully request that this requirement only apply to municipalities within New York.

Response: Revisions to the provision have been made in the revised rulemaking.

Comment: This would appear to be a disposal ban for waste originating outside of New York State since none of that waste would originate from municipalities with Department approved CRAs or LSWMPs. This requirement should be modified as follows:

“Except for facilities regulated under section 360.17 and section 360.18 of this Part or Part 361, Part 365, or Subpart 362-4 of this Title, a facility may not accept waste that is generated within a municipality that is not included in a department-approved comprehensive recycling analysis (CRA) or a department-approved local solid waste management plan (LSWMP) after being notified by the department that the municipality is non-compliant.”

Response: Revisions to the provision have been made in the revised rulemaking.

Comment: Part 360.19(c) seems to place a regulatory burden on private solid waste management facilities to enforce NYSDEC regulations against municipal entities and Planning Units within the state. I do not think that waste management facilities should be put in this enforcement role. My opinion that this enforcement burden is solely placed on private facilities is based on the additional contention that municipally-operated waste management facilities would not likely enforce this requirement upon themselves if their LSMP or CRA is not current/approved.

Response: These requirements have been in place since 1988 and do not reflect a change in requirements, direction or policy.

Comment: We recommend adoption of a specific exclusion for scrap processing facilities regarding the prohibition on the acceptance of "waste" originating from within a municipality which does not have an approved Local Solid Waste Management Plan or Comprehensive Recycling Analysis.

Response: Under the language of this provision, scrap processing facilities are excluded from this requirement.

360.19(c)(4)
Comment: The timeframe for removing unauthorized waste from the facility should be 30 days as an industry standard.

Response: The 7-day timeframe can be extended by the Department for cases such as non-putrescible waste or unauthorized waste such as low-level radioactive waste.

Comment: Combustion facilities occasionally receive unauthorized waste in the form of low-level radioactive waste (LLRW). For low-level radioactive waste (LLRW), the proposed maximum 7 days onsite storage limit is too short. Current regulations allow 90 days for onsite storage of unauthorized waste. Specific to low-level radioactive waste that Covanta sometimes receives (then segregates, secures and contains), there are certain radioactive isotopes with a decay half-life that requires a hold-time longer than 7 days. On-site storage is safer, more environmentally friendly and more cost effective than the additional handling processing and transportation of LLRW. We respectfully request that the proposed regulation allow unauthorized low-level radioactive waste (LLRW) time allowance remain at 90 days. Any material that cannot be processed within 90 days of receipt will be removed by an authorized party.

Response: The 7-day timeframe can be extended by the Department for cases such as non-putrescible waste or unauthorized waste such as low-level radioactive waste.

360.19(c)(4)(i)
Comment: In addition to the annual reporting requirement, we suggest language be added to require immediate reporting of incidents, emergencies, or deviations from the standard operating procedure. Immediately upon learning of an incident or emergency,

reporting to NYSDEC should be required, in order for NYSDEC to inform the NYSDOH, the local health department in whose jurisdiction the incident occurs, and any other local jurisdictions that may be impacted. This requirement should apply to a wider array of scenarios than those identified in this provision.

Response: Permitted facilities are required to have approved contingency plans which outline the situations in which the department and other agencies will be notified in the event of an emergency or other incident.

360.19(c)(5)
Comment: A facility has no control over covering and no way of determining adequacy. A facility cannot be liable for the failure by the transporter.

Response: A facility has the ability to turn away waste that is uncovered when received at their facility.

360.19(c)(7)
Comment: We disagree with the requirement of providing a collection area for source separated recyclables when providing a convenience area for residential waste drop off as proposed in 360.19(c)(7). There has not been a demonstrated need for an additional collection area. Residents who use our drop off use it to dispose of bulky items and other periodic cleaning events they might conduct. If people are not willing to put their recyclables on the curb for collection, they certainly will not sort them out later for a special trip to the landfill. Suggest this requirement be removed or reworded to "encourage" the addition of an area for collection of source separated recyclables.

Response: The provision has been amended to address the concern raised.

360.19(c)(8)
Comment: This provision is impossible to comply with since as facility has no ability to monitor the legal status of receiving sites other than the initial contracting for disposal. Furthermore, the transporter selects the second receiving facility for much of the clean fill material leaving the facility. The only actors who can be liable for the legal status of the second receiving facility are the transporter and that facility. The policy mindset of forcing the transfer stations to substitute for the DEC as the public policing authority will never work as it is physically and financially impossible for the transfer stations to substitute for DEC enforcement elsewhere in the State.

Response: It is the facility's responsibility to direct waste to facilities which are authorized to accept the waste. However, the Department acknowledges that the facility loses direct control of the waste after it is transported from the facility. To allow for this, the language in the regulation has been revised to require the facility to ensure that the waste is destined to be managed at an appropriate facility.

360.19(d)(1)
Comment: There is a reference to 360.16(d)(4) in this provision which does not exist.

Response: The reference has been corrected.

360.19(d)(4)
Comment: We disagree with the requirement that “spare parts” in “adequate numbers” be “available during all hours of operation.” It is impractical to have such a requirement. Parts can be delivered to a facility in a day or less and equipment can be rented if it cannot be repaired in a timely fashion. This requirement would be very expensive and wasteful if implemented. Suggest that “spare parts” be removed. The rest of the requirement is sufficient to ensure reasonably uninterrupted operation of the facility.

Response: The requirement for maintaining spare parts has been removed.

360.19(d)(5)
Comment: It is suggested to modify 360.19(d)(5) to remove the phrase “continuously free from standing water.” It is unrealistic to expect any facility to not have a puddle somewhere, whether on its tip floor, parking lot or its cover. The rest of the requirement is sufficient to compel a facility to keep areas reasonably well drained and dry.

Response: The language of the provision has been amended to include the phrase “standing water is minimized” instead of “continuously free from standing water”.

360.19(d)(8)
Comment: A facility has no control over covering and no way of determining adequacy. A facility cannot be liable for the failure by the transporter.

Response: While on the facility property, the facility owner has the ability to require transporters at their site to properly manage waste and can turn away loads.

360.19(d)(9)
Comment: Compliance will never occur and there is no policy basis for this provision. Please provide a comprehensive definition of the term “shutdown”.

Response: A routine component of a contingency plan includes notifying the department when unscheduled shutdowns of a facility occur. Confusion regarding the meaning of the term “shutdown” has not been an issue in the past.

360.19(e)
Comment: Daily routine inspections are fine and a matter of course for running a landfill, but having a requirement to log that every day is burdensome. Landfill supervisors will spend all of their time on paperwork related to this and the myriad of other inspections required by Part 360 and other regulations and have little time left to actually run the landfill.

Response: As noted, routine inspections are basic requirements for the proper operation of a landfill. Documentation of routine inspections is necessary to ensure that they are conducted completely and properly in accordance with the regulations.

360.19(g)&(i)

Comment: The term “nuisance” is a well-defined term in law and as much of the law is inappropriate for these regulations, the term should not be used. If it remains, please define “nuisance” and provide clear and objective legal standards as are provided for noise levels.

Response: The Department will make the determination on a case-by-case basis whether or not dust or odors constitute a nuisance condition.

360.19(i)
Comment: I believe the proposed regulations should include a requirement for some type of operator monitoring for odors, not only at the site, but at strategic locations off site, recognizing that methane is lighter than air and so will naturally rise to be blown around by the prevailing winds. The way it is currently set up, nearby citizens are essentially relied on to do this monitoring for the operator. If no complaints are received it is assumed there is not an odor problem. I suggest the following change in paragraph 360 1.14(f)(3) to be consistent with paragraph (m).

“The facility owner or operator must frequently monitor and inspect the facility for malfunctions, deteriorations, operator errors, and discharges that may cause a nuisance odor release to the environment or a threat to human health. The facility owner or operator must promptly remedy any deterioration or malfunction of equipment or structures or any other problems revealed by the inspections to ensure that no environmental, nuisance odor or human health hazard develops. Where a hazard is imminent or has already occurred, remedial action must be taken immediately”

Response: These regulations govern a myriad of types and sizes of facilities. The need and means to control and monitor odor vary significantly. Every facility is required to monitor odor under the provisions of 360.19(i) to ensure that odors do not constitute a nuisance. The department is often tasked to determine whether the methods used by the facility are appropriate given the type of facility and location.

360.19(j)
Comment: Noise is required to be assessed in SEQR and therefor**e** we believe that including noise in Part 360 is redundant, unnecessary and that Part 360.19(j) should be removed from the regulations. However, we offer the following comments on the proposed Part 360.19(j). We acknowledge that the Department has removed the 80dBA equipment limit in the current regulations. In addition, the proposed regulations also would allow for facility operating noise levels of up to 3 decibels above background. These are both positive changes which provide some flexibility. Based on many recent landfill permitting projects and hearings held in the State, we believe, if Part 360.19(j) is not deleted, clarifications on noise assessments performed for permit applications should be identified in Part 360.16. We also believe the operational section outlined in Part 360.19(j) should be modified to account for a noise monitoring plan, if necessary based on the assessment in the permit process. Furthermore, many facilities are permitted to begin operations prior to 7:00 am. These operations typically include maintenance of equipment, stripping cover soils prior to waste placement, and general

site upkeep. We therefore request that compliance hours for daytime and nighttime periods be modified to 6:00 am to 9:00 pm and 9:00 pm to 6:00 am, respectively.

Response: The regulations related to noise for both application and operating requirements have been revised. The starting time for the daytime period has been retained.

Comment: The noise standards cannot be achieved where the facility entrance road intersects the property line. Please make clear that the noise standard applies to the operations onsite and not to the vehicular traffic entering and exiting the property.

Response: On-site vehicle traffic is a component of the noise requirements for the site. Any additional truck noise from the surrounding roads and community is considered background noise.

Comment: Where the local jurisdiction has zoning or a local noise ordinance that is more stringent,, the local standard should apply.

Response: Local noise standards would still be in effect and may be more restrictive, noise regulations in this continue to apply.

Comment: Elimination of the existing requirement from 360-1.14(p)(4) “sound levels from on-site equipment not exceed 80 decibels at a distance of 50 feet from that equipment” will result in the following impacts:

- Facilities operators (employers) will be excused from DEC requirements to utilize certain noise prevention and noise reduction measures within their facilities, and
- Solid waste management workers in these facilities will consequently be exposed to higher levels of occupational noise and will potentially incur additional avoidable and unnecessary permanent health harm, i.e., noise-induced hearing loss.

Response: Internal combustion-powered equipment is required at landfills to properly manage the waste stream. Equipment which meets the 80 dBA limit is difficult to obtain, and is smaller than typical equipment used at landfills. Use of this smaller equipment would require increased fuel usage and may potentially create greater sound levels due to longer duration of use. Additionally, elimination of this requirement will not affect the noise regulations enforced at the property boundary. Occupational safety and health requirements are outside the scope of this rulemaking.

Comment: Modify 360.19(j) for Operations:

Except as may be authorized under a noise easement, the owner or operator of a facility must ensure that noise (other than that occurring during construction of the facility) resulting from equipment or operations at the facility does not exceed the following energy equivalent sound levels at the property line of the facility where the

adjacent property is zoned or otherwise authorized for residential purposes for residential use:
Character of Community within a one-mile radius of facility Leq Energy Equivalent Sound Levels

The Leq is the equivalent steady-state sound level which contains the same acoustic energy as the time varying sound level during a one-hour period. It is not necessary that the measurements be taken over a full one-hour time interval, but sufficient measurements must be available to allow a valid extrapolation to a one-hour time interval.

Facility operations must be compliant with the noise assessment and operational noise monitoring and control plan per 360.16(c), if required. If developed for a facility, the operational noise monitoring and control plan shall be included in the Facility Manual outlined in 360.16(b)(4). If the department requires additional operational noise assessments, the assessments shall be in accordance with 360.16(c). Equipment must be maintained in good working order to limit operational noise. Mufflers are required on all internal combustion powered equipment used at the facility.

Response: The regulations related to noise have been revised to require the noise level restrictions only at the boundary of properties zoned or otherwise authorized for residential use.

Comment: Limits of sound where ambient noise exceeds the limit. You existing regulation imposes specific noise levels that must not be exceeded based on the class of neighborhood involved. (rural, suburban or urban). It further states that “If the background residual sound level (excluding any contributions from the solid waste management facility) exceeds these limits, the facility must not produce an Leq exceeding that background.” This would seem to cover most if not all of the bases and should allow elimination of the different levels based on the character of the neighborhood. It does not however recognize the situation where the background level is low to begin with. If the background level is, say 40 db in a rural area, (which is entirely possible) the current regulations allow a 17 db increase in sound level. This will be wildly noticeable and extremely annoying. If the background however is already 57 dbA the regulation says there will be no increase allowed. This then favors a community with already higher background levels and penalizes those communities where quiet prevails. Just the kind of neighborhood people move to to get away from noise! The regulation should therefore be consistent and require no increase in whatever the current background noise level is if it is to truly be designed to protect citizens from the nuisance of unwanted noise. However your **proposed** regulation moves in the reverse direction because it changes this to allowing the sound level in these cases to go to 3 db **above** the background. This is an unnecessary relaxation of a regulation designed to protect citizens which instead favors the operators of facilities at the citizens’ expense. If this section is to change at all it should be changed to kick in not when the ambient level “exceeds these limits” but in all cases. That is, it should read “The facility must not produce an Leq exceeding that of the current background

level." If this is deemed not to be possible, then the current regulation language should stand.

Response: The regulations establish acceptable noise levels for properties adjacent to the facility, and allow an increase of three decibels above background only in the circumstance where existing background exceeds the sound level limits.

Comment: Maximum sound level for operating machinery. Current regulations contain in addition to maximum levels at the facility property line, a requirement that levels at 50 feet distant from any operating equipment not exceed 80 dbA. Your current proposed regulation drops this requirement. This additional requirement, by itself is not particularly useful since 1) the maximum level at the property line is defined elsewhere, and 2) it only applies to individual pieces of equipment. As to the first item listed, if the measurement is to also be taken and compared against an A weighted scale, there is a reasonable argument for dropping this requirement. It merely provides a somewhat redundant limitation on the operation of equipment and does not realistically take into account multiple pieces of equipment operating simultaneously. However if the dbA scale continues to be employed in the property line measurement regulation, I feel the redundancy is warranted, particularly when considering the next paragraph below regarding measurement frequency. Since taking infrequent measurements and extrapolating the readings to extend over a one hour period can easily miss spikes to due specific operating anomalies, retaining this restriction provides a second level of defense against abnormally loud noise from these machines. For example, I listen all day to landfill noise while sitting outside. I will be the first to admit while I can hear almost constant noise from the machines, there are times when whatever they are doing results in a particularly loud series of noises. (banging tailgates, certain crushing noises, engine braking, etc.) If these were not observed in the "infrequent" samples taken (or worse, intentionally ignored), they would be missed and not taken into consideration when extrapolating the one hour averages. Having the 80 db limit per machine gives an additional chance to catch an infrequent but nonetheless extremely annoying sound spike to be discovered.

However, it is a rare occurrence when a single piece of equipment is operating at the top of the pile. Usually there are two or more pieces of equipment operating simultaneously, even if one is only the dump truck delivering the trash. This requirement, rather than being eliminated in the proposed regulations should be modified to say that the 80 db limit should apply to the operation of whatever equipment is operated simultaneously. Furthermore, the measurements should also be related to the dbC weighted scale as well.

Response: Internal combustion-powered equipment is required at the landfill to properly manage the waste stream. Equipment which meets the 80 dBA limit is difficult to obtain, and is smaller than typical equipment used at landfills. Use of this smaller equipment would require increased fuel usage and may potentially create greater sound levels due to longer duration of use. Additionally, elimination of this requirement will not affect the property boundary sound limitations required.

Comment: Allowable Measurements. The current and proposed regulations allow measurements of sound level to be taken at infrequent intervals and extrapolated to estimate the measurements over a one hour period. This is fine if all that is being looked at are the average levels of sound emanating from the site. But the level of annoyance is not about the average level over an hour. It is the constant, continuous sound over the long period of time that results in the level of annoyance. The proposed regulations don't even require measurement over a complete hour's time do not recognize this constant aspect of the nuisance level of a continuous sound.

Response: Leq energy equivalent sound levels are used due to sound level fluctuations and the limitations of existing sound meters. The regulations require that the sound level must be the weighted sound level measured with the slow metering characteristic to give a better indication of the average noise level where noise levels can be variable.

Comment: Please consider using local standards where such are stated in zoning or a noise ordinance. Facility noise should not include truck traffic ingressing/egressing the facility. References could be made to NYSDEC's Policy for Assessing and Mitigating Noise Impacts.

Response: DEP-00-1, Assessing and Mitigating Noise Impacts is a guidance document that explains the department's regulatory authority for undertaking noise evaluations and for imposing condition for noise mitigation measures in the approval of permits for various types of facilities pursuant to regulatory program regulations and the State Environmental Quality Review Act (SEQR). Part 360 is one of regulations that is referred to in the guidance but establishes regulatory requirements beyond guidance for SEQR requirements. Local noise standards would still be in effect and could be more restrictive than state noise regulations. Truck traffic within the property of the facility would be considered part of the operations of the facility and must be considered. Any additional truck noise associated with the project on the surrounding roads and community would be considered background noise and would addressed by SEQR.

Comment: The proposed regulations should only require operational noise monitoring if there are residential or sensitive receptors on adjacent properties. Requiring annual noise monitoring at facilities with no adjacent receptors has no merit and is a waste of our limited resources.

Response: The Leq energy equivalent sound levels are not to be exceeded whenever there is a possibility of a residential or sensitive receptor using their adjacent property. This would include the simple act of visiting the adjacent property. In the unique case where an adjacent property will never be used, the applicant can agree to a noise easement with the adjacent property owner or apply for a variance in accordance with section 360.10.

Comment: It is unfortunate that the sound level requirement has been removed inside the landfill property line. Please reconsider that. It will certainly affect the workers and

will still continue to bother the neighbors since the property line is invisible and is not a sound barrier. The neighbors are already subject to noisy truck traffic. Please regulate state-of-the-art protection hearing protect for the workers.

Response: The noise limits required in the regulations are appropriate to limit impacts on neighboring properties. The noise associated with road traffic and the occupational safety concerns associated with on-site noise are outside the scope of this rulemaking.

Comment: I am concerned with your use of the phrase "noise easement" which pertains to the owner or operator of a landfill facility. The use of the term "noise easement" sounds like a loophole the landfill operators favor and not like something that would protect the public from noise pollution. If indeed this phrase is being suggested by landfill operators, it could be interpreted as illegal. If you add this phrase "noise easement" to the regulations, you could in effect be allowing private easement contracts to modify or vary the application of the noise limit. As a result, when a new owner buys land near the landfill, someone who had not agreed to vary the noise limit so it does not apply to her land, is nevertheless powerless to ask DEC to enforce the noise rule. That is arbitrary and unreasonable for the new owner, and it transfers regulatory power from DEC to the landfill operator, who might find unscrupulous ways to avoid meeting the set decibel limits. Please do not include the term "noise easement" in this regulation.

Response: The wording “Except as may be authorized under a noise easement” has been removed.

Comment: We suggest that subsection (j) be modified as follows:

(j) Noise levels. Except as may be authorized under a noise easement, or as required by federal or state regulations, the owner or operator of a facility….

Response: These regulations do not take the place of other state or federal regulations that may be in effect. The language has been retained.

360.19(j)(1)
Comment: Please consider the following amendment to this provision:

If the background Leq sound level measured at the facility property line in the absence of sound produced by equipment operated at the facility exceeds the referenced Leq sound level limit, the measurements of Leq sound levels of facility sources along with background sources must not exceed the Leq sound levels of the background sources alone by more than 3 dBA.

Response: The language has been added to the regulations.

360.19(j)(2)
Comment: Please consider the following amendment to this provision:

The sound level must be measured with A-weighting and Slow time constant.

Response: The language has been added to the regulations.

360.19(j)(3)
Comment: Please consider the following amendment to this provision:

Measuring instruments must be Type 1 or Class 1 precision sound level meters, Type 2 or Class 2 general purpose sound level meters, or corresponding Type S1A or S2A special purpose sound level meters.

Response: The language has been added to the regulations.

360.19(k)
Comment: The provision is very dangerous in that all it says is that one must comply with the law. It is unnecessary and legally messy. Every citizen must stop violating the law immediately.

Response: This subdivision has been combined with the proposed 360.19(e), since they contained similar subject matter.

360.19(l)(2)
Comment: We urge the Department to explicitly state that the operating record requirements for solid waste management facilities are not applicable to scrap processing facilities , particularly with regard to a daily log specifying the “planning unit” from which “waste” is delivered to the facility. Operation records for scrap processors are regulated under the General Business Law.

Response: Scrap processing facilities are solid waste management facilities and tracking of appropriate solid waste management received from planning units is the responsibility of these facilities. Reasonable effort should be made to obtain information regarding origin of waste received.

360.19(l)(2)(i)
Comment: Facility often has no basis for knowledge of either origination or destination. Facility’s obligation must be limited to receipt of material that matches the content requirements for the type of facility and like all other citizens, for having control over the illegal depositing of material as provided for comprehensively elsewhere in the law.

Response: Reasonable effort should be made to obtain information regarding origin of waste received.

360.19(o)
Comment: Please specify the situations where single wall tanks and piping are acceptable and when double wall tanks and piping are required.

Response: Individual subparts within Parts 361-366 specify specific requirements for tanks and piping.

360.19(o)(1)&(2)
Comment: With regards to tank containment requirements, as written, the proposed regulations are confusing. They are proposing to require tanks to have both double walled construction with leak detection and additionally a secondary containment system. We respectfully request that the proposed regulation be revised to allow either option but not require both systems. We suggest the following modifications to this provision:

o) Tank Requirements. The owner or operator of a facility that includes tanks for waste storage must comply with the following requirements:
(1) All tanks must:
(i) have double-walled construction with leak detection, if deemed necessary by the department.
(2) If required by the department, above ground tanks must:
(i) have and maintain a secondary containment system that is compatible with the waste
being stored;
(3) Self inspection requirements for tanks and related equipment:
(i) tanks must be inspected on no less than a weekly basis when waste is present

(ii) the overfill protection system must be inspected weekly

Response: The provisions allow the department to require either tanks with double walls or tanks with single walls with secondary containment. It is highly unlikely both would be required by the department.

360.19(o)(3)
Comment: With regards to self-inspection frequency, we believe a weekly inspection is not necessary but rather a monthly inspection would be more reasonable. This frequency is utilized in the DEC's Bulk Petroleum and Bulk Chemical programs for those tanks and should be used for waste tanks as well. We respectfully request that the proposed regulation be revise from a weekly to a monthly frequency.

Response: The provision has been revised to reflect an inspection frequency which is consistent with the department's Bulk Petroleum and Bulk Chemical programs.

Section 360.20 Environmental Monitoring Services

360.20(a)
Comment: All NYSDEC permitted and registered solid waste management facilities should be required to maintain and pay for a NYSDEC environmental monitor services employee.

Response: The use of environmental monitoring services is guided by Commissioner Policy CP-64. The revised regulations are consistent with CP-64.

Comment: All permitted solid waste management facilities should pay for and be inspected by an environmental monitor and should be inspected under the supervision of the regional solid waste director and administrator. All registered facilities should pay for and be inspected quarterly by an environmental monitor.

Response: The use of environmental monitoring services is guided by Commissioner Policy CP-64. The revised regulations are consistent with CP-64.

Comment: All registered solid waste management facilities should pay for and be inspected quarterly by an environmental monitor.

Response: The use of environmental monitoring services is guided by Commissioner Policy CP-64. The revised regulations are consistent with CP-64.

Comment: Small and medium sized solid waste management facilities are not monitored regularly and are the sites that avoid the environmental review process and cause pollutions incidents that are not good for the environment.

Response: The use of environmental monitoring services is guided by Commissioner Policy CP-64. The revised regulations are consistent with CP-64.

Comment: 25,000 TPY facilities should pay for and be environmentally monitored by an environmental monitor at least quarterly. These small to medium size exempt or registered facilities become a major source of all environmental complaints and actions in NYS.

Response: The use of environmental monitoring services is guided by Commissioner Policy CP-64. The revised regulations are consistent with CP-64.

Comment: Multiple comments were received stating that the proposed regulations indicate that NYSDEC may require monitors under the listed criteria but some NYSDEC regions require environmental monitors for all solid waste management facilities. Monitors are expensive and should be required only where permit compliance has been a problem.

Response: The use of environmental monitoring services is guided by Commissioner Policy CP-64. The revised regulations are consistent with CP-64.

Comment: These proposed provisions are simply a license to staff to act without reasonableness.

Response: The use of environmental monitoring services is guided by Commissioner Policy CP-64. The revised regulations are consistent with CP-64.

360.20(a)(ii)
Comment: The Department must delete the meaningless and thus dangerous language of “reveals an inability or unwillingness to comply” proposed subparagraph 360.20(a)(ii) when referencing an owner or operators past practices.

Response: The use of environmental monitoring services is guided by Commissioner Policy CP-64. The revised regulations are consistent with the wording of CP-64.

Comment: Subparagraph 360.20(a)(ii) must include the concept of “reasonableness” to prevent abuse by staff.

Response: The use of environmental monitoring services is guided by Commissioner Policy CP-64. The revised regulations are consistent with CP-64.

Comment: There is no policy basis to expand the criteria in subparagraph 360.20(a)(ii).

Response: The use of environmental monitoring services is guided by Commissioner Policy CP-64. The revised regulations are consistent with CP-64.

360.20(a)(iii)
Comment: The Department must delete proposed subparagraph 360.20(a)(iii) as meaningless and thus dangerous.

Response: The use of environmental monitoring services is guided by Commissioner Policy CP-64. The revised regulations are consistent with CP-64.

360.20(b)
Comment: Multiple comments were received stating that paragraph 360.20(b) indicates that a facility must cease waste acceptance for lack of payment and that the owner/operator should have an opportunity to rectify the issue prior to having to cease operations. The proposed penalty for a late payment is too harsh. A grace period should be provided for late payments, and should be accompanied by a warning notice from the department to the facility owner and operator about the facility shutdown requirement if payment is not made within 20 days from receipt of the warning notice.

Response: The regulations have been revised to address this concern.

Section 360.21 Closure Requirements

Comment: Adding time requirements to closure activities does not aid in the prevention or limitation of adverse environmental impacts, especially inadequate timeframes that might encourage hasty or haphazard closure of the facility. The specified timeframes for the removal of the final waste quantity and the complete removal of all materials as well as any decontamination necessary of 30 days and 60 days, respectively, is not sufficient for all facilities. For instance, Part 361 allows for 60 to 180 days storage of

processed and unprocessed material during operation. The proposed 30 days for waste removal following the last waste receipt would be insufficient for certain material markets, by the DEC's own admission based on the proposed Part 361 requirements. We request the timeframe for closure be deleted and the metrics for closure activities be returned to that in the current regulations, which are performance-based, which has been shown to be effective for proper management and the prevention of environmental and health impacts. If a timeframe for closure activities is to be implemented, we request that it be extended to a minimum of 180 days.

Response: The provision has been amended to extend the timeframe for removal of waste and completion of closure activities to 90 days.

Section 360.22 Financial Assurance

Comment: We request that the Department eliminate financial assurance requirements for facilities other than landfills. This is an unfunded mandate and the closure requirements as defined in Section 360-22 do not provide sufficient detail to define closure for facilities other than landfills.

Response: The current regulations require financial assurance for facilities other than landfills. The proposed regulations extend this requirement to other facilities to further protect public health and the environment.

Comment: There is absolutely no justification in the history of the operation of fill and C&D debris industry to permit such a destructive and burdensome set of regulations. This is an extreme of regulation that is "unthinking, but is sounds good politically." The multi-page provision is written irrationally applying the huge burden of hazardous waste landfills on transfer stations.

Response: The regulations have been revised to require that only permitted C&D debris recycling facilities obtain require financial assurance.

Comment: Part 360-22 contains no language as to who, when, and upon what criteria these provisions are imposed.

Response: Section 360.22 provides the general criterial applicable to all facilities which may be required to obtain financial assurance. However, the individual Parts, including Parts 361 through 365, indicate which facilities are subject to Section 360.22. As to when financial assurance must be in place, Section 360.22 requires the owner or operator of a facility to obtain a financial assurance beginning no later than 60 days prior to the initial receipt of waste. However, the transition rules at subdivision 360.4(j) extend that timeframe for certain facilities. The criteria for establishing the cost estimate and financial assurance mechanism are found in section 360.22.

Comment: This part would greatly benefit by reorganizing and making clear that post-closure monitoring and custodial care only relate to disposal facilities.

Response: To clarify, paragraph 360.22(b)(1) applies to facilities other than a landfill and 360.22(b)(2) applies to landfills.

Comment: Municipal owner/operators which are taxing authorities and/or which are subject to routine financial oversight by the New York State Comptroller's Office should not need to provide financial assurances for closure.

Response: Municipal owners or operators that operate facilities requiring financial assurance have the option of using the local government financial test or the local government guarantee if they meet the requirements in 360.22(d)(4) or 360.22(d)(5).

Comment: Custodial Care language directs that permittees must submit financial assurance proposals acceptable to the Department "to secure closure, and where applicable, post-closure care including custodial care…." This suggests that the requirement for financial assurance respecting custodial care is subject to Department discretion. However, other provisions (Part 360.22(b)(2), (b)(2)(ii), (b)(2)(iii), (b)(3)(iv), (c)(l)(vi); see also Part 363-4.5(n)(6)) suggest that all financial assurance plans must include provisions for both post-closure care and custodial care, no matter what the circumstances. Please clarify.

Response: 360.22 applies to all types of solid waste management facilities that are required to obtain financial assurance. Financial assurance for post closure care and custodial care are required for landfills only and do not apply to other facility types.

Comment: The closure/financial assurance provisions are also patently vague relative to both the duration and parameters pertaining to the post-closure care and custodial care periods. The proposed regulations
mention in multiple places a mandatory minimum 30-year post-closure period or rolling 30-year post-closure period. (363-4.5(n)(6), 360.22(b)(2)(ii), 360.22(b)(2)(iii), 360.22(b)(3)(iv)) The definitions, however, define the post-closure care period and custodial care period relative to one another and, most importantly, the level of risk posed by the landfill. The post- closure care period is defined to be "the period after final closure of a facility that continues until the owner or operator of a facility can demonstrate to the department that the threat to public health or the environment has been reduced to a level where environmental monitoring and maintenance can be reduced." Part 360.2(198). The custodial care period is defined as "the period after the post-closure care period when, as the department may determine, the facility poses a significantly reduced threat to public health and the environment and environmental monitoring and maintenance can be reduced." Part 360.2(73). If, after a timeframe of less than 30 years, the landfill demonstrates stability (i.e., a reduced threat to public health and the environment, whatever that means), does the post-closure care period terminate and the custodial care period begin? The regulatory language should be clarified to specify that the level of care after closure is tied to risk, and if the landfill demonstrates stability after a specified period of time, even if less than 30 years, then the custodial care period commences and financial assurance is accordingly reduced at that time.

Response: The regulations have been revised to clarify the post-closure care and custodial care periods. The Part 363 landfill regulations set no specific time period for the post-closure care period. While it is unlikely that the landfill will stabilize in a time period shorter than 30 years, at any time after the post-closure care period begins, the landfill can attempt to demonstrate to the Department that the landfill posed a reduced threat based on reduced leachate generation, landfill gas emissions. In order to calculate financial assurance obligations, the regulations require that the landfill assume a 30-year period. The regulations have also been adjusted to require the submission of the initial custodial care cost estimate as part of the demonstration of reduced threat. This revision ensures that a duplication of financial assurance requirements for both post-closure care and custodial care is not required.

Comment: The definitional language of the proposed Part 360 regulations also requires much- needed
clarification as to the parameters/thresholds for the Department's determination of what constitutes a reduced threat so as to warrant the transition from post-closure to custodial care. As presently written, the regulations provide no guidance whatsoever on this matter, thereby encouraging arbitrary and discriminatory enforcement. Consequently, as presently written, the language is unconstitutionally vague.

Response: The determination of reduced threat will be made on a facility-specific basis based on a demonstration that the landfill no longer generated leachate to a level that will impact groundwater and no longer generates landfill gas to a level that requires control or constitutes a threat to surrounding properties.

Comment: To the extent the proposed closure/financial assurance provisions can be read to suggest the possibility of custodial care absent the Department's demonstration of a bona fide threat to public health or the environment, such exceeds the scope of the Department's authority under its enabling statute. ECL § 27-0703(3) directs that any rulemaking by the Department must be substantiated with an environmental impact statement or written assessment as to how the proposed rule will prevent or reduce the conditions identified in subsection 2. Therefore, the Department's regulations under Article 27, title 7, must have a firm foundation in preventing or reducing conditions that impair public health or safety. Thus, to the extent the proposed Part 360 regulations can be read (or later applied) to require care at a facility that poses no genuine health or safety risk, such is ultra vires and, therefore, unenforceable.

Response: The custodial care period described in these regulations provide reduced regulatory obligations for landfills where the threat of environmental impacts have been reduced. However, the potential health and safety risk from those landfills remains, which requires continued management of final cover systems and groundwater monitoring to confirm that no impacts to the environment from the landfill are evident.

Comment: To the extent the proposed language in Part 360 regarding closure and financial assurance can be read to suggest perpetual custodial care, such is

inconsistent with the federal scheme under RCRA. Federal regulations implementing RCRA plainly contemplate an end to the post-closure care period. See 40 C.F.R. 258.6 l(e), 258.72(b). Accordingly, the proposed regulatory language should be revised to clarify that perpetual custodial care is not an intended requirement.

Response: It is the intent of the department to require reduced but continuing monitoring and maintenance of landfills through a continuing custodial care period. Unless the landfill is removed through a landfill reclamation project, the custodial care period will continue perpetually. As an approved state, the Department's regulations can be more stringent that the federal regulations.

Comment: Currently registered and permitted facilities in DEC Region 2 are also regulated under comparable New York City regulations and thus have already provided financial assurance. If financial assurance is intended to "secure closure," only one financial assurance mechanism is necessary. The proposed regulations should be amended to include a clause that a financial assurance mechanism issued for cleanup costs to a municipality are sufficient to provide financial assurance for the purpose of these regulations.

Response: On a site specific basis, the financial assurance cost estimate and financial assurance mechanism being used to meet the New York City regulations or other municipal financial assurance regulations would be evaluated for compliance with the requirements in 360.22. In cases where the municipal financial assurance obligations were found to be compliant with Part 360 requirements, duplicate financial assurance instruments would not be required.

Comment: It is unclear from this section and Part 360.22(b)(2)(iii) when a facility will need to account for custodial care in the financial assurance estimates. As currently written, custodial care will need to be accounted for in the financial assurance estimates no later than 60 days prior to the initial receipt of waste. We believe that the custodial care should be accounted for when the actual post-closure care period begins, not when the facility is operating.

Response: The regulations have been revised to require that the initial custodial care cost estimate be submitted to the department as part of the demonstration that the threat to public health or the environment has been reduced to a level where environmental monitoring and maintenance can be reduced.

Comment: There is no way to determine from the proposed regulations when the custodial care period could begin or end for financial assurance planning purposes. Therefore, we request that the Part 360.22 be revised to clarify when custodial care needs to be accounted for, and for what period. We suggest DEC develop guidelines which continue to call for closure/post-closure reserves on a rolling 30-year timeframe.

Response: The regulations have been revised to clarify the custodial care period, and to clarify that the custodial care costs estimates must be calculated on a rolling 30-year timeframe.

Comment: 360.22(a)(1)(vi) We strongly object to the new language that would require a privately owned facility to establish a trust fund for post closure (and custodial) care at the time of closure. The current regulation allows for DEC approval of surety bonds and letters of credit, and DEC approval and successful use of these mechanisms is well established. As we have expressed in response to prior proposals, there are several issues with this requirement, primarily: 1. A trust fund is the least cost-effective financial instrument, resulting in unnecessary financial burden on the operator. 2. Financial assurance is a backstop in the event of bankruptcy, and surety bonds and letters of credit provide that assurance. 3. The proposed financial assurance for private facilities (with regard to all of the instruments, including the financial test) is excessive and unwarranted.

Response: The regulations have been revised to allow any mechanism acceptable under the regulations to be used for post-closure care financial assurance.

Comment: **360.22(b)** The custodial care program in Part 363 is a new idea, not a clarification of the current post-closure requirements. That "clarification" was to state the 30-year period is now a rolling 30-year period that continues until the department declares otherwise.

Response: Previous Part 360 regulations required a minimum of 30 years post closure care and provided no end to the post-closure care period unless the demonstrated that the landfill no posed a threat to human health or the environment. Because there was no specific time period for the post-closure care period, the Department specified a rolling 30 year period for calculation of financial assurance obligations.

Comment: The other outlandish statement was to differentiate municipally-owned facilities between those that are "merchant" facilities and those that are not. There are countless town dumps in this state run by the local municipality for their own wastes that have become inactive hazardous waste sites. There is no telling who will or will not have an environmental problem just because of where the wastes come from. That differentiation should be removed.

Response: This provision applies to revenue-oriented municipal facilities receiving waste for disposal from outside the municipality for purposes of generating revenue beyond that necessary to operate the facility. This activity creates a greater financial assurance burden on the municipality than would have been created if the landfill was used only for the citizens of the municipality.

Comment: **360.22(b)(1)(i)** We have experienced a difference between NYSDEC regions in establishment of the factor to be used as a multiplier for disposal costs. For complete clarity and consistency, we would suggest the language of aforementioned

subsection be modified to, “(i) At a minimum, the closure cost estimate must include the cost at current market prices, to load, transport and dispose of the maximum….”

Response: The regulations have been so revised.

Comment: 360.22(b)(2) The incorporation of ill-defined information such as service life of individual landfill components is wrong at this point in time.

Response: It is the department’s intent to have adequate funding for maintenance and/or replacement of landfill liner system and cover system components.

Comment: 360.22(b)(2)(i)(b) It appears that the custodial care plan isn’t submitted until after the post-closure care period is deemed complete (per 360-10.6(b)(2)) and the custodial care plan will essentially be the same as the post-closure care plan with several tasks removed or reduced. Why would the cost be estimated as early as the preliminary closure plan stage?

Response: A conceptual custodial care plan must be included in the facility manual submitted as part of the permit application in accordance with 363-4.5(n). Revisions have been made to regulations to require the custodial care cost estimate be submitted with the demonstration that the landfill’s threat to public health or the environment has been reduced to a level where environmental monitoring and maintenance can be reduced. This adjustment is intended to relieve the landfill of a duplicative financial assurance obligation for both post-closure care and custodial care at the same time.

Comment: 360.22(b)(2)(ii) With the state-of-the-art capping system constructed on the landfills, the leachate quantities will reduce over time. Landfill facilities should be allowed to account for this reduction over time in their cost estimates, especially when their site performance demonstrates declining leachate generation during post-closure. We respectfully request the Department add the allowance for leachate generation reduction over time into the financial assurance estimates.

Response: A post-closure care cost estimate may be submitted which includes a reasonable and supported estimate for leachate reduction following closure.

Comment: The proposed regulations would require financial assurance for facilities other than landfills, such as recycling facilities and transfer stations, which at a minimum must include the cost to dispose the maximum permitted storage capacity at the facility as well as estimates reflecting components outlined in the facility-specific closure plan. This is a significant departure from the current regulations, which do not mandate financial assurance for these types of facilities. We recommend that the current regulatory approach to financial assurance for such facilities be continued, with decisions regarding the need for a specific non-landfill facility to provide financial assurance determined by the department on a case by case basis in accordance with each facility’s site specific circumstances and environs.

Response: Financial assurance is necessary for some types of facilities to ensure that waste is properly managed at the time of closure. The Department has limited this requirement to the minimum number of facility types that it deems necessary, and the regulations have been revised related to financial assurance requirements for specific facility types.

Comment: With regard to post-closure financial assurance estimates outlined in Part 360-22(b)(2)(ii), the minimum post-closure care period is 30 years. We understand, from our experience with the Department, that the intent is a minimum 30-year rolling post-closure period for planning purposes. We request that the regulation reflect the "rolling" terminology to eliminate possible confusion going forward.

Response: The regulation has been revised to reflect the rolling 30 year post closure care period.

Comment: 360.22(b)(2)(iii) A cell that is actively receiving waste would not have undergone closure or begun post-closure care. As such what is the reference to active cells related to?

Response: Post-closure care and custodial care estimates must account for all landfill cells, including both cells that are closed and cells that are active that will eventually need to be closed.

Comment: 360.22(b)(2)(iv) We recommend revision to the “rolling 30-year term” as referenced in Part 360.22(b)(3)(iv), which equates to a perpetual care requirement. In the absence of defensible methodology and an adequate data set, a determination of no future threat is difficult to obtain. Therefore, a default of rolling 30-year PC term provides a buffer until such an outcome can be determined. However, with the advent of 10-year PC permits and the framework for a site-specific data driven outcome confirmed by a confirmation-monitoring period, a reasonable requirement is a “rolling 10-year” term starting in year 20 of the post closure care period. The stipulation for such an interpretation is the collection of the data needed to complete a functional stability evaluation. Regulatory precedent for such a stipulation is found in the CalRecycle rule 27CCR §22211 (http://www.calrecycle.ca.gov/lea/Regs/Implement/Postclosure/Monitoring.htm). This rule notes this data as “proactive monitoring data”. It is suggested that DEC adopt this approach and require that a functional stability evaluation is conducted starting in year 20 of post closure and every 10-years thereafter to document the status of the landfill relative to threat and therefore the support to reduce the PC term to a period less than 10 years.

Response: Because the typical length of the post-closure care period is expected to be longer than 30 years**,** the Department believes funding for 30 years of post-closure care is necessary to provide adequate funding for the department to continue to maintain the post closure care operations at the landfill and to maintain protection to public health and the environment. Upon a demonstration to the Department that the landfill is no

longer a threat to public health or the environment, the financial assurance mechanism can be adjusted to blend the any remaining post-closure care obligations with custodial care obligations so that the total combined rolling period is 30 years.

Comment: 360.22(b)(2)(v) Many commenters responded the requirement that the total cost estimate to be increased by a contingency factor of at least 15%. We believe this percentage is inappropriate and will tie up funds unnecessarily which could potentially be utilized for other programs. The inclusion of such a contingency factor is not a recommended accounting practice according to Statement No. 18 of the Governmental Accounting Standards Series ("Accounting for Municipal Solid Waste Landfill Closure and Post-Closure Care Costs"), and is unnecessary since such cost estimates are reviewed and adjusted every year for inflation. We respectfully recommend that a mandated contingency percentage be deleted from the regulations.

Response: The contingency factor is intended to cover any unforeseen circumstances that are not included or anticipated in cost estimates. The regulations have been revised to include a contingency factor index.

Comment: Suggest the wording in 360.22((b)(2)(v) be changed to 5 percent for closure cost estimate, or index the contingency fee to the total value of the estimate, i.e, 15 percent for estimates up to $100,000, 10 percent for estimates up to $1,000,000 and 5 percent for estimates above $ 1 million.

Response: The regulations have been revised to include an contingency factor index.

Comment: 360.22(b)(3)(iv) The first part of the sentence refers to both post-closure and custodial care periods while the second part refers to a 30-year post-closure care period only. Does that infer that the entire period for both post-closure and custodial care is 30-years? Should the custodial care period have not been referenced? If not, does the Department anticipate that the custodial care period will also be 30 years? For a currently operating facility with older cells that fall under post-closure care, the upcoming year of costs for post-closure care are already included in the current year budget. Can/should the cost estimate for financial assurance purposed be based on the remaining 29 years?

Response: The regulations have been adjusted to clarify that a total of 30 years financial assurance is required from the facility, and that this may be a post-closure care period, a custodial care period, or a combination of both.

Comment: 360.22(b)(4) This discounting approach could mitigate the cost impacts of a conservative framework for providing financial assurance; however, it is unclear as to how (and if) this would be implemented in practice.

Response: Discounted cost estimates would be approved by the Department on a site specific basis.

Comment: 360.22(b)(4)(i) Can this certification be used to reduce or eliminate the 15% contingency?

Response: The certification does not remove or reduce the requirement to provide funding for contingencies. The regulations have been revised associated with the contingency factor to reduce the financial assurance burden on large cost estimate.

Comment: 360.22(b)(4)(iv) Does this infer that there is the potential to reduce years remaining under the post-closure care period? Does this mean that years may be reduced from the custodial care period? The current regulations infer that an updated cost estimate should be submitted if an active cell is closed or a new cell is placed into service "mid-year." Does this infer that the cost estimates only needs to be updated annually moving forward?

Response: The department may approve discounted estimates of post-closure care, custodial care costs and/or of corrective measures costs up to the rate of return for essentially risk-free investments, net of inflation, under the conditions listed in 360.22(b)(4)(iv). Custodial care is an ongoing requirement, but the financial assurance is to be calculated on a 30-year rolling basis.

Comment: 360.22(c) We are extremely concerned about the requirements that facility operators must establish a trust in the name of DEC to both guarantee compliance and provide DEC with financial compensation in the event of violations. Before this requirement is finalized, DEC must determine that institutions will be willing to provide facility operators with the financial backing that these new rules will require.

Response: Financial assurance is established to provide funds for closure, post closure care, custodial care or corrective measures. Facilities have been successful in obtaining financial assurance instruments under the previous Part 360 regulations so the Department expect that availability to continue. The financial assurance is not intended to be used in the event of violations.

Comment: If we do the math how can any firm pull enough revenue to balance out the inbound approved material with a clean outbound product, with the scale required it is impossible to do with the volume set at the specs in which the board is proposing. The other portion we must also take into consideration how this Assurance is calculated. If we assume that all the material is contaminated or it is unusable then this proposal will put most facilities under.

Response: The regulations have been revised to remove the general financial assurance requirement for registered C&D debris recycling facilities. For the facilities which require financial assurance, the amount required is calculated on a site-specific basis.

Comment: 360.22(c)(1)(ii), 360.22(c)(1)(vi) There is a logic disconnect when reading 360.22(c)(1)(ii) and (vi). (ii) requires funds be available when needed. (vi) states that the

post closure care and custodial care mechanisms must be established at the time of closure. That would seem to be too late. Post closure and custodial care funds, as 360.22(c)(1)(ii) states, need to be available and that would be the time they are needed. These funds should be established soon after opening of a facility, on a timetable agreed upon during the initial permitting process, as per 360.22(d)(ii)(2) for example.

Response: The closure and post closure funds must be available before initial receipt of waste. Therefore the funds are available when needed in the form of an allowable financial assurance mechanism as defined in 360.22(d). The regulations related to these requirements have been revised.

Comment: 360.22(d)(2)(iv), 360.22(d)(3)(iv) The requirement to establish a trust is both problematic and very expensive. Financial institutions are generally not willing to enter into such arrangements at all on the basis provided by the regulations. Bonds cost between 5-10% of the face value per annum, so they are not an insignificant expense in themselves. Since the bond is in the name of the DEC, surely that is sufficient to allow the Department the right and freedom to access the money in the appropriate circumstances.

Response: The regulations have been revised to allow all acceptable financial assurance mechanisms.

Comment: **360.22(c)(1)(vii)** We respectfully disagree with this requirement and propose to remove this from the regulation. If not removed, the requirement should become effective when the private operator no longer has an obligation under an Agreement; this does not necessarily coincide with the landfill closure or beginning of the post-closure period.

Response: The regulations has been revised.

Comment: The proposed regulations would obligate a public owner to manage funds belonging to another entity. The public owner should recognizes its obligation to perform the closure and post closure activities required under the law in the event of a default by its landfill operator. For example, if a default bond's proceeds accrue to a dedicated fund that should constitute adequate insurance that funding for post closure activities exist. The regulations should be rewritten to require post closure funds established by a private operator be turned over to a municipal landfill owner only where a cash reserve is used by the private entity to meet its post closure obligations.

Response: The post closure mechanism is transferred to the public owner. Therefore the public owner is then managing its own funds. The financial assurance instrument can be constructed to accrue to a dedicated fund. This would be compliant with the regulatory requirements.

Comment: 360.22(d) A standby escrow agreement was initially approved by Region 1, but disapproved by Albany. We would like it to be considered for future use. Rather

than establishing a fund of money that would be held over a long period of time, requiring management until it may be needed (say constantly investing the principal over say 20 years), we would like to pursue an alternative agreement involving a bond that would be called if needed, with the funds disbursed quickly to perform the required closure activities and cleanup.

Response: The regulations allow for the use of a surety bond as a financial assurance mechanism.

Comment: 360.22(d)(4)(iv)(*a*)(*3*) This provision adds unnecessary, additional annual costs to municipalities that are already fiscally challenged. To remedy this concern: add to this clause that if the municipalities' audited year-end financial statements do not contain any material weaknesses that this clause does not apply.

Response: This provision is appropriate and was adopted from 40 CFR 258.74(f).

Comment: **360.22(d)(4), 360.22(d)(5)** Considering the intent of providing perpetual care for certain facilities and the potential need for vast sums of funds to accomplish this task, it is recommended that the Local Government Financial Test (360.22(d)(4)) and Local Government Guarantee (360.22(d)(5)) both have time limits placed on them. These mechanisms should only be used as a bridge until a mechanism can be established that provides hard assets to cover closure, post closure and custodial care as needed. By not placing a time limit or essentially allowing these guarantee mechanisms to be renewed ad infinitum, it is virtually assured a municipality will one day fail the testing requirements and have no funds available to start or continue closure, post closure or custodial care. The taxpayers of New York are then left with the bill. In addition, the guarantee as it is written creates a vastly unlevel playing field for private facilities that are forced to carry these massive costs right from the day they open.

Response: The local government financial test and the local government guarantee are acceptable financial assurance mechanisms in the current regulations. Specific requirements are included in the regulations to determine the financial viability of the municipality. Municipalities that do not meet this requirements are not eligible to use the financial test or guarantee and must provide another acceptable financial assurance mechanism. The proposed language has been retained.

Comment: 360.22(e)(3) We recommend either that subsection (3) be changed to state, "A trust agreement for a trust fund, as identified in paragraph (1) of subdivision (d) of this section, must be worded substantially as
follows,..." or that the requirement of the Trust Agreement/Stand-By Trust Agreement that a corporate seal be affixed be deleted, as many of the institutions available to provide such trust agreements are not corporations, but rather limited liability companies or partnerships and, as such, do not have corporate seals.

Response: The regulation has been revised to allow for circumstances where the institution is not a corporation.

Part 361 Material Recovery Facilities

361-1 Recyclables Handling and Recovery Facilities

Comment: Permits have been proposed for material recovery faculties handling greater than 250 tons per day. Again, this is great on paper but will not provide any substantive relief to North Brooklyn because all the MRF in the community are below the threshold. We urge you to require permits for all solid waste facilities located in environmental justice communities.

We are concerned that the substantial exemptions and loopholes in many of the proposed rules will allow facilities in Region 2 to continue operating without additional oversight or scrutiny, despite substantial community impacts, such as clustering, poor siting, bad safety track records, and other compliance problems. Before issuing or renewing permits for any substantial waste facility, DEC should gather community and employee input on whether or not the waste facilities are located in potential environmental justice communities as identified by DEC's own Office of Environmental Justice and the proximity of facilities to residences, schools and parks and weigh these factors heavily in permit decisions.

Response: The Department takes environmental justice concerns very seriously and appreciates the concerns raised. The regulations are intended to minimize the impact of solid waste management facility operations on the surrounding community regardless of the nature of that specific community. Registered facilities do not require site-specific permits because of the specific nature and potential impact of the waste they receive. Operating requirements, including restrictions on nuisance noise, dust and odors, are applicable to registered facilities as well as permitting facilities and will be enforced by the Department.

Comment: These revisions treat recycling facilities as if they were MSW facilities, putting an undue burden on the operators by limiting time, space, and imposing financial sureties to "clean up" a site. These facilities are holding inert products that can be brought back to serve a cost-effective reuse and reduce the need for virgin materials. The state must understand that further encumbrances on the operation of these facilities only makes it less attractive for the private sector to enter this business, ultimately resulting in the further expenditure of non-renewable natural resources and in increase in the waste stream.

Response: Impacts on surrounding communities are possible from the activities of solid waste management facilities, including recycling facilities. The proposed regulations are intended to minimize those impacts.

Comment: Multiple commenters suggested that the threshold for permitting of RHRFs utilize a 30 day average or annual daily average. Most recycling programs (residential) have one time per week pick-up and have spikes on that day. The volume of

recyclables collected varies seasonally throughout the year. It is difficult for a registered facility limitation to be based on 250 tons in any single day, a better measure is based on an annual daily average.

Response: The permit threshold has been revised to utilize a 250 ton daily maximum based on a weekly average.

Comment: Multiple commenters questioned why are permits now being required for MRF handling more than 250 tpd. This seems unnecessary, especially when registrations are now term-limited. We propose that RHRFs remain registered, not permitted, facilities under Part 360. Alternatively, at a minimum, any existing RHRF should be allowed to remain as a registered facility, effectively grandfathered. Under this scenario, only new and possible significantly expanded RHRFs would require permits. Permitting will not serve to reduce environmental concerns beyond the protections already in place for registered facilities and otherwise available at the local level.

Response: The permit threshold has been revised to utilize a 250 ton daily maximum based on a weekly average.

Comment: We support the Department in your efforts to reclassify recycling facilities from registration to permitted status and thus establish comparable operating and reporting standards across the entire waste stream.

Response: Comment noted.

361-1.1(b)
Comment: We request that the Transfer Facilities regulated under 362-3 be added to the list of exempt facilities, as there is a big difference between transferring source separated recyclables (which is done at a Transfer Facility) and processing them (which is generally done at a Recyclables Handling and Recovery Facility). Transfer Facilities should not be subject to the same regulations as Recyclables Handling and Recovery Facilities.

Response: It is the Department's intent to regulate non-putrescible source-separated recyclables in the same manner. Any facility handling these materials is regulated in Subpart 361-1.

361-1.2
Comment: We recommend adding an exemption for sites operated by an institution for collection of reusables and recyclables from that institution.

Response: This activity would be exempt under proposed 360.14(c)(1).

361-1.3
Comment: What is the rationale for utilizing a 15% residue rate as opposed to any other rate or none at all.

Response: A maximum residue rate is intended to ensure that source-separated recyclables are the primary waste managed at the facility. The existing regulations require registered facilities to generate less than two tons or 15 percent of their average intake per day (whichever is greater) as residue based on a full year of operation. The changes to this requirement would only affect facilities accepting 13.35 tons or less per day based on a full year of operation.

361-1.3(a)(2)
Comment: We recommend that the Department eliminate Section (2) of this provision or clarify that to be considered under this provision, a facility must install a certified scale. Allowing fill material yards which typically operate based on yardage, to register under this provision is opening up the possibility of fraudulent behavior based on conversion rates. It would be virtually impossible to properly monitor these facilities and the Department is already short - handed when it comes to enforcement.

Response: Facilities which manage fill material would be regulated under 361-5.

Comment: We recommend that the threshold for permitting be increased from 250 tons per day to 1920 tons per day.

Response: Unlike permitted facilities, registered facilities are not subject to Uniform Procedures or State Environmental Quality Review processes. The 250 tons daily maximum based on a weekly average is intended to limit the truck traffic, noise and other environmental impacts that would otherwise be addressed in the permitting process.

361-1.5(c)
Comment: There should be some flexibility in the maximum storage period for recyclables if the 180 calendar day requirement is difficult to achieve. The Department should have authority to extend the storage period through written approval to the facility.

Response: The storage requirements have been revised.

Comment: Does this provision apply to glass storage? Seems to be contradictory to DOT glass specs. Under current regulations a product in commerce is not considered a recyclable. Once the glass meets a spec then it should not be included under this provision.

Response: The regulations have been revised to remove time restrictions on materials which meet a beneficial use determination under 360.12.

361-1.5(g)
Comment: Facilities without scales will either need to install scales or arrange to pay for the use of a certified scale if one is available nearby. The initial capital cost for these facilities to install truck sales would be in the range of $50,000 to $100,000+ depending on site conditions.

Response: In order to determine whether or not the facility is operating in accordance with the registration or permit requirements, accurate quantities of material delivered to and leaving the facility must be recorded. As indicated in the comment, the Department is not requiring that scales be installed at the facility. Rather, the requirement states that all wastes and recyclables delivered to or leaving the facility must be weighed and recorded.

Comment: Please clarify that only facilities accepting more than 5 tons of material per day must weigh and record received material.

Response: The statement made in the comment is correct.

361-2 Land Application and Associated Storage Facilities

Comment: Maximum holding times for compost will impede the marketing of bulk volumes of material, common in the industry based upon usage and transportation needs. This will add expense and market dilution by needing to move material to meet prescribed time limits. Longer holding times are recommended.

Response: The maximum holding times have been increased to 36 months to allow for marketing issues.

Comment: If the spreading of liquid manure is going to be allowed, please consider mandating that it be injected into the ground so that all people can enjoy their right to fresh air and a healthy life.

Response: The Part 360 regulations do not govern the landspreading of manure. For farms with larger quantities of animals, manure management is regulated by DEC's Division of Water under the Concentrated Animal Feeding Operations (CAFO) regulations.

Comment: I understand that a farmers land may need animal manure and egg shells, but other DEC regions require injection of liquid manure in the ground and there is no smell or hardly any, from doing it this way. If that is so, than why can't this requirement be applied to all farmers throughout the State?

Response: The Part 360 regulations do not cover the land application of manure. Injection of liquid manure is not required. For egg shells from a processing facility, land application under Part 361-2 is required to control nuisance conditions such as odors.

Comment: I wish to comment on the proposed regulations relating to so called "bio-solids" and their use in agricultural settings. It seems to me that they are seriously lacking in rigor in regards the testing for hazardous chemicals. The proposal seems to only require testing for 10 different metals and no other hazardous chemicals other than salmonella and e coli. While this may meet federal EPA guidelines it is hardly adequate to protect human health or the agricultural and natural environments.

Response: The regulations are formulated to require testing for pollutants that are potentially present in concentrations that will be a concern. To date, EPA has not found hazardous chemicals at concentrations in biosolids that would dictate routine monitoring.

Comment: In regards to the proposed changes in the Solid Waste Management Facilities (Part 360) regulations, we would like to oppose these changes at this time based upon the fact that no local agricultural/environmental agency or organization or planning entity was directly informed of such impacting changes in how municipal sludge is to be managed for the future in New York State.

Response: There are limited changes to the regulations governing the land application of biosolids. DEC attempted to thoroughly publicize the availability of the draft regulations for review and comment through numerous means, including an extended the public comment period.

Comment: It is disheartening that when the DEC decides to revise Part 360 that instead of using emerging science on the health risks inherent with the use of biosolids application to farmland, the expertise available at Cornell University and the vast amount of peer reviewed research that is available to anyone with a computer, the DEC decides to loosen regulations to lighten the load of industry. I cannot understand how the NYSDEC can in all good conscience be proposing to even allow land application of biosolids, much less loosen regulations.

Response: DEC appreciates the concerns expressed by some faculty at Cornell but based on the totality of the research available, the Department believes that biosolids use is environmentally protective when conducted in accordance with the regulations. This view is consistent with positions taken by the United States Environmental Protection Agency, the United States Department of Agriculture, the Food and Drug Administration, and other states that regulate this practice.

Comment: The minimum horizontal distance from the perimeter of the land application area with respect to property line (50 ft) and drainage swale (25 feet) are inadequate. The distances are close enough for the pollutants in biosolids to migrate to places (road ditches) that lead to streams, rivers, wetlands and waterways. The surface water and state regulated wetlands distance has been and is again, too close.

Response: The buffer zones have been in regulation for many years and the Department is not aware of any instance where they have not been sufficient to protect nearby environmental resources.

Comment: The draft regulations has removed appropriate soil types by suggesting that if it is farmed it is appropriate to apply biosolids. There is land in western New York that will have standing water for several days after a rain during a period of drought. Matrix Environment did comprehensive soil tests and much of Wheatfield's soil is inappropriate in the current regulations. This change seems tailor-made for Quasar and Millville Farms.

Response: DEC has received many comments over the years that the soil type restrictions are too stringent. There are no similar soil restrictions in federal regulations for biosolids land application or for the land application of manure from large animal farms in New York State. There are other operational and site restrictions to control potential impacts such as incorporation criteria, nutrient loading restrictions, slope restrictions, etc.

Comment: Part 361 allows the injection of biosolids into frozen ground. There is no injection of anything in frozen ground. Farmers don't plow in frozen ground and a plow is much sturdier than the injectors. Some of the injectors use hydraulically pressured air. That does not really work with frozen ground. Frozen soil is water laden and when it does thaw; the biosolids will be transported with the run-off which will go into the drainage ditches that will lead to the streams that will lead to the rivers.

Response: There are times of the season when injection below the land surface is possible even though the surface may be frozen. No injection would be allowed if the biosolids cannot be effectively placed below the soil surface. If injected below the soil surface it will not move to the soil surface and be a constituent of runoff.

361-2.1
Comment: In general, DEC should consider replacing the term *"waste"* used throughout this section with a more general term such as *"material", "beneficial material"* or *"organic material".*

Response: The Department will revise the regulations to attempt to reduce the use of the term "waste". In some cases it may be necessary to use since the law supporting the regulations uses this terminology.

Comment: In the introductory paragraph, Section 361-2. I Applicability, it is unclear if this is meant to include Class A biosolids. Reading further, we can imply that they are not covered and therefore exempt, as the only options offered for pathogen reduction are for Class B biosolids (361-2.5(d)(2)(i)). We believe revising this section to specifically include Class A biosolids language is necessary to demonstrate this explicitly. See proposed addition of (g).
361-2.2 Exempt facilities

(g) Land application facility using Class A biosolids.

Response: The language in the proposed rules did not explicitly indicate that material generated from facilities regulated under the proposed 361-3 would not be regulated under proposed Subpart 361-2. Therefore, an exemption has been added to make this clarification.

361-2.3

Comment:

Paper mill residuals have a beneficial use for land application. We believe that it would be appropriate to regulate the use of paper mill residuals as a soil amendment through a registration process rather than through a permit process. The registration process will result in more recycling of paper mill residuals, and will prove to be less time consuming for both the farmers and DEC. See proposed definition for paper mill residuals in §360.2(b). Additional time for storage is necessary as paper mill residuals may not be used on a daily basis, and when needed, it is difficult for sufficient material for the full site to be delivered in a single day. Also, with more stockpile flexibility, more material can be diverted from disposal in a landfill. To address this opportunity, we propose the insertion of a new subsection §36 1-2.3(e).

(e) A land application facility for paper mill residuals, provided the owner or operator of the facility complies with the following:

(1) The operating requirements of subdivision 361-2.S(a) and 361-2.S(b) of this Subpart are met;

(2) A minimum of one representative analysis of the waste for total Kjeldahl nitrogen, ammonia, nitrate, total phosphorus, total potassium, total solids, pH, Calcium Carbonate Equivalence, % organic matter is submitted
annually.

(3) The application rate does not exceed the nitrogen and phosphorus needs of the crop, exceed 3 tons of lime equivalence, or result in organic matter content in the upper 8 inches of soil in excess of 8%, whichever is more
restrictive ·

(4) The use of the paper mill residuals is beneficial to the soil where the crop will be grown.

(5) The operating requirements of 361-2.5(b)(12) are met, except that the paper mill residuals may be delivered no more than 120 days prior to their utilization.

Response: A registration is warranted for the land application of paper mill residuals. New regulatory criteria have been added to 361-2.

361-2.4(c)(3)

Comment: Food processing waste land application facilities for Long Island must apply wastes based on phosphorus needs of the plants receiving the wastes, and on a comprehensive nutrient management plan for the facility (361-2.4(c)(3)). The plan requires using formulas for nutrient availability that are based on assumptions regarding soil nutrient storage (although each site is supposed to test soils prior to receiving wastes). This does not seem to be well-formulated.

Response: There is currently no land application of food processing waste on Long Island. Land application rates are typically based on the nitrogen needs but can be restricted to phosphorus needs in sensitive watersheds. Nutrient availability calculations presented in the regulations apply to biosolids are based on technical guidance from USEPA.

Comment: It is important that the facility operation plan for the land application approval includes evidence or documentation about the destination facility, delivery schedule, and application rate. We proposed adding a new sub-section to address this, see proposed §361 -2.4(c)(6).
361-2.4(c) a facility operation plan that must include
(6) the location of deliveries of residuals with evidence that the location meets that criteria in 361-2.5(b)

Response: This paragraph requires that the permit application provide information to demonstrate compliance with section 361-2.5. This provision would include the location criteria.

Comment: The procedure of waste delivery and then application are typically separate; please revise as follows:
361-2.4(c)(3) timing and amount of waste delivery, application rate and any supplemental waste or fertilizer that will be used;

Response: The proposed language for paragraph 361-2.4(c)(3) has been revised.

Comment: Testing of biodsolids requires use of the 361-3.7 parameter list, which does not include organic compounds (especially estrogen-active compounds) so that the loading of these compounds is not being regulated.

Response: To date, based on testing and risk assessment, USEPA has not included organic compounds in the testing protocol for biosolids. It is an ongoing area of research and if USEPA revises the testing recommendations, DEC will revise the state regulations accordingly.

361-2.4(e)(3)(iv)
Comment: For phosphorus, 30 percent of the phosphorus applied with the waste must be assumed to be available for plant use. For potassium, 100 percent of the potassium applied with the waste must be assumed to be available for plant use.

For biosolids, we would recommend that 30 percent of the phosphorus applied be assumed to be available for plant use rather than 50 percent as proposed in red text. Our recommended change is based on the following document:
Water Environment Federation factsheet, May 2014, PHOSPHORUS IN BIOSOLIDS: HOW TO PROTECT WATER QUALITY WHILE ADVANCING BIOSOLIDS USE

Response: Subparagraph 361-2.4(e)(3)(iv) has been revised to 30 percent, as suggested.

Comment: The elimination cumulative loading limits is not appropriate. If anything, the current cumulative loading limits were too high and the new regulations should have lowered them rather than eliminate them. I refer you to a recent peer-reviewed publication -- Charlton,A. et al, Long-term impact of sewage sludge application on soil microbial biomass: An evaluation using meta-analysis, Environmental Pollution (2016) available at http://dx.doi.org/10.1016/j.envpol.2016.07.050. I am also disappointed that a review and update of the Part 360 regulations did not include the addition of maximum concentration limits for at least the most toxic of the persistent organic pollutants that contaminate sewage sludge.

Response: Under USEPA regulations and based on USDA research and guidance, if the metal concentration is low enough, the cumulative metal loading is no longer a concern. The biosolids concentration limits allowed in Part 361 are at or below the level that would require cumulative loading tracking under federal criteria.

361-2.5(b)
Comment:
For most residuals, it is impractical to expect to deliver the entire quantity necessary to spread on the field and spread it within 24 hours. It is also impractical to expect most farms to be able to build an engineered storage facility for the short term storage of the sometimes small quantities of residuals for spreading. As a result, we propose to add section **§361-2.5(b)(l2)** to allow the temporary short term field stacking of residuals immediately in advance of spreading. See proposed language.

(12) The temporary field stacking of residuals prior to land application is permitted, provided that the following criteria are met:
i. The field stacked residuals are delivered no more than 30 days prior to their utilization
ii. The volume of field stacked residuals is no greater than the volume of materials needed at the facility.
iii. The location of the field stacked residuals must:
a. Meet the requirements of subsection 2.S(b)(1 ,2,3,6 and 10)
b. Must be located at the facility where the residual will be utilized.
c. Must have a minimum horizontal distance from the features described in the following table:

Feature	Minimum horizontal separation distance (feet)
Occupied building other than those owned by the facility owner or operator	300

Public roads and abutting property lines	100
Potable water well	200
Surface water	100

iv. The field stacked residuals must not be located on slopes in excess of three (3) percent.
v. The residuals must have a sufficient solids content to be stacked at least 3 feet high and maintain a form that sheds water.
vi. The stockpile area must be reseeded to scavenge excess soil nutrients and to sustain healthy ground cover when residuals are not stockpiled on site.
vii. The stockpile area must be sited and designed so that any runoff is not carried beyond the approved utilization area.

Response: Criteria for temporary farm stacking have been added to Part 361-2.

Comment: On page 43 of the Consolidated Regulatory Impact Statement, it says "In many cases, the cost to adhere to the regulatory criteria has been reduced without any reduction in environmental protection". There may indeed be some instances where this statement is true, but as for the regulations on land application of biosolids, the scientific evidence does not support this assertion. The cost of adherence to regulation would be reduced, but there would be a corresponding degradation of the environment. I hope the DEC reconsiders the regulations for land application of biosolids in favor of greater environmental protection, with the understanding that in the long run, this provides greater protection against a future economic burden to all of us.

Response: The Department appreciates the concern as it relates to the land application of biosolids. Department staff closely follow the regulatory and research activities in this area and revise our regulations as needed to ensure environmental protection. The regulations for biosolids use have been in place for many decades and have been revised and updated periodically. Based on our experience and available information, the Department supports this practice as environmentally protective when the regulations are followed.

Comment: Soil pH requirements should be crop specific since not all crops require soils at 6.5 pH or higher. Meeting this pH requirement on all fields is a challenge for land application as there is a narrow time frame in which material can be applied due to weather and planting conditions. Presumably this requirement relates to the decreased availability of metals in higher pH soils, however, metals in biosolids are low enough that biosolids use on soils with pHs lower than 6.5 will not detrimentally impact environmental quality. Please see our revision.

361-2.5(d)(l)(i) Soil pH must be 5.5 standard units or higher.

Response: The Department agrees that higher pH is no longer needed for metal mobility control given the metal standards required. The standard will be modified to 6.0 to reflect the desired level for most agricultural crops in New York State.

361-2.5(d)(2)(ii)
Comment: The owner or operator of the land application facility must achieve one of the following vector attraction reduction requirements ....
(i) waste that is injected below the land surface must be incorporated within one hour of application. No significant amount of waste may be present on the land surface within one hour after the waste is applied; or
(j) waste applied to the surface must be incorporated into the soil within six hours after application on the land.

Response: The regulations will be revised to more closely reflect the language in the federal regulations, as outlined in the comment.

Comment: Value to soil improvement goes beyond just Nitrogen and Lime value, Organic Matter can also improve soil characteristic and its ability to grow crops; see proposed changes.
361-2.5(e)(2) Nutrient or lime content. The waste must contain at least 1 percent total Kjeldahl nitrogen or at least 50 percent calcium carbonate equivalence, has an Organic Matter content of greater than 40%, or provide sufficient documentation to demonstrate that the material is a benefit to the soil or plant grown.

Response: Organic matter content will be added as a benefit provided it is needed for the soil where it will be used.

Comment: DEC and NYSDAM rules should clearly state jurisdiction over agricultural beneficial use of wastes/waste derived products and authority over local entities efforts to assert authority to restrict biosolids use under DEC permits with DAM authority. We request that NYSDEC incorporate the specific authority of NYSDAM for land application of biosolids in agriculture districts into NYSDEC rules to clarify to localities within agriculture districts that local laws or regulations banning agronomic beneficial use of biosolids performed under NYSDEC laws, regulations, and permits will not stand.

Response: While it may be beneficial to inform the public about the extent of the Department of Agriculture and Market's jurisdiction, it is not necessary to incorporate a reference to their authority in DEC regulations. In addition, while proposed Part 361 would regulate the land application facility, it does not impact or control actions by local agencies. The Department will update our website to add information about the farm protections that are available from NYSDAM and how they affect potential local laws.

Comment: The amount of non-manure waste placed in the CAFO permitted lagoon should be further defined to include digestate from an anaerobic digestion facility that excludes biosolids and/or septage as non-manure waste

Response: The proposed regulations have been revised.

Comment: Land application of the mixture of unrecognizable food processing wastes and manure should be exempt for non-CAFO facilities if there is a CNMP in place and the manure storage structure was designed and built in accordance to NRCS Code NY313 or section 2.7 of this Subpart.

Response: The proposed regulations have been modified to incorporate the suggested exemption.

Comment: Requiring the generator to register the facilities that beneficially use unrecognizable food processing wastes would place a burden on the generator to manage and monitor the facilities operations which it has no control and would be an additional cost of doing business.

Response: The provision has been revised.

Comment: Elimination of the Residential Setback (500 ft.) is good, but should be the same as the manure spreading setback required for CAFO Facilities (XX ft.). In most rural areas where residences utilize potable wells, the setback should also be the same as CAFO requirements (100 ft.). The Department should consider setbacks for spreading a mixture of manure and un-recognizable food processing wastes be the same as the CAFO regulations. This would allow the farmer to beneficially utilize wastes on a larger portion of cropland and reduce the burden to cover larger setback areas with other fertilizer materials.

Response: Unrecognizable food processing waste land application buffers to water sources will be revised to be consistent with the CAFO criteria.

Comment: The buffer zones stipulated are inadequate. The proposed regulations set distances to wells, boundaries, residences etc. without a word as to what type of earth the "biosolids" are being applied to. Slope degree is mentioned but again no mention of what the composition of the ground. I think what type of soil is involved would influence what the buffer zone and slope considerations should be.

Response: The quantity of runoff is dependent on soil and site characteristics. However, it would be onerous to develop appropriate buffer zones for each application site. In many cases, the buffer zones needed would be less than the regulations require. The buffer zones have been in the regulations for many years so the Department has field experience with these criteria and have not found them to be inadequate for runoff control.

Comment: That is equivalent to more than one half inch of rain. In many areas a half inch of rain over a short period will end up with run off. The "biosolids" are not applied slowly over hours but quickly. Again, with no mention of what type of soil, the proposed regulation will not protect human health nor the environment in many cases.

Response: The ability of the soil to absorb water is dependent on a number of factors including soil type, moisture holding capacity, previous precipitation, slope, etc. Cornell conducted research with hydraulic loading and found rates in typical setting could reach 40,000 gallons per acre in a single application without runoff. The Department has not seen runoff problems with the current restriction, which has been in the regulations for more than two decades.

Comment: Requiring incorporation in all cases within 24 hours is not an acceptable agricultural practice on cropland such as grass and hay. Grass and hay cropland in many cases yield multiple cutting during the growing season. In these cases, the operator has a very short window of three days to apply waste materials before the plants re-bloom and start to grow and absorb the nutrients. Part 360-4 2 (b)(1)(i) excluded incorporation of non-recognizable food processing wastes. The language of Part 360-4.2(b)(1)(i) should be extended to Part 361-2.3(b)(1).

Response: The Department has issued variances in those cases where the crop would be damaged by incorporation (hay, etc.) if other protective factors are present such as low slopes. The Department prefers to continue to handle these requests on a case-specific basis.

361-2.7(a), (b), (c)
Comment: These are unreasonable requests. Who will be taking the samples? The State or will the state be paying for a third party to take the unknown number of samples required? This is unclear. In the 6 years that I have operated our facility it does not happen every 12 months – in fact I think I only came close to a few hundred yards of our volume limits. This is not a feasible request unless NY State is issuing large areas of crushed fill material jobs!

Response: It is Department staff's understanding that the commenter operates a construction and demolition debris processing facility. Presuming that the comment referred to the impact of Section 2.7 on C&D debris processors, those facilities would not be subject to the criteria proposed in 361-2.

361-3 Composting and Other Organics Processing Facilities

Comment: The proposed regulations do not appear to address diversion of source-separated materials that contain contamination. For a variety of reasons, material may arrive too contaminated to be processed at the intended facility. The proposed regulations are not clear about how such materials are to be evaluated and processed. DEC should make clear revisions to the regulations concerning operating criteria related to the collection, transport, and processing of source-separated materials.

Response: Part 361 governs the facilities that process organics wastes into products, such as compost. The Department recognizes a potential for contaminants (e.g., plastics, etc.) to be present in food scraps. The facility must address how these

contaminants are removed and that information is reviewed by the Department to determine if it is adequate.

Comment: Registrations have been proposed for 1, organics processing facilities that accept less than 5,000 cubic yards or 4,000 wet tons; 2, Anaerobic digestion or fermentation facilities that accept less than 50 tons; and 3, all organics processing facilities that process only food waste, with no limit on quantity. Though there are not many of these facilities locate in North Brooklyn today, outside of the digesters located at the Newtown Creek Sewage Treatment Plant, with the city poised to scale up compost collection from residents and businesses in the coming decade, North Brooklyn could see a huge impact from increases in facilities of these types. We urge DEC to require permits rather than registrations for all of these facilities if they're located in environmental justice communities.

Response: DEC takes environmental justice concerns very seriously and appreciates the concerns raised. Due to buffer zone requirements, there are not many organics processing facilities, other than community gardens, etc. in urban areas. However, should composting increase, the detailed operating criteria proposed in subdivision 361-3(c) which include requirements to turn over waste piles, and the requirement for a written run-off plan are expected to minimize the potential impact from registered facilities wherever they may be located in the state.

Comment: The new policy on anaerobic digestion should be written to include any other current or future technology that can convert biomass and approved organic materials into a clean synthesis gas or a fuel gas for the production of electricity. Such a policy will minimize greenhouse gas emissions production and should become mandatory for any/all existing landfills. At a certain effective future date, these convertible materials should be banned from landfill disposal as new alternative and innovative clean energy technologies come on line. Banning these materials from landfill disposal will reduce greenhouse gases as well as our overall carbon footprint.

Response: Subpart 361-3 governs facilities that convert organic waste into soil products. The Department does not preclude other conversion technologies that produce a fuel in any way. However, the appropriate regulatory location for those facilities is Part 362.

Comment: The record keeping requirements may not be detailed enough to evaluate whether source-separation is being maintained. There is no subdivision in the proposed regulations in Part 361 applying the general record keeping requirements in Part 360 to these facilities. While there are general statements that the requirements of Part 360 apply to composting facilities, the absence of a subdivision like 361-1.6 apply. Generalized annual record keeping requirements are likely not sufficient to evaluate compliance with the proposed regulations, especially to ensure that source separated materials are processed only at authorized facilities.

Response: 360.19(a) specifically states that the general operating requirements are applicable to all registered and permitted facilities. In addition, each Subpart references Part 360. The Department believes these provisions are sufficient to impose the general requirements on all facilities.

Comment: Any active sand mine or former sand mine that is yet to be fully remediated within a sole-source aquifer should be prohibited from operating as a storage and/or processing site for composting or mulching purposes. The proximity of these sites to groundwater will lead to greater contamination potential.

Response:. The proposed regulations specify thresholds for composting and mulching facilities that would be exempt, require a registration or would require a permit. The comment suggests that a composting or mulching facility of any size should be prohibited if siting within the footprint of a mine. The diversion of waste from landfills is beneficial and is consistent with the State's solid waste management plan. However, the proposed rules would set standards for composting and mulching facilities to ensure proper handling of waste. For registered facilities, the detailed operating criteria proposed in subdivision 361-3(c) which include, among other things, requirements to turn over waste piles, and the requirement for a written run-off plan. These measures would minimize the potential impact from registered facilities wherever they may be located in the state. For facilities that require a permit, the Department would consider the site-specific impacts of a project and would consider the environmental conditions of the location proposed by an applicant.

Comment: Composting and mulch facilities can significantly impact groundwater, which has been shown repeatedly on Long Island. It is clear that organic waste processing facilities are likely to contaminate groundwater and place the drinking water for sole-source aquifer regions like Long Island at risk.

Facilities in sole-source aquifer areas should be required to adhere to the following requirements:

* Shelter piles from precipitation
* Place piles on impermeable surface
* Test runoff/groundwater immediately surrounding for pesticides, heavy metals, VOCs, radiation
* Manage/control runoff from the facility in accordance with a written plan
* Increase staff for inspections of these facilities

Response: Like any solid waste management facility, organics processing has the potential to cause adverse impacts to surface water or groundwater, if such activities are not regulated. The proposed regulations include a number of new rules to address the issues raised in the comment, such as the need for a run-off control plan for both registered and permitted facilities. As to the suggestion that organics be sheltered from precipitation, it would be impractical to impose such as requirement since the use of sunlight and water are necessary components of the composting process. The

comment also notes that staff should be increased for inspection. However, the allocation of personnel resources is beyond the scope of this rulemaking.

Comment: The Department should adopt proposed regulatory changes that will facilitate small-scale composting while protecting local communities. We support the bulk of these proposed changes, but recommend one modification that is intended to provide added protection for local communities. We urge the Department to clarify that, in determining whether or not to allow for these exemptions from permit or registration requirements, significant expressions of concern from affected communities regarding facilities with repeated complaints will trigger the more comprehensive permitting process. The Department should develop regulations that phase out the landfilling of food and yard waste. We urge the Department to explore all available avenues to increase composting and organics processing-and more broadly reduce food waste-across the state. The best option would be comprehensive food waste legislation that included measures to help prevent, recover, and recycle food waste. However, even without such a bill, the Department could take important steps to move food waste recycling forward. In fact, the Department could consider adding organic matter to the list of disposal prohibitions included in proposed Section 363-8.1(o). Rotting organic matter in our landfills is very real source of greenhouse gases and a waste of valuable nutrients that should be returned to the soil. We urge the Department to move forward with measures to prevent and recover food waste and ban organics from landfills.

Response: Legislative changes are outside the scope of rulemaking, however, the Department agrees that diversion of organics from landfills is beneficial. As to the request that public comment or interest be used to determine which facilities should be exempt or registered, the extended comment period provided for the proposed rules and the public comment which follows notice of the revised rulemaking provides public involvement in the content of any final rule promulgated by the Department.

Comment: We encourage DEC to consider other opportunities for expansion of small-scale recycling and reuse facilities. In the current DEC regulations, under "Operating Criteria" for a registered composting facility, it does not specify when the material needs to be processed; the only restriction is that organics cannot stay on site for more than 36 months. However, the newly proposed operating criteria specify that organic material must be processed on the day it is received and that it cannot stay on site for more than 24 months. Reducing the time period from 36 months to 24 months is a substantive change, one that composting facilities may not be able to adapt to. In addition, weather-related issues and lack of local enforcement could hinder a site's ability to abide by a 24 hour processing rule, when before they had no time limit for processing material.

Response: DEC agrees that 24 months may not be sufficient for smaller facilities, the regulations have been revised to allow 36 months for exempt facilities. However, registered facilities should have the ability to compost and move material off-site within 24 months. The requirement for processing on the day received has been revised to allow a longer period if individual containers are used.

Comment: The 1% limit on non-organic material [per 361-3.3(b)(10)] is difficult if not impossible to accurately monitor and comply with. There is a similar concern about the requirement to process organic waste on the day received per 361-3.3(b)(13). We understand based on feedback gathered from NYSDEC public information sessions that this provision applies to SSOW operations and facilities only. Yard waste composting facilities will not be held to this standard. We recommend deleting the limit on non-organic material since operational and end-use considerations will determine what is appropriate for each SSOW operation and facility.

Response: The regulations have been revised accordingly.

Comment: We were rather dismayed to not see the recommendations that the DEC collaborated on in -- the DEC's collaboration of the Suffolk County Department of Health study for investigation of ground water in composting facilities. It was an endeavor that started in 2009. The report came out this year in 2016. It is clear science that composting is causing manganese, heavy metals, in unprecedented amounts. You know, the ground water standard is 300 ppm, and in the study, 25 they are finding them as high as 58,000. So whether it is that, alpha radiation, gamma radiation was accelerated or was increased, and thorium and other heavy metals, ammonia. We would urge you to incorporate the recommendations here, which were sheltering the piles from precipitation placing the piles on impermeable surfaces, capturing storm water. I couldn't believe that it wasn't in the proposed regulations.

Response: Like any solid waste management facility, organics processing has the potential to cause adverse impacts to surface water or groundwater, if such activities are not regulated. As stated, above, the proposed rules add a new subpart for mulch processing facilities which are exempt under the current regulations. This new subpart contains a number of requirements to control potential impacts from these facilities, including the development of a run-off plan that must be approved by the Department.

Comment: 361-3 is convoluted. The section needs to be better organized by completely separating the requirements for composting from anaerobic digestion and by clearly separating the waste source categories such as biosolids, municipal waste, source-separated organics and so on. The lumping together of some waste source categories results in contradictions when looking at requirements for individual waste sources.

Response: Substantial reorganization of the Subpart has occurred in the revised rulemaking.

Comment: In 361-3, the term “digestate” needs a definition to fully explain what it is. In addition, digestate should not be considered a “product” since it is not something that any consumer will be able to buy off the shelf or go to a garden supply outlet and order a truckload for a home garden, such as they could with compost. The end use of

digestate is specialized and limited to only a few options that should be tracked and documented.

Response: The Department agrees that the regulations for anaerobic digesters and the use of digestate needed additional clarification. The Subpart has been rewritten to separate the standards applicable to anaerobic digesters and to specify the appropriate use of, and definition of, digestate.

361-3.2(c)
Comment: Certain facilities for animal carcasses are exempted. The NYSDOT recommends that transportation maintenance facilities, where roadkill animals are composted in accordance with NYSDOT guidelines be exempted. Please confirm that 360-14(c) includes transportation maintenance facilities under this exemption.

Response: The exemption found in 360-14(c)(1) would apply to a compost facility located at a NYSDOT maintenance facility for animal carcasses generated on State roads and properties. To avoid any confusion, an exemption has been added to 361-3 to govern NYSDOT composting operations.

Comment: Composting sites <10000 cu yds/yr but greater than 3000 cu yds/yr are to be registered; all runoff must be handled "in a manner acceptable to the Department." A run-off plan is required so that run-off is managed onsite and organic matter movement into soil is "minimized." These terms are not defined, and so are too broad.

Response: The appropriate means to control runoff is site specific and will be determined by the Department based on the specifics of the operation.

Comment: The regulations allow a compost facility that manages either 5,000 cu yds or 4000 tpy of food waste to be registered. This is a garbage truck/day of food waste: that's a big input of potentially problematic material.

Response: The Department agrees that there is potential for these facilities to cause nuisance conditions (odors) and environmental problems (water impacts, etc.). The Department has the ability to bring enforcement action against a facility that does not comply with the required criteria.

Comment: Maximum holding times for compost will impede the marketing of bulk volumes of material, common in the industry based upon usage and transportation needs. This will add expense and market dilution by needing to move material to meet prescribed time limits. Longer holding times are recommended.

Response: The maximum holding times is 24 months for composting facilities, which should allow for marketing the product.

361-3.3(a)(4)
Comment: Unless there is something substantially different between this section and section (2) change to "not limited to food processing waste". We suggest that DEC remove this section and revise 361 -3.3(a)(2) to include food processing waste.

Response: The regulations have been revised to include food processing waste into the other provisions.

361-3.3(b)(2)
Comment: We disagree with the new criteria, and would prefer to reinstate the current criteria as stated in 360-5.3(b)(2)(ii). It precludes the use of other potentially good materials (Short paper fiber, leaves, possibly some papers or cardboards, etc.). Please see the revisions.
The process must use acceptable amendments and bulking agents and follow an acceptable method of composting that minimizes odor generation and results in a mature product, such as **uncontaminated, unadulterated wood,** clean unadulterated sawdust, wood shavings or other uncontaminated material with a high C:N ratio.

Response: For registered facilities, the intent is to limit the amendments to a form of clean wood material. Broadening the criteria leads to facilities that could receive unlimited amounts of “amendments” that may otherwise require a permit under proposed 361-3.

Comment: There should be a separate legal classification for all thermal technologies that do not use combustion of municipal solid waste. Providing favoritism to a dirty-sourced feedstock and allowing anaerobic digestion processes a less rigorous regulation is not good environmental policy and invites many questions. Anaerobic digesters are not the cleanest solution and should not be given a free pass, especially in light of equal or better, more sustainable environmental solutions. This type of approach and practice kills any possibility for further mixed waste processing facilities in NYS. These types of facilities can provide numerous jobs for entry level positions, semi-skilled equipment and vehicle operators and drivers to highly skilled mechanics, plant operators and management employment. These facilities also bring huge economic development opportunities to a community as well as a significant tax base as well.

Response: Subpart 361-3 governs facilities that convert organic waste into soil products. The Department does not preclude other conversion technologies that produce a fuel in any way. However, the appropriate regulatory location for those facilities is Part 362.

361-3.3(b)(13)
Comment: While we generally agree with this requirement, there should be some flexibility built in to allow for processes that might need a minimum volume (batch) to be processed efficiently that cannot be collected in one day. Our recommended changes are in bold:

Other than leaves or packaged products, 50 to 100 tons or 150 cubic yards ~~all~~ **organic waste must be processed on the day received, or** within 72 hours of being received with DEC approval.

Response: The regulations have been revised to allow longer storage in containers.

Comment: The operation plan of a composting sites >10000 cu yds/yr must include a leachate (runoff) management plan (including treatment & disposal); 361-3.4(b)(10) implies a "low permeability soil base" may be sufficient to control leachate releases. However, 361-3.5(a)(5) exempts yard waste facilities from generating leachate, specifying only that run-off must be managed in a "manner acceptable to the Department." Curing compost appears to be required to be stored for 50 days on low permeability soils (inferred from 361-3.5(a)(7)(iv) which exempts products older than 50 days from "the requirement" that they be stored on low permeability soils). Treatment and disposal is not specified but presumably will be SPDES and other requirements. So, what exactly are yard waste facilities required to do?

Response: Yard waste composting facilities are not required to operate on a low permeability pad. However, runoff must be controlled on-site in a manner that will not cause groundwater violations. These controls are case-specific and depend on the site and the operations. In many cases, the required stormwater management plans will be able to provide the information needed to present to the Department.

Comment: Permitted composting sites must have an odor control and response plan; the contents of these plans is not defined.

Response: Odor control methods depend on the site and the details of the operation of the facility (type and amount of waste, enclosure, etc.). The Department reviews the plans as part of the permit review process and works with the applicant on the contents of the plans that would be acceptable for the particular facility.

Comment: Source separated organics (SSO) composting-anaerobic digestion (AD) facilities need to specify the point of generation of all SSO, including plans to minimize unacceptable wastes; residences appear to be exempted; for commercial generators, appears to require copies of contracts specifying acceptable materials. That's a great deal of detail for a permit.

Response: The Department needs to know the type and characteristic of the waste to determine if the proposed facility can effectively process the material. A copy of the contract language is needed to determine what requirements the generator must follow and how the waste must be separated at the source.

Comment: Unloading, storage and processing of compostables at facilities > 100 tpd (36,500 tpy) must be enclosed; this will be a major issues for some of the larger Long Island compost facilities.

Response: The enclosure requirement was meant to apply to biosolids and municipal solid waste facilities. The regulations have been revised accordingly.

Comment: Requires each generator of SSO to collect SSO separately from other wastes, and "remove inorganic and non-processible materials," which appears to be a great disincentive from participating in SSO programs (by necessitating per-treatment of the separated wastes).

Response: For a source-separated organic to qualify for the SSO provisions in the regulations, the organics must be separated at the source. It does not necessarily require separating a mixed material, it is most likely accomplished by having collection bins that are designated for organics only.

Comment: I like the way you wish to protect compost from heavy metals and other pollutants and that you want to install fixed radiation detectors to monitor incoming waste so that any above 25 pCi/g will not be accepted. Please be sure the radiation detectors are technologically sophisticated and measure different types of radiation. These detectors are not cheap but they are essential.

Response: The facility is responsible for the proper installation and operation of the detector.

361-3.5(a)(7)
Comment: There may be a typographical error in the first line of 361-3.5(a)(7). Should it read "…and facilities that accept at least 10 wet tons…"?

Response: It is a typographical error. The regulations have been revised.

361-3.5(a)(7)(iv)
Comment: Appears to require curing compost to be stored on low permeability soils for 50 days (this clause actually relieves 50 day old or more cured compost from "the requirement" to be so stored; "the requirement" does not seem to be in the regulations). The regulations need to be made clearer.

Response: The regulations have been revised to clarify that the compost must be stored on a pad for 50 days.

361-3.5(a)(20)(v)(a) and (b)
Comment: These clauses should both require, at a minimum, registration given the sensitivity of the subject. There is no good reason to ease the use of biosolids-derived digestate and yet, require registration of digestate derived from any other waste materials that do not contain biosolids.

Response: The provision cited required a permit for the use of digestate that is derived from the digestion of biosolids unless it has been treated by a Class A technology. This

is not an easing of the regulatory requirement – it is the same permit that would be required for biosolids land application from other treatment processes.

361-3.5(b)(15)
Comment: SSO will require a level of pathogen reduction as determined by the Department (based on the type of material and its end use). So, some pathogens are to be allowed?

Response: Some SSO have a low probability of having pathogens present. The provision allows the Department to review the material and determine if pathogen reduction is needed.

361-3.5(c)
Comment: 361-3.5(c) where it states that digestate "may be considered a product" seems inconsistent with 361-3.5(a)(20)(v)(a) and (21)(vi)(a) which may require a permit or registration. At a minimum, it should be registered. Digestate should not be considered a "product' under any circumstances.

Response: Digestate may be dried or otherwise processed so that it is similar to other soil products. The proposed regulations have been revise to provide additional details concerning this provision.

361-3.5(d)(1)
Comment: Requires annual testing of SSO facility products for (primarily) metals and pathogens. Is this adequate, if the Department suspects the material may be causing problems?

Response: The testing frequency for SSO products is dependent on the amount produced, as outlined in Table 5. SSO are primarily food scraps, so the potential for pollutants (heavy metals) are low and operating criteria is required to achieve pathogen reduction.

361-3.7 Table 3
Comment: We agree with this modification. We would also recommend changes similar to those recommended for Table 2. We would also recommend that the frequency reduction potential also be applied to Tables 4 & 5 Annual Product Testing Frequency.

Response: The Department agrees to the proposals for Table 2 and will revise Table 3 accordingly. Unlike biosolids entering the process, the products are the actual material that is distributed to the public so the Department does not agree with a reduction in the analytical frequency for products.

361-3.7 Table 4 and 5
Comment: We believe these categories are too small and result in unnecessary analytical work and expense. Essentially, the upper limit applies to any facility that generates one truckload of material per day. We would recommend using the same

testing categories and frequencies as we recommended for Tables 2 & 3, with the potential for frequency reduction based on low metals content.

Response: DEC believes the frequencies are reasonable for the product testing.

361-3.7 Table 6
Comment: We disagree with this revision, in that it essentially makes EQ metals standards the maximum allowable for both feedstocks and products. The 503 maximums were already shown by risk assessment to be protective of human health and the environment when used according to BMPs. We would recommend at a minimum that the column heading be changed to annual average or, ideally, restore the original columns from Tables 4 & 7 from 360-5.10.

Response: DEC believes that the Table 3 standards of Part 503 provides for the protection of the public health and the environment regardless of the future use of the soil, such as the conversion of farmland to single family home development. These limits have been described as the no adverse effect levels by USDA. In addition, the Table 3 limits are readily achievable for a treatment plant. Under Part 503, the Table 3 limits are a monthly average. Since the majority of facilities do not have to analyze more than once a month, the Table 3 limits become a maximum limit in practice. We will revise the regulations to allow a monthly average for those facilities that may do more than one analysis in a month.

361-3.7 Table 7
Comment: One change that we disagree with is the change of maximum hold times for Salmonella and Fecal Coliform samples (from 24 hours to 6 hours). While this may make sense for drinking water samples, it has no basis in reality for sludge, compost, and biosolids samples where the actual materials are stockpiled and exposed to the environment for relatively long periods of time. Adherence that the lower hold time will result in added cost and labor for no additional benefit. While there is a clarifying footnote (24 hours for Class B anaerobically or aerobically digested systems and Class A compost processes), it should be 1) revised to read Class A organic processes or 2) made clear that compost includes all Class A organic processes.

Response: The table has been removed because the criteria from USEPA are revised periodically. Guidance on the current criteria will be made available from the Department.

361-3.7 Table 2
Comment: We agree with this change but would recommend changing the next lower level from > 1000 to 15000 tpy to > 2500 to 15000 tpy, and the next lower to > 200 to **l** 000 tpy tc;> > 200 to 2500 tpy. As written, the third level is a very narrow category (roughly 800 to 5000 wet tons) while the fourth level is considerably wider (roughly 4000 to 75000 wet tons). This assumes cake solids of 20 to 25 %.

Response: Table 2 and Table 3 have been revised accordingly.

361-3.3(b)(10)
Comment: This section would limit composting and other organic processing facilities to less than 1% non-organic material present. Given the amount of soil, gravel, and similar material that is often associated with tree and similar debris, this limit seems unachievable. In addition, no testing protocol has been promulgated to document compliance with this requirement.

Response: The proposed regulations have been revised accordingly.

Comment: The 1% limit on non-organic material is difficult if not impossible to accurately monitor and comply with. There is no need for the regulations to specify such a percentage limit on non-organic material, and we recommend deleting it, since operational and end-use considerations will determine what is appropriate for each SSOW operation and facility

Response: The proposed regulations have been revised accordingly.

Comment: We do not fully understand what the Department is trying to achieve with this requirement. It is unreasonable to process "all organic waste" (e.g., tree stumps, grass clippings, etc...) on the day it is received. Perhaps the Department is referring to "putrescible" waste that can cause odors? This should be clarified such that it is not too broad and unnecessarily restrictive.

Response: The proposed regulations have been revised accordingly.

Comment: Chromium should be removed from Table 6 testing requirements.

Response: Chromium has been removed from federal regulations governing the land application of biosolids at 40 CFR Part 503. However, there have been issues with pressure treated wood being used as amendments and the analyses for chromium in products helps to insure this type of wood is prohibited.

361-4 Wood Debris and Yard Trimmings Processing Facilities

Comment: The Department is strongly urged to require documentation from the applicant (or municipality) that the facility's proposed operation complies with the local zoning ordinances prior to the issuance of a registration.

Response: Applicants are obligated to comply with all local, State, and federal regulations regardless of their ability to obtain a Registration from the Department. The determination of whether the applicant is compliant with the requirements of another jurisdiction, such as local zoning, is best decided between those parties.

Comment: Under the proposed regulations, quality of life issues specific to Long Islanders are not being addressed with regard to mulching and composting facilities. As

I am sure you are also aware, there are many areas within the state that are not nearly as densely populated as Long Island. In these communities, a commercial mulching facility may not be a nuisance to the surrounding residents, as there is ample space between these facilities and the closest homes. Because of the diverse nature of New York State, both geographically and by population density, a one-size-fits-all determination is not the best course of action when regulating mulch and composting facilities. We would strongly suggest that the DEC consider adding language similar to that in our bill to ensure that, no matter what, Long Island residents will have their quality of life and water supplies protected.

Response: The Department has revised the regulations to include additional criteria for Long Island based on the potential groundwater impacts that have been shown with Long Island soils. Nuisance issues can affect any neighborhood, including those in other locations in New York State.

Comment: I think we're trying to fix a bunch of problems with a wide brush. This is a big and diverse state and people treat their properties differently. Laws like this will put a small business like us out of business. I know the governor is saying he's trying to build business and trying to help small businesses, and this would be a huge detriment to us. The pile heights and the sizes and the spacing are too restrictive. I own less than seven acres in the Town of Colonie, and they're talking about making the piles 15 foot high and no wider than 30 foot. I wouldn't have enough acreage to do the 8- or 10,000 yards of mulch that I produce as of right now. Bonding and closure plans, they are taking a lot of the laws that are written for landfills and they're trying to push them toward the small mulch yard. If you want to know where my product's going to go, it's a commodity. It's not garbage. It's not old steel. My product is a wanted commodity. Once a year my yard cleans out and I have to buy more product and make more mulch. So, it's very restrictive for us. It's going to be a huge cost or it could put us out of business. Not only that, they're going to create a monopoly. We're small. There's a lot of small mulch yards in the Albany area, and there's a couple large The large ones are going to be able to absorb these costs. We're not going to be able to. It will put a small guy like me out of business and the large company will be able to take over. I think that's wrong. I would hope the state would not want to do this. Time limits for pile storage. I take compost in in October. I have six months to get rid of it. How do I get rid of it in February? Who wants it? So, now the product has to stay on my land, I have to send to a landfill? It doesn't make sense. Some of the ideas that we do are recycling. We're recycling product for a better use for our families and for the future. Recordkeeping, stringent recordkeeping. Every guy who brings a load of wood chips into my yard, I have to tell -- I have to write down where it comes from and put it down and where the load is going. Most guys don't even know.

Response: The regulations have been revised to address the concerns raised. The site described would require registration under the revised regulations and would be allowed to utilize the current pile sizes and holding times for the mulch prior to distribution. Bonding is not required and maintaining records of each source is not required, just a summary of all material received and distributed.

Comment: I really think that we need to inform. There's got to be thousands of registered mulch companies like ours throughout the State of New York. If this is true, what I understand, and I just learned about it less than an hour ago, we are out of business. We can't comply with these laws. It's a family business. My kids run the business now, most of it. 14, 15 employees. I know it's not big. It won't hurt the governor's office at all. I would please ask that you mail everyone that this law reflects that's registered with the state like us a letter, so they know about it. Nobody knows about it. It's very important they find out or there will be a lot of companies going out of business.

Response: The Department agrees that not all mulch facilities present the same level of potential risk. The regulations have been revised to recognize that facilities in less dense areas can operate under different requirements without causing environmental harm.

361-4.2
Comment: include (e) A facility that has been in operation for over 10 years and is located in a county with less than 750,000 residents.

Response: The regulations have been revised to address the concern for many existing facilities in upstate New York where groundwater concerns have not been demonstrated and fires, odors, and dust have been less prevalent by allowing larger pile sizes. The temperature monitoring requirements and buffers have also been revised to allow greater flexibility for mulch processors.

361-4.2(b)
Comment: This should be revised to: A facility that stores unadulterated wood debris in an area not more than three acres -provided the piles adhere to the size restriction found in paragraph 361-4.3(a)(2) of this Subpart. The acreage is determined by the footprint of the unadulterated wood debris on-site, excluding areas where unadulterated wood debris is not present.

Response: The exemption has been revised to eliminate the buffer zone to the property line and a quantity instead of an acreage.

Comment: Wood chip-mulch facilities less than 2 acres in size are exempt; this does not seem to be wise, especially in the downstate regions.

Response: The regulations have been revised to exempt facilities that contain less than 10,000 cubic yards. These facilities must still comply with the pile size criteria to reduce potential impacts.

Comment: The current language may allow for sand mines operating within a sole-source aquifer region to accept storm debris from a designated disaster as a possible exemption. DEC should establish clear guidelines for sand mines accepting storm

debris, which limit the time frame that sand mines can accept storm debris, and prohibiting the processing of vegetative waste that may be included as storm debris. After Superstorm Sandy, many of the facilities that accepted such storm debris were storing that debris for long periods of time and/or processing it into mulch onsite. This potential loophole should be expressly forbidden for sand mines in a sole source aquifer for groundwater protection.

Response: The revised regulations require facilities to have approved plans to address potential groundwater impacts. This will give the Department to evaluate the characteristic of a particular site, such as a mine, to determine of the plan is sufficient.

Comment: Storm debris storage/processing facilities are exempt; this does not seem wise, given the downstate issues with mulch facilities.

Response: Storm debris management is handled under specific Department approved guidelines during the cleanup and is handled on a case-specific basis depending on the type and severity of the storm.

Comment: Facilities processing <30,000 cu yds/yr need a registration; 30,000 cubic yards is a lot of material.

Response: The registration contains a number of piles and site criteria. If these criteria are not met, the facility can be required to obtain a Part 360 permit.

Comment: Runoff from a registered or exempt wood chip-mulch facility is not leachate but must be managed in a manner acceptable to the Department; this is not specified enough.

Response: The Department will review the runoff plans on a case-specific basis to determine if the controls are adequate for the size of the facility and the site soil characteristics and other properties. The Department will use available information available from research and other regulatory programs to make the determinations of adequacy. These are case-specific reviews and criteria.

Comment: Remove 25 feet to a property line.

Add: 200 feet to a residence, however this does not apply if the residence is owned by the facility.

Response: The proposed regulations have been revised accordingly.

361-4.3(a)(2)
Comment: All piles of material, both unprocessed and processed, cannot exceed 15 feet high and 30 feet wide at the base and piles must be triangular in cross section. However, a pile may exceed 15 feet in height, provided that the internal temperature is checked at least twice per week and must have an internal temperature of less than 140

degrees. If temperature exceeds 140 degrees, proper industry standards must be utilized immediately to reduce the temperature.

Response: The Department agrees that pile height can be higher than proposed if the material is unprocessed or additional temperature monitoring occurred. The regulatory criteria have been revised accordingly.

Comment: There should be a delineation between unprocessed and processed material pile height. We request the Department consider alternatives such as an unprocessed pile height of 20' (30' wide at base and trapezoidal in cross-section) and processed material pile height of 18 ' high (30' wide at base and trapezoidal cross section).

Response: The Department agrees that pile height can be higher than proposed if the material is unprocessed or additional temperature monitoring occurred. The regulatory criteria have been revised accordingly.

Comment: There should be a difference between processed and unprocessed material. Unprocessed material should not exceed 20ft. height and 30ft. wide at the base. Piles must be in trapezoid in cross section. For processed material pile height cannot exceed 18ft. high and 30 ft. wide the cross section and should be in a trapezoid form.

Response: We agree that piles height should vary depending on whether the material has been processed. Regulations have been revised accordingly.

Comment: We recommend increasing the pile heights to 60’ and allow for a width that is proportional to allow for the safe operation of management vehicles on the pile. The proposed heights and width unfairly limit materials allowed to be kept on site and encumbers existing business models developed for the size of the properties now in use.

Response: The pile site has been altered, however 60 feet is excessive and can lead to fires, odors, and other concerns.

361-4.3(a)(3)
Comment: All piles of material, both unprocessed and processed, must be accessible to emergency vehicles.

Response: The regulations have been revised to require 10 feet between piles.

Comment: The separation of piles could be reduced to 15' wide as this is sufficient space for process equipment, fire trucks and water trucks.

Response: The regulations have been revised to require 10 feet between piles.

Comment: The separation difference should be 15ft. wide (not 25ft). 15ft. is sufficient space for process equipment, fire and water trucks to assess the material.

Response: The Department agrees that 25 feet is excessive and has revised the criteria in the regulations.

Comment: Recommend a pile separation of no more than 10'. The proposed restriction severely limits the land use availability on site. Best management practices at our facility require a 10' separation because this allows for the safe travel of vehicles including emergency response equipment.

Response: The Department agrees that 25 feet is excessive and has revised the criteria in the regulations.

361-4.3(a)(4)
Comment: Recommend definition to what could be considered combustible so that debris from the normal course of business could not from wind or truck spillage is not a violation.

Response: This provision has been removed from the regulations.

361-4.3(a)(5)
Comment: Recommend restacking requirement be 180 days.

Response: The proposed regulations have been revised accordingly.

361-4.3(a)(6)
Comment: Recommend removal of this provision as normal maintenance of piles requires use of heavy machinery on top of piles to properly manage.

Response: Compaction has been shown to increase the potential for fires in mulch piles, therefore, the measure is appropriate to include in regulation.

Comment: It is sufficient to monitor the temperature once a week.

Response: The proposed regulations have been revised accordingly.

361-4.3(a)(6)(b)
Comment: Recommend a "timing out" provision be added to the section so that a company that is in compliance for 5 straight years can move from annual reporting time frame to a 5 year period. Our experience is that these reports take a lot of our associates time and effort and because we are regularly in compliance no action comes out of the reports. This type of provision also encourages companies to be in compliance as it reduces reporting time and cost burdens.

Response: The Department is currently working on methods, such as electronic reporting with pre-populated fields, to ease reporting requirements.

361-4.3(a)(7)
Comment: Please clarify this requirement. What is it intended to prevent?

Response: Research has shown that these variations can lead to additional risk of fires in the mulch piles. This provision has been removed because it is too vague for practical implementation.

Comment: The Department should reconsider monitoring temperatures once a week. Minimum.

Response: The proposed regulations have been revised accordingly.

Comment: Since there are several ways a fire can be extinguished, the Department should consider including alternatives or request the permit holder to confer with local fire Departments for proper procedures.

Response: The proposed regulations have been revised accordingly.

Comment: Wood chip-mulch facilities>30,000 cu yds/yr need to be permitted.

Response: Under the rulemaking, these facilities would require a permit under Part 360-4.

Comment: A permitted wood chip-mulch facility is required to have stormwater controls that minimize the potential for organic matter to reach groundwater-surface water "resources"; this is not well defined.

Response: Stormwater controls may not be sufficient in all cases to protect groundwater. DEC is currently funding a research project being conducted on Long Island by a consulting firm familiar with groundwater assessment and remediation. The results of the research project are expected in 2017 and will be used to determine what the Department will accept from facilities as part of their groundwater protection measures.

Comment: If tree debris is hauled from a jobsite to a facility, who is responsible for the recordkeeping? The trucker doing the hauling? The receiving facility? The generator? (What if not in the threshold quantity?)

Response: Under the proposed rules, recordkeeping for registered and permitted facilities is the responsibility of the mulch processing facility, not the transporter or generator.

Comment: Land clearing and wood waste facilities are no longer exempt material recovery facilities. If the sole stated reason for requiring registration is to collect estimated data on small yard waste chipping operations, there are equally effective ways of collecting this data other than imposing a registration requirement on those small operators. The registration is additional paperwork and will provide a disincentive to small rural municipalities to continue their yard waste chipping programs.

Response: Mulch facilities can be a source of odor, dust, and fires. Small, rural facilities will likely be exempt from the regulatory criteria.

Comment: We would recommend amending the time period to be 24 months. The nature of the supply collection, manufacturing, and delivery cycle does not allow for materials to sit for the short period proposed. Supply must be collected in the warmer growing season months, put through the composting process, than processed and bagged before delivery can be executed.

Require facilities to maintain records to indicate the date material entered and was processed at the facility instead of labeling piles. The nature of compost management and moving of the piles does not lend itself to maintaining records or labels at the pile itself.

Response: Revisions made to the regulations to allow greater flexibility in storage and recordkeeping.

361-4.3(a)(8)
Comment: Recommend changing this to facility must provide fire training and have bmp's for managing piles.

Response: Temperature monitoring has been shown to be an effective practice, in conjunction with other management criteria, to monitor the operations and prevent impacts.

361-4.3(a)(9)
Comment: In the event of a fire, the first action is to cut off oxygen to stop the fire. This can normally be done by smothering the material and surrounding the area with a dense material like compost or clean fill. After, the affected area should be dismantled of any burning material and then it can be doused with water. As a precaution this material should not be reconstructed back into a pile.

Recommend removing this provision. Materials can catch fire for different reasons and best management practices may require different tactics such as dismantling alone or using other fire suppression materials. While water can be used to knock down flames venting can also be used in a situation.

Response: The regulations have been revised to allow other methods approved by the local fire Department or approved by DEC.

361-4.3(a)(10)
Comment: Suggest removal since all sites must be compliant with local and state fire law. Local infrastructure may limit availability of on-site water as well.

Response: The referenced requirement has been deleted.

361-4.3(a)(11)
Comment: Recommend removing but if kept providing more definition to standing water. We maintain all our sites to be passable by our equipment. These sites are work areas and addressing every pothole or low area that forms would be unmanageable. Sites are already regulated for storm water runoff and contain features that contain water as part of those programs.

Response: Regulations revised to include ruts and low area criteria. Control of standing water is also an odor control measure.

361-4.3(a)(12)
Comment: Recommend removal or an exemption since our sites already have existing storm water permits.

Response: Stormwater controls may not be sufficient in all cases to protect groundwater. DEC is currently funding a research project being conducted on Long Island by a consulting firm familiar with groundwater assessment and remediation. The results of the research project are expected in 2017 and will be used to determine what the Department will accept from facilities as part of their groundwater protection measures.

361-4.3(a)(13)
Comment: Recommend this be restricted to at least one opening of 12 feet. Our sites already support the ingress and egress of large equipment like tractor trailers. If multiple entries of this size are required it may not be met at existing facilities.

Response: The recommendation has been incorporated in to the regulations.

361-4.3(a)(14)
Comment: This provision would severely limit the useable property on existing sites and require the acquisition of large pieces of land for new developments increasing costs.

- All sites have to comply with local zoning laws and other restrictions on what can be permitted on the property. If a site has been zoned for this use the local community was a part of that process or the surrounding properties were aware of the operation at the time they acquired property.
- Recommend restricting buffer of 25 feet to only to distance of composting piles to property line.

- Recommend reducing waterway buffer to 50 feet.

Request better definition of what is a waterway to ensure features like storm water ponds are not included and also what are the permitted activities in the buffer zone.

Response: The proposal has been revised to limit buffers to water bodies/wells and to a residence. Under the Environmental Conservation Law, DEC is obligated to have regulatory criteria to control dust, odors, and groundwater impacts. Part 360 contains definitions applicable to water bodies.

361-5 Construction and Demolition Debris Processing Facilities

Comment: Recently the Department issued a "Guidance Letter" to holders of a Registration for a Construction and Demolition Debris facility, setting out extensive requirements with respect to having and implementing a Waste Control Plan for such facilities. The responsibilities, feasibility and enforceability of compliance with the Guidance Letter remains somewhat arbitrary, overbroad and vague. Moreover, it is unclear whether the requirements of the "Guidance Letter" are part of the proposed regulations. If they are not and the Department intends to enforce such requirements, now is the time to propose these requirements as regulations rather than just have them remain as guidance.

Response: Registered facility must meet the operating requirements of Part 360 through development and implementation of a waste control plan. However, waste control plans for registered facilities are not reviewed and approved by the Department. This continues to be the case in the proposed regulations. The referenced guidance letter was issued to provide examples of the waste control plans that may aid in meeting the operating requirements of Part 360, and the Department will continue to provide guidance as necessary.

Comment: We feel as though the 250 tons/day cut-off for registration vs. permitting is arbitrary. These changes to Part 360 would mean that some recycling facilities would be lumped together with waste transfer stations. Wherever possible, the distinction between waste management and recycling should be strengthened.

Response: In order to strengthen the distinction between waste management and recycling, the name for these facilities has been changed from C&D debris processing facilities to C&D debris recycling facilities. In addition, the 250 tons per day threshold has been changed to 500 tons per day based on a monthly average for C&D debris recycling facilities.

Comment: The 250 TPD permitting threshold is too low. As an example, the State Environmental Quality Review Guidance states that indications of significant adverse project impacts include a substantial adverse change in traffic levels. A numerical example of a substantial adverse change is identified in the NYC CEQR March 2014 Technical Manual, which specifies that an increase of up to 50 vehicle trip ends per hour is not considered an adverse impact. This equates to approximately 10 trucks

entering a facility per hour, assuming each 30-ton truck load is equivalent to 2.5 passenger cars as contemplated in the Manual. Over an eight-hour day (which is short for the waste industry), a facility could process 80 truckloads, which is equivalent to 2,400 tons per day of RUCARBS. Thus, a facility accepting up to 2,400 TPD of RUCARBS would not have an adverse impact and should not require a permit.

Response: The 250 ton per day threshold has been changed to 500 tons per day based on a monthly average.

Comment: Enclosures have been proposed for construction and demolition debris facilities ameliorate odor and noise impacts to surrounding communities. This is great on paper but will not provide any relief to North Brooklyn as existing C&D facilities are grandfathered in. We urge you to require enclosures for all construction and demolition debris facilities located in environmental justice communities, as defined by the office of the DEC.

Response: The Department takes environmental justice concerns very seriously and appreciates the concerns raised. The regulations are intended to minimize the impact of solid waste management facility operations on the surrounding community regardless of the nature of that specific community. Registered facilities do not require site-specific permits because of the specific nature and potential impact of the waste they receive. Operating requirements, including restrictions on nuisance noise, dust and odors, are applicable to registered facilities as well as permitting facilities and will be enforced by the Department. However, enclosure is not required for registered facilities or existing facilities where retrofitting would be required.

Comment: Grinding, remixing, and reapplying damaged asphalt road surface is a practice used by virtually every Town and County highway Department in upstate New York. It is absurd to not classify milling of asphalt as an exempt activity. To do otherwise is going to divert material from the recycling stream to the solid waste stream which is exactly counter to the legislative mandate cited to justify promulgation of these regulations. The proposed regulations will put even very small towns into the level of requiring a full-blown permit to conduct these economically and environmentally beneficial activities and will see tons of material that should be recycled, instead heading for landfills.

Response: The grinding of asphalt road surfaces on the roadway itself or on properties under the same ownership or control as the roadway would be an exempt activity under 360.14(c)(1). The pre-determined beneficial use for processed asphalt pavement and asphalt millings has been moved to 360.12(c)(3)(ix), clarifying that any processed asphalt or asphalt millings is covered under the pre-determined beneficial use. Therefore, RAP used as an ingredient in producing new asphalt pavement would not be considered a waste and the asphalt plant producing the asphalt pavement would not be considered a solid waste management facility.

Comment: The 180-day storage limit for asphalt millings should be removed, as very often milling material is stored over the winter until the next paving season. This material is very often stockpiled at a municipal transfer station. This would not only be discouraging recycling, it would also tend to discourage beneficial activities such as hazardous waste collection days at Town and County facilities.

Response: The 180 storage limit has been removed from the revised proposal.

Comment: Authorizing pulverizing concrete operation in residential neighborhoods exposes the local community to significant environmental/health risks

Response: Under the proposed 360.19 operating requirements, which apply to registered as well as permitted facilities, requirements such as water protection, prevention of tracking of waste and other materials onto off-site roadways, confinement of waste, and control of dust, odor and noise are imposed.

Comment: Please confirm that spoil areas for exempt C&D debris are not subject to regulation under 361-5.

Response: Disposal of specific types of C&D debris including concrete, asphalt pavement, rock, and brick is not regulated under 361-5. Rather, this activity is regulated under 363-2.

Comment: By requiring a Fill Materials Operation Permit, NYC has a successful track record of preventing the deposit of improper material. DEC can only be similarly effective if it also requires that receivers of fill in the rest of the state prove that they are receiving only clean material.

Response: The regulations in Part 360 related to reuse of fill material have been revised. In addition, a new registration for the management of fill material has been included in 361-5.

Comment: The revised regulations should exempt construction companies and mine sites with C & D Processing Registrations from any storage time limits, pile size limits, or spatial requirements.

Response: Part 360 requirements for solid waste management facilities are appropriate for facilities that are located at a mine and any overlap with an operator's mined land use or reclamation plan should be addressed during permit review. The operating requirements associated with solid waste management facilities would be implemented to restrict any environmental impacts.

Comment: On-site masonry grinding operations at construction demolition sites will be severely impacted and forced to register or gain a permit for each site specific job.

Response: Processing at the site of waste generation is not regulated under this Part, as it would be considered an exempt facility under the requirements of 360.14(c)(1).

Comment: The DEC has not undertaken a legitimate consideration of alternative approaches. My facility already complies with performance management transmitted by the City of New York relating to odor, noise, vibration et cetera. These local requirements already ensure that the surrounding community is not impacted. I implore the DEC to exempt New York City fill facilities from these proposed changes and recognize that the Department of Sanitation has been a lead agency within the city limits and they're doing a great job.

Response: The proposed 360.19 operating requirements regarding odor and noise are essentially identical to the existing Part 360-1.14 operational requirements for odor and noise, and there are no operating requirements regarding vibration in the current or draft Part 360. The Department will work with facility operators to achieve compliance with the Part 360 requirements.

Comment: "C&D residue" is barely mentioned and the regulations do not deals with the problems communities and commuters are having as a result of waste-by-rail.

Response: Residues from the processing of C&D debris are regulated under this Part and the beneficial use section found in 360.12.

361-5.1
Comment: Please clarify what is meant by "…facilities that handle…" in the applicability. It is our understanding that DEC does not intend to include handling of wastes at their point of origin.

Response: With some exceptions as described in 360.14(c)(1), management of wastes at the site of waste generation is not regulated under this Part as it is considered an exempt facility.

361-5.2
Comment: This section exempts smaller facilities from permitting requirements, environmental monitoring and allows registration permits for receiving 250 tons per day and with no annual restriction cap. This minimally regulated facility should be capped at no more than 100 tons per day as many other states have already done if NYSDEC were to stick with tonnage measurement requirements. Most if not all of these types of minimally permitted facilities have a certified weight scale or a licensed certified weight-master. Therefore, tonnage restriction regulatory monitoring is not enforceable or defendable. At registered facilities and there is no certified weight-scale or licensed/certified weight master these type facilities should be limited to no more than 12,500 cubic yards per year. This is a unit of measurement that can be regulated and/or enforced. In the event a certified weight scale and a licensed weight master is part of the facility site the registered facility be authorized to accept no more than 100 tons per day and not to exceed 25,000 tons per year (TPY).

Response: The ton per day limit has been increased to 500 tons per day and revised to be calculated as a monthly average. The subject material has low potential for environmental impacts and only the materials with the smallest potential for impact may be received, processed or sorted outside of an enclosed building.

Comment: This section exempts smaller facilities from permitting requirements, only registration, and there should be concern about this as these small facilities can accumulate enough material to become problems if the site operators walk away. In addition, setting only one tonnage level for all materials does not recognize the differences in material densities. For example, 250 tons of C&D is a lot less volume of material than 250 tons of plastics, and the rule should reflect these different material densities.

Response: The regulations have been revised related to the permitting thresholds for various facility types. In addition, the regulations allow financial assurance to be required of registered or permitted facilities on a site-specific basis.

Comment: Allowing for multiple small transfer of solid waste without permitting allows for the transfer of noxious waste without appropriate oversight and result in negative impacts to our community.

Response: The regulations require that a permit be obtained if more than two registered facilities are proposed to be located on geographically contiguous land under the control or ownership of the same person.

Comment: A threshold amount of 250 tons per day appears arbitrary. There is no data in the DGEIS to justify the 250 tons per day limitation and there is no correlation of the 250 tons per day limitation with operating capabilities. The mere conclusion by the Department that the "processing of C&D debris can generate noise, dust and odor [and] that the processing of more than 250 tons per day of any C&D debris is likely to have some adverse impact on surrounding community and the environment" is an insufficient analysis, given the potentiality of shutting down a registered facility due to the time and expense to meet permitting requirements. There should be a maximum pile size specified in the section, or, alternatively, the financial assurance requirements in Sections 360.21 and 360.22 should account for the maximum pile size to be remediated based on the throughput for a year.

Response: The 250 ton per day threshold has been changed to 500 tons per day based on a monthly average. 360.4(f) is the applicable transition citation for a registered facility which is now subject to permitting requirements. Storage requirements in 361-5.4(f) have been revised to allow storage based on the available area of the facility instead of a generic maximum storage volume. The regulations have been revised to remove the requirement for financial assurance at registered C&D debris recycling facilities, though the regulations allow financial assurance to be required of registered or permitted facilities on a site-specific basis.

360-5.4(a)
Comment: How does this impact milling operations, temporary operations where grinding is done on the site of demolition of a masonry building, and surface mines operations that normally grind stone but on occasion provide grinding services for construction debris such as brick?

Response: Milling the surface of a road is exempt under 360.14(c)(1). Grinding of C&D debris as part of building demolition on the site of generation of the waste is also exempt under 360.14(c)(1). A surface mine would require a registration under 361-5 to process brick, soil, rock, concrete (including steel or fiberglass reinforcing embedded in concrete) and other masonry materials that were generated off-site as long as less than 500 tons per day of those materials were received based on a monthly average.

Comment: Instead of an outright ban against 'outdoor' activities, the regulations should allow them when dust and storm water runoff are controlled. The regulations should be revised to allow milling, construction and demolition debris sorting operations under certain conditions and controls as a matter of right.

Response: Control of dust and stormwater run-off are required at all solid waste management facilities. The regulations have been revised to allow outdoor management of concrete and other masonry material, asphalt pavement, brick, rock, fill material, roofing shingles and unadulterated wood.

361-5.2(a)(1)
Comment: Asphalt must not be excluded from the allowable material in this list. NYSDOS originally required that all loads be received without asphalt and founds that it was impossible.

Response: Under 361-5.2(a)(2) C&D debris processing facilities may accept asphalt pavement under a registration. Under 361-5.2(a)(6) a C&D debris processing facility could accept asphalt pavement as well as any of the other C&D debris material listed in 361-5.2(a)(1) and (3)-(5) under a registration.

Comment: Many comments suggested that the 250 ton per day limit is too low for RAP. A typical day of milling would generate 1250 tons of RAP. Since RAP has not been shown to have any environmental consequences, the amount of it that is received at a facility on any given day should not be restricted.

Response: The 250 ton per day threshold has been changed to 500 tons per day based on a monthly average. The storage requirement have also been revised in the regulations to allow longer storage times from beneficial use materials.

Comment: Classifying asphalt plants that handle RAP as waste handlers will pose zoning issues at the local level. Most towns and villages specify where waste handling can occur within their jurisdiction and this may or may not preclude the use of RAP at

many locations, ultimately leading to an overall reduction in the reuse of RAP. Cost is also an issue. The increased cost of handling that will be the result of these changes will be a factor in determining if accepting RAP is cost effective.

Response: Under 360.12(c)(3)(ix), which states that "(r)ecycled material or residues generated from uncontaminated asphalt pavement or asphalt millings that is separated from other C&D debris prior to processing and subsequently processed and stored in a separate area as a discrete material stream may be beneficially used as an ingredient in asphalt pavement for roadways, parking lots, or other paved surfaces." Therefore, RAP used as an ingredient in producing new asphalt pavement would not be a waste and the asphalt plant producing the asphalt pavement would not be a waste facility.

Comment: Space should be the determining factor in creating a daily cap on material brought inbound to a registered facility. For example, our facility consists of about 20 acres. It takes about 2,000 tons of unprocessed material to create 1,000 tons Recycled Item #4. If we sell 1,000 tons of Recycled Item #4 we would easily have space to take in 2,000 tons of unprocessed concrete, blacktop, and brick; the more processed material we sell and transport outbound, the more unprocessed material we can take inbound. Therefore, we should not be limited, nor limit our customers, based on an arbitrary daily quantity cap but rather by the space we have available at any given time.

Response: The threshold for throughput limits above which a permit is required are intended to ensure that high-traffic operations which may impact the surrounding community are evaluated under SEQRA.

Comment: We request that that threshold for registered C&D debris facilities be increased from 250 tons per day to 2,400 tons per day.

Response: The 250 ton per day threshold has been changed to 500 tons per day based on a monthly average.

361-5.2(a)(2)
Comment: The rational for the low permit thresholds is not realistic for RAP use because none of the listed impacts will increase with increased RAP use. Noise and truck traffic will be the same whether a facility is processing RAP or traditional aggregate. EPA recognizes that RAP piles are not likely to cause fugitive dust problems because aggregate is coated with asphalt which can reduce dust emissions.

Response: The 250 ton per day threshold has been changed to 500 tons per day based on a monthly average. The regulations have been revised to require owners or operator to declare the storage volume available at their facility based on the size and orientation of the site.

Comment: Does the 250 tons per day limit apply to an entity that is holding and screening material for re-use on the same project? How about for use in commercial mixes?

Response: The processing of concrete, asphalt and similar wastes at the site of waste generation is not regulated under this Part as it is considered an exempt facility. Receipt of unprocessed concrete or asphalt pavement from off-site requires a permit or registration under 361-5.

361-5.2(a)(5)
Comment: Please clarify what is mean by "source-separated recyclables…under an approved case-specific beneficial use determination."

Response: As the term is used in 361-5.2(a)(5), source-separated recyclables refers to recyclable materials segregated from C&D debris at the point of generation for separate collection, transportation, sale, recycling or other management. A case-specific beneficial use determination (BUD) is a written approval document that certain wastes can be used as effective substitutes for commercial products or raw materials. The materials cease to be waste when used according to the BUD. This is a case-specific BUD (see 360.12(d)) as opposed to the pre-determined BUDs listed in 360.12(c).

361-5.4
Comment: We fully support the requirement that receiving, processing, and sorting of mixed C&D debris occurs only within an enclosed facility.

Response: Comment noted.

Comment: The need for an enclosed building should depend in the type of process that is used at the facility and the environmental and health impacts produced by that process, not on the type of material and tonnage.
This kind of regulation commonly results in the proliferation of enterprises that fall below the threshold for regulation.

Response: The 500 tons per day threshold determines whether a permit or a registration is required for the activity. The operating requirements established for C&D debris recycling facilities in Part 360.19 and Part 361-5 are intended to ensure that impacts to public health or the environment are minimized.

Comment: Multiple commenters argued that the proposed receiving and storage restrictions on volume and storage time will severely reduce existing storage capacity and potentially significantly reduce or shut down business. The Part 360 regulations, as proposed, will decisively compromise the ability to repurpose concrete and asphalt debris by severely and unnecessarily elevating the cost of existing recycling methods.

Response: The storage requirements related to time and volume restrictions have been revised.

Comment: In general, the proposed Part 360 revisions do not differentiate between materials such as RAP and concrete from road construction projects and, for example,

the mixed C&D debris from a building demolition. The revised regulations should specifically acknowledge that unadulterated RAP and concrete such as that produced during road reconstruction projects, are recyclable materials and not solid wastes.

Response: Recycled material generated from processed concrete and asphalt pavement is identified in 360.12(c)(3)(viii) and (ix) as a pre-determined beneficial use material, which is no longer considered a waste.

361-5.4(a)
Comment: Enclosure requirement for construction & demolition facilities is unenforceable as drafted, and therefore entirely superficial. To begin with, far more facilities are exempted from this requirement than those that fall under the rule (see, e.g., Sections 360.4(b)(3) and 361-5.4(a)). Even for those facilities that will be required to operate enclosed, there is no clear timeline for compliance anywhere in the proposed rules or the Transition section (see Section 360.4, which specifies timelines for obtaining a permit but not for construction of enclosures for newly-permitted facilities), or anywhere else. Finally, there is no indication of how this new requirement will be enforced. Without a clear timeline, and without an identifiable list of which facilities will now be required to conduct their operations enclosed, the DEC is left without any cognizable enforcement tools or plan.

Response: The retrofitting of existing facilities to meet new regulations is generally not required. The materials included in 361-5.4(a) were purposely exempted from having to be received, processed and sorted within an enclosed building because they are not expected to have significant impacts if received, processed and sorted outside. Enclosures required for newly permitted facilities would be required to be constructed before the operations which require enclosure could be pursued.

Comment: While the new Part 361 proposed regulation will require new facilities processing like C&D to be enclosed, they will not require immediate retrofitting of existing facilities. This will exempt as many as 23 facilities located in the Bronx, Brooklyn, and Queens from taking the necessary measures to prevent harmful material from contaminating our communities. These facilities and other waste processing centers have long contaminated and disrupted the lives of New York's most vulnerable population. To ensure that the toxic hazards associated with C&D facilities are contained, we recommend that all existing C&D facilities be required to retrofit for enclosure.

Response: The retrofitting of existing facilities to meet new regulations is not required.

Comment: It is physically impossible to enclose fill material transfer stations and this provision will close the entire industry.

Response: The regulations have been revised to clarify that facilities which recycle fill material will not require enclosure.

Comment: Requiring shingle recycling facilities to process under roof is unnecessary as these operations need roughly the same amount of space to operate as a concrete recycler. Nowhere else in the country is that required. There is no public safety threat that a processed shingle pile presents, and the agency has failed to present one here.

Response: The regulations have been revised to clarify that facilities which process roofing shingles do not require enclosure.

Comment: The requirement for receiving, processing and sorting activities in an enclosed building found in 361-5.4(a) is much too restrictive. While it may make sense in an urban setting, there needs to be provision for outdoor processing at sites with a large buffer between the activity and any nearby receptor. The requirement also places an unnecessary financial burden on operations that meet the goals of reducing, reusing and recycling waste materials. Suggest that a provision be added to allow outside operations that have a buffer of at least 500 feet between its footprint and the site's property line and can demonstrate that all runoff from the facility can be managed to the Department's satisfaction.

Response: The regulations have been revised to reduce the separation distance requirements.

Comment: The provisions of 361-5.2 (a)(1) and (2) refer to the former RUCARBS facilities. The problem is in the wording: it is not clear whether the intent is to exempt the registered facilities only, or whether it is to exempt the materials that are listed in the referenced section that relate to RUCARBS. RUCARBS facilities should be exempt from the enclosure requirement. Can you clarify?

Response: The regulations have been revised to clarify that these facilities do not require enclosure.

Comment: The cost to enclose a facility would cause many existing operations such as ours to go out of business and close its doors. A compromise here would be necessary to keep facilities such as ours open. A compromise here would be to enclose some of the sides of the tipping floor, but NOT to construct a new building. A better choice is to require any new facilities applying for a permit be enclosed, or if an existing facility chooses to expand the tipping floor etc., that same be required to enclose the tipping floor.

Response: The retrofitting of existing facilities to meet new regulations is not required.

Comment: NYSDEC already has the authority to require enclosure of any C&D processing facility where on-site or off-site dust violates the standards of Part 360. As such the language of Part 361-5.4(a) should be changed to the following: "all receiving, processing, and sorting activities must be conducted under roof, in a building constructed with not less than three side walls."

Response: The regulations have been revised to clarify that enclosure is not required for existing facilities.

361-5.4(b)
Comment: Why must we record both cubic yards and tons?

Response: Reporting in both cubic yards and tons is required in order to validate the reported information. Annual report forms provide conversion factors to aid in these calculations.

Comment: This section does not require all sites to have scales, as it says (otherwise measured) and can be recorded in cubic yards or tons. Estimating methods are in disrepute because it promotes sham recycling. In response, third-party programs developed to the ISO level have been developed to insure that a recycling facility is actually processing and recycling at the rate it claims. The agency should require that all recycling facilities be certified to this level to insure of accuracy in the recycling rate and tonnages reported to it.

Response: The Department has concluded that the current requirements are appropriate because the cost associated with on-site scales are not appropriate in all cases. The requirement has been retained.

Comment: This paragraph requires that all waste be measured in tons, which would require all trucks to be weighed on a scale. Traditionally in the RUCARBS business, the inbound material is measured in cubic yards.

Response: Material should be weighed when a scale is available and recorded in tons. For facilities which do not have access to a scale, the material volume should be measured and recorded in cubic yards. Annual report forms provide conversion factors to aid in reporting in both units.

361-5.4(c)
Comment: Zero tolerance for any levels of deleterious materials, such as asbestos, is impractical and unenforceable. Background level amounts can be found in large incoming volumes of demolition materials or even in the everyday environment. Zero tolerance is impossible, and the agency should recognize this fact.

Response: The definition of 'uncontaminated' has been revised to allow up to 5% of other wastes by volume.

361-5.4(c)-(e)
Comment: Material coming into a facility unless contracted from a specific source is next to impossible to prove. We all are competitive on our pricing so location is always a key factor for our customers. Although we do a visual inspection on the material to make sure we can accept it, we cannot prove where it comes from.

Response: The regulations have been revised to require tracking documents to accompany the transport of C&D debris.

361-5.4(d)
Comment: The proposed regulations hold the waste transfer station legally responsible for incoming and outgoing solid waste material to ensure that no historic fill is used in the processing and recycling of lawful C&D debris material. What is the problem with historic fill? Who determines that it is historic?

Response: The regulations have been revised to remove the restriction on historic fill.

Comment: This section and 360.13(b) allow a C&D processing facility to receive historic fill only if it consists solely of RUCARBS. However, if a C&D facility is permitted to accept C&D materials other than RUCARBS, it should be allowed to accept historic fill containing those materials. For example, if it is permitted to accept asphalt from construction debris, it should be allowed to accept historic fill that contains asphalt. Language should be added to allow for this.

Response: The regulations have been revised to remove the restriction on historic fill.

361-5.4(f)(1)
Comment: Requiring stockpiles of finished C&D products to be under roof is unnecessary, uneconomical, and does nothing to protect human health and safety. DEC should require regular stockpile turnover requirements, but those stockpiles should be allowed to be stored outside, as building costs are too tremendous for the recycling market. This rule could require dozens of acres to be covered at unbelievable costs. No other state has this requirement because it is unnecessary and a technical nightmare.

Response: The regulations have been revised to exclude particular waste types from the enclosure requirement.

Comment: Aggregate stockpile time limits should be increased to 24 months in recognition of the seasonality and vagaries of the market. If there is no significant construction activity near where the material is stockpiled, it would be uneconomical to transport it long distances just to satisfy the time restraint requirements.

Response: The limits on storage time have been revised.

Comment: This provision limits the height and width of stockpiles and caps the cubic feet of stored materials. Well design and maintained stockpiles often exceed these limits. These limitations will also often result in the facility occupying more ground area than necessary. Stockpiling should be left to the judgment and discretion of the experienced operator.

Response: The regulations have been revised to require that site-specific storage volumes be established in the registration process.

361-5.4(f)(1)(i)
Comment: Many mines throughout the state also have C&D debris processing registrations. These sites are generally very large with perimeter berms and quarry benches that shield the material from view and contain it onsite. The revised regulations should exempt mine sites with C&D debris registrations from any storage time limits. In addition, mines typically managed stockpiles of aggregate which are much bigger than C&D debris piles would be. The revised regulations should have no restrictions on pile size at mine sites.

Response: The regulations related to storage time and volume restrictions have been revised.

361-5.4(f)(1)(iii)
Comment: The pile size limitations seem arbitrary. Why limit pile sizes at all?

Response: The regulations have been revised to require that storage volumes be established in the registration process.

361-5.4(f)(2)
Comment: What is the definition of below normal grade level? What about on a mine floor? Storing RUCARBS in mine sites above the seasonal high water table but below normal grade level is a preferred environmental practice since it is shielded and contained. If this restriction is included in the final regulations it will exclude mine sites from being able to provide a valuable service to its customers as well as eliminate an environmentally sustainable business practices of recycling and reuse.

Response: Below normal grade means below the prevailing naturally occurring or constructed grade of the ground surface. This is intended to restrict the improper disposal of waste. In this context, storage on the floor of a mine would not be considered below normal grade level. The regulations have been revised to clarify this requirement.

Comment: An exemption should be provided for asphalted or concreted surfaces.

Response: The regulation allows storage of concrete or asphalt storage area floors are not required for the separate storage of processed or unprocessed uncontaminated concrete, other masonry waste, asphalt pavement, brick, soil, fill material or rock without concrete or asphalt storage area floors. The language has been retained.

361-5.4(f)(3)
Comment: This paragraph could be revised by reference to distances to sensitive receptors, such as ecologically sensitive areas (wetlands, waterways, surface water, etc. or residential areas). Most of the traditional RUCARBS facilities on Long Island are

occurring in areas that are zoned for industrial activities. In the absence of sensitive receptors pre-existing registered facilities should be exempt from the setback requirements. In the event of sensitive receptors, setback requirements could be determined as follows:
• Within 250 feet, all work must be completed in an enclosed building.
• Within 500 feet, add the 50 foot setback.
• Within 1000 feet, then no restrictions would be required.
Also, the placement of the storage piles should be a negotiated process when obtaining a Permit with the Regional Solid Waste Manager.

Response: The separation distances between piles and from property boundaries have been revised.

Comment: The 50-foot setback is impossible to comply with for facilities in NYC. The 20-foot pile height in M2 and M3 zone properties is too restrictive. 25-footh pile spacing cannot be achieved. These restrictions would significantly reduce storage capacity at facilities in NYC. We recommend a 25-ft separation between combustible piles, a 15-ft separation between non-combustible piles, and a 25-ft separation between piles and property boundaries with the stipulation that the Department can approve alternative distances.

Response: The separation distances between piles and from property boundaries have been revised.

Comment: There is no mention of piles that are separated in bins. Frequently, smaller stockpiles of specialty materials can be stored in concrete block bins to facilitate storage. How would this be looked upon by the Department?

Response: The regulations have been revised to allow for storage in bins or other storage structures.

361-5.4(g)
Comment: The financial assurance provisions in New York City, with the current property value, is totally unnecessary. Also, New York City Department of Sanitation already requires financial assurance. We request that the Department not require a financial assurance in the circumstance where a local authority already requires one. This should be restricted to only facilities handling very large quantities of material on a regular basis.

Response: The regulations have been revised to require financial assurance of permitted facilities only. However, the Department may require financial assurance on a site-specific basis.

Comment: Eliminate duplicate coverage of financial assurance (also required by local jurisdiction).

Response: The regulations have been revised to prevent duplication of financial assurance requirements when municipal financial assurance meets Part 360 requirements.

361-5.5(a) & 361-5.7
Comment: Once the acceptable input material is processed into beneficial use determination its final destination is next to impossible to track. Unless it being used for a job specific contract, we supply other contractors material that they would stockpile for later use at their locations. We also supply other supply yards which resale from there. The most important part of us recycling is the ability to find places to make it useful and cost effectiveness compared to using new material. The requirement to track beneficial use material destined for reuse should be removed.

Response: The regulations have been revised to exclude beneficial use materials from the tracking form requirement.

361-5.6
Comment: Existing predetermined BUD at 6 NYCRR 360-1.15(b)(11) exempts from regulation certain listed materials when placed in commerce to serve as a substitute to conventional aggregate. The existing 6 NYCRR 360-1.15(b) work well and encourage significant recycling. The proposed regulations have moved this particular BUD to Section 361-5.6. Under this section it appears materials to be considered for beneficial use must first pass through a permitted or registered facility and then be subject to strict storage timeframes and stockpile limitations. These proposed limitations make it extremely difficult to beneficially reuse materials and creates significant business risks to generators and users of construction materials. The proposed limitations also change the point at which the BUD exemption applies (i.e., placed in commerce vs. when at the final use destination). Effective beneficial use requires the ability to move and temporarily store materials as is the case with other marketable commodities. For these reasons, we strongly recommend the existing predetermined BUD provisions of 6 NYCRR 360-1.15(b) be retained.

Response: The regulations have been revised to return the beneficial use determination to section 360.12.

Comment: RUCARBS have been allowed to be used as reclamation backfill at mine sites around the state under conditions included in site-specific mining permits issued by DEC. The proposed changes threaten to eliminate that practice. And the proposed "reserves the right to require a permit pursuant to 360.17 for land placement, including mine reclamation." In effect this is double jeopardy for an operator whose mining permit allows the practice, but who would also need a Part 360 permit as well. Duplicative regulatory efforts are unnecessarily burdensome to operators and they also strain Department resources.

Response: The regulations have been revised to return the beneficial use determination to section 360.12. The potential use of these materials for mine reclamation will not be impacted.

Comment: Processed C&D is known to create hydrogen sulfide gas. When disposed in an MSW landfill, hydrogen sulfide in the gas stream complicates the collection and recovery of methane. A C&D debris landfill does not generate a significant amount of methane, therefore this is not a significant issue. The language should be adjusted to allow residue to be disposed of in a C&D debris landfill.

Response: Residue from processing of C&D debris can contain concentrated contaminants. MSW landfills, which utilize double composite liners systems, are the appropriate disposals location to ensure that the environment is protected.

Comment: It is not clear whether proposed 361-5.6 is intended to apply to the site of a demolition project (i.e., whether such a site would be considered a "facility"). However, if that is the intent, the predetermined beneficial use of recycled concrete aggregate or residues generated from uncontaminated, recognizable concrete and other masonry products, brick, soil or rock separated from other debris should not be limited to material used as commercial aggregate. Clean crushed concrete, for example, which is reused on the site where it is generated or a property under the same ownership should not be considered waste. It should be noted that it appears that this type of use would be exempt under proposed 363-2.l(h) from Subpart 363 (Landfills).

Response: The pre-determined beneficial use for these wastes have been moved to Part 360.12. However, their use under the pre-determined BUD continues to apply to any location where they may be used. The disposal of similar wastes is exempt under Subpart 363-2, however the restriction on that exempt disposal has been revised to no more than one acre.

Comment: What is the point of initiation of tracking documents required for transporting historic fill and for C&D shipments**?** C&D processing facilities must complete and provide a C&D tracking document to transporters for processed C&D and unprocessed residues. In 364-3.3 and 4.10, transporters must also maintain a tracking document for C&D and historic fill shipments.

Response: The point of initiation of the tracking document required under Part 364 is the point where transport originates, whether that be the waste generator or a registered or permitted C&D debris recovery facility. Tracking documents required of the C&D debris recovery facility originate at their facility.

361-5.6(a)
Comment: For purposes of sections (a)(1) and (a)(2) of this subsection, when the source of the recycled aggregates, residues or material is from roads or other projects owned or contracted by state, county, or local governmental entities or other public authorities, the recycled material should not be considered a waste or C&D debris for

purposes of Title 360 or 361 so long as the recycled material is destined for a RUCARBS processing site or RUCARBS processing operation as defined below:

(i) For purposes of this section, a "RUCARBS processing site" should be defined as a facility operating pursuant to a valid Mined Land Reclamation Permit, or a state permitted asphalt plant or ready mixed concrete plant with operating RUBARBS processing equipment (e.g. crushing and screening equipment).

(ii) For purposes of this section, a "RUCARBS processing operation" should be defined as a facility operating with a permit or approval issued pursuant to 6 NYCRR Part 201-4, 201-5, or 201-6 with operating RUCARBS processing equipment, or a village, town, city, county, or state owned and operated road maintenance facility.

This proposes structure removes the material from the regulations at the point of generation. This eliminates the need to revise the applicability of 361-5.4 (storage) as that section applies to C&D processing facilities, not the RUCARBS facilities defined above.

Response: The predetermined beneficial use determination which is now located in 360.12 attaches to the processed concrete, asphalt, and similar materials when they meet the technical requirements for the intended use. The process may take place at the site of generation, a site under the same ownership or control as the site of generation, or an authorized solid waste management facility.

361-5.6(a)(1)

Comment: Concrete, masonry, brick, soil, rock kept separate may be used as commercial aggregate or can be transferred to a registered facility. But any storage greater than 180 days will be sent to landfill per other portions of the regulations. Why? Would the commercial aggregate used receive the aggregate as a raw material or would they have storage and recordkeeping restrictions too? Would they have to get a registration or permit?

Response: The regulations have been revised related to storage and volume limits. The use of material that meets the pre-determined beneficial use determination requirements would not be required to meet the requirements of Subpart 361-5.

Comment: Including steel or fiberglass reinforcing embedded in concrete as part of the BUD.

Response: Processed concrete would be separated from steel or fiberglass reinforcement. These materials would not be useful in the use of concrete as an aggregate, so the language has been retained.

361-5.6(a)(2)

Comment: There are few waste flows where the asphalt is separated prior to processing. The vast majority of asphalt is comingled with clean fill.

Response: The regulation include allowances for both source-separated asphalt and asphalt intermixed with other wastes.

Comment: The proposal identifies reclaimed asphalt as a pre-determine BUD "when it is used as an ingredient in asphalt pavement." Reclaimed asphalt should be included under the pre-determined BUD at the point where it meets the specifications to be used as an ingredient in asphalt (i.e., at the point of milling) or when it is received at the location of use. Ideally, it should be excluded from the definition of solid waste completely.

Response: The regulations have been revised to attach the pre-determined BUD to asphalt when it meets the technical requirements for the intended use.

Comment: Why is the pre-BUD for asphalt restricted to asphalt "used as an ingredient" in asphalt pavement**?** Oftentimes, asphalt is simply ground up onsite and used as substrate for a roadway. This use should be included in the pre-BUD. Language should be changed to reflect this use.

Response: The regulations have been revised to expand the pre-determined uses for processed asphalt pavement and asphalt millings.

Comment: This section creates a pre-determined BUD for uncontaminated asphalt pavement that is "transferred to a registered facility that is dedicated solely to the recycling of asphalt." If the asphalt is separated from other C&D debris anyway, it should not matter that it is brought to a facility that is dedicated "solely" to the recycling of asphalt. So long as the facility is properly registered or permitted, whether it processes other wastes should not matter. The definition should reflect this fact.

Response: The regulation include allowances for both source-separated asphalt and asphalt intermixed with other wastes.

361-5.7
Comment: It is an irrational policy, financially and logistically, to base the entire regulatory structure on the physically impossible and DEC budget busting program of "tracking" rather than, as successfully demonstrated by NYC, achieving your result by setting analytical standards and regulating the actual depositing of material.

Response: The regulations have been revised to set analytical standards on the reuse of fill material and residues leaving the facility. Tracking requirements have been revised in this Subpart and in Part 364.

Comment: Tracking is onerous. If considered recycled aggregate, then why is the paperwork needed? The tracking/sales is included in the annual report.

Response: The regulations have been revised to remove the tracking requirement for recycled material such as processed concrete and asphalt.

Comment: We recommend that the most effective step DEC can take to track and manage C&D transport and disposal is to create a cradle-to-grave digital/computerized tracking system and database, which should be updated in real time. This type of system would have numerous benefits to enforcement by making violations readily apparent. Updates to the transport status of each truckload would be required at departure from the generation site and again at arrival of the designated disposal site. Tracking occurs by simply entering the weight and type of materials into a central data base upon departure and disposal. Each of these status updates should be required to be reported by the transporter and confirmed by the generator and the designated disposal site. We agree that the disposal facility needs to notify the generator of receiving the material, but the DEC should be notified as well, and it would be best if all of this could occur in real time. If DEC officers had access to such information in the field by simply logging on the data base, they would be able to immediately determine if a particular load is being properly tracked – and if it is - where it's coming from, and where it should be going just by the transport vehicle's license plate or registration number. That aspect alone would be a major deterrent for any bad actors who would attempt to circumvent the tracking system. DEC would also be able to maintain records, which would assist investigations into illegal dumping. This should not entirely replace the requirement of carrying a hard tracking document, but would be a huge step up for accurately tracking and maintaining records of C&D disposal throughout New York State.

Response: The regulations have been revised to include an enhanced tracking system for waste transporters regulated under Part 364.

Comment: Westchester County currently requires that we document the street and town where inbound unprocessed material comes from. We also currently document the exact location of where processed outbound material is being delivered to and require signature of receipt when we are the material transporter. As I am interpreting it, to conform to this proposed section, when a customer picks up 18 yards of Recycled Item #4 (for example) from our facility we would have to document the location to where the processed material is being transported and the customer would sign that document. This would be a burden but would not be impossible to achieve if and only if the DEC would allow us to modify the current structure of our invoices to satisfy this section rather than create an entirely separate "tracking document".

Response: The regulations have been revised to remove the tracking requirement for recycled material such as processed concrete and asphalt.

Comment: Transportation of C&D debris also must be tracked and document the facility of origin, the transporter and the intended destination. [361-5.7 and 364-3.3(d)].

Response: The regulations have been revised to include an enhanced tracking system for waste transporters regulated under Part 364.

361-5.7(a)
Comment: It is our understanding that a tracking document is NOT required for material generated at a C&D processing facility located outside the state of New York. Please clarify and adjust language as appropriate.

Response: The regulation of solid waste management facilities located outside of New York State is outside the scope of these regulations.

Comment: Based on the April 13th NYSDEC seminar discussing the proposed changes, it appears that this section was intended for C&D wastes and residues and not all materials, as not all material leaving a RUCARBS facility is a waste and is actually being recycled and sold as a commodity. It is impractical and unnecessary to require RAP, as well as "recognizable concrete and concrete products, asphalt pavement, brick, glass, soil and rock," that are processed and included as ingredients and then sold as an alternative construction aggregate, to have a tracking form when it leaves the site. Please verify and adjust language as necessary.

Response: The regulations have been revised to remove the tracking requirement for recycled material such as processed concrete and asphalt.

361-5.7(b)
Comment: There cannot be a legal burden on the facility as it is impossible to control document after it leaves facility. The first two sentences must be deleted. The provision must be clear that the only obligation on the generating facility is to receive delivery of the tracking document from the transporter and maintain it in its records.

Response: The first two sentences of 361-5.7(b) do not require anything of the generating facility. As indicated in the comment, the only requirements that 361-5.7 imposes on the generating facility are to **"**maintain these C&D debris tracking documents at its facility for inspection by the Department", to "account for all materials leaving the facility" and to **"**maintain all C&D debris tracking documents for a minimum of 7 years as required by paragraph 360.19(l)(2) of this Title."

Comment: The requirement that the tracking documents be returned from the receiving facility to the generator should be removed. Also, the requirement that documents be retained by the facility for 7 years should be removed.

Response: The requirements that the receiving facilities return the completed tracking documents to the generating facilities and that the generating facilities maintain them for a minimum of 7 years benefits the generating facilities by accounting for the wastes and materials that were removed from the generating facilities, which is required by 361-5.7(b). The language has been retained.

Comment: We support the stipulation that the "intended recipient must certify that it received the material for registered or permitting transporters" but recommend that it is reiterated under Part 364 that so the procedure is clear.

Response: The regulations have been revised to include an enhanced tracking system for waste transporters regulated under Part 364.

Comment: The transporter typically owns the relationship with the generator. The receiving facility does not have a relationship with the generator, therefore the receiving facility can sign the tracking document and return it to the transporter. The transporter should have the obligation of returning it to the generator within two weeks. We recommend that the language be adjusted in this way.

Response: The contact information for the generating facility is included on the tracking form, so it should not be difficult for the receiving facility to provide the completed tracking form to the generating facility even if the two facilities have no relationship. However, if the transporter is willing to provide the completed tracking form to the generating facility and does that within the two weeks required by 361-5.7(b), that should be acceptable.

361-5.7(c)
Comment: There cannot be legal burden on the facility as it is impossible to control document after it leaves facility. The subsection (c) must be deleted.

Response: Since 361-5.7(c) specifies that the processing facilities are regulated under 361-5, the Department can require that those facilities comply with the tracking requirements just like the initial processing facilities are required to do.

361-5.7(d)
Comment: Can only maintain a copy of the document in the state of completion at the time it leaves the facility or that it receives from the transporter.

Response: The provision requires that the facility maintain those records that it receives as part of the tracking process.

Comment: The seven year record maintenance requirement places an unjustly onerous burden, and commensurate liability, on the facility operators. The proposed regulations also seek to hold the transfer station operator legally responsible for all aspects of the process, for all firms it does business with, though they are often not within their control.

Response: This requirement is a standard component of the solid waste management facility regulations.

361-6 Waste Tire Handling and Recovery Facilities

Comment: There is an immense number of tire dealers that aren't aware of the regulations and therefore aren't forced to comply. The rules should be the same for everyone. They need to be enforced on every region, not a specific region.

Response: The Department holds all tire dealers to the same standards. All tire dealers in all regions of the state are required to be in compliance with Part 360 regulations, and the Department will bring enforcement against entities which fail to comply with the regulations as appropriate. Enforcement actions have been taken in many circumstances for the illegal storage and disposal of waste tires.

Comment: Casings for retread purposes should be able to earn a BUD, which would exempt them from being considered a solid waste.

Response: Tire retreading is considered solid waste management activity and is not considered a beneficial use of a waste. Once a tire is retreaded, they are no longer considered as solid waste.

361-6.3(a)(1)(v)
Comment: How was this number is arrived at as a reasonable "one size fits all" limit? Other areas of the regulation mention 1,000 tires also as a "one size fits all" limit. These limits have no relationship to the size or character of the facility. In reality, as long as there is a fixed time limit that a full trailer can be stored onsite, what difference does it make if there are 6 or 7 or 10 trailers and accurate recordkeeping is required? I am sure that partially filled trailers can be easily dealt with also.

Response: Part 361-6 limits the amount of waste tires that can be stored under a registration. Since a facility collecting and storing waste tires seeking a registration only has to comply with 361-6.3 and not the design and operating requirements of a permitted facility outlined in Part 361-6.5, limitations are in place to prevent the possible negative environmental impacts that a large amount of stored waste tires could have. The Department's Waste Tire Abatement Program has worked to cleanup sites that have large amounts of waste tires illegally disposed of, and these regulations will help prevent the development of more abatement sites in the future. If a facility wishes to store waste tires in larger quantities or for a longer period of time, they can apply for a Waste Tire Handling and Recovery Facility Permit to do so.

361-7 Metal Processing and Vehicle Dismantling Facilities

361-7.3(a)
Comment: We emphatically recommends that, consistent with the recognition that scrap commodities are not solid wastes, the adopted reporting requirements respect that scrap processing companies engage in a highly competitive industry. Specific reporting information such as the type and quantity of material handled is proprietary and sensitive. While solid waste regulators strive to obtain a "mass balance" to determine that certain wastes are disposed of properly by matching generation/transport and disposal reports, there exists no comparable public policy imperative with regard to valuable scrap commodities which are sold on an open market.

Response: Scrap metals are considered solid waste under the Part 360 regulations. The Department has revised the solid waste management facility annual report form to remove information that may be considered confidential business information.

361-7.3(b)
Comment: This section exempts scrap metal processors that store 500 cubic yards or less of material. This threshold is too low since elsewhere in the proposed rules, piles up to 750 cubic yards are allowed for C&D material. Scrap metal is presumably less objectionable than C&D material. This threshold should be changed to 2,000 cubic yards.

Response: In order to allow higher volumes of storage at exempt facilities, the threshold for exemption has been revised to 1000 cubic yards.

Comment: We recommend that the 500 cy storage threshold for registration be amended to distinguish between indoor and outdoor storage. A scrap processing facility which stores no more than 500 cy of material outdoors should be exempt without regard to any amount of indoor storage, given that indoor storage does not result in environmental impacts.

Response: The regulations have been revised to exclude indoor storage of metal from the 500 cubic yard threshold.

Comment: We recommend that the threshold for registration based on outdoor storage be further qualified temporally**.** Thus, for example, registration would be required based on the outdoor storage of 500 cy of material for 1 year or more, or 1,000 cy of outdoor storage for 6 months. By doing so the regulation will take into consideration that there may be incidental periods where outdoor storage becomes necessary for a short period of time due to market conditions or business opportunities.

Response: In order to allow higher volumes of storage at exempt facilities, the threshold for exemption has been revised to 1000 cubic yards.

361-8 Used Cooking Oil and Yellow Grease Processing Facilities
361-8.2, 8.3
Comment: The final regulation should facilitate biodiesel production, due to its exemption of small-scale uses of oil and yellow grease [361-8.2] and registration requirements for facilities that accept up to 500,000 gallons per year [361-8.3]. New York should do everything it can to support this form of biofuels rather than ones that rely on unsustainable plant growth and harvesting (e.g. palm, soy and or corn).

Response: Even though the Department supports the production and use of biofuels as an alternative fuel, it is imperative to have a specific set of regulatory criteria for used cooking oil and yellow grease processing facilities.
Moreover, while used cooking oil and yellow grease is being reused and its useful life is being extended in form of biofuels, these materials are still considered waste and as

such should be regulated to ensure all operations comply with sound environmental standards.

Part 362 Combustion, Thermal Treatment, Transfer, and Collection Facilities

362-1 Combustion Facilities and Thermal Treatment Facilities
General

Comment: The revisions do not protect against the harms of incinerator wastes going into New York's municipal solid waste and construction and demolition debris landfills.

Response: The Part 360 regulations are designed to protect the environment from potential harms from solid wastes, including ash from incineration. In addition, the solid waste management facility permitting process includes the environmental review under SEQRA to address potential concerns for a proposed SWMF.

Comment: DEC must prohibit the incineration of municipal solid waste.

Response: The department disagrees. The combustion of MSW is one of the MSW management options expressed in the state solid waste management policy and has been appropriately addressed in the regulations.

Comment: There are no siting requirements listed for Combustion, Thermal Treatment, Transfer, and Collection Facilities, which are arguably some of the most objectionable. Both combustion facilities and waste transfer facilities have been noted to cause respiratory illness, the former via the creation of lethal dioxins and the latter by introducing steady truck traffic into a community. Great care must be taken to develop newer and cleaner ways of transporting and processing our waste. Equally great care must be taken in assuring that the current burden of our harmful methods is equitably distributed among communities of different racial and socioeconomic compositions.

Response: The proposed regulations are not intended to address the siting of individual facilities. All site-specific considerations are addressed in the individual solid waste management facility permitting process, which includes review of the potential for significant adverse impacts under the State Environmental Quality Review Act. The potential for adverse impacts on air quality and truck traffic are among the list of issues evaluated under SEQRA.

Comment: We are concerned with the unequal treatment of different biomass processes based on feedstock, rather than on a uniform emission standard regardless of source. We believe the disparate treatment with respect to comparative emission testing requirements, applicable to pyrolysis and gasification of adulterated biomass feedstock, (compared to no additional requirements for landfill gas) of the New York State Renewable Portfolio Standard Biomass Power Guide, will serve to inhibit the development of new technologies. Further, uncertainty surrounding the certification of biomass RECs produced from emerging technologies serves to constrain investment needed to support their implementation; the implementation which often has the added

benefit of diverting waste from landfills and reducing associated emissions and vehicle miles traveled. We believe the comparative emission testing requirement should be revised with a standard emission threshold applicable to all sources. The current regulatory framework has differing requirements based on fuel sourcing that are confusing and costly. The adoption of emissions testing for contaminants in accordance with the Great Lakes States Air Permitting Agreement, 1988, would ensure protection of the environment and allow for clean energy innovation while providing market certainty, encouraging private investment, and reducing costs. The proposed Clean Energy Standard must state a benchmark "standard" to avoid creating the uncertainty of a "moving goal post" that the Comparative Emission Testing Biomass Power Guide would create.

Response: The Renewable Portfolio Standard and Clean Energy Standard are outside the scope of this rulemaking.

Comment: The proposed regulations for municipal garbage burners refer to combustion facilities that accept only source separated recyclables as feedstocks [362-1.5(b)(7) and (8)]. It is unclear what facilities this refers to as source-separated recyclables should not be combusted.

Response: 362-1.5(b)(8) is intended to allow a thermal treatment facility to treat source-separated feedstock for which there is no recycling market as determined by the department in order to recover value in the feedstock. An example is a facility which thermally treats non-recyclable plastics to generate biodiesel or other fuel products.

Comment: There should be a separate legal classification for all thermal technologies that do not use combustion of municipal solid waste. Providing favoritism to a dirty-sourced feedstock and allowing anaerobic digestion processes a less rigorous regulation is not good environmental policy and invites many questions. Why in this day and age would we be supporting and encouraging placement of organics/biomass into landfills? These proposed regulations should be providing advantage and incentive to any and all disruptive innovative and alternative energy product technology that can create environmentally friendly green products such as renewable energy or green transportation fuels from waste feedstocks under careful greenhouse gas emission regulation. These facilities also bring huge economic development opportunities to a community as well as a significant tax base as well.

Response: The department agrees that organics and biomass should be recycled or reused rather than disposed. For those wastes that cannot be recycled or reused, Part 360 regulates their treatment or disposal, whether it be through combustion or other processing technology or by landfilling.

Comment: Biomass Prepared Fuel (BPF) is engineering technically and a legally different product than Refuse derived fuel (RDF) and should be regulated differently. Different from a landfill or a combustion process, BPF has been sorted, recyclables have been removed, and unrecognizable sized ingredients (fines) have been removed,

and the remaining organics fraction has been segregated and processed into a 2" minus (or smaller size gradation) biomass prepared fuel feedstock. Biomass prepared fuel does not technically or legally have the same definition or engineering parameters as refuse derived-fuel (RDF) and must be recognized and regulated differently in any new proposed rules and regulations upgrades.

Response: The regulation have been adjusted to reduce regulatory requirements for wastes that have been authorized as alternative fuels under 6 NYCRR Part 212 or 227.

362-1.2
Comment: Please confirm that facilities with used oil furnaces where waste oil is generated, collected and combusted on-site are exempt from this Part.

Response: These facilities are not regulated under this Part.

362-1.4
Comment: Volatile matter testing requirements, formerly Part 360-3.5(c)(2)(i)(a) through (e), have been removed from regulation. Please remove 362-1.4(c)(4)(iii) for consistency.

Response: The change has been made in the revised regulations.

362-1.5(a)
Comment: The draft regulation states that combustors that treat MSW must include power generation. There is no reason to limit this to just the production of power. Language related to steam, hot water, and other usable forms of energy should be included in the regulations.

Response: The change has been made in the regulations.

362-1.5(b)(7)
Comment: The regulation sets a acceptance limit of 25 pCi/g of radium-226. No fixed radiation detectors designed for the waste management industry can identify specific radioactive isotopes. And no fixed or portable devices can measure in units of radioactivity per mass of material such as pCi/g. Fixed radiation detectors designed for the waste management industry measure radiation exposure levels (i.e. cps, µR/hr). The Department should remove these requirements or should provide limits in a unit of measure that current facility monitoring equipment can measure.

Response: Radiation detectors are used to indicate whether a radioactive material is present. Once detected, further evaluation must be performed to determine whether or not the radioactivity exceeds the 25 pCi/g limit.

362-1.5(b)(7)(ii)
Comment: When incinerators encounter radiation, it can be quickly dispersed and impact human health and the environment. The limits should be reduced to 2x background.

Response: In some cases, limiting the trigger to two times background causes false positive trigger events which inhibit the ability of the facility to accurately identify radioactive wastes. The standard or between two and five times background allows for the effective operation of the radiation detectors and has been retained in the regulations.

362-1.5(b)(8)
Comment: No limits or recognition is made for culling out materials unsuited for recycling. In addition, this would seem to preclude the use of recyclables as feedstock to a synthetic fuel manufacturing facility, even if that was found to be the most efficient and environmentally safe method for reuse of the recyclables. This rule should be clarified to clearly exclude material found unsuitable for recycling (for example, recyclables that are too wet, dirty, or the wrong material type that are errantly in the recycling stream and other residuals such as bottle caps that are too small to capture in a bundle with other plastics for recycling. Such materials may best be diverted from a landfill by being sent to a combustor, thermal treatment facility (such as a gasifier), or other use, or if no economically viable alternative can be found may best be placed in a landfill.

Response: The regulations allow the department to determine whether a recycling market exists for a specific source-separated recyclable. This would include materials which are unsuitable for recycling because of handling or collection problems. The provision does not preclude the use of materials as feedstock for synthetic fuel manufacturing so long as the department determines that no recycling market exists for those materials.

362-1.5(b)(9)
Comment: The term "source-separated pharmaceutical waste" has not been defined in the proposed Part 360 regulations. RMW and biohazard waste are very different than the Pharmaceutical waste. Bulk pharmaceutical waste should be mixed thoroughly with other wastes on the tipping floor prior to combustion to avoid potential safety and environmental impacts, including exceeding air emission limits. For example, high concentrations of iodine and sulfur that are a common ingredients in pharmaceuticals can cause an increase in opacity and sulfur dioxide emissions, respectively.

The following changes should be made:

a. "Source-separated pharmaceutical waste" should be removed from 362-1.5(b)(9) to allow for the continued processing of all types of pharmaceutical waste in a safe and environmentally response manner.

b. Create a new definition for "source-separated pharmaceutical waste": waste pharmaceuticals that have been separated from the waste stream at the point of generation; including manufacture, distribution, commercial or residential end user *alternatively* include "manufacture, distribution, commercial or residential end user" in the definition of Pharmaceutical waste.

c. Add a subparagraph: "(iv) This paragraph does not apply to Treated RMW. In keeping with NYS Department of Health Regulations, Treated RMW may be disposed of at specific NYSDEC authorized facilities."

Response: Separate definitions are included in Part 360 for both 'source-separated' and 'pharmaceutical waste.' No additional definition is necessary. The regulations have been revised related to handling of source-separated pharmaceutical wastes and regulated medical waste. In order to be treated at the combustion facility, treated regulated medical waste must be identified in the facility's permit and waste control plan in accordance with paragraph 361-1.5(b)(1). The suggested language is not necessary and the language in the regulation related to it has been retained.

Comment: The proposed Radium-226 25 pCi/g acceptance threshold is extremely low and we believe it can only be detected at this level in a laboratory setting.

Response: This level of radioactivity can be determined by both laboratory analysis and radiation isotope identifying devices.

Comment: Under the proposed regulation; with no instrument capable of real-time measurement of pCi/g, we believe that facilities must reject every load that triggers the alarm. And all radioactive material would require disposal by an Authorized party. The cost of which would be borne by the municipality or hauler or disposal facility. The present method (2x to 5x back ground) and of allowing for on-site decay is safer, more environmentally friendly and more cost effective.

Response: The radioactive waste detection plan must describe the procedures that the facility will follow in determining the acceptability of a waste load which has triggered the radiation detector. Allowing a load of waste to decay to below the trigger level is an acceptable means of responding to a trigger event.

362-1.5(b)(7)(iv)

Comment: This subparagraph should be modified with the following language removed from the existing regulation: *"... recorded at least daily."* Due to the steady nature of background radiation concentrations at our facilities, we do not believe there is a need to record background values on a daily basis. In addition, many fixed radiation detection systems adjust the radiation alarm setpoint (2x to 5x background) based on current background levels ("floating" setpoint) by monitoring background levels on a continuous basis. Alternatively, this background reading could be recorded on a calendar quarterly basis as described below for other system checks.

Response: Recording daily background readings is a standard operating procedure for radiation detector operations and has been retained in the regulations.

362-1.5(b)(7)(v)
Comment: This subparagraph should be modified to require the field check be performed on a calendar quarterly basis, unless otherwise required more frequently by the manufacturer. Performing field checks of the radiation detectors on a weekly basis is excessive considering the calibration frequency of these devices is normally annually.

Response: Weekly field checks are a standard operating procedure for radiation detector operations and has been retained in the regulations.

362-1.5(b)(7)(vi)
Comment: This subparagraph should be modified so that the requirement to calibrate radiation detectors also reflect the calibration frequency recommended by the manufacturer. *" ... radiation detector must be calibrated* ***annually or as recommended by the manufacturer,*** *and documentation describing the calibration must be maintained at the facility."*

Response: The regulations have been revised to reflect calibration frequency recommended by the manufacturer.

Comment: Facilities should have a requirement to maintain personnel awareness of radiation procedures. We propose that the following text be added: "Facility personnel must be trained annually in proper daily calibration and detection and response procedures."

Response: A training requirement is included in the regulations at 362-1.5(e)(2).

362-1.5(b)(7)(vii)
Comment: We believe it would be appropriate to notify DEC after each instance of radiation detection. Please see the revision proposed. The text should be changed to: "Each instance in which the radiation detector is triggered by a waste load must be documented and reported to DEC."

Response: A reporting requirement has been added to the revised regulations.

362-1.5(c)(2)(i)
Comment: After the first sentence, insert "The residue shall also be tested using a modification of EPA Method 1311 wherein the final pH of the TCLP is titrated to 6.0 or a representative pH documented for leachate at the proposed disposal site. The TCLP measurements for each analyte must be reported in accordance with current scientific detection limits. The range of results shall be reported in addition to the mean result. If the result is below the practical quantitation limit, a qualifier notation may be included. In addition, leachate shall be tested for known toxic constituents including dioxins and furans."

Response: The Department requires use of the methodology that is directed by USEPA and is required for NYSDOH ELAP certification. The Department also requires reporting of the 90% upper confidence limit, as per USEPA.

362-1.5(c)(2)(ii)
Comment: We respectfully request that wording "6-month intervals" be replaced with "twice per calendar year. Testing interval shall be no earlier than 4 months since the previous testing and no later than 8 months since the previous testing." Based on past experience, some flexibility is needed to account for outage periods, personnel availability, and system issues.

Response: The language has been revised in the regulations to address the concern raised in this comment.

362-1.5(c)(2)(iii)
Comment: This section also allows DEC to reduce the frequency of garbage burning ash testing to one round every five years after 2 years of semi-annual testing with no exceedances. This is too infrequent. Do not allow reduction in either the frequency of testing or the chemicals tested.

Response: Historical ash testing shows few instances of ash exhibiting hazardous characteristics when tested using the toxic characteristic leaching procedure (TCLP). Reducing the frequency of ash testing from a semi-annual schedule to one round every five years, after 2 years of semi-annual testing with no exceedances, is appropriate based on existing ash testing data and will not negatively impact the landfill environment or human health while still providing regular verification of the ash characteristics.

362-2 Municipal Solid Waste Processing Facilities

General
Comment: Regarding “facilities which perform post-collection separation,” please clarify: Does the Department intend that this section includes institutional wastes, for example a university recycling department which collects batteries to send to a recycler?

Response: No. The management of solid waste on the site of generation is not regulated under this subpart.

362-2. I
Comment: It is not clear in Section 362-2. I (applicability) if facilities that will be regulated under Section 362-1 (e.g., a combustion facility) may also be regulated under section 362-2. Are post-collection separation activities performed at a combustion facility in order to separate non-processible or unacceptable wastes regulated under 362-2? Is metal recovery metal from ash residue? We respectfully request that

wording be added to Section 362-2.1 stating "This Subpart does not apply to facilities that are regulated under 362-1."

Response: The intent of Subpart 362-1 is to address facilities that use combustion as a direct means of treatment, whereas Subpart 362-2 is intended to regulate facilities which sort waste in order to recover recyclables or to source materials which serve as a feedstock to fuel production. Since it is possible for a facility to conduct activities regulated under both Subparts 362-1 and 362-2, the suggested language cannot be included in the revised regulations. However, a facility that recovers metal from ash residue or separates non-processible or unacceptable wastes in order to produce a fuel is regulated under Subpart 362-1 rather than 362-2.

362-2.3(b)
Comment: This language should be consistent with the source-separated recyclables language found in 362-1.5(b)(8).

Response: The language has been revised in the regulations.

362-2.3(d)
Comment: This section needs more clarity and/or direction. Our experience is that recycling of smoke detectors in electronic waste streams are rejected from recycling due to low-level radioactive readings. Therefore, electronic recycling vendors do not take any smoke detectors, which is counterproductive.

Response: This requirement is intended to prevent regulated radioactive wastes from being received and processed at solid waste management facilities. Under the revised regulations, the department would be notified in the event that a radiation detection unit is triggered, and the facility must determine whether the radioactive waste is a regulated radioactive waste and whether it exceeds the 25 pCi/g acceptance threshold. However, regulated radioactive waste is not expected at recyclables handling and recovery facilities because of the recyclables that they receive are source-separated.

Comment: Is it the Department's intention to preclude non-hazardous industrial waste from RDF processing facilities? We see no reason to impose such a ban and recommend that this portion of the draft regulations be revised to allow for non-hazardous industrial waste as RDF feedstock, subject to the Department's permit. The review process allows ample opportunity to ensure that the waste feedstock for an RDF processing facility is appropriate and environmentally acceptable.

Response: Subpart 362-2 is intended to regulate facilities that process municipal solid wastes. The definition of municipal solid waste does not include industrial waste. A facility that processes other solid wastes, such as non-hazardous industrial wastes, would not be prohibited but instead would require a Part 360 non-specific facility permit to operate.

362-3 Transfer Facilities

Comment: All facilities need to be permitted, not simply "Registered." There can be no minimum threshold for having to obtain a DEC permit for a rail transfer/transload/intermodal solid waste container facility that is receiving solid waste and putting it on/in a rail car.

Response: The use of registrations, instead of permits, for certain types or sizes of facilities is an effective means of regulation. Registrations and permits are subject to the same inspection and enforcement provisions in Parts 360 and have been in use in the solid waste program since 1993. As to the concern raised about certain transfer facilities, only small, municipally-affiliated transfer facilities would be regulated under a registration under this proposal.

Comment: Daily limits should provide flexibility for weather conditions, religious holidays, traffic conditions and other conditions such as labor strikes, which can result in heavy days at a transfer station. Solid waste facilities must meet the public demand, and daily acceptance limits must be set with sufficient flexibility to allow for that demand.

Response: The department has the discretion to issue emergency authorizations for unforeseen circumstances. For site specific reoccurring circumstances the department can add special permit conditions to individual transfer facility permits, subject to Part 621Uniform Procedures.

Comment: DEC must be compelled to set standards for waste-by-rail processing operations so that waste are contained in sealed rail containers which control dust and odors during transport. These standards would eliminate discrepancies in requirements established by different DEC regional offices. Containment standards both MSW and C&D debris must be set, and increased inspection and enforcement by the Department must be instituted.

Response: The department's jurisdiction under the federal Clean Railroads Act does not extend to actions of rail carriers during transport.

Comment: The federal Clean Railroads Act of 2008 strengthens New York State's commitment to protect the public health of its citizens in the area of rail transport and the new regulations should reflect this. The current revision excludes rail, although DEC has been permitting rail transfer facilities for years.

Response: The proposal regulates transfer facilities as allowed under the Clean Railroads Act.

Comment: The 360 regulations must require updates of filthy, outmoded operations when permits are renewed, and not allow grandfathering of existing, outmoded facilities.

Response: The transition requirements in Part 360 require facilities to meet new operating requirements upon permit renewal or modification, when it is appropriate to do so. For instance, new construction at an existing facility would have to comply with the revised regulations. However, the revised regulations do not require existing facilities to be retrofitted.

Comment: Regulations must require ironclad financial assurance in the event of closure of rail-reliant facilities, to protect taxpayers and adjacent properties owners.

Response: The concern addressed in this comment has been addressed as Part 360 contains detailed requirements for financial security. For facilities subject to Part 362, subdivision 362-3.5(i) requires financial assurance for the closure of permitted transfer facilities.

Comment: There should be a provision in the regulations about intergovernmental coordination among DEC, MTA- LIRR, and NYSDOT to ensure passenger and freight rail safety with waste-by-rail.

Response: Passenger and freight rail safety is beyond the scope of this rulemaking.

Comment: Any waste by rail transfer should reflect the terms of the MTA freight Transfer agreement made in 1997. DEC should coordinate with MTA to incorporate any changes that will be made in the upcoming Transfer Agreement renewal. The Transfer Agreement is the legal framework within which NYA agreed to operate LIRR's freight concession. NYS can't be permitting rail transfer operations that violate this legal framework.

Response: Any agreements between legal entities related to rail transfer are outside the scope of this rulemaking.

362-3.2
Comment: These exemptions should refer to activities rather than a facilities.

Response: *Facility* means a location and associated devices employed in the management of solid waste beyond the initial collection process. The term includes all structures, appurtenances and improvements on the land used for the management or disposal of solid waste. Accordingly, this is the appropriate terminology.

Comment: Please make clear that a transfer facility located at a generator's location is exempt. For example, does it cover transfer of waste between buildings on a college campus?

Response: The management, other than disposal, of solid waste at the site of generation is exempt under 360.14(c)(1).

362-3.2(a)

Comment: This exemption should allow for the transfer of waste from truck to train or truck to barge, or vice versa.

Response: This activity is allowed under the proposal so long as the conditions of the subdivision are met.

362-3.2(a)(2)
Comment: Please specify which types of material require rigid, leak-proof, closed containers. Does this include steel scrap metal, tires, C&D debris, etc? Does this include waste dumpsters where the waste is collected?

Response: The requirement applies to any solid waste that is transferred under the exemption. It does not apply to waste collected at the site of generation.

Comment: We believe it problematic and limiting to introduce in this subsection the necessity that the "leak-proof, closed containers" used for exempt transfer be "rigid." Such a requirement not only prevents the use of alternative container technologies or emerging rail container advancements that could otherwise qualify as both leak-proof and closed, but also eliminates recourse by anyone seeking use of direct truck to train transfer, as the variance provisions of Part 360.10 are unavailable. In addition, the Long Island municipal solid waste market will be disproportionately affected, since most transfer stations on Long Island bale MSW to allow flexibility in shipment methodologies (rail or truck), and competitive market conditions on the Island (compared to adjacent New York City) do not support the significant capital investment required for rigid intermodal containers. We urge the Department to sustain the rail shipment of solid waste by removing the term "rigid" from the language.

Response: The proposed regulations do not prohibit the use of non-rigid containers in the transfer of solid waste, and transfer operations occurring in the manner described in the comment could continue; they just would not qualify for a complete exemption from Part 362. Rigid, leak-proof, closed containers are the appropriate standard for containers transferred at exempt facilities. The appropriate level of regulation for transfer of solid waste in non-rigid containers is either a registration or a permit depending on the amount of waste handled at the facility.

362-3.2(a)(3)
Comment: How does this requirement apply when material like used furniture is being collected for reuse or recycling?

Response: The proposed regulations at subdivision 360.2(a)(3)(i) excludes from the definition of solid waste materials that are intended for reuse for their original function, without processing, such as materials at a garage sale, consignment shop, textile collection location or similar venue.

Comment: Hauler operations sometimes require that a full roll-off box be temporarily staged at a location under the control of the hauler. The waste would remain in the

container at all times. Therefore, the language should be adjusted to allow containers to be placed on the ground for up to 24 hours.

Response: Paragraphs 360.14(c)(3) and 360.14(c)(4) allow for storage of waste on vehicle during transport. In all cases the containers are required to remain on the vehicle and those provisions will be retained in the regulations as they have been determined to be appropriate management. At facilities where containers are placed on the ground, either a registration or permit would be required.

362-3.2(b)(2)
Comment: This exemption should also apply to an operator leasing a transfer facility from a municipality. The language should be adjusted to read, "the transfer location and all vehicles are owned or leased by the municipality…."

Response: The regulations have been revised to address this concern.

362-3.2(b)(6)
Comment: Smaller transfer facilities vary in the length of time waste sits in a dumpster until it is taken to a landfill, and requiring a daily log to track the amount of waste received is not possible without installation of expensive weighing equipment (all incoming waste would need to be weighed). Many small transfer stations do not presently have such weighing equipment. If waste is kept in a rigid leak-proof container that is covered at the end of each day, why is there a need for a daily log? That requirement seems to serve no purpose and should be removed from the regulations.

Response: In light of the size of the facilities impacted by subdivision 362-3.2(b), the Department agrees the cost associated with maintaining a daily log outweighs the benefits. Therefore, the regulations have been revised to address this concern.

362-3.2(c)
Comment: The proposed revisions which expand the volume of materials that exempt composting facilities may process is commendable, however, there are no similar exemptions for the transfer of source-separated organics to composting facilities. While this exemption is a good step, further flexibility related to transfer of source-separated organics to composting is necessary.

Response: The regulations governing composting facilities for source-separated organics are found in Subpart 361-3. Subpart 362-3 governs transfer facilities that serve as an intermediary between the SSO generator and the composting facility. Under the current transfer station regulations in Part 360, there is no exemption for transfer stations that manage a limited amount of SSO. Part 362-3.2(c) provides a new and significant exemption for transfer facilities that manage no more than five cubic yards of SSO per day.

362-3.3(a)(1)

Comment: It is important that registered facilities should only be accepting household waste. Please return this language from the current 360-11.1: "No industrial waste, commercial waste, treated or untreated medical waste, asbestos waste or C&D debris shall be accepted unless specifically approved in advance by the department."

Response: The use of registrations, instead of permits, for certain types or sizes of facilities is an effective means of regulation. Registrations and permits are subject to the same inspection and enforcement provisions in Parts 360, therefore the requirements of the registration are sufficient to control any potential impacts of the facility.

362-3.3(a)(2)
Comment: If only residential waste is allowed to be accepted under a registration, a time-frame for non-putrescible non-recyclable waste would not be necessary.

Response: Household waste, like other wastes, can become putrescent. A maximum timeframe for any waste at the site is necessary to ensure that the facility operates in an acceptable manner and does not cause off-site impacts. Therefore, the time requirement has been retained.

362-3.3(a)(4)
Comment: Metals or other recovered materials often need a 6 month time frame to collect a quantity sufficient to justify transportation. We request that the storage time be increased from 90 days to 180 days.

Response: The storage period has been revised to be consistent with the requirements of subdivision 361.1.5(c).

362-3.5
Comment: Consistent with the current Part 360-11.4 regulations for permitted transfer stations, only household and commercial waste is acceptable unless otherwise approved by the Department. This standard practice should remain under the new regulations. All of these waste streams require special equipment or additional employee protection or tracking that should be evaluated by DEC on a case-by-case, facility specific basis.

Response: In the case of permitted transfer facilities, the facility's waste control plan should describe the facility specific, or case-by-case, concerns expressed in the comment.

Comment: Minimum design standards should be provided to assure uniformity among NYSDEC regions. For example, some regions require that waste vehicles be parked on lined pads equipped with leachate collection. There are no requirements in Part 360 mandating lined parking areas for trucks at transfer facilities.

Response: The regulations set the basic requirements for activities at solid waste management facilities. Site-specific issues are addressed at permitted facilities by special permit conditions.

Comment: The requirement for registered transfer facilities to accept recyclable materials and be authorized as a registered recyclables handling and recovery Facility (RHRF) is redundant in several ways. To start, municipalities under General Municipal Law are already required to adopt a local law or ordinance mandating the source separation of recyclables or reusable materials from solid waste. As such, recyclables are already treated separately from solid waste; since this has already been implemented it is not necessary to require individual facilities to do so. In addition, redundant registrations under both transfer stations and materials recovery facilities is both confusing and would double the amount of reporting required for each facility.

Response: The provision has been included to ensure the requirements of General Municipal Law are followed. Reporting the information from the operations at the facility will not double the reporting required, as the Subpart 362 reporting requirements refer back to the annual reporting requirement in Part 360.

362-3.5(a)
Comment: The phrase "source-separated" does not need to be included in front of each type of material. This section would read better if the phrase was only used once at the beginning of the list.

Response: The language was chosen to avoid confusion and has been retained.

362-3.5(b)
Comment: The reference to odor control needs clarification. Odors should not affect off-site receptors. There will be on-site odors including at the tipping floor.

Response: It is understood that odors will be present on the tipping floor. This requirement refers to measures which will reduce the impact of odors on off-site receptors.

Comment: The current regulation language which requires the any processing, tipping, sorting, storage, and compaction areas be located in an enclosed building or covered area should be retained.

Response: The revised regulations include this requirement.

Comment: The proposed regulation would require the construction of new buildings to house the existing transfer and sorting operations at the subject facility. However, given the relatively small size of this facility and the nature of the materials accepted (non-putrescible waste only), this regulation would introduce an unnecessary cost burden (construction, maintenance and operation of buildings) with minimal environmental benefit. The financial hardship of constructing a building could result in closure of our

facility. While our sorting and transfer activities are not performed within an enclosed building, all materials are kept in containers which can be covered if overnight storage is required. As such, subdivision (b) should be modified to consider the operational characteristics of the facility, particularly the types of materials processed and the methods/equipment used in operations. By considering these additional factors, facilities that accept putrescible wastes would be regulated without an unfair regulatory burden on facilities accepting only non-putrescible wastes.

Response: The transition requirements in Subpart 360.4 do not require existing facilities to retrofit their buildings to meet the new regulatory requirements.

362-3.5(b) and (f)
Comment: It is unfeasible to prohibit outdoor storage of putrescible waste as 362-3.5(b) and (f) are currently written. Provisions need to be made to allow outdoor staging of full, covered trailers awaiting transport to the final disposal destination. Transportation delays due to breakdown or weather are a common occurrence. With the new radiation detection program, a waste collection vehicle with putrescible waste onboard may need to be impounded at the site until the detection level returns to background. Requiring an enclosed building for these circumstances is very expensive. Rather, it is suggested that trailer staging be conducted on a hard surface with appropriate run on/runoff control and that time limits be set. For trailer staging, require the full trailer be moved the next business day. For waste collection vehicles that trigger the radiation detection alarm and subsequently return to background levels, require the load be deposited in the transfer station within the next business day, but otherwise suspend any time limits until then. For any weather or breakdown delays, require notification of the Regional Materials Management Engineer on the day of the occurrence through email or phone call.

Response: The requirements for facility storage do not include storage on a vehicle. Any restriction or storage limits related to vehicles would be considered on a facility-specific basis as part of the permit.

362-3.5(c)
Comment: Please specify if the drainage structures may be single walled. Section 360-19(o) gives NYSDEC flexibility but does not provide any criteria. Clear criteria should be provided to determine if/when double wall tanks or pipes are needed.

Response: It is the intent of the department to allow flexibility based on facility-specific designs.

Comment: This proposed regulation would benefit from the consideration of different types of facilities and the environments in which they operate. This particular regulation, which appears to aim to reduce stormwater and groundwater impacts, also references subdivision 360.19 (o), which is related to on-site waste tanks. On-site stormwater is often adequately managed without the use of enclosed tanks. Trucks unload from a recycled concrete aggregate (RCA) ramp. Material from the trucks is

deposited into various containers, each of which rests on a concrete or asphalt slab. All outdoor storage is confined to containers. Stormwater runoff is directed to a stormwater containment and recharge area located in the southwest corner of this site. Please clarify whether or not this arrangement would be acceptable under the proposed rule.

Response: Site-specific requirement may be necessary based on the activities at a particular site. However, given only the information in the comment, the arrangement would be acceptable under the regulations.

362-3.5(d)
Comment: What is meant by "cleaned"? Is daily wash down required? Can cleaning be done in sections or must the floor be free of waste?

Response: The tipping floor must be free of waste in order to reduce odors and other nuisance conditions.

362-3.5(e)
Comment: The facility we operate has a contaminated soil transfer station. Is it the intent of the DEC to have a radioactive waste plan for petroleum contaminated soil? Language should be changed to clarify the requirement.

Response: The regulations have been revised with respect to facilities which receive and transfer fill material. These facilities will be regulated under Part 361-5 rather than 362-3.

Comment: It should be made clear that a vehicle found to set off a radiation detector can be temporarily stored and re-measured.

Response: This is an acceptable response to a radiation detector trigger event and can be incorporated into the radiation detection plan for a facility.

362-3.5(f)
Comment: Please confirm transfer facility relates to the building structure only. Does this regulation exclude drop and hook operations? Permits include time frames for removal of waste. The language " whichever comes first." should be stricken.

Response: The regulation governs any facility where solid waste which was generated at another location is received for transfer to another solid waste management facility. The language is included to clarify that containers should be removed when full in order to reduce odor and other nuisance conditions.

Comment: Multiple comments argue that the proposed three day time period is insufficient to account for holiday weekends and other operational issues. Extending the period to five to seven calendar day period was requested as a more practical period of time.

Response: Agreed. The language has been adjusted in the proposal.

362-3.5(g)
Comment: Through the permit application documents, the Department will review and approve the facility waste control plan to ensure the facility has appropriate management procedures in place for asbestos-containing waste. This process should include other wastes which require special handling such as friable asbestos-containing waste, treated regulated medical waste, and industrial wastes. This subdivision should be expanded to include other waste types, and should require that the waste control plan includes proper waste tracking document management.

Response: The facility's waste control plan would address these other types of waste and include waste tracking requirements where appropriate.

362-3.5(h)
Comment: In regards to the waste delivered to the facility, it may be problematic to weigh all waste delivered to a facility especially in the case of residential drop off locations. This could be a new cost to any transfer station that barely exceeds this tonnage threshold. The investment in scales may be better spent and equally effective in using a municipally sold garbage bag program as the pay as you throw implementation vehicle.

Response: In order to determine whether or not the transfer facility is operating in accordance with its permit requirements, accurate quantities of material delivered to and leaving the facility are necessary.

Comment: We do not weigh all of the vehicles that enter our transfer stations. Given the number of vehicles visiting the facility, this would be impractical. We request that this requirement be deleted or that the Department provide an exception for smaller vehicles, such as cars, vans, SUVs, single axle trailers, etc.

Response: The regulations have been revised to address this concern.

362-3.5(i)
Comment: Public authorities should not be required to post financial assurance. Public authorities are scrutinized by the New York State Comptroller. Separate oversight by the NYSDEC is simply not necessary. In situations where financial assurances are required, the minimum requirements for preparation of the closure cost estimate should be stated. For example, assume the building and leachate tanks (if any) are full. Some regions seek sub-slab investigation at time of closure. Yet there is no specific requirement in 6 NYCRR Part 360 to perform sub-slab closure investigations of transfer facilities.

Response: The necessary closure activities at a facility should be identified and evaluated as part of a closure plan. These activities will vary based on the site-specific circumstances. Once the closure plan is approved by the department, the associated

costs are used to determine the amount of financial assurance that is necessary. Both public and private owner or operators of solid waste management facilities may be required to provide financial assurance, though publicly-owned facilities have a broader array of options available.

362-4 Household Hazardous Waste Collection Facilities and Events

Comment: Clarification is needed as to whether or not the Part 362-4 will impact CleanSweep events hosted by NYSDOT facilities.

Response: No, the proposed Subpart 362-4 will not have any impacts on Clean Sweep events. Subpart 362-4 applies specifically to Household Hazardous Waste (HHW) collection events and HHW Collection Facilities, which focus on collection, storage, and disposal of HHW and hazardous wastes from conditionally exempt small quantity generators (CESQGs) as defined in Part 371 of this Title. Moreover, Clean Sweep events are not available for homeowners and are offered to agricultural and non-agricultural entities which cannot participate in residential HHW collection events.

Comment: It is imperative that HHW collection data is accurate and quantifiable. The categories and units of measure of the Post-Event Reports need to be amended. All HHW programs should be submitting their collection rates in the same format. Data should be collected electronically so that it can easily be quantified.

Response: The department recognizes the value of a standardized form to ensure accurate data collection from HHW facilities and collection events. A revised annual report form will be released after the proposed regulations are promulgated. Additionally, the department is working toward a web-based reporting system.

362-4.3
Comment: For HHW collection events it is more appropriate to require an event specific report within a reasonable time-frame from the conclusion of the event. The current regulations at 373-4.3(a)(4) require a report within 10 days, which is too short of a time-frame to acquire all required information. We request that the program sponsor be required to submit a report 45 business days after the collection event, which is more reasonable.

Response: The regulations no longer require a report after collection events. Rather, an annual report will be required for all HHW collected throughout the year.

362-4.5(b)
Comment: For HHW collection events, it is more appropriate to submit a report for each individual event as opposed to an annual report. An annual report is more appropriate for a facility. We request that the regulation be amended to make this change.

Response: The department's intent with this provision is to reduce the amount of submissions from municipalities and to streamline the reporting process. The requirement will be retained.

Comment: While we understand the reasoning behind requiring radiation detection procedures at transfer facilities, we are concerned with operational impediments to implementing these procedures at household hazardous waste collection facilities, where waste is delivered by residents. Radiation detection equipment will detect isotopes of patients undergoing medical treatments. This poses several problems that should be addressed prior to implementing this requirement. First, unlike at a transfer station, where a truck that has set off a radiation detector can be set aside awaiting response from the local Department of Health and a hazardous waste handler, there is no mechanism in place for personnel at a residential drop-off site to detain a visitor that has set off radiation detection indicators. Moreover, at a transfer station, there is a considerable expense incurred each time a hazardous waste handler is called to the facility for a radiation alarm. In most cases, the owner/operator of the facility passes along this cost to the customer that has brought in the waste that has set off the alarm (i.e. the private hauler or municipality). In the case of a residential drop-off facility, the owner/operator would presumably have to absorb this cost rather than pass it along to a resident. We recommend that DEC first establish specific protocols addressing the aforementioned concerns prior to imposing this regulation.

Response: Radiation detectors are not required at HHW collection facilities.

Part 363 Landfills

363 General Comments on Disposal
Comment: Recommend amending the regulations to exempt State operations and projects from local/municipal flow control laws.

Response: The applicability of a local law to solid waste management activities is beyond the scope of this rulemaking.

Comment: While we believe it is DEC's responsibility to achieve its environmental goals in a cost effective and efficient manner, it should do so in a way that ensures a balanced and commercially competitive environment such as a level playing field amongst the regulated community.

Response: The comment is noted.

Comment: For some reason, your department has allowed waste from other states into some NYS landfills. I don't think this was ever the intent of the law. NYS regulations won't reduce waste when landfills profit from taking in waste from other states and the DEC permits it. If the DEC's purpose is to benefit landfill operators, then why not forget about lessening waste within the state? Why should I bother to separate my weekly waste? Why should I recycle products?

Response: New York State laws and regulations are not intended to prohibit wastes generated outside of the state from disposal at landfills located inside the state. However, disposal is the last option in the state's solid waste management hierarchy, but it is a necessary option for waste which cannot be reduced, reused, recycled, or energy recovered. The Department's programs, as well as state law, are focused on reducing waste disposal through source separation, recovery, and other means.

Comment: Commenter recommended using the ALARA (As Low As Reasonably Achievable) principle to consider classifying drill cuttings and other associated oil and gas drilling wastes containing above –background Radium concentrations as TENORM and specifically do not define drill cuttings or drilling wastes to exclude them from the definition of TENORM.

Response: This matter has been evaluated by the Department and it was determined that since drill cuttings are not technologically enhanced naturally occurring radioactive material (TENORM) it is not appropriate to apply the ALARA principle to the treatment of such waste. Other wastes which may result from oil and gas production may qualify as TENORM, such as piping removed from a well at the end of its production period.

Any waste load which triggers the radiation alarm set points established in the revised rules will have to be evaluated on a case by case basis in accordance with the Department's radiation regulations.

Comment: Waste characterization of drill cuttings and oil and gas drilling wastes by representative sampling and laboratory analytical methods is the most accurate way to determine the quantity and activity of radioactive substances prior to disposal in a landfill. Waste characterization should be prescribed through regulation or guidance to consist of representative composite sample or drilling waste of TENORM in order to determine if the material is eligible for New York's landfill disposal limitation on 25pCi/g Radium 226.

Response: As stated above, certain oil and gas wastes that are generated during the gas extraction process can be classified as TENORM and would be subject to regulation under the Department's regulations at 6 NYCRR Part 382 and may be prohibited from disposal in Part 360 landfills. To ensure such waste is properly disposed, the proposed regulations have been revised to both require radiation detectors to screen all wastes received for disposal and to determine the concentration of radioactivity in the waste for those waste which exceed the detector alarm set points.

Comment: We strongly urge the NYSDEC to:

1. Prohibit disposal of oil and gas waste in landfills including municipal solid waste, industrial and construction and demolition landfills.
2. Prohibit disposal of leachate at wastewater treatment facilities from landfills accepting oil and gas drilling waste.
3. Prohibit application of liquid waste byproducts and their constituents from oil and gas drilling, production and storage operations on roads as a de-icer, for dust control and for any other road maintenance and construction purposes.
4. Close the hazardous waste loophole that exempts oil and gas waste.
5. Reclassify and regulate drill cuttings as Technologically Enhanced Naturally Occurring Radioactive Material (TENORM) consistent with the classification by the U.S. Environmental Protection Agency.
6. Maintain a public database of oil and gas waste management and disposal.

Response: The disposal of drill cuttings at solid waste landfills and the use of brines produced from formations other than the Marcellus shale for specific beneficial uses are consistent with the Part 360 regulations. The proposal has been enhanced to include testing criteria and operating requirements to ensure these activities are protective of public health and the environment. The prohibition of leachate at wastewater treatment plants, the definition of hazardous waste related to oil and gas wastes, and the classification of wastes as TENORM are outside the scope of this rulemaking.

Comment: Consider requiring that drilling wastes are analyzed by TCLP to determine their leaching behavior in a landfill setting prior to disposal. States should consider using their existing authority to develop leachability criteria for drilling waste contaminants that do not already have limits under 40 CFR Part 261. TCLP analysis is not recommended

as a measure to restrict waste disposal of evaluate toxicity per se, but rather to better understand leaching behavior in a landfill setting to evaluate improvements to management strategies at landfills.

Response:. The Department has reviewed site specific characterization data on drill cuttings associated with individual landfills that have been approved to accept drill cuttings. Those landfills have also been required to sample their leachate for anticipated changes in characterization as well. In light of available information, there is no basis for site specific TCLP testing of drill cuttings.

Comment: New York cannot keep expanding its landfills without tremendous consequences to air and water in the state. The draft Generic Environmental Impact Statement accompanying the proposed revisions completely ignores the environmental impacts that may result from the proposed regulatory changes. The GEIS fails to identify and take a hard look at many areas of relevant environmental concern. An adequate environmental impact analysis must be conducted!

Response: The draft regulations, standing alone, do not authorize expansion of a landfill. The regulations, specifically Part 363, re-establish the permitting framework for new landfills and expansions of existing facilities and the regulations include detailed requirements for a permit application. Many of the requirements found in the proposed Part 363 reflect existing regulations found in Subpart 360-2. The proposed rulemaking would also re-establish the minimum regulatory requirements for the siting, design, construction, operation and closure of all landfills in New York State. Compliance with these minimum requirements ensures that the environment will be protected. Therefore, with respect to Part 363, the draft regulations would not result in any significant adverse environmental impacts. The environmental impacts that may result from issuance of an individual landfill permit are evaluated separately under SEQR for each project.

Comment: State laboratory certification program(s) should closely evaluate new and emerging laboratory analytical techniques for Radium 226 that may provide waste generators of solid waste facilities with more rapid analytical methods to characterize wastes.

Response: While the ELAP certification program is outside the scope of this rulemaking, the Department does, as a matter of routine, evaluate new and emerging analytical methods as they are developed and consider their inclusion into the Department's analytical protocols**.**

Comment: Drilling waste from HVHF drilling operations should be tested at its source (i.e. Pennsylvania) for radiation and thus will not need to waste resources/emit GHGs to transport it to NY just to be turned away.

Response: The Department does not have jurisdiction over waste generation in other states.

Comment: Of particular concern, is the proposed regulations do not address the NEW waste stream of HVHF drilling wastes. The solid waste from Pennsylvania HVHF drilling sites and brine, mixed to become a semi-solid, are recognized as being a threat to water and public health. That is why the DEC is not permitting HVHF drilling in NYS.

Why is this kind of waste from Pennsylvania allowed to be buried in NYS landfills?
Has the DEC done research proving nothing from landfills is getting in our water and air environment?
Is anything getting into our food supply?
Please contact me with links to DEC research studies about landfill waste impacts to our environment.

I learned HVHF waste, allowed in NYS landfills, contains frack chemicals and radium that comes from drilling in rocks such as shale. I also learned radium causes cancer if inhaled or ingested. Since radium and other chemicals eventually become part of the landfill leachate, it gets back into the public water supply when sent to public sewer treatment facilities. It cannot be removed when water is treated. It gets into the atmosphere through evaporation at landfills.

Response: The comment suggests that liquid waste from oil and gas production wells where high-volume hydraulic fracturing was conducted are disposed of in New York State. Bulk liquids are not permitted for disposal in New York. However, the disposal of drill cuttings is permitted and disposal of cuttings at landfills regulated under Part 360 regulations is protective of public health and the environment. The proposed regulations include a restriction on where drill cuttings may be placed in the landfill, to prevent the fines from drill cuttings from clogging the leachate collection system. In addition, the continued and on-going operational groundwater monitoring, and leachate monitoring requirements are designed to ensure that no contaminants are released from landfills.

363-2.1(a) Exemption for disposal at an owner-occupied single family residence

Comment: Does this exemption allow for the disposal of the house itself on the property (i.e., house burns; building a new house and wants to bury old house on property)?

Response: With some exceptions, the exemption for disposal of solid waste generated from an owner-occupied single-family residence would include the structure itself. As a result, the disposal of the residence on the property where it was located would not be subject to the regulations applicable to landfills. However, proposed Section 360-2.1 identifies wastes that are not permitted to be disposed under this exemption, including waste tires, household hazardous wastes, electronic waste and lead-acid batteries.

363-2.1(e) Exemption for disposal of overburden, tailings, and other mining waste at point of generation.
Comment: Please clarify, does this exemption include disposal facilities for exploration and production drill cuttings?

Response: Drill cuttings are not classified as mining waste, so the exemption for the disposal of mining waste as drafted would not apply. The exemption has been revised to include drill cuttings generated by air or water-based drilling methods.

363-2.1(g) Exemption limiting tree debris disposal to 1 acre
Comment: The limits of site size to 1 acre and not being able to charge a fee is limiting on many smaller operations and results in needing to gain a permit for continued monitoring. Is there a better way to manage the very large facilities that are of most concern?

Response: The proposed regulations are based on the Department's experience with tree disposal facilities that are currently exempt. It was frequently observed that tree debris would be commingled with other regulated solid wastes. Therefore, by limiting the size of the facility and removing the financial incentive to receipt of the waste, the expectation is that environmental impacts from these facilities will be below levels of concern. In essence, small operations would still be exempt and those facilities which intend to operate as a commercial disposal facility would be required to obtain a permit.

363-2.1(h) Exemption Limitations for Facilities that except RUCARBS
Comment: The proposed regulations should preserve the existing exemption (Part 360-7.l(b)(l)) for facilities taking in only these inert materials (i.e., RUCARBS) or eliminate these materials from definition of "solid waste."

Response: An exemption for disposal of RUCARBs is included in the proposed regulations. However, unlimited disposal of RUCARBs will no longer be permitted, as the proposed rules would limit the total disposal volume to 5000 cubic yard. In the Department's experience, the unlimited disposal of RUCARBs, which is permissible under the existing regulations, was open to abuse and owners and operators created dumping grounds for this waste that led to adverse environmental impacts.

Comment: Suggested additional clarifications that could be included in text of these provisions after the list of conditions at Part 363-2.1(h) that could help address NYSDOT/NYSTA transportation projects are provided as follows: *"Placements conducted in accordance with NYSDOT/NYSTA specifications and contract documents are exempt from the quantity limit of condition (5) above. In addition, placements that are associated with night work projects may be conducted during other than daylight hours, when the placement is concurrent to the project work and adequate lighting is provided at the placement site."*

Response: The regulation has been revised to include a new exemption for material generated from a public works project that is managed in the public right of way.

363-2.1(h) Exemption Limitations for Facilities that accept RUCARBS
Comment: Since this exemption from landfill requirements pertains solely to the placement of the materials on the property with no subsequent "management of waste",

the use of the terms "facility" and "life of the facility" may cause confusion and may imply more activities than what is involved or allowed. The use of the term site or property may better be interpreted to pertain to the sole placement of designated materials on property that is allowed by the exemption.

Response: Since a facility is defined as a location and associated devices involved in the management of waste, the activities referred to constitute a facility as it is defined under Part 360 regulations, however, an attempt to better clarify this was made to the revised express terms.

363-2.1(h) Exemption Limitations for Facilities that except RUCARBS
Comment: Questions have been raised regarding the interpretation of the term recognizable when used to designate certain clean recognizable C&D materials (Proposed regulation Part 363-2.1(h)). During discussions with DEC, DEC has described the issues with C&D debris and historic fill where recyclers are taking the residual fines from C&D grinding activities and incorporating it into topsoil. Based on the discussion, the problem appears to be the inability to visually recognize the fines which are problematic from clean fines. A proposal to assist both DEC and the transportation agencies is to define "recognizable" based on some form of professional judgement that ensures uses for transportation purposes in accordance with NYSDOT/Thruway specifications.

Response: The term ‘recognizable’ is based on professional judgment. Further clarification regarding how this determination is made will be developed through guidance.

363-2.1(h) Exemption Limitations for Facilities that except RUCARBS
Comments: Nassau and Suffolk Counties should not be excluded from this provision.

Response: The Long Island Landfill Law, found in Article 27, Title 4 of the Environmental Conservation Law, establishes disposal requirements in Nassau and Suffolk Counties. The law does not allow for any disposal except under a permit.

363-2.1(h)(1) Exemption for RUCARBS disposal restricting operators from charging a fee
Comment: This requirement restricting these operations from being able to charge a fee is poor policy as it based solely on the premise that just because a fee is charged that the material must be contaminated and it does nothing to reduce illegal dumping of contaminated material. The real problem of improper disposition of unclean or contaminated materials with third parties now involves large projects that improperly accept unclean material despite formal or informal review by DEC. Prohibiting fees for receipt of actual clean material dramatically reduces the locations to properly deposit clean material and increases dead of the night illegal dumping. The provision accomplishes nothing and increases illegal dumping.

Response: The restriction from collection of a fee for disposal is specified in Article 27, Title 7 of the Environmental Conservation Law. The proposed revisions have added a number of predetermined beneficial uses which are intended to assist in the proper reuse of clean material when placed into commerce and should help to address these concerns.

363-2.1(h)(2) Exemption limiting placement of RUCARBS during sunset and sunrise

Comment: Please consider the elimination of the daylight hours restriction at draft Part 363-2.1(h)(2) for certain situations where placement is concurrent to the work associated with night work projects, adequate lighting is provided at the facility and the work is performed in accordance with NYSDOT/NYSTA specifications.

Discussion:
Restriction of C&D placement between sunrise and sunset limits the efficiency of nighttime construction work which has become a regular practice for transportation roadwork. Nighttime construction activities involving removal of C&D currently requires stockpiling of the material until daylight, essentially handling the material twice.

Since the enactment of the current regulation, nighttime work has become very common, especially in urban and high-traffic corridors. This prohibition has hampered some contractors who are forced to handle C&D material twice - once while removing and stockpiling material such as Portland cement concrete, asphalt pavement, and soil mixed with these materials and subsequently moving the stockpiles to final placement.

Response: The concern expressed in this comment has been addressed by the addition of a new exemption for waste produced from state and municipal highway projects. This exemption does not include a restriction on the time of day during which waste can be accepted.

363-2.1(h)(5) Exemption limiting volume of RUCARBS for disposal

Comment: The draft revisions specify that a site where “exempt” C&D debris is placed within a transportation ROW may qualify as a landfill facility. A facility’s lifetime limit of 5,000 cubic yards for exempt C&D debris is expected to significantly impact many transportation construction projects. This provision will likely prevent reuse of large quantities of exempt C&D debris and divert much of the material unnecessarily to landfills.

If traditionally-exempt C&D debris material in excess of 5,000cubic yards must go to a fully regulated C&D debris landfill which requires significant additional measures under the proposed regulations (e.g. lining), the cost of disposal will increase and significant amounts of relatively inert materials may go to the landfill and not be reused. There should be a process identified in the regulation for the transition from a traditionally-exempt to fully-regulated C&D debris landfill.

Response: A new exemption for State and municipal highway projects has been added to the proposal. Transition language which describes the process of converting from an exempt facility to a permitted facility are included in the proposal.

Comment: The following modification to this provision should be considered to allow for DEC authorized mine reclamation project to continue to operate: "…*no more than a total of 5,000 cubic yards of waste is received during the lifetime of the facility; except at facilities operating pursuant to a valid Mined Land Reclamation permit*."

Response: Materials received pursuant to a Mined Land Reclamation permit and authorized under a beneficial use determination are no longer considered solid wastes and are not subject to the requirements of this exemption.

Comment: Proposed part 363-2(1)(h)(5) states that no more than a total of 5,000 cubic yards of "waste" RUCARBS can be received during the lifetime of the facility or else the facility loses its exemption and must obtain a Part 360 permit to operate a landfill. This low exemption threshold would eliminate the current practice of importing clean, "exempt C&D debris" for reuse purposes. Instead, hundreds of thousands of tons of such materials would need to be transported to and disposed of in landfills.

Response: The exemption restricts the disposal of C&D debris in an effort to promote reuse of this material. The reuse of C&D debris could be authorized by a beneficial use determination and in that regard would not be subject to the requirements of this exemption.

Comment: The provisions of Part 363-2.1(h)(5) limits the volume of clean fill to an absolute maximum of 5,000 cubic yards. For a construction site that needs to raise the grade due flood risk credited to global warming may not be allowed to receive additional clean fill if in previous years the site had received 5,000 cubic yards of materials prior and as such establishes a poor policy.

This policy is worsened when one considers that there are fewer "perfect" locations to deposit clean material and that this policy will quickly close out all desirable locations and vastly increasing placement of materials in less than perfect locations.

There is no valid reason to limit placement of clean fill; especially if DEC amends its proposal to require permits with analyticals for receipt of material. DEC's proposed reason for the limitation was to "increase recycling" of clean material. This policy reflects a fundamental misunderstanding of the recycling of clean material. The economics of recycling of fill material ensure that only material that cannot be recycled or sold is ever deposited. The cost of hauling and dumping clean fill material to a receiving facility is significant. The recycling/sale of material at the generating facility is actually a profit center for the facility. All generating facilities truck and dump material to a receiving facility ONLY when there is no market for the material. Limiting the amount to ever be deposited at a single location will have no impact on recycling.

Response: The exemption restricts the disposal of C&D debris. Reuse of C&D debris authorized by a pre-determined beneficial use determination would not be subject to the requirements of this exemption.

Comment: Please consider the inclusion of an intermediate option (such as notification) for placement of clean material that provides an additional degree of control/notifications beyond a totally exempt activity, but not to the requirements for a fully permitted and designed Part 363 Landfill.

Inclusion of the following SUGGESTED additional item should be considered:
Part 363-2.1 (h): "(6) waste exceeding 5,000 cubic yards are received, however, notification to NYSDEC by the landowner (on form ____or per____ (procedure)) must occur prior to placement in an upland area above 5,000 cubic yards."

Response: The department has concluded that, with the exception of small volume facilities, disposal of solid waste should be restricted to permitted facilities. For clean C&D debris, the goal is to discourage disposal and promote reuse of these valuable materials through the use of a pre-determined beneficial use determination. This will provide a non-burdensome pathway for these materials to be reused.

Comment: Please explain the rationale of limiting the volume of clean fill received at an exempt facility to 5,000 cubic yards. The new provisions of the Part 360 and 361 requires closer monitoring of inbound material through a Waste Control Plan. If the clean fill generators can adequately demonstrate that the material meets Department standards through approved Waste Control Plans and the receiving facility needs significantly more than 5,000 cubic yards to complete the site restoration there should be a method for the receiving facility to receive additional volume.

Response: Projects associated with site restoration that meet the requirements of a beneficial use determination would not be subject to the 5,000 cubic yard limit.

Comment: This low exemption threshold would eliminate the current practice of importing clean, "exempt C&D debris" into mines as use for reclamation backfill. Instead, thousands of tons of these materials would need to be transported to and disposed of in landfills.

Response: Materials received pursuant to a Mined Land Reclamation permit and authorized under a beneficial use determination are no longer considered solid wastes and are not subject to the requirements of this exemption.

363-3.1 Inactive Disposal Facilities Disturbance Proposal or Environmental Impact Discovery Notification
Comment: This section of the revised regulations refers to "disposal area" in numerous locations and the term is not defined in proposed regulations. For clarity purposes it is recommended the term "disposal area" be substituted for the term "disposal facility" which is adequately defined in the revised regulations.

Response: The Department agrees that the use of disposal area should be clarified. The relevant language has been adjusted in the proposal.

Comment: The "landfills" of C&D debris materials are now needed to be landfilled with all the same lining and covers and drainage systems as waste landfills. What are the costs vs. benefit?

Response: The liner and final cover system requirements for construction and demolition debris landfills would be regulated under the proposed rules in a similar fashion to how those landfills are regulated under the existing Part 360. The construction requirements associated with construction and demolition debris landfills are found at subdivision 363-6.6(b) of the proposal.

Comment: A definition of "inactive" or an exemption is sorely needed in 363-3.1. For example, does it apply to an intermediate covered area or cell of an active landfill? If not, and it was meant for old, closed facilities, suggest that wording be added specifying that the section applies to a landfill facility that is closed or has been inactive for some period of time.

Response: Disposal cells within a landfill are not separate disposal facilities and would not be regulated under Subpart 363-3. Instead, this Subpart is intended to apply to disturbance of any disposal facility or landfill which ceased accepting waste prior to the Department's current solid waste program. The Subpart has been revised to make explicit that it applies only to landfills which ceased accepting waste prior to October 9, 1993.

363-4.2(a)(2) Vicinity Map
Comment: Constructing a wind rose based on local meteorological data could be expensive and time consuming if there is no local source of such data. We suggest allowing the use of the nearest local source of meteorological data.

Response: The regulation has been revised to allow the use of the nearest local source of data.

363-4.2(a)(3)(v) Engineering Plan Accuracy to nearest 100th of a foot.
Comment: Requiring horizontal and vertical locations of wells to the nearest 100th of a foot is very onerous standard and unnecessary. Having such a degree of accuracy is not warranted for the accuracy of any drawings on which it would appear and would require physical surveying at the time of the well installation which might only occur at the rate of one or two wells per day. Having such a degree of accuracy could imply a cost of $500 to $1,000 per well just to achieve the 100th of a foot.

Response: The proposed regulation specifying the accuracy of the engineering plan to mapped well locations has been revised to require a horizontal accuracy to the nearest tenth of a foot, but retained the vertical accuracy of 100th of a foot.

363-4.2(b)(3) Engineering Drawings Depiction of Elevations on 100 square foot Grid

Comment: Proposed Section 363-4.2(b)(3)-Current Regulation: Part 360-7.3 and 7.4. This requirement translates to 16 points per acre which experience has shown is excessive data gathering unless other sources of information such as United States Geological Survey (USGS) reports indicate a large variability in soil lithology. The 100-foot square grid requirement should be reduced to a 200 foot square grid, unless other sources of information, such as USGS reports indicate a large variability in soil lithology.

Response: In the Department's experience, the interpolation of bedrock surfaces has been varied, when compared to supporting documentation, even with the use of a 100 foot grid system. Expanding the existing 100 foot grid system to 200 foot would only decrease the accuracy of the correlations between groundwater and bedrock elevations. The 100 foot square grid is the appropriate level of detail for a landfill application and conveys the level of attention required by engineers and hydrogeologists who prepare permit application supporting documents. The language in the regulation has been retained.

363-4.3(e)(1)(iii) design of Stormwater management system (363-4.3(f))

Comment: The requirements to evaluation a leachate or stormwater system for a catastrophic event of this magnitude as directed in §363-4.3(e)(l)(iii) and §363-4.3(f) would be arbitrary.

Response: Storms of increasing severity have occurred in the state in recent years. This evaluation is appropriate to evaluate the ability of the landfill design to manage large volumes of precipitation which could negatively impact the facility and the environment.

363-4.5 Facility Manual

Comment: Comment proposes that new Noise Monitoring and Control Plan be added to list of plans required in the Facility Manual in order to have the landfill operator better prepared to monitor and control noise.
Please see the proposed text below:
"(New section) Operational noise monitoring and control plan to mitigate or monitor sound levels to
meet required levels shall be prepared as part of the application. The operational noise monitoring and control plan shall include:
(1) Description of fill areas where noise propagation off site is most probable to occur.
(2) Mitigation measures to be enacted (ex. real-time monitoring system, noise barriers) or modified operational controls utilized to mitigate facility noise when operations are occurring
(i .e. reduced equipment operation, limiting trucks tipping in the specified area, limited hours of operation).
(3) Protocol for noise monitoring including monitoring locations, methods and equipment, monitoring frequency and duration, and action levels.
(4) Criteria for discontinuing the noise monitoring and control plan."

Response: The regulations have been revised to include this plan in the requirement for a Part 363 application.

Comment: The draft regulations at Part 363-4.5 for a Facility Manual, as written, are cumbersome and would be unwieldy if a manual were prepared as the draft regulations stipulate. An example of this is the requirement to include the hydrogeologic investigation in the manual. Part 363-4.5(f) indicates that the hydrogeologic investigation, which includes the environmental monitoring plan, site investigation plan, and site analytical plan as required in Subpart 363-7. The hydrogeologic investigation should be referenced by the Facility Manual not included in the manual. The first paragraph of Part 363-4.5 should be modified to, "…the facility manual must: refer to engineering drawings and reports and hydrogeologic investigation plans and reports prepared in accordance with this subpart as appropriate…", and delete Part 363-4.5(f).

Response: The landfill's hydrogeologic investigation plan would be cumbersome to include in the Facility Manual. Therefore, it is sufficient for the Facility Manual to make reference to the investigation plan. However, the Department maintains that the environmental monitoring plan should be considered a part of the Facility Manual, since monitoring is an integral part of landfill operation. The language of the proposed regulation has been modified to more explicitly incorporate the hydrogeologic investigation report and the environmental monitoring plan as components of the engineering report to address the concern raised in this comment.

Comment: The Facility Manual required in 363-4.5 is too large and cumbersome, and the earlier comment on 360.16(c)(4) applies here as well. At a minimum, the following parts of the Manual should for example be standalone documents:
a. Sustainability Plan – This plan is more along the lines of a corporate or municipality level goals document and not something that has any day-to-day value to those

operating the facility. However, we strongly disagree if the concept behind this plan is to impose actions and/or diversion targets by way of permit conditions gleaned from the sustainability plan.
b. Hydrogeologic Investigation – In Modern's experience alone, the documents that make up the investigations can take up an entire bookshelf. Rather that all this information, the monitoring schedules including any rotations of routine, baseline and expanded parameter analyses, the Environmental Monitoring locations on the site and any care instructions for monitoring wells and other locations should be part of the Manual.
c. Emergency Response Plan – Any response or contingency plan should be stand alone for easy reference and use during an emergency. Its need is hopefully only on very rare occasions.
d. Conceptual closure, post-closure care, custodial care and end use plan – Other than including a closure plan drawing for information purposes, the rest of the information serves no operation purpose. The information is years, decades or a century or more into the future and subject to change over time, including at the time each of these events come to pass.

Response: The environmental monitoring plan should be considered a part of the Facility Manual. However, the text of the proposed regulation has been revised.

363-4.5(a) Sustainability Plan
Comment: It is important to note here that technology and material management is evolving and changing, what is considered sustainable today may not be considered sustainable a year from now. There should be more of an emphasis on goals for sustainability instead of plans. We recommend that this Sustainability Plan be used as a guidance document, and not a compliance or operating plan and evaluate every five years instead of every three.
The commenter suggested that the sustainability plan be revised to read as follow:
"Sustainability Plan. The plan must should describe the landfill's goals to conserve and sustain natural resources. The plan should describe how natural resources and airspace will be conserved through use of concepts such as front end diversion of recyclables, sustainable disposal of organic wastes, alterative operating cover materials, alternative energy or materials resource production, waste mass stabilization, landfill reclamation, or other sustainable landfill management techniques with market considerations. The sustainability plan must be updated and submitted to the department every five years, at a minimum."

Response: Sustainability is an important aspect of landfill operations, and the plan should describe the landfill owner or operator's goal and plans to achieve them. These provisions are intentionally not prescriptive as the Department understands that the sustainability goals of each landfill should be unique to their individual circumstances and conditions. The regulations have been revised to require an update to his plan every five years.

Comment: This provision does not fit in the Landfill Section, since developing a sustainability plan is a planning exercise. The requirements of this section are already generally addressed in Part 366. A separate sustainability document is unnecessarily redundant, given the detailed planning analysis mandated in Part 366. This is also a new requirement that if implemented would cost planning units additional time and expense (estimated at thousands of dollars per sustainability plan). 363-4.5(a) is not needed or warranted and should be deleted from Part 360 proposed revisions.

Response: Part 366 set the requirements for local planning units to submit local solid waste management plans. Not all landfills are directly affiliated with planning units. If the landfill is directly affiliated, it would be appropriate to coordinate the sustainability plan with the local solid waste management plan.

Comment: There needs to be a discussion in 363-4.5(a) regarding the impacts to the public when a sustainability plan is incorporated into a facility's permit and essentially bans organic waste disposal depending on how the plan is written or what the department dictates is acceptable "front end diversion" or "reduced disposal of organic waste". As stated in the DGEIS now, "the sustainability plan will…reduce receipt of organic waste". That is a backdoor way of implementing an organics disposal ban advocated in Beyond Waste.

Response: The sustainability plan describes the landfills plans related to sustainability, and is developed by the permittee. The proposed regulations do not proscribe any particular operating requirements for inclusion in the plan and it is not the Department's intent to require that a landfill implement an organic disposal ban through this requirement. The sustainability plan as proposed is meant to provide a landfill operator with a regulatory framework under which it may adjust to changing conditions. This is similar to subdivision 360-2.9(a) of the existing regulations.

Comment: The Sustainability Plan must be updated and submitted to the Department every 3 years. This could this be a five-year submittal since there are not generally many operational changes at a landfill; or have it updated with permit renewal applications. Implementation of this requirement based on a 3yr cycle also raises concerns that the Department will not be able to review plans in a timely manner as all facilities will be on the same 3-yr cycle.

Response: The regulations have been revised to set a five-year cycle for the plan.

Comment: Landfills will be required to have a sustainability plan that targets diversion of recyclables and organics, as well as use of alternative daily cover and other techniques to conserve natural resources [363-4.5(a)]. This should be broadened to include an outright ban rather than just a diversion of recyclables and organics. Also, the final regulation must ensure that the plan has to be updated at least every 3 years.

Response: The department does not currently have statutory authority to institute a ban on organic wastes from landfill disposal.

363-4.5(c)(3) Monitoring in place density

Comments: Permitting calculations do not establish maximum in place densities, this section should be removed. Alternatively, initial design densities should be designed with a factor of safety included in the permit application instead of an ongoing monitoring requirement. Annual AUF calculations are not equivalent to in place densities.

Response: Calculation of in-place density is necessary to ensure that placed waste does not exceed the design load for the facility.

Comment: We acknowledge the importance of verifying waste mass density as part of fill progression tracking. Even though the actual waste mass density may exceed the design density in the permit application, this does not automatically mean there is a problem. They recommend that this section be expanded to allow for additional investigation and analyses to help determine whether or not an actual problem has arisen. In most cases, re-calculation based on actual site conditions or additional monitoring of the structural components of the landfill would be feasible. For instance, video inspection could verify that leachate collection piping is not crushing or buckling under the added loading. Secondary flow rate monitoring would verify if the primary liner system has been compromised.

Response: While video inspections and secondary leachate flows are useful indicators for assessing proper operation of the landfill's liner and leachate collection system, the owner or operator should still monitor whether in place densities correspond with the landfill's design parameters. Sudden increases in waste mass density can adversely affect the landfill's stability.

Comment: Facility Manual Requirements 363-4.5(c)(3) - Since there is no guidance on how to monitor in-place waste density, suggest this requirement be omitted from the Fill Progression Plan.

Response: Calculation of in-place density is a reasonable requirement to ensure that the landfill's leachate collection and removal system is not impaired from high overburden stresses and that the on-going structural stability of the landfill is maintained.

Comment: The commenter takes issue with the provisions of section 363-4.5(c)(3) and (4) relative to the landfill operator tracking the density of the wastes received and placed in location documented on the fill progression plan. The Commenter argues that the landfill's design requirements have already established acceptable waste densities for the anticipated wastes received per section 363-4.3(c)(3)(ii) stating that a minimum factor of safety of 25% for the leachate collection system. During the design phase, the designer, a licensed professional engineer, prepares the collection system design using densities based on site specific conditions, experience and appropriate safety factors. This design procedure has proven to be successful. The DEC has not provided any

information or data suggesting that the current design procedures, which do not require the monitoring of density are inadequate to protect human health or the environment. However if during the life of the landfill the operator proposes to increase the height of the landfill and hence the load and densities on the base liner system above the original design elevation, then the impact of the height increase on the base liner system should be evaluated. Additionally, the requirement of recording the location of each day's operation is unnecessary paper work, and will require additional personnel which will add to operating costs, serves no practical purpose, and does not enhance operations. Assuming a consultant is hired to perform this task for 2 hours per day, at $100 per hour for 250 working days/per year this could amount to $50,000/per year.

Suggested Revision
As with other comments noted above, DEC has not provided any information or basis for concluding that waste density description is necessary to address a common problem. The requirement for a daily log of waste location should be removed since this requires a facility to potentially hire additional personnel and engage in additional paperwork, which will ultimately add to operating costs, and yet it serves no practical purpose nor does it enhance operations.
However, if the landfill height and hence load and densities are increased above the original design then the impact on the base liner system should be evaluated.

Response: Many landfill liner and leachate collection systems were designed decades ago. Over time the physical properties of solid wastes have changed. There have also been operational changes at landfills that encourage increased in-place densities in order to maximum air space. Due to the variability of waste characteristics and changes in operational methods, proactive verification of in-place density is necessary to ensure that loading does not exceed the landfill's design limits.

363-4.5(c)(5) Horizontal Gas Collection System Location
Comment: Suggest the location of the gas collection system within the Fill Progression Plan be eliminated. The existing systems of a landfill are large and complex, causing too much "noise" on a fill progression plan. Future locations of systems are always subject to change and again add more "noise" to a Fill Progression Plan.

Response: Identification of the location of the gas collection system is necessary to ensure future work will not damage or interfere with the system.

363-4.5(d)(3) Requirement of identify and locate wastes of low-permeability and low shear strengths
Comment: Requirements for special handling or treatment are already defined in section 363-8. This section should be removed, it is not necessary.

Response: Section 363-4.5 describes application requirements related to the Facility Manual that would be used to identify and manage wastes that could impair proper operation of the landfill, while Subpart 363-8 describes minimum operating requirements

for dealing with such wastes. The regulation has been revised to include specific operating requirements for low permeability and low shear strength wastes.

363-4.5(d)(4)(v) Procedures in the Facility Manual to detect and prevent source separated recyclables from being disposed of in the landfill.

Comment: Facility Manual Requirements 363-4.5(d)(4)(v) – Suggest changing the requirement from "preventing"which might entail hazardous activities such as salvaging the recyclables from the active working face to identifying and notifying the generator regarding current legislative requirements.

Response: The landfill facility manual should have specific details for identifying loads of waste containing source separated recyclables and should detail procedures for identifying the generator or landfill customer and notifying them that disposing of source separated recyclables at the facility is prohibited. Use of on-site signage and outreach to facility users is what is intended under these provisions and the requirement does not infer that materials need to be recovered from the active working face. Rejection of a load which would include these materials is also appropriate. The relevant subparagraph has been modified to clarify the Department's intent.

363-4.5(g)(3) Annual Maintenance and video inspection of the primary and secondary leachate collection and removal system.

Comment: Requiring a video inspection as part of the annual to maintenance program for the primary and secondary leachate collection and removal system should not be a mandated approach to the annual maintenance requirements as it is onerous and unwarranted. Video inspection only makes sense when there is an issue at a particular area. Suggest consideration of adding discussion relative to when and where video inspection is needed rather than an across the board requirement annually. Also request that this requirement only be required for facilities constructed in accordance with the revised regulations.

Response: Due to the critical importance of a landfill's leachate collection and removal systems the Department proposed to modify the existing regulations to require proactive monitoring of the performance of these components. The operating requirements proposed in Subpart 363-8 requires biennial video inspections. These provisions of the regulation have been revised to clarify the requirement.

363-4.5(h)(4) Odor Control Plan

Comment: Active gas collection system installation requirements is a blind requirement that adds expense, limits revenue opportunity from carbon credit sales, and may be both unwarranted and unsupportable for facilities that do not generate significant quantities of landfill gas, including monofills and landfills with limited organic wastes. Retain the current regulatory standards for gas management.

Response: This plan is focused on the identification and control of landfill odors through all appropriate methods which may include active gas collection. The

regulations have been revised to remove the requirement to collect and destroy landfill gas and have been replaced with a requirement to install an active gas collection system and to create a greenhouse gas reduction plan as part of the landfill's sustainability plan.

Comment: If an odiferous waste can be "managed" to minimize odors, it should not be required to be rejected.

Response: The wording of this provision was intended to provide an example of what an operator could do to control an odor problem at the landfill. Rejection of the load would not be required if the odor problem can otherwise be controlled. These proposed rule has been modified to clarify the Department's intent and to address the concern raised in the comment.

363-4.5(i) Gas Monitoring and Emission Control Plan

Comment: …make landfill gas control universal for all landfills, and as quickly as possible. Although sectorial accounts of methane generation are not accurate, and estimates of landfill releases are also not very good, it seems clear that landfills are a major source of methane, and are a major contributor to the 250% increase in atmospheric methane concentrations since the dawn of the industrial revolution. Methane is too potent a greenhouse gas, and climate change too great an environmental threat, to allow these releases to continue to be unchecked.

Response: The majority of New York State's active municipal solid waste landfills currently utilize active landfill gas collection systems and landfill gas-to-energy facilities. This includes both privately owned and municipally owned entities. The proposed regulations have been revised to encourage landfill owners and operators to continue to minimize the generation and release of greenhouse gases to the extent possible.

Comment: Facilities that are subject to NSPS are already required to create a Gas Monitoring and Control System Plan, and we believe it would be redundant to have an additional requirement for the same type of plan under this Title. We are proposing that the plan required by NSPS would satisfy the requirement in this section. The suggested wording the new section 363-4.5((i)(4) would be as follows: *"(4) A facility that is subject to NSPS may utilize the Gas Collection and Control System Plan to satisfy the requirements under section (i) of this part.*"

Response: The Department acknowledges that numerous landfills in New York State are already subject to the NSPS emission requirements under the provisions 6 NYCRR Part 201 and therefore may be required to develop similar plans under that program. While the Department does not elect to adopt the suggested language, the Department would consider substitution of a Gas Monitoring and Control System Plan as an effective substitute, provided that the plan sufficiently addressed the components listed in subdivision (i).

363-4.5(i)(2) Description of Air Quality Monitoring

Comment: Much more information is needed about the air quality monitoring the Department is requiring under this provision. It appears from this reference that the Department is looking for more than what is required by the NSPS regulations and 363-8.1(e). Difficult to comment on the unknown, further clarification of what is being asked should be given here.

Response: Paragraph 363-4.5(i)(2) does not contain a specific operating requirement and does not call for a specific level of monitoring, as that would depend on the specific proposal. The paragraph instead requires an applicant to identify how emissions would be monitored and controlled.

Comment: The requirement for an active system will prevent fugitive emissions of landfill gasses which obviates the need to monitor fugitive air emissions for landfill gasses. Air monitoring for landfill gases can be an expensive, time consuming, and an imprecise measurement of fugitive emissions. A properly designed active system and flaring will provide sufficient control of landfill gas emissions. Suggested Revision: Because the new regulations mandate an active system for all facilities and an active system will control fugitive emissions the monitoring requirement should be removed.

Response: The proposed regulations have been revised to remove the requirement for active gas collection and destruction from landfills. However, the majority of existing municipal solid waste landfills have active gas collection systems that when operating properly are effective at controlling emissions. The Department is also aware that active gas collection systems can become ineffective due to trapped condensation or from mass settlements of waste that cause system leakage or impinge on gas collection system. The language has been modified to clarify the Department's intent with these provisions.

363-4.5(k) Residential drop off operations
Comment: Could landfills with existing co-located registered residential drop off operations be grandfathered?

Response: This provision does not require a residential drop-off area to be used at the landfill, so existing drop off locations would be acceptable.

363-4.5(l) Radioactive Waste Detection Plan
Comment: Again, it is a great idea to "require that all landfills that accept MSW to install and utilize fixed radiation detectors to monitor all incoming waste loads." This will give radiation the attention so badly needed. But it bothers me when I read "However, given the availability and relatively small expense of radiation detection equipment, it was determined that use of radiation detectors was a prudent requirement." You may buy cheap equipment that won't do the full job. For example, some low cost machines do not measure all types of radioactivity. The machines have to be placed in such a way as to examine the full load.

Response: When the Department indicated that radiation detection was relatively inexpensive, that statement was relative to overall operational costs of the landfill and was not intended to mean that inexpensive detection equipment should be sought out. Typical radiation detectors measure gamma radiation. The regulations require that the alarm trigger setting be set at between two and five times background gamma radiation. Additional evaluation is necessary to determine if the waste is a regulated radioactive waste and if it exceeds the 25 pCi/g limit.

Comment: There are several regulations that already govern the use, transport, and disposal of radioactive
Material. These regulations are sufficient to monitor radioactive material. The proposed requirement of installing and maintaining radiation detectors is an unnecessary and costly burden on landfill owners and operators. The capital cost of such a system is approximately $60,000.7 Operations and record keeping is fairly automated except with respect to weekly calibration. Operational costs for calibration and preparing a report which increases paperwork are estimated assuming 2 hours/week for a consultant at $100 per hour, for 52 weeks or approximately $10,400 per year.
Again, the agency fails to provide any information or data demonstrating that the change in regulation is actually necessary to address an actual problem. The DEC does not cite to or refer to any case where illegal disposal of radioactive materials have occurred for C&D or cleanfill landfills. If such information, the agency should provide it. Moreover, the NYSDEC's draft regulatory impact statement for the proposed changes does not refer to C&D landfills as requiring radiation detectors only to MSWlandfills.

Additionally, the need for a detection system should take into account the probability of low level waste entering a facility based on a reasonable expectation of a source of material being in close proximity to a facility to warrant the economic transport of that material to a facility, or other factors. For example, it is extremely unlikely that tracking spoils, that may contain low levels of radioactive waste (LLW), would be transported from upstate New York to Long Island, a distance of several hundred miles. Again using Long Island as an example while there are many hospitals that generate low level waste for diagnostic testing disposal is regulated by NYSERDA. Even in the unlikely event that such diagnostic testing waste enters the facility, these radioisotopes have short half-lives (i.e. 6 to 8 days),8 and would pose no long term threat to the environment.

Suggested Revision: The requirement for a radioactive waste detection plan should be removed or at least remove the requirement for C&D landfills on Long Island since the probability of material been delivered to a
Long Island C&D facility is low. Even local LLW that is generated from hospitals are already regulated by the NYSERDA and have short half-lives that would not pose a long term threat to the environment.

Response: The regulations have been revised to clarify that radiation detectors are only required a landfills which receive municipal solid waste or drilling and production wastes.

Comment: We appreciate and support the installation of radiation detectors at landfills to monitor waste loads.

Response: Comment noted.

363-4.5(n)(6) Estimate of closure, post-closure care and custodial care monitoring and maintenance costs
Comment: Commenter proposed revisions to this section in order the afford more flexibility by revising the last
section of (6) to read as follows: "…including a rolling 30-year post-closure care period, *extended beyond the 30-year period as appropriate,* …"

Response: The post-closure care period may extend beyond 30 years, but the cost estimate related to it must be based on a 30-year rolling period.

363-5 DGEIS regarding the Siting Requirements and EJ issues
Comment: The Draft Generic Environmental Impact Statement (DGEIS) suggests a revision to the Subpart 363-5 Siting Requirements for Land Fills that removes the requirement for a site selection study which identifies a range of alternative sites, stating that: "a private applicant usually will find the process unworkable." It goes on to say that this decision will have no environmental impact. The DFEIS fails to address the possible social outcomes of such an action. Solid Waste Management should maintain a commitment to work closely with communities and municipal planning units to carefully study the placement of solid waste management facilities. Low income communities of color have long been overburdened by the disproportionate siting of municipal and private waste facilities in their neighborhoods. The requirement for a siting study must remain, and furthermore it must prove that the selected sight does not overburden already marginalized communities.

Response: The regulations, standing alone, do not authorize any specific landfill or landfill expansion. Instead, proposed Part 363 is designed to specify the requirements for an application for a permit and largely re-promulgate the standards for the detailed technical information that must be submitted in support of an application. While the Department's existing regulations required a siting study, the siting study and alternatives analysis under the existing Part 360 was redundant to the analysis conducted pursuant to the State Environmental Quality Review Act. Since the SEQR process already addresses issues such as local land uses and community character, the need for a redundant siting study was not incorporating into Part 363.

363-5.1(c)(1)(i) thru (iii) and (5.1(c)(2)
Comment: The siting prohibitions listed in 363-5.1(c)(i) thru (iii), above, can be overcome by undertaking certain
actions that are set forth in Section 305 of Article 25-AA of the Agriculture and Markets Law. For the sake of clarity, we recommend making the revisions that are [underlined and bracketed] below:

(1) [Except as may be allowed in accordance with 363-5.1(c)(2), a] new landfill or a lateral expansion of an existing landfill may not be located on property which:
(i) is taken through the exercise of eminent domain;
(ii) consists of more than 50 percent of agricultural soil group 1 or 2 (Land Classification System as certified by the New York State Commissioner of Agriculture and Markets); and
(iii) is within an agricultural district formed pursuant to the Agriculture and Markets Law, article 25-AA, sections 303 and 304.
(2) A new landfill or a lateral expansion of an existing landfill within an agricultural district may not be sited within an agricultural district unless compliance with the requirements of article 25-AA, section 305 of the Agriculture and Markets Law has been demonstrated. [Nothing contained herein, however, shall be deemed to prohibit siting when:

(i)The owner of such land has entered into a written agreement which shall indicate his consent for site consideration; or
(ii) The applicant for a permit has made a commitment in the permit application to fund a farm land protection conservation easement within a reasonable proximity to the proposed project in an amount not less than the dollar value of any such farm land purchased for the project;
(iii)The commissioner of agriculture and markets, in concurrence with the commissioner of environmental conservation, has determined that any such agricultural land to be taken, constitutes less than five percent of the project site.]

Response: The suggested revision would incorporate language found in Article 7, Title 7 of the ECL into Subpart 363-5. While there are circumstances where it is appropriate to repeat statutory law in regulation, the Department determined in this instance that the siting restriction found in the statute need not be repeated in connection with the siting restrictions in Subpart 363-5.

363-5.1(d) Siting requirements for primary water supply aquifers, principal aquifers and public water supplies
Comment: No landfill expansions on primary aquifers: it is noted that at least one existing landfill in the state
would have a finite capacity.

Response: Comment noted.

363-5.1(e) Aircraft Safety
Comment: Aircraft Safety: The FAA does not make determinations relating to bird hazards. They just have Advisory Circulars.

Response: Documentation from the FAA regarding aircraft safety, which may constitute notices, advisories, or other FAA determinations, must be submitted as part of a permit application as it has been required under previous versions of the regulations.

636-5.1(e)(5) Height of Landfill –Nuisance and Visual Affects

Comment: As implied by the forgoing discussion, the sense of smell of the citizens is fairly rigorously protected even by the existing regulations. Essentially there is a zero forgiveness for odors emanating from the landfill. This can only be interpreted as desiring to control a public nuisance to one of the human senses – the sense of smell. This is really not an issue of environmental protection in the literal sense, but rather one designed to protect the citizens of the state. So the logical next question is, what about nuisance impacts to the other senses? The first that comes to mind is the sense of sight. As I mentioned earlier, this is certainly at least as important a sense as that of smell. I have a family member who from birth has been afflicted with a condition that has eliminated her sense of smell. She gets along just fine. How much more significant would it be for her if she were instead blind from birth? So the sense of sight is certainly one that should qualify for equal protection from nuisance impacts! Yet I have not found one word in either the existing or the proposed regulations that speak to the nuisance of unsightliness - nothing that speaks to the requirement for screening of any type or even the recognition that this is truly a visual nuisance to the citizens of the community. Is it any less of nuisance to wake up every morning and the first sight that greets your eyes is the bare mountain of trash out your bedroom window? As you will see, this is exactly what I and my neighbors see, once the leaves come off the trees. Or how about the view of the pristine Adirondack mountains, formerly visible from numerous locations in the area that now has the landfill in the foreground. What negative impacts on the overall community, tourist industry or business community does this cause? How does this ever-growing blight on the landscape square with your mission to “enhance the health, safety and welfare of the people of the state and their overall economic and social well-being?”

This impact is predominantly due to the extreme height of the mountain of trash which becomes more visible from more places as time goes on and the fact that our particular homes are high on a bluff directly across the Saranac River from the facility. If there were even nominal regulations on the height of the facility, this would be much less of a problem. Many of the surrounding municipalities have height restrictions on buildings of two stories or 40 feet. And this is for structures that are generally aesthetically pleasing or at least non-intrusive. Why is the only height restriction in your existing and proposed regulations listed as 200 feet for something as offensive as a landfill? This is equivalent to a 20 story building and it is only mentioned in the section on aircraft safety! (Section 360 7.4, (a) (5) (i) (c) (3).) Incredibly, it seems your only concern is you don’t want the height of the facility to become a hazard to aircraft! Other communities and states have imposed height restrictions on landfills and there has been at least one court case where a landfill was ruled a “structure” and thus subject to the local zoning restriction of 40 feet. (See Tri-County Landfill, Inc. v. Liberty Tp. Bd. of Sup'rs, No. 175 C.D. 2013, 2014 WL 97316 (Pa. Commw. Ct., Jan. 9, 2014)).

While a 40 foot height is probably a bit of overkill, it still follows that some reasonable height restriction (not 200 feet!) would be consistent with the agencies desire to protect its citizens from undo nuisance impacts to the senses, in this case the sense of sight. A requirement for screening the facility from sight would also be consistent with the

protection of the senses. This would be difficult I realize. How do you screen a 200 foot high mountain! All the more reason to set a lower height limit. But even a 100 foot or lower pile would present challenges. Expensive? Probably. Impossible? No. See http://oclandfills.com/landfill/active/olindalandfill/olindafrontslopeimprovements

Response: The potential for a permitted facility to cause visual impacts is an important consideration, worthy of review in connection with a specific project. However, whether a specific facility has the potential to cause visual impacts depends on several factors, such as the locations of visual receptors, local land uses, and topography. The availability of mitigation also depends on site-specific considerations, therefore, mitigation of visual impacts is not being proposed to be addressed on a state-wide basis. The commenter is correct that the proposed regulation includes a 200 foot landfill height restriction. This limit was derived directly from applicable FAA guidance and regulation specific to landfill siting and aircraft safety. Incorporation of this limit is not intended to be an indicator of how high a landfill may be constructed. Each application for a new landfill or expansion of an existing landfill is subject to an individual evaluation under the State Environmental Quality Review Act, and it is during the SEQR process that visual impacts and other quality of life issues presented by a specific proposal are addressed.

363-5.1(g)(2) Landfill expansions at sites with existing groundwater contamination

Comment: The Department should eliminate provisions in the draft that will negatively impact water quality. For example, 363-5.1(g)(2) allows for the expansion of existing landfills that are already contaminating groundwater under certain circumstances. And 363-6.11(a)(4) exempts leachate conveyance lines and gas condensate lines outside the landfill liner system from the requirement to be at least 5 feet from the seasonal high groundwater table or 10 feet from bedrock. ***Since it doesn't specify where they should be, these exemptions should be eliminated.***

Response: Any proposed landfill expansion on either a greenfield or a brownfield site must be designed, constructed and operated in such a manner that it is protective of the environment. A further condition on an existing landfill site is that the expansion must be mindful of the existing site conditions and it may not contribute to existing contamination. All leachate conveyance lines and gas condensate lines located outside the landfill liner system must be designed to have double containment and must be constructed to provide for effective monitoring of leak detection and collection system performance. Consequently the minimum separation from seasonal high groundwater and bedrock is not required for these systems because they can be exhumed and repaired upon detection of any leakage, which not a feasible option for the landfill itself.

363-5.1(i) Seismic impact zones

Comment: DEC should quantify what a seismic impact zone is, without a definition this term is too vague.

Response: Seismic impact zone is defined under Part 363-4.3(d) Seismic Stability Analysis, which is referenced in this section of the regulations. As defined in Part 363-4.3(d), a seismic impact zone is defined an area with a 10 percent or greater probability that the maximum horizontal acceleration in lithified earth material, expressed as a percentage of the earth's gravitational pull (g), will exceed 0.10g in 250 years (or two percent or greater probability in 50 years) as delineated on a United States Geological Survey (USGS) National Earthquake Hazard Reduction Program (NEHRP) Probabilistic Earthquake Acceleration and Velocity Map for the United States and Puerto Rico. This definition matches the definition as it is defined the federal requirements for municipal solid waste landfill criteria in 40 CFR Part 258.

363-6 General Comment on Liner Requirements for C&D debris Landfills
Comment: The use of only double composite lined landfills for C&D debris landfills is problematic – it is not that such liners can easily be retrofitted – if this rule is applied it should be on a proactive basis to the landfills when permitting and constructing new cells and any existing new cells / sites should be grandfathered. Otherwise a number if previously viable (and approved) landfills will effectively disappear as disposal option, which will result in overnight consternation, and encourage higher transportation and disposal costs, not to mention the environmental downside of the extra diesel fumes and additional wear and tear on the State's infrastructure.

Response: As proposed, subdivision 363-6.6(b) would require only single composite liners for C&D debris landfills. The regulations have been revised to clarify these requirements.

363-6 Landfill Design DGEIS
Comment: DEC is urged to withdraw the proposed revisions to the landfill slope rules. The new slope rules will allow a very substantial increase in the capacity of every permitted landfill in New York. The possibility of slope failure under the new slope rules is especially high in landfills taking substantial amounts of drilling wastes. Drilling wastes are four times as dense as industrial and municipal waste, and this high density increases the risk of slope failure.

The Draft GEIS does not adequately address all the areas of environmental concern with the proposed new slope rules, including the risks of increased slope failure and increased impacts on air and water from substantially expanded landfills. Nor does the Draft GEIS take into account the substantial expansion in the capacity of New York landfills that has taken place in recent years as a result of the increased privatization of New York's solid waste landfills. Most municipal landfills in New York have been effectively privatized under lease arrangements that typically prohibit the county owner of the landfill from opposing the private operator's expansion plans. Private operators seek to increase landfill revenues by filling permitted landfill space rapidly and then seeking expansion of landfill capacities. In every instance, DEC has approved expansion proposals. As more and more landfills in New York are being expanded, larger and larger amounts of land are being used for landfills, more and more air emissions are being generated and more and more waterbodies are being exposed to

the risks of water contamination at the landfill sites and in the waterbodies into which the treatment plants handling landfill leachate discharge their effluent.

The review conducted in the Draft GEIS of the new slope rules is not adequate because it fails to:
1. identify all areas of relevant environmental concern, 2. take a "hard look" at the environmental issues identified, and 3. Present a reasoned elaboration for why the identified environmental impacts will not adversely affect the environment.

DEC must conduct an adequate environmental review of the consequences of allowing a very substantial increase in the capacity of every permitted landfill in New York under the new slope rules and determine whether such expansions are consistent with New York's solid waste laws which are based on a policy of reducing waste disposal by landfilling. Because the environmental costs of continuing to expand New York's landfills will be too high, DEC is urged to not to backslide on the existing regulatory limits on landfill slopes.

Furthermore, increased height creates increased pressure from an increased load which can endanger liner integrity and affect its ability to retain leachate. DEC must conduct an adequate environmental review of the consequences of allowing a very substantial increase in the capacity of every permitted landfill in New York under the new slope rules and determine whether such expansions are consistent with New York's solid waste laws which are based on a policy of reducing waste disposal by landfilling.

Response: Proposed paragraph 363-8.1(a)(1) states that “(f)inal external slopes must not be greater than 33 percent, but interim external slopes may exceed 33 percent if the owner or operator demonstrates to the Department’s satisfaction that a greater slope is stable and slopes are not greater than 33 percent at final closure.” This is not a new landfill slope rule, but is a clarification of an existing Part 360 provision, located at 6 NYCRR 360-2.17(b)(2) which states that “Lift height must not exceed 10 feet and shall not have a final slope greater than 33 percent. Wastes must be placed and graded in accordance with the provisions of the fill progression plan set forth in section 360-2.9(e) of this Subpart, and shall not be placed at a grade of less than four percent to accommodate facility closure.” Proposed paragraph 363-8.1(a)(1) is clarifying that waste can be placed at interim slopes in excess of 33 percent if demonstrated and attested by the design engineer to be stable upon placement and to not exceed 33 percent at the time of closure. The final slope of 33 percent is expected to be met by the normal process of waste settlement and biodegradation which occurs in municipal solid waste landfills. Enabling landfills to take advantage of this inherent characteristic of interred municipal solid waste allows for the optimization of landfill’s disposal capacity and site life while reducing the need for new landfills or major expansion of existing landfills.

363-6 DGEIS Discussion on required electrical resistivity testing of both primary and secondary liners

Comment: There is no current issue with action leakage rate performance at landfills. Therefore, the premise of the discussion regarding 363-6 flawed. Primary liner performance is generally excellent because of the new testing methods. However, to extend those same methods to the secondary liner without an actual demonstration of the need for the added protection there is not warranted. It is a “belts and suspenders” approach. One or the other is needed, not both. There is no discussion on the increased complexity of construction of a liner system due to the proposed additional testing requirement.

Response: Electrical resistivity testing (ERT) is a construction quality assurance tool (CQA) that has gained wide acceptance in the landfill industry since the Part 360 regulations were last revised in 1993. This testing has been performed on the upper liner system at the majority of landfill construction projects across the State and has identified liner defects created during landfill construction and after conventional, seam-focused landfill CQA testing has been performed. Research has shown that the number of liner defects drops drastically when this test is part of the landfill’s CQA program. Specifically, industry literature has demonstrated that when only conventional CQA testing is used, the number of defects range from six to nine major defects per acre. When CQA testing includes ERT, the number is typically less than one defect per acre and the defects are generally smaller in size. It should be pointed out that only the flatter slopes of the landfill floor are required to be tested under the proposed regulations. Given this information and the Department’s concern for ensuring long-term protection of groundwater quality, the Department has determined that ERT verification of secondary liner construction quality is a reasonable requirement which will help ensure groundwater quality around solid waste landfills is not impacted by the landfill.

363-6 DGEIS Design enhancements to the hydraulic capacity of the secondary leachate collection and removal system

Comment: The design premise for rapid detection of a leak from the primary system into the secondary system is mistaken. Current design requirements are sufficient to collect and allow detection of a leak within a period of days. There is no need for 24 hour detection since there is almost no way a plug of several thousand gallons of leachate can enter the system from one spot, which is what would need to occur to exceed the 30-day average limit in one day. There is also no discussion on the rationale to require a factor of safety of 10 and the use of reduction factors when designing these systems. There is no discussion why 1,000 gallons per acre per day was chosen as the design goal. Landfills with leachate collection systems completely covered by waste and daily/intermediate cover materials will see less than half that amount in the primary leachate collection system.

Response: Based on liner performance monitoring and groundwater sampling, double-lined landfills are typically performing adequately. However, the current regulations have no design thresholds for the secondary leachate collection and removal systems. Landfills will need to retain functionality for hundreds of years and as such the Department took a hard look at how the current regulations could be enhanced to best

ensure acceptable long-term containment performance. In light of the length of time that landfills cells are required to operate including the post-closure care period, and the potential for clogging of leachate collection systems throughout that operating period, the Department considers a higher hydraulic design capacity to be necessary and appropriate. The 1,000 gallons per acre per day design requirement was chosen in order to assure that any breach to the primary liner is identified quickly, and to allow for adequate leachate collection and removal in the event of a catastrophic breach of the primary liner.

363-6.1 General requirements

Comments: Publically owned wastewater treatment works (POTWs) to which landfill is often sent for treatment do not monitor or treat wastewaters for Ra-226 or Ra-228 or other contaminants found in exploration and development waste largely because the Federal NPDES permits do not require it nor does NYS SPDES permits require it also.

Two NYS POTWs (Wellsville and Village of Bath) have accepted leachate from landfill that have accepted E&P wastes and as such without treatment methods to treat E&P wastes may discharge these constituents to NYS waterways. Any unregulated discharge of these pollutants most likely would run afoul of the federal Clean Water Act's anti-degradation provisions as they could impair the receiving waters existing use whether for drinking or fish propagation.

Unless landfills can guarantee that the leachate going to POTWs is free of toxic substances and has radiological content no great than drinking water standards (5piC/g), their leachate should not be disposed of at POTWs-since this practice effectively means direct discharge of contaminants into rivers and streams. DEC should amend Part 3363-6.1 to include a provision that any landfill accepting E&P waste is prohibited from sending leachate POTWs. This is necessary to prevent toxic and radiological substances associated with oil and gas activities from potentially causing harm to aquatic life, drinking water resources and public health.

The inability of POTWs to remove substances contained in E&P wastes is reflected in USEPA;s 2016 rule prohibiting the disposal of wastewater from unconventional oil and gas operations at POTWs because it can, "…contain high concentrations of dissolved solids (or salts), as well as pollutants such as radioactive elements, metals, chlorides, sulfates, and other dissolved inorganic constituents that POTWs are note designed to remove…constituents can be discharged, untreated, from the POTW to the receiving water; can disrupt the operation of the POTW (e.g., by inhibiting biological treatment; can accumulate in biosolids (sewage sludge), limiting their use; and can facilitate the formation of harmful DBPs (disinfection by-products).

The provisions on 363-6.1(c) state that leachate collection systems should be designed to effectively protect surface and groundwater resources from uncontrolled releases of landfill leachate. Studies indicate that over time, most landfills will experience leachate leakage into the environment; known pathways to water resources include the overflow of leachate collection units cracks in piping systems, as well as landfill liner failures.

Given this, DEC should amend Subpart 363-6.1(c) to include monitoring and repair requirements for full leachate collection and removal system, including at minimum weekly inspections and full repair within three days of a spill.

Response: Existing regulations require double composite liners for municipal solid waste landfills in the state. The proposed regulations have been enhanced to increase the efficiency and protectiveness of the landfill liner design, thereby increasing groundwater protection of the landfill. Operating requirements including annual cleaning and periodic video inspection of these systems through cleanouts help ensure the long-term effectiveness of the landfill components. The regulation of wastewater treatment plants is outside the scope of this rulemaking.

363-6.1(e) Requirement for lateral expansions needing to meet "all" of the provisions proposed revised liner systems or if not expansion would require compliant overliner

Comment: Most existing double-lined landfills with adequately operating secondary leachate collection and removal systems and to require them meet all of the liner requirements of the proposed liner requirements (i.e, primary and secondary drainage layer permeability or new performance requirements for these components) is not needed. As long as the secondary monitoring is in place and working without any problems should be proof enough that the proposed lateral expansion will not have to meet the new liner system requirements. Re-write this provision to afford more flexibility to not to needlessly require revised liner system requirements in lateral expansions. Suggested re-wording: *"(e) For lateral expansions adjacent to existing landfills that have less than a double liner system with secondary monitoring, any encroachment on the existing landfill's side slope must be designed to meet the equivalent liner system requirements of this Part."*

Response: The wording of subdivision 363-6.1(e) has been modified to clarify that this provision refers to the basic configuration of the liner system such as whether it is a single composite or double composite liner system.

363-6.1(f) Protection of existing wells and monitoring networks for progress cell construction

Comment: Monitoring well networks should be properly designed to provide effective monitoring, the abandonment and addition of existing monitoring wells should be performed as necessary to meet this requirement. We believe that DEC should remove this section.

Response: Protection of existing monitoring well networks is necessary because tracking data from the same wells over time provides enhanced data comparability. The use of the word "minimize" provides sufficient allowance for such monitoring well placement and replacement when needed. The language in the regulation has been retained.

363-6.2 Property line separation requirement

Comment: Current regulations allow a 50-foot separation for C&D sites on Long Island due to the recognition that there is a scarcity of available land. Several facilities have long range plans to maximize landfill life. The proposed regulations would reduce the capacities of sites by hundreds of thousands of yards. This would have considerable impact on the solid waste management strategies and costs for communities on Long Island as well as have negative environmental impacts if wastes have to transported out-of-the-area **(**e.g., increased air pollution and release of greenhouse gases due to increased use of trucks). Considering the safe guards under the existing regulations as well as the safeguards in the proposed regulations, continued use of a 50-foot buffer should be permitted. Suggested Revision: The current 50-foot buffer for C&D sites on Long Island should be retained as sufficient.

Response: The regulations have been revised to require a 50-foot buffer for landfills in Nassau and Suffolk Counties which accept waste identified in 363-8.2(a) in order to allow for continuity of existing landfill designs and construction.

363-6.4 Bedrock Separation

Comment: DEC should not ease up on the 10-ft separation between bedrock and bottom of leachate collection system. A minimum of 10 ft separation should be kept in all cases. In addition, in regards to a maximum hydraulic conductivity of $1x10^{-6}$. This criteria may be too low if using slug test methods and/or borehole skin effects are not taken into account. Drilling in fine-grained unconsolidated sediments often deposits a skin membrane of silt/clay on the borehole surface, which, if not taken account of, results in inaccurate pump tests which err on the side that indicates that the deposits are less permeable than they actually are. If borehole skin effects not corrected for or taken into account by the pump test analysis, then I recommend revising the maximum hydraulic conductivity to a more conservative $1x10^{-7}$ centimeters per second.

Response: The regulation has been revised to require ten feet of separation. The proposal to allow for a five foot separation was based in part on the good performance of the engineered double composite liner system and the expense incurred to backfill a site with ten feet of soil when bedrock is unexpectedly encountered during landfill construction. However, after further consideration, the Department has determined that a ten foot separation should remain in the regulation for the following reasons: 1) the low permeability soils required to make up this separation provide additional attenuating capacity to prevent contamination of bedrock aquifers; 2) accurately predicting bedrock groundwater flow conditions can be difficult; 3) in the event of liner failure, contamination in bedrock could spread rapidly through fractures and cover a large area; 4) experience has shown that that even with good hydrogeologic investigations, unexpected high points in bedrock can be encountered. Keeping with the ten foot separation provides a buffer to account for these unexpected high points. Ultimately, the ten foot separation along with the liner requirements will continue to ensure that a high level of environmental protection is achieved even in the unlikely event of a liner failure.

363-6.5(b) Landfill Subgrade

Comment: The subgrade is not necessarily always immediately below the landfill liner system. The commenter proposes the reworded text below to afford flexibility and clarification:

363-6.5(b) Materials required. The landfill subgrade material must be free of visible organic material and consist of on-site soils, or select fill approved by the department. There must be a minimum thickness approved, pursuant to section 363-6.4 of this Part, below the landfill liner system consisting predominantly of silt and clay-rich, low-permeability materials.

Response: It is unclear what would be between the landfill liner system and the subgrade, but the regulation has been revised to remove the word "immediately" to allow for the inclusion of some other material or structure between the subgrade and the landfill liner system should it be included in the design and approved by the Department.

363-6.6 Liner System and Final Cover Requirements
Comment: DEC should require double-liners for MSW ash monofill landfills and mixed MSW ash and MSW landfills.

Response: MSW landfills that accept MSW combustor ash are required to utilize double composite liners. The requirement for single composite liners for monofills for disposal of treated MSW fly ash, MSW bottom ash and MSW combined ash except in Nassau and Suffolk Counties has been protective of the environment and it is not necessary to augment that requirement.

363-6.6(a) Requirement for GCL in upper composite liner for Clean fill Landfills on LI
Comment: The vast majority of primary liner slopes are less than 10%. Accordingly, this proposed regulation would require a GCL for most liner systems. Under the current regulations, the two feet (24 inches) of low permeability soil as part of the secondary containment system provide an effective fail safe barrier for the liner system and consequently the GCL requirement is unnecessary. The installation of GCL will add approximately $43,560 per acre to landfill construction projects.4 In addition, for clean fill landfills in the deep flow region of Nassau and Suffolk Counties, the primary liner requirement is 80 mil, which is thicker than the standard requirement of 60 mil for the rest of New York State. Since the clean fill landfills in the deep flow region of Nassau and Suffolk Counties must use 80 mil liners, which are thicker and hence less prone to puncture than 60 mil liners, these landfills should not be required to add a GCL.
Suggested Revision:
The requirement for the GCL under the primary liner should be removed for clean fill landfills on Long Island in the deep flow recharge area since these landfills use thicker liners than those in other areas of New York State.

Response: The 80 mil geomembranes are required by the Long Island Landfill Law because of the importance of preventing contamination of the deep flow recharge area. Composite liner systems made up of a geomembrane barrier directly underlain by a

geosynthetic clay liner (GCL) greatly outperform the geomembrane liner by itself. Eliminating the GCL from the primary liner system would compromise the effectiveness of system in that any defect in the geomembrane would allow leachate to escape the primary collection system. The Department has determined that an upper composite liner is prudent and reasonable for all double lined landfills including clean fill landfills located in Nassau and Suffolk Counties. The language in the regulation has therefore been retained in the revised draft.

363-6.6(a) & (a)(1)(ii) Low permeability soil barrier of the secondary composite liner system

Comment: The commenter proposes that flexibility be added to this provision such that the DEC can approve an equivalent design of 2 foot thick low permeability soil barrier in the secondary composite liner. Alternatives such as Geosynthetic Clay Liner (GCL) should be allowed to substitute here.

Response: Equivalent design provisions are included at 363-6.21, however, the Department has not allowed equivalent designs for the two-foot thick low permeability soil barrier in the secondary composite liner system because of its durability when compared to relatively thin GCL or other geosynthetic systems. A two-foot thick clay barrier as the lowermost component of the double liner system provides for greater service life when compared to geosynthetic materials. In the case of a catastrophic event such as a landfill fire or a major failure of the liner system, the two foot thick low permeability soil layer is the last barrier to contamination entering the environment and would provide needed environmental protection.

363-6.6(a)(1)(i) Geomembrane thickness requirement

Comment: The commenter believes there needs to be a clarification on the thickness of the geomembrane. The “nominal 60 mil HDPE” required in the proposed regulations does not correspond to GRI GM 13 standards. GRI GM 13 requires HDPE to be manufactured with a thickness of 60 (nominal -5%) mils. Many commenters believes the thickness requirement as proposed would require a non-industry standard “special run” geomembrane. Therefore, NWRA requests that the thickness of the HDPE geomembrane for the primary and secondary composite liner systems be changed to “60 mils (nominal -5%)” to match GRI standards**.**

Response: The regulations have been revised to remove the word “minimum” and replace it with “or thicker.” The use of the word “nominal” is intended to allow for variability in thickness that is inherent in geomembrane manufacturing, and for which tolerances have been established through the work of the Geosynthetic Institute. The regulation is also intended to be flexible enough to allow thicker geomembranes to be used if desired by the designer or landfill owner. There is no reason that a special geomembrane must be produced to satisfy the requirement for a 60 mil nominal HDPE geomembrane.

363-6.6(a)(3)(ii) Primary leachate collection drainage layer permeability requirements

Comment: The proposed upper foot of material with the lower permeability (0.1 cm/sec) correlates to a clean medium sand.1 The proposed lower foot of material with the higher permeability (1 cm/sec. correlates to a clean coarse sand. 2 Accordingly, under the proposed change the upper foot of material will tend to have smaller particle sizes than the lower foot and consequently smaller particles from the upper foot will migrate to the lower foot over time, creating an average permeability. In addition, once the landfill begins operation, fine particles from the waste material will also migrate to the drainage layer further reducing permeability, which is inevitable, but not enough to prevent the flow of leachate to the collection system. The flow capacity for two feet of soil with one foot of head at 1 EE- 2cm/second, which follows the existing regulations, exhibits a flow capacity of 212 gpd/sq.ft. However with a typical peak leachate generation of 2500 gpad which is the equivalent of 0.057gpd/ sq. ft. the design under the existing regulations has a calculated factor of safety of 3,700 which is more than adequate to meet the factor of safety of 1.5 as defined in Part 363-4.3(c)(3)(ii).

Constructability is also an issue because grading 12 inches of sand on the proposed geotextile cushion (see Proposed Section 363-6.9) can create wrinkles and/or tears in the geocushion/geomembrane. Placing 24 inches of material with the currently required permeabilities is less likely to cause wrinkles and tears in a geocushion or geomembrane since the material is less coarse and the depth of material provides a buffer between the wheels of the operating equipment and the plastic liner beneath the soil.

Finally, the costs for the higher permeability soil material would add approximately $16,000 per acre to landfill construction without providing any additional environmental protection

Suggested Revision: The higher and dual permeability requirement should be removed since the proposed requirement: (a) is more costly, (b) is potentially damaging to the liner system, (c) fine particles from the waste will enter the drainage layer regardless of the proposed changes, (d) the existing requirements meet the safety factor required by the regulation, and (e) there is no environmental justification for change from the current requirements to this dual permeability requirements. Alternatively, if the agency does not remove the proposed requirement, then the agency should offer landfill operators the option of either complying with the existing regulations or with the proposed regulations.

Response: The regulations have been updated to require a higher permeability of 1 cm/sec for the primary leachate collection and removal system in order to minimize the potential for clogging. This is supported by literature on long-term performance of landfill drainage layers. Furthermore, this permeability has also been commonly specified by landfill design engineers in the majority of landfill liner designs even though the current regulations only require a minimum permeability of 0.01 cm/sec. To provide flexibility, the concept for a dual permeability layer for the primary drainage layer was included in

the regulations to allow the upper layer of the primary drainage layer to be made up of a layer of tire-derived aggregate, which typically is able to meet the permeability of 0.1 cm/sec. Tire-derived aggregate as the upper layer of the landfill's primary drainage layer enhances the liner system protection from frost when waste has not yet been placed in the cell and also enhances the durability of the drainage layer and thus protection of the geomembrane. The lower component of drainage layer would be still be required to have the higher permeability to protect against clogging. As to the concern for punctures to the geomembrane layer, the Department has documentation from liner integrity testing indicating that defects from these higher permeability aggregates are not a problem when a proper geocushion material is specified. However, if a landfill designer does not want to specify the upper layer of the drainage layer with a lower permeability layer then they can specify the entire two foot drainage layer meeting the 1 cm/sec permeability requirement. Due to concern for long-term performance of the primary leachate collection and removal system, the lower 12 inches or entire 24 inches of the drainage layer must have a minimum permeability of 1.0 cm/sec. This requirement is included to ensure long-term protection against the drainage layer clogging.

363-6.6(a)(3)(iii) Permeability of LCRS
Comment: As discussed in Comments 1 and 2, the higher permeability requires a coarser, and hence more abrasive soil, which could damage the liner and unnecessarily increase costs. The current regulations contain sufficient permeability requirements, and allow for a factor of safety greater than the 1.5 required by the regulations. Suggested Revision:
This increased permeability requirement should be removed from proposed Section 363-6.6(a)(3)(iii).

Response: These provisions apply to liner system slopes greater than 10 percent. Due to the effects of slope on efficient leachate conveyance in the primary drainage layer, the Department proposed a hydraulic conductivity of 0.1 cm/sec. In order to maintain the long-term performance of these drainage layers, an increased hydraulic conductivity above that required by the existing regulations is both prudent and reasonable.

363-6.6(a)(4) Hydraulic Capacity Design criteria for the secondary leachate collection and removal system
Comment: Our existing landfill designs would not meet this standard. The requirement for a maximum detection time of 24 hours is not necessary. Secondary monitoring is performed daily, and issues with the ALR are identified through a 30-day running average. There is no need for a design standard incorporating a maximum detection time.

Response: This requirement is for newly constructed landfill cells. As provided in the transition rules, retro-fitting of existing facilities is not required.

Comment: Why is one foot of sand necessary for one inch of head in secondary? A suggested compromise would be 6 inches of sand.

Response: The one-inch head requirement is intended to ensure that the secondary leachate collection layer will avoid a confined flow condition between the upper and lower geomembrane liners which from a leakage theory perspective increases leakages rates across the lower liner system should a confined flow condition exist and increases potential groundwater quality impacts. This requirement is only on the base of landfills where slopes are less than or equal to 10 percent.

Comment: Coupled with other design requirements for components of a landfill liner system, the need to design a secondary leachate collection system to be able to collect a minimum of 1,000 gallons per acre per day per 363-6.6(a)(4) is unjustifiable for several reasons. For instance, the design elements that go into the collection system include the use of performance reduction factors and the addition of a factor of safety on top that. Further, assuming the sudden disappearance of the primary liner and that the secondary liner system is then the sole removal system left beneath the landfill is nonsense. The primary system will still continue to collect leachate, just with a slight reduction in volume. As an example, a primary leachate collection system collecting 500 gallons per acre per day with a 30 gallon per acre per day secondary system collection rate only sees a six percent reduction in volume collected. Another way to put it: to exceed the 30- day average limit, a ten acre cell would need to see a plug flow of over 6,000 gallons in a 24-hour period to trigger a determination of a leak based on a 30-day average. Leakage suddenly coming from one spot in the liner would be next to impossible. Additionally, a landfill with waste in it will not experience leachate generation rates anywhere near 1,000 gallons per acre per day. The Department has plenty of information on file on typical active leachate collection system rates. Suggest striking the 1,000 gallon per acre per day requirement from the rest of this section. Current design requirements are sufficient.

Response: The new design criteria for the secondary leachate collection and removal system has been added since the existing regulations did not specify any such criteria for the landfill designer. The detection time of 24 hours and the maximum hydraulic capacity of 1000 gpad provides the design engineer with the minimum requirements for a conservatively designed secondary leachate collection and removal system that would be capable of handling an extreme failure of the upper liner system. The 24 hour detection time has a basis in USEPA technical guidance documents for designing double lined landfills. The 1000 gpad hydraulic loading is based on a typical landfill's operating leachate flow in the primary leachate collection and removal system. The one inch head requirement has been removed from the proposed regulations. While leakage into the secondary leachate collection and removal system is unlikely, the secondary leachate collection system should be designed to handle these conditions if a catastrophic failure did occur.

Comment: The specification for a hydraulic conductivity of. 0.1 centimeter per second would defeat the purpose of GCL. Understanding the desire to minimize the head on the secondary containment system, a one inch head is unrealistic. Calculations to demonstrate that low of a head level given the calculations to determine pipe and head

design would make this impossible. Would the DEC consider the use of 1 foot of sand as the drainage media in the secondary leachate collection and removal system on slopes less than 10 percent?

Response: The one inch head limit has been removed from the proposed regulation.

363-6.6(a)(4)(i)
Comment: The points in Comment 1 regarding constructability, cost, and the unnecessary increase in permeability are incorporated here. Additionally, laboratory transmissivity testing at a loading of 15,000 psf for 100 hours and a 3% slope demonstrates that the flow capacity of a typical geocomposite is 4.7EE-3 m2/s (Product literature for GSE Duraflow 330-8-8). This geocomposite utilized for a detection system in a hypothetical 20 acre cell, bisected by the detection piping, can accommodate a flow of 1127 gpad with a FS of 10 and total reduction factor of 1.89 without the use of a high permeability soil layer . Consequently, the additional 1 foot soil layer is not required to meet the minimum flow of 1000 gpad. The additional one foot of soil in the proposed regulations would add approximately $85,000 per acre and represents a loss in landfill volume of 1613 CY/ acre. Suggested Revision: The requirement for one foot of sand under the primary liner should be removed. The existing requirements should remain unchanged.

Response: The Department is aware that there are geosynthetic geocomposite drainage materials that will meet the new hydraulic capacity design criteria for the secondary leachate collection and removal system. However, a totally synthetic drainage layer is less than one inch in thickness and as such, if flows are even slightly impeded (e.g., from a potential wrinkle in the lower geomembrane) then a confined flow condition could exist. The one foot soil drainage media thickness in the secondary leachate collection system on the base of the landfill floor is intended to mitigate the formation of wrinkles in the lower geomembrane during construction and to provide a physical separation between the primary and secondary liners. This enhances the environmental protectiveness of the system. No changes in the proposed regulations were made as a result of this comment.

Comment: The commenter opposes any change to the design of the liner system and final cover requirements that are not supported by data showing the existing liner system and final cover requirements are inadequate. The existing New York State requirements for liners and final cover meet requirements of other states for hazardous waste landfills. As local planning units do more to remove hazardous materials from the waste stream, the need for raising the requirements for liner and final cover seem excessive.

Response: The comment is noted. However, many of the liner and final cover system enhancements included in the proposed regulations are based on the designs of recent landfills permitted and constructed in the State since the last major revisions to Part 360. The Department also determined that many of the proposed changes to the landfill

liner and final cover systems were needed to best ensure effective long-term performance of these critical containment system components.

363-6.6(b)
Comment: Delete any mention of "municipal waste combustor ash monofills" from this section. Do not allow combustor ash to be deposited as fill or cover in landfills with only a single liner. Standards for landfills containing ash should be at least as stringent as for landfills used for MSW.

Response: The Department's current regulations provide that a single composite liner system is sufficient for disposal of municipal waste combustor ash. The Department does not intend to modify that premise in the revised regulations.

363-6.6(d) Reference to gas venting layer
Comment: Numerous commenters stated that this is an antiquated method to manage landfill gas at a landfill facility. Most facilities have implemented active landfill gas collection systems. Venting gas to the atmosphere only occurs on a limited basis. Installation of a gas venting layer has been varianced successfully at many active and inactive landfill closures throughout the State. Installation of a gas venting layer at the active landfill gas collection facilities may lead to possible air intrusion into the landfill resulting in a potential fire risk. There is also a significant cost to the gas venting layer. We believe the need for a gas venting layer should be determined by the design engineer and not required. The commenter requests that the Department include language in Part 363-6.6(d) to allow a gas venting layer as an option, not a requirement.

Response: The regulation has been revised to remove the requirement for a gas venting layer. The layer can be included in the final cover design at the discretion of the designer.

363-6.7(a)(1) GCL intrusion into the secondary leachate collection drainage media

Comment: This section regulation should be revised to refer to the "carrier geotextile" within the GCL instead of the lower surface of the GCL being able to "inhibit: bentonite migration. The GCL can inhibit the migration of bentonite, but may not be able to "completely" prevent it.

Response: The regulation has been revised to refer to the carrier geotextile instead of the lower surface of the GCL and terminology has been changed from "prevent" to "inhibit" to acknowledge the practicality of minimizing bentonite migration into the secondary leachate collection and removal layer.

363-6.7(a)(2)(iv)
Comment: Suggest 363-6.7(a)(2)(iv) be revised to state the presence of cracks or granular material be minimized per the Department approved CQA/CQC plan. It is not possible for a secondary liner to be "free" of these issues.

Response: The regulation has been revised to include this adjustment.

363-6.7(b)(1)(i)
Comment: We support the concept for GCL on the 3:1 slope, but this section should be revised to impart more flexibility by referring the *"33 percent average in any directions."* is required instead of flatly saying "33 percent".

Response: The Department has limited the maximum slope of all parts and components of a liner system to a maximum of 33 percent to promote constructability and slope stability. The language in the regulation has been retained.

Comment: Commenters suggest that the proposed wording of this provision be rewritten as follows: *Part 363-6.7(b)(1)(i): "The GCL must be placed to achieve a minimum post-settlement effective slope of no less than two percent, except slopes parallel to the leachate collection pipe must have a minimum post-settlement slope of one percent."*

Response: The regulation has been revised to identify minimum slopes, however, those slopes are necessary during operation of the landfill as well as after settlement takes place. In addition, settlement is difficult to predict and verify. Therefore, the reference to post-settlement has not been included.

363-6.7(b)(1)(iv) 20 day requirement to cover geomembrane covering a GCL
Comment: The 20 day requirement for covering a geomembrane with soil that is covering a GCL is too restrictive. We believe that the 20 days should be increased to 60 days to afford more flexibility.

Response: The regulation has been revised to increase the requirement to 60 days.

363-6.7(b)(2)(i)
Comment*:* Commenters recommended that each section should be re-written to clarify the discussion on slope, the suggested wording is as follows: *"The soil component of the liner system must be placed to achieve a minimum post-settlement effective slope of no less than two percent, except slopes parallel to the leachate collection pipe must have a minimum post-settlement slope of one percent."*

Response: The regulations has been revised in proposed subdivision 363-6.1(c) and where liner system slopes are referred to in sections 363-6.7 and 363-6.8.

363-6.8(b)(5)(i)
Comment: Suggest 363-6.8(b)(5)(i) not require full roll lengths be used on slopes. This requirement can cause an unnecessary waste of materials. In addition, what constitutes a side slope? Is it a slope greater than 10 percent? This same section already seems to allow horizontal slopes so long as they are more than five feet from the toe of slope.

Rather, state here that horizontal seams on side slopes greater than 25 percent must be minimized.

Response: The regulations have been revised to make these adjustments.

363-6.8(c)(3)(vii) Electrical resistivity testing after soil layer placement
Comment: Numerous commenters suggest that the requirement for secondary geomembrane liner integrity testing be removed from 363-6.8(c)(3)(vii) for now. The technology currently available does not allow for testing of areas of the secondary liner without significantly interrupting construction progress. While a good idea, the Department can amend this one regulation in the future once testing techniques improve. There is no immediate threat of poor liner performance that must be addressed by requiring the secondary liner testing of which the commenter is aware of. There does not appear any justification for imposing this test to be done both upper and lower liners. Requiring both the primary and secondary liners to be tested is thus not necessary, scheduling the testing of both will be challenging, testing the primary only should be sufficient.

Response: Action leakage rate is not a good indicator of leakage through the secondary liner system. The technology has developed sufficiently to make liner integrity testing a reasonable requirement for both primary and secondary geomembranes and is being required to best ensure that groundwater will be protected for the long-term. See the related responses at the beginning of this subpart. The proposal has not been modified in the revised rules.

363-6.9 Geocushion Requirements
Comment: As noted in the above comment regarding Proposed Section 363-6.6(a)(3)(ii), the higher permeability requires a coarser, and hence more abrasive soil, which could damage the geomembrane liner. Consequently, the abrasion problem created by the proposed regulations as noted above must now be solved by installing a geocushion at an increased cost of $24,000per acre.3 In effect, the NYSDEC creates a problem by proposing a coarser material and then attempts to solve the problem by requiring a geocushion. Suggested Revision: If the DEC were to delete the proposed higher permeability requirement as requested in Comment # 1 discussed above, then there is no need for the high cost geocushion that is being proposed in this section 363-6.9. Alternatively, the proposed regulations should provide the option to choose either the geocushion and dual permeability approach or the current regulatory standard, which would permit landfill operators to make decisions based on local conditions.

Response: The proposed regulations have been revised to include an increase in the hydraulic conductivity of the primary leachate collection and removal system to match the hydraulic conductivity typically specified in the majority of landfills built since 1993. The increase in hydraulic conductivity is based on literature supporting that higher permeability of this drainage layer is needed to ensure against clogging and to increase the service life of this critical layer.

363-6.9(b)(1)
Comment: Requiring an enclosure for long term geocushion storage per 363-6.9(b)(1) is unwarranted. Rather, require rolls be stored off the ground under an additional cover or tarp (so as not to rely solely on the manufacturer's wrapping) or within an enclosure.

Response: The regulation has been revised to allow the option of storage off the ground under an additional cover or tarp.

363-6.9(b)(3)
Comment: Suggest amending 363-6.9(b)(3) by stating that geocushion materials must be placed in a manner that minimizes wrinkles and folds. "free" is not possible and when sewing geocushion materials together, fold overs will occur.

Response: The regulation has been revised to make this adjustment.

363-6.10(a) Calcium carbonate limit for soil drainage layer
Comment: Commenters suggest that the use of the standard ASTM 03042 to determine calcium carbonate content will make it difficult if not impossible for most stone materials in the State to meet the 15% maximum calcium carbonate requirement. ASTM 03042 utilizes acid which is much more aggressive than landfill leachate. We would recommend either increasing this percentage to 30% maximum or add language similar to the following to allow for modified testing: "Testing for calcium carbonate content shall utilize a pH to represent landfill leachate."

Response: The regulation has been revised to refer to appropriate testing methods. The Department would accept ASTM 03042 as an appropriate testing method in this case.

363-6.10(b)(2) Minimum 2% slope of drainage layer
Comment: Numerous commenters asked DEC to revise this provisions to read as follows: *Part 363-6.10(b)(2) "The soil drainage layer must be placed on a minimum post-settlement effective slope of two percent.*

Response: The regulations have been revised to make this adjustment.

363-6.11(a)(1) Requirement for leachate and gas condensate lines to operate without clogging throughout the life, post-closure and custodial care period
Comment: The design requirement for leachate collection pipes in 363-6.11(a)(1) is impossible. Nothing can be designed to last forever, which is the net effect when considering the open-ended timeframes of post-closure care and custodial care. A timeframe of x number of years needs to be specified here. However, there is not enough information to select that proper time. It is suggested, at this time, to set a timeframe equal to the active life of the landfill plus 30 years. When better information becomes available and is vetted by the Department and the regulated community, then the timeframe can be increased if necessary.

Response: The regulations have been revised to remove reference to the custodial care period for leachate collection and removal system.

363-6.11(a)(1) Peak flow of Primary LCRS
Comment: Many commenters are in agreement with this provision; however, the current Part 360- 2.7(b)(9)(i) allows the piping network to be sized for the peak flow attributed to a 24-hour-25- year storm to be removed from the landfill cell within seven days or less. We believe the seven day window is an important design and operational parameter. We request that Part 360- 6.11(a)(1) be modified as follows: "The primary and secondary leachate collection and removal system and the gas collection condensate piping system must be designed and built to allow for representative sampling of leachate and condensate and to operate without clogging during the landfill's active life, post-closure care period, and custodial care period. The primary collection pipe network must be sized for peak flow attributed to a 24-hour-25-year storm to be removed from the landfill cell within seven days or less."

Response: The regulations have been revised to allow seven days for the precipitation from a 24-hour 25-year storm to be removed from the cell.

363-6.11(b)(1) Increase in leachate collection pipe diameters
Comment: An increase in diameter provides slightly lower velocities and much lower depths of flow, which will create sediment buildup. There are no benefits to having the proposed eight and six inch requirement. The current six and four inch requirements should be retained.

Response: The increased diameter is intended to allow longer life and greater accessibility for maintaining the leachate collection system. The proposed regulation has been retained.

Comment: This section should be reworded to clarify which nominal diameter is required for the primary and which is required for the secondary, reword as follows: "*363-6.11(b)(l) be a minimum of eight inches in inside nominal diameter for the primary and six inches in inside nominal diameter for the secondary;"*

Response: The regulations have been revised to make this adjustment.

363-6.11(d) Certification Requirements for construction of leachate collection pipes
Comment: This certification requirement should be removed along with the underlying video inspection requirements. NYSDEC should consider accepting lamping of lines as construction progresses.

Response: Construction certification is a standard industry procedure by which a professional engineer registered in New York State who has overall responsibility for the project is required in order to document that the project was completed in accordance

with the proposed regulations and as well as the Department-approved plans, drawings and other documentation included in the design of the project.

363-6.12(a)(1)(i) & (2)(i) Factor of Safety of 10 for geosynthetic leachate collection drainage layers

Comment: 363-6.12(a)(1)(i) and (2)(i) require a factor of safety of at least 10 after employing various reduction factors in the design calculation. Acceptable engineering practice only requires a factor of safety of 2. See the US Army Corp of Engineers Unified Facilities Guide Specification for Geosynthetic Drainage Materials, Section 31 05 20, Page 6. A global factor of safety of 2 is used in their specification updated January 2016. Richardson and Zhao recommend a global factor of safety between 2 and 3 (GEOSYNTHETIC FUNDAMENTALS IN LANDFILL DESIGN, Proc. of Int. Symp. on Geoenvironmental Eng., ISGE2009. September 8-10, 2009, Hangzhou, China). Recommend this section be changed to require a minimum design factor of safety of 2.

Response: The regulations have been revised to require a factor of safety of three.

Comment: Many commenters raised concern with the proposed regulations require the secondary collection layer to be comprised of a geocomposite on slopes greater than 10% and both a geocomposite and soil drainage layer on slopes less than or equal to 10%. The factor of safety on the geocomposite must be a minimum of 10. Please clarify whether or not the factor of safety includes the various reduction factors for creep, intrusion, clogging etc. that are typically incorporated into the transmissivity calculation. Since the State of New York requires and has the added environmental protection of a double composite liner system, as well as additional leak detection layer requirements for flow capacity, soil hydraulic conductivity, leak detection time, and liquid thickness, it is our belief that the design parameters proposed in the new regulations are excessively burdensome with no added environmental benefit and no precedent or scientific basis for their use. It is unclear to the commenter what the objective of these additional requirements is, given the exemplary performance of double composite liner systems across the state. After consultation with design professionals, the commenter recommends the regulations require a minimum design factor of safety of 2.0. Reduction factors, as determined by the design engineer based on the application, would be in addition to the factor of safety.

Response: The factor of safety does not include the reduction factors. The factor of safety in 363-6.12(a)(1)(i) has been reduced to 3.

363-6.12(a)(1)(iii) Geocomposite transmissivity testing requirements

Comment: The 1,000 pounds per square foot seems to be excessive if we are required to use a Factor of Safety of 10. The language in the next paragraph seems more appropriate, and this section could be removed.

Response: The reference to the 1,000 pound per square foot minimum has been removed.

363-6.12(a)(1)(i) and (2)(i) Geosynthetic drainage layer design requirements
Comment: The proposed regulations require the secondary collection layer to be comprised of both a geocomposite and soil drainage layer on slopes less than or equal to 10%. The factor of safety on the geocomposite must be a minimum of 10. Please clarify whether or not the Factor of Safety includes the various reduction factors for creep, intrusion, clogging etc. that are typically incorporated into the transmissivity calculation. If the actual factor of safety is 10, in addition to the reduction factors, most likely all geocomposite will be required to be tri-planer type geocomposites (i.e. sole sourced), thereby adding significant construction costs. Many sites have successfully utilized bi-planer geocomposites. We do not see the need for this excessively high factor of safety. After consultation with design professionals. NYSASWM recommends the regulations require a minimum design factor of safety of 2.0. Reduction factors, as determined by the design engineer based on the application, would be in addition to the factor of safety. This has been common practice and was previously outlined in technical papers presented at Department sponsored events on December 1, 1999 and again March 22-23, 2016. Refer to references below that were included in the events. Giraud, J.P., Zomberg, J.G., and Zhao, A., 2000a, "Hydraullc Design of Geosynthetic and Granular liquid Col!ection Layers", Geosynthetics Jnternatlonal, Special ls.sue on liquid Collection Systems, Vol. 7, Nos. 4·6, pp. 285-380. Richardson, G.N. and A. Zhao. 1999. Design of Lateral Drainage Systems for Landfills, Raleigh, North carolina. Richardson, G.N., Zhao, A. (1998). "Composite Drains for Side Slopes In Landfi[J Final Covers." Geotechnlcal Fabrics Report, June/July, pp. 22-2S, 1998.

Response: The factor of safety does not include the reduction factors. The factors of safety in 363-6.12(a)(1)(i) and 6.12(a)(2)(i) have been reduced to 3.

363-6.12(c)(2)
Comment: A. The proposed regulation does not specify whether the testing would be done in the field or in a laboratory. The proposed regulation should be modified to state that the required testing can be performed in a laboratory even though it will be expensive to do such testing. It would be very difficult, if not impossible, to create and measure these conditions in the field. The one inch head requirement is unnecessarily excessive since the liner drainage designs are based on not exceeding one foot of head except during the 25-year 24-hour storm. Suggested Revision: This regulation should be modified to clarify that laboratory, not field, testing is required.

Response: The regulation has been revised to specify that the hydraulic transmissivity testing must be performed in a laboratory. The one inch head requirement has been replaced by a requirement that the head within the leachate collection layer must remain less than the thickness of that layer to prevent hydraulic connectivity.

363-6.15 Gas venting layer
Comment: This is an antiquated method to manage landfill gas at a landfill facility. Most facilities have implemented active landfill gas collection systems. Venting gas to the atmosphere only occurs on a limited basis. Installation of a gas venting layer has been varianced successfully at many active and inactive landfill closures throughout the

State. Installation of a gas venting layer at the active landfill gas collection facilities may lead to possible air intrusion into the landfill resulting in a potential fire risk. There is also a significant cost to the gas venting layer. We believe the need for a gas venting layer should be determined by the design engineer and not required. The commenter requests that the Department include language in Part 363-6.15 to allow a gas venting layer as an option, not a requirement.

Response: The regulation has been revised to remove the requirement for a gas venting layer.

363-6.15(b)(1) Requirement for 1 gas vent per acre in final cover
Comment: The existing regulations as well, as proposed regulations require active gas control systems as per 363-8.1 (e)(1) and most landfills currently utilize an active system which creates a vacuum in the landfill. Installing one gas vent per acre would inhibit the operation of an active system by allowing the intrusion of air into the landfill, which can increase the chance of landfill fires as well as reduce the concentration of methane which will inhibit flaring. Additionally, differential settlement between the vents and surrounding waste mass will tend to tear the seal between the vent and geomembrane cap, allowing the entry of water and oxygen into the closed landfill. Suggested Revision: This existing requirement should be removed because the proposed regulations require active gas control and the 1 vent per acre is counterproductive to the operation of an active system.

Response: The regulation has been revised to remove the requirement for a gas venting layer. In addition, the requirements for active gas collection and destruction have been removed, and replaced with a requirement for gas collection system to be installed in the landfill's waste mass to provide for the removal of the gas from the cell.

Comment: In 363-6.15(b)(1), there should be a differentiation between facilities with active gas collection and control systems and those without. Requiring a gas vent riser for facilities with active gas collection is unwarranted at closure since the active system will still be needed decades into the future. At that future date, the potential exists to simply convert well heads into passive gas venting point sources. Also, at that point in time, the engineer can determine which areas of the landfill might still need passive venting. It may be much less than a one vent per acre basis.

Response: The regulation has been revised to remove the requirement for gas vent risers.

363-6.15(b)(2) Passive gas vents
Comment: If landfills are required to have active gas collection, gas vent riser pipes should not be
required. Please see the following proposed addition to 363-6.15(b) as a new section (3): "*(3) areas of the landfill that do not have an active gas collection system shall utilize gas vent riser pipes."*

Response: The regulation has been revised to remove the requirement for gas vent risers as this has been left to the discretion of the landfill designer.

363-6.16(a)(2)(ii) Minimum nominal thickness for geomembranes
Comment: Numerous commenters raised concern with the term "minimum nominal thickness" in the proposed regulations does not correspond to GRI GM 13 standards for HOPE geomembranes or GRI GM 17 standards for LLDPE geomembranes. Both GRI GM 13 and GRI GM 17 allows HDPE and LLDPE to be manufactured with a nominal thickness minus 5%. As proposed in the draft regulations, this requirement would require a non-industry standard "special run" geomembrane for both materials. We respectfully request that the regulated thickness of the geomembrane materials be changed to allow for nominal -5% to match GRI standards.

Response: The regulations have been revised to remove the word “minimum” and replace it with “or thicker.” The use of the work “nominal” is intended to allow for variability in thickness that is inherent in geomembrane manufacturing, and for which tolerances have been established through the work of the Geosynthetic Institute. The regulation is also intended to be flexible enough to allow thicker geomembranes to be used if desired by the designer or landfill owner. There is no reason that a special geomembrane must be produced to satisfy the requirement for a 60 mil nominal HDPE geomembrane.

363-6.16(b)(2)(ii) Geomembrane barrier layer
Comment: There are areas of the landfill liner system in which GCL is not used and the geomembrane is used. Please see the proposed revision in following text: *(ii) where GCL is used, the geomembrane must be placed in direct and uniform contact with the GCL.*

Response: The regulations have been revised to make this adjustment.

363-6.19(e) Electrical resistivity testing of the primary and secondary liner systems
Comment: Numerous commenters raised concern that the requirement for electrical resistivity testing of the secondary liner to be an unnecessary unfunded mandate. There is an increased construction cost associated with this additional testing. There is also an added cost (estimated to be $10,000 per acre in consultation with providers of this service) of further construction delays with the added coordination and delay which is not easily calculated. This is expected to add an estimated $160,000 in construction CQA costs for an assumed 8 acre cell. It is unclear to the commenter what the objective of these additional requirements is, given the exemplary performance of double composite liner systems across the state. There is no environmental justification for imposing these additional requirements. State-wide, the data for the primary leakage rate recording in the secondary collection system landfill has consistently proven to be better than what is required by State and Federal regulations. Based on environmental monitoring results across the State, there is little to no evidence that the composite secondary liner systems are performing inadequately. What minimal environmental

benefit that can be gained from this requirement is offset by the added risk for damage to exposed secondary liner waiting for electrical resistivity testing, and the damage to overall liner systems that can occur during winter exposure resulting from construction delays.

Response: Action leakage rate is not a good indicator of leakage through the secondary liner system. The technology has developed sufficiently to make liner integrity testing a reasonable requirement for both primary and secondary geomembranes. The proposed regulation has been retained.

363-6.20 Aboveground and on-ground leachate storage tanks
Comment: We strongly support these provisions to properly contain leachate in closed systems prior to disposal, including subpart (a) requiring a secondary containment system in the event of a leachate spill. Containment is particularly vital because the design provisions in this requirement implicitly allow for the storage of leachate onsite up to three months.

Response: Comment noted.

363-6.20(a) Leachate storage
Comment: The Department should be able to approve alternative storage and transport systems,
please see the revision in revised text: 363-6.20(a) Except as described in the transition requirements in section 360.4 of this Title, only a storage tank system may be used to store leachate. The aboveground and on-ground leachate storage tank system must be capable of containing a minimum of three consecutive months combined primary and secondary leachate flow based on calculations required by subdivision 363-4.3(e) of this Part, unless an alternate storage and transport system is approved by the Department, and must have a secondary containment system capable of retaining leachate in the event of a leachate spill.

Response: The regulation has been revised to make this adjustment.

Comment: Eliminating the surface septage disposal lagoons and instead storing the leachate in storage tanks as per Subpart 363-8 Operating Requirements seems like an improvement. I assume the tanks will be metal and the leachate will be corrosive. In the end, everything is going to leak, including the landfill liners. Already the Steuben County landfill has a leak that requires regular maintenance forever. LONG TERM planning is going to be needed. There are about 26 large landfills now. They may be too big already. This creates a stability problem with the angle of repose. There have been landslides in the walls of these large landfills.

Response: Leachate tanks were required in the proposed regulations because they require less maintenance than surface impoundments. The leachate tanks typically used at landfills are constructed of glass-lined metal to reduce corrosion. Secondary containment is required by the provision to control leaks.

363-6.20(a)(2) Leachate storage options
Comment: Double-walled tanks should also be considered a form of secondary containment and added to this section.

Response: Double-walled tanks are an option for the landfill owner or operator, but other requirements have been included to reduce the potential for leakage. The language in the proposed regulation has been retained.

363-6.21(c)(1)(ii) Equivalent Design Standards for Alternative Operating Cover limits on Percent Fines
Comment: Numerous commenters requested that Part 360-6.21(c)(1)(ii) be deleted in its entirety. As written, this draft regulatory provision could severely limit the use of contaminated soil as AOC. Many contaminated soils with high clay and silt contents will have fines contents in excess of 25% by weight passing the #200 sieve. As stated previously, this could potentially drive up the cost of environmentally beneficial spill remediation projects and which could have the unintended consequence of driving remediation contractors to seek out less environmentally sound disposal options.

Response: It was the Department's intent to try to minimize fines which could diminish the performance of landfill leachate collection and removal systems. However, in order to allow for the use of contaminated soils as alternative operating cover the regulations have been revised to remove the requirement.

363-6.21(c)(2)(i) Equivalent design for shredder residue for AOC
Comment: The proposed regulation require all proposals to use automobile shredder residue as AOC must provide analytical data demonstrating that the shredder residue does not contain total PCBs concentrations greater than 50 parts per million. Proposals to use automobile shredder residue should also be addressed in the cover material management plan, with a plan for quarterly analysis. Please see our revision in italic text.
Proposals must also include an update to the cover material management plan as described in Part 363-4.5(e)(4) with details on the following criteria:
(a)Quarterly analysis for PCBs concentration from each generator. For generators in NYS, analysis must be completed at a NYS Certified lab. Results of analysis must be kept on file at the site.
(b)Laboratory results for each calendar year must be submitted with the annual report as described in Part 360.19(l)(3).

Response: The regulations have been revised based on the recommended language.

363-7.1(b)(2), (d), (g)
Comment: The text of this provision should be revised to delete reference to "…qualified groundwater scientist" and in turn insert the words: "…licensed New York State Professional Geologist…" in recognizing the recent changes regarding licensure professional geologists. The following sentence should be added to the end of the text

of this provision: *The surficial geological map must be submitted under the stamp and signature of a professional geologist or professional engineer licensed and currently registered to practice in the State of New York.*

Response: Although this entire Subpart has been divided and relocated into Subpart 363-4, the proposed regulations have been revised to include reference to licensed professional geologists.

363-7.1(e)
Comment: The text of this provision should be revised as follows: *Test pits. Test pits may be used to determine shallow stratigraphy. The test pits must be logged by a qualified, competent geologist or geotechnical…..*

Response: The existing language requires that the geologist or engineer must have experience in similar hyrogeologic investigations and has been retained.

363-7.2(a)(1)(v)
Comment: The italic sentence should be added after the following cited phrase of this provision: "Every precaution must be taken during drilling and construction of monitoring wells to avoid introducing contaminants into a borehole*. Only a permitted drinking water supply source, or a potable water source of known chemistry, may be used in the drilling and installation of monitoring wells or piezometers unless otherwise approved by the Department in writing.*"

Response: The phrase "a permitted drinking water supply source" is sufficiently similar to the phrase "a potable water source." The language has been retained.

363-7.2(a)(1)(vi)
Comment: With respect to decontamination of equipment before use and between boreholes the words "steam cleaned" should be removed and replaced with "properly decontaminated".

Response: The Department agrees with this clarification. As such, the proposed regulations have been revised to include this language.

363-7.2(a)(1)(ix)
Comment: This requirement is appropriate for wells installed in overburden (porous media), however wells installed in competent bedrock should not be required to meet this same requirement. Current completion of a typical 2-inch diameter well into competent bedrock requires the proper installation techniques to adequately seal overburden water bearing unit(s), allowing discrete sample collection from the bedrock water bearing zone. Bedrock wells are typically installed by advancing steel casing (generally 4-inch diameter) through the overburden until contact with the underlying bedrock unit. The casing is seated into the top of bedrock and grouted in place to seal *off* the overburden water bearing unit(s). Advancement of a standard NX core barrel (3-inch diameter core) or larger diameter core bit (typically HQ - 3 3/8 -inch) is the

preferred method for the retrieval of a bedrock core. Upon completion of the bedrock coring, the borehole is subsequently reamed with a 3 7 /8-inch rotary bit, followed by the installation of a nominal 2-inch inside diameter well screen or riser pipe. Reaming the borehole to a diameter of 3 7 /8-inch will allow for the proper use of a 3/4-inch tremie pipe (OD is 1.050") to install the cement/bentonite grout, which is the current construction method (and is approved by DEC via project specific work plans). If a nominal diameter of at least two inches or larger than the outside diameter of the casing and screen were to be newly required for bedrock well construction, the costs for each diameter bedrock well installation would rise significantly as it would require placement of a larger diameter surface casing (typically 6-inch) and borehole reaming with a 5 7 /8-inch bit. This significant increased cost would not return significant benefit in the quality of bedrock well construction versus what is typical current practice**.**

Response: The language has been changed in the revised proposal to indicate that the boring must have a minimum diameter that is approximately two inches larger than the diameter of the well screen and riser. The example described in the comment (3 7/8-inch borehole with a 2-inch well screen and riser) is consistent with this requirement.

363-7.2(a)(2)(vi)
Comment: As a permittee, we would prefer to be required to provide keys upon request in the event that padlocks need to be replaced, etc. This could become a tracking issue, and would be better served by provided keys to the Department upon request. Maintaining a current set of keys on site is a better means of security. Please revise text say *the "keys will be maintained at the facility and will be provided to department staff upon request."* In lieu of providing a duplicate key to the Department.

Response: The proposed regulations have been revised to include the substance of the suggested language.

363-7.2(a)(3)
Comment: The use of words "obtaining sediment free samples" in this section is subjective and is not always possible. The commenter suggests the following words replace the quoted words above "reducing the sediment as much as possible" to be more realistic an understanding of actual conditions when conducting sampling.

Response: The Department recognizes that obtaining samples that are truly free of sediment is not always possible; however, this should still be the goal of well development. Existing language stating that development should attempt "to increase the likelihood of obtaining sediment free water" and "minimize to the greatest extent possible the amount of turbidity in the well" acknowledge that this goal may not always be met.

363-7.2(a)(6)(ii)
Comment: The following sentence of this provision should be revised: "*The screened interval of the borehole must be sealed separately and tested to ensure its adequacy*

before sealing…" to read as follows: *"The screened interval of the borehole must be sealed separately and sounded to ensure its adequacy before sealing…"*

Response: The term "sounded" is equivalent to "testing' in this case. The language in the proposed regulation has been retained.

363-7.2(c)(4)
Comments: The commenter is questioning the DEC's need for "original" field logs to comply with this provision. The commenter is recommending that the word "original" be deleted.

Response: The regulation requires that copies of original field logs be submitted upon request of the Department only. The language in the regulation has been retained.

363-7.2(d) In situ hydraulic testing in all monitoring wells
Comment: Hydraulic conductivity testing must be conducted in "representative monitoring wells and piezometers" as agreed by the Department. This testing of "all" wells and piezometers is not necessary.

Response: There may be circumstances where performing hydraulic conductivity testing in all monitoring wells and piezometers is not warranted. The regulations have been revised to state that hydraulic conductivity testing must be performed in all wells and piezometers unless otherwise approved by the Department.

363-7.3(a)
Comment: The commenter is recommending the following paragraph of this provision be reworded with the inserted new wording in italics: "The site investigation report must define the geology, hydrology, and hydrogeology of the existing or the proposed facility in sufficient detail to determine the suitability of the site for the disposal of waste. *The scope and extent of the hydrogeologic investigation must build a clear conceptual regional and site-specific model of the critical stratigraphic section (CSS),* be based on the hydrogeologic complexity of the site and the ability of the site to restrict contaminant migration*. The Site Investigation Report must be submitted under the stamp and signature of a professional geologist or professional engineer licensed and currently registered to practice in the State of New York.*

Response: The requirements for the critical stratigraphic section are adequately addressed later in the regulations, therefore the language in the regulation has been retained. The regulation has been revised related to the requirement for submittal by a professional engineer or geologist.

363-7.3(a)(1)
Comment: Change "groundwater measurements" to "hydraulic head measurements."

Response: The regulation has been revised to make this adjustment.

363-7.3(a)(2)
Comment: The following addition of "primary pathway" should be added to ensure that the primary pathway of the critical stratigraphic will be defined as part of the Site Investigation Report. "Part 363-7.3(a)(2) – a definition of the critical stratigraphic section and "primary pathway."

Response: The regulations contain language stating that a primary objective of the site investigation report is to develop a thorough understanding of site hydrogeology such that the primary routes of potential contaminant migration are identified and monitored. Some examples of this type of language are contained in 363-7.3(a)(3), 363-7.3(b)(2), 363-7.3(b)(2)(ii), 363-7.4(b)(1) and 363-7.4(b)(1)(ii)(a).

363-7.3(b)(2)(i)
Comment: Revise the following phrase to read as follows adding the new text in italics: "…all hydrogeologic units (e.g., aquifers, aquitards and aquicludes) *within the critical stratigraphic section,* and how they……

Response: The site investigation report must include all of the site-specific "hydrogeologic units" within the proposed facility whether they fall within the Critical Stratigraphic Section or not. The language in the regulation has been retained.

363-7.3(b)(2)(ii)
Comment: In the following phrase from this section: "**…**local groundwater recharge and discharge areas, high and low groundwater tables and potentiometric surfaces for each hydrologic unit,….." the word "hydrologic" should be substituted with the word " hydrogeologic".

Response: The regulation has been revised to make this adjustment.

363-7.4 Environmental Monitoring Plan
Comment: Radionuclides in groundwater and surface water and sediments would only be required in the event of contingency sampling. It is recommended that the requirement for radionuclide analysis be specified in Part 363-7.6 in at least the routine (annual) groundwater, surface water and sediment sampling for the facility in the EMP.

Response: The current placement of the radionuclides in the expanded parameters is appropriate. Background for radionuclides will be established prior to the facility taking in waste and testing will occur twice per year in the leachate characterization once landfilling begins. If there is an issue at the facility the Department has the authority to require the landfill operator to do additional sampling for radionuclides.

Comment: Sediment sampling is required by the proposed Part 363 at any landfill surface water sampling location. Sediment analysis in a landfill's EMP should be also be required to include the radionuclide parameters listed in the proposed Part 363-7.6's Table 3A.

Response: Radionuclides included as part of the expanded parameter list for any water or soil samples is appropriate. The proposed regulation has been revised to clarify that the Department may modify the parameters for analysis based on the location of the landfill or site-specific factors. This provides the Department the flexibility to include radionuclide testing for either water or soil sampling as necessary.

Comment: While it is commendable that New York has proposed to require at least semi-annual monitoring for radionuclides in primary leachate collection systems, a greater frequency would be highly useful to evaluating influent conditions for leachate treatment systems. It is strongly recommended that the leachate monitoring for radionuclides is conducted on at least a quarterly basis.

Response: The current frequency for leachate sampling is appropriate. The Department has the ability to increase the frequency of monitoring at any facility as necessary.

Comment: It is recommended that EMPs be required to include monitoring of sediments for Radium 226 near discharge points for leachate treatment systems if treated effluents are discharged on-site. If leachate is transported off-site for treatment, such as a POTWs, it is recommended that sediment monitoring for radionuclides on a routine basis is added as an NPDES discharge permit condition.

Response: The parameters and the frequency for monitoring water and soil samples is determined on a site specific basis. The initial site investigation requires an expanded analysis for all proposed monitoring points. If radionuclides (or any other parameter) are determined to be an issue at a facility, then the environmental monitoring plan must be written to address that issue. The requirements associated with water discharge permits are outside the scope of this rulemaking.

Comment: It is further recommended to closely evaluate NPDES permits for facilities that treat or transfer leachate of-site for additional treatment, such as POTWs. Evaluation of leachate monitoring data should provide the information necessary to determine if modification to NPDES discharge limitations or additional treatment is needed.

Response: The regulation of wastewater treatment plants is outside the scope of this rulemaking.

363-7.4(a)(3)
Comment: We strongly agree with DEC's requirement that landfills have a detailed plan in place for the frequency and location of monitoring. Part 363-7.4(a)(3) should specify that the "analyses to be performed" must be in accordance with the USEPA standard methods for relevant contaminants, as specified in Part 363-7.6.

Response: The requirements in section 363-7.6 are sufficient to ensure that the proper methods are utilized. The language in the regulation has been retained.

363-7.4(b)(1)
Comment: The commenter recommends the following wording for this provisions: Part 363-7.4(b)(1) – Groundwater sampling. Groundwater monitoring wells must be capable of detecting facility-derived groundwater contamination within the [primary pathway of the] critical stratigraphic section. The [underlined and bracketed] modification shown above is consistent with the proposed addition of the term "Primary Pathway" to allow for a distinction between the CSS as defined in the site characterization report and the appropriate stratigraphic location for groundwater monitoring.

Response: The regulations contain language stating that a primary objective of the site investigation report is to develop a thorough understanding of site hydrogeology such that the primary routes of potential contaminant migration are identified and monitored. Some examples of this type of language are contained in proposed 363-7.3(a)(3), 363-7.3(b)(2), 363-7.3(b)(2)(ii), 363-7.4(b)(1) and 363-7.4(b)(1)(ii)(a).

363-7.4(b)(1)(i)(a)
Comment: The commenter is recommending the following rewording of as expressed in italics: "Horizontal spacing of wells must be based upon site-specific conditions *as determined by a professional geologist or professional engineer licensed and currently registered to practice in the State of New York, subject to approval by the Department*. These conditions..."

Response: The recommended language would preclude a qualified geologist working under a licensed professional geologist or engineer from completing this task. The requirement that the final report will be signed by a licensed professional is sufficient.

363-7.4(b)(1)(i)(b)(1) and (2)
Comment: These subparagraphs should begin with the words "Unless otherwise approved by the Department," Incorporation of this language will clarify that where site-specific conditions warrant, alternative spacing may be approved by the Department.

Response: The maximum spacing requirements for downgradient (500 feet) and crossgradient (1,500 feet) wells are generally appropriate. However, there may be site-specific conditions that warrant minor variations from these requirements. The last sentence in proposed subdivision 363-7.1(a) states that any aspect of the site investigation report or environmental monitoring plan that deviates from the minimum requirements may be approved by the Department as long as that deviation is identified and justified in the appropriate document. This provides sufficient flexibility to accommodate the situation described in the comment.

363-7.4(b)(1)(i)(b), and 7.4(1)(i)(c)
Comment: Part 363-7.4(b)(1)(i)(b) – should be revised to read as follows: *In the primary pathway of the critical stratigraphic section..."*
The revised text shown above is consistent with the proposed addition of the term "Primary Pathway" to allow for a distinction between the CSS as defined in the site

characterization report and the appropriate stratigraphic location for groundwater monitoring. In the event that the Department determines a need for monitoring in a hydrostratigraphic unit other than the primary pathway, subparagraph 363-7.4(1)(i)(c) allows the Department to require monitoring of additional units.

Response: See discussion regarding critical stratigraphic section above.

363-7.4(b)(1)(i)(e)
Comment: Part 363-7.4(b)(1)(i)(e) – should be revised to read as follows: "*All downgradient monitoring wells must be located within 150 meters of the waste boundary. All monitoring wells should avoid construction within structural berms whenever possible."*
The revised text above are recommended for the reasons set forth in the following paragraphs. Placement of monitoring wells very near the solid waste boundary is often not practical, or necessary to ensure ready detection of an impact. Subtitle D requires wells to be located within 150 meters – site-specific conditions and the overall monitoring strategy approved by the Department should dictate well proximity to the solid waste boundary (which might include locations closer than 150 meters from the waste boundary). Elimination of the overly-restrictive proximity requirement of 50 feet will remove an unnecessarily arbitrary regulatory requirement and provide greater flexibility to strategize monitoring well locations. Locating wells very close to the solid waste boundary often exposes them to damage by operating equipment, places sampling personnel near access roads and operating equipment, and consequently increases the potential for dust and damage to compromise well and sample integrity. These factors should be considered, and flexibility granted within the scope of Subtitle D, when developing a groundwater monitoring strategy.

Response: The location of monitoring wells within 50 feet of the waste boundary is generally appropriate in order to ensure early detection of any contaminant release. However, there may be site-specific circumstances that warrant a greater separation. The existing language states that "downgradient monitoring wells must be located within 50 feet of or as close as possible to the waste boundary …., unless precluded by site conditions". It may be necessary to place wells outside of berms and away from access roads as stated by the commenter. The existing language is intended to accommodate those situations.

363-7.4(b)(1)(ii)(a) and363-7.5(c)(6)(iii)
Comment: Part 363-7.4(b)(1)(ii)(a) – Well screens must be located to readily detect groundwater contamination throughout the saturated thickness of the first water-bearing unit, and must be installed at a representative number of points at each subsequent permeable unit throughout the critical stratigraphic section. Well screens must not act as conduits through impermeable layers. [Wells monitoring the uppermost water-bearing unit must be screened to ensure that the water table surface is within the screened interval at all times.]

Part 363-7.5(c)(6)(iii) – Evacuation of the well must replace stagnant water in the well and sand pack with fresh water representative of the formation. Evacuation methods, including pumping rate, depth of pump intake, and method of determining sufficiency of evacuation must be consistently applied each time the well is sampled. [Evacuation methods must create the least possible turbidity in the well and must not lower the water in the well below the top of the sand pack whenever feasible. Evacuated water must be properly managed.]

The [bracketed] portions of these two requirements appear to conflict with each other, because one cannot have the water table within the screened interval and then evacuate the well while ensuring that the water in the well stays above the top of the sand pack, as it would already be below the top of the sand pack. The following wording is suggested for consideration with regard to Part 363-7.4(b)(1)(ii)(a): "*Wells monitoring the uppermost water-bearing unit must be screened to ensure that the water table is above the top of the sand pack, unless otherwise approved by the Department.*"

Response: The two referenced citations could be interpreted as contradictory. Including "whenever feasible" in 363-7.5(c)(6)(iii) was intended to recognize that there may be circumstances where the water level in the well was within the sand pack or well screen. However, the language in 363-7.5(c)(6)(iii) has been revised to clarify. The language in 363-7.4(b)(1)(ii)(a) to preclude installation of wells where the screen intersects the water table has not been revised, since this is often desirable for shallow wells.

363-7.4(b)(2)
Comment: This provision requires monitoring points for all surface water bodies that may be significantly affected by a contaminant release from the facility and notes that additional sediment monitoring may be required by the Department if necessary. Sediment samples must be collected from each location where surface water samples are collected and consist of the upper five centimeters of sediment. Sampling frequency and analytical parameter requirements will follow routine, baseline and contingency programs summarized in Table 3. It is again noted that sampling and analysis for radionuclides would occur only under a contingency sampling program, if triggered by analysis of other facility water, sediment, or leachate sampling results. Based on the previous recommendations from other recent research presented in this report and consistent with the ALARA principle, it is recommended that a requirement for radionuclide analysis, as specified in Proposed Part 363-7.6 Table 3A, should be made a requirement for facility EMPs. It is recommended that radionuclide sampling and analysis in performed on at least a routine frequency (annual) for groundwater, surface water, and sediment monitoring. See hard copy of comment #153 for other case studies.

Response: The proposed radionuclide testing requirements is adequate for the typical landfill. The regulations provide sufficient flexibility to increase the sampling for radionuclides if the situation warrants.

Comment: 'Sampling activities at surface water monitoring points include surface water, and may include sediment if determined necessary by the Department.' This is good, not all surface water sampling points need to also have sediment tested. We have been sampling sediment for years at all surface water locations, the results of which have never raised any concerns. This is a waste of money and resources. Sediment sampling is more relevant to Superfund sites.

Response: The proposed regulation at 363-7.5(c)(7)(iii) has been revised to indicate that sediment sampling may be taken, which is also consistent with proposed paragraph 363-7.4(b)(2).

363-7.4(b)(2)(iv)
Comment: Add requirement for sampling of iron floc deposits to requirements of Site Investigation Report.

Response: Aspects of the hydrogeologic investigation including sampling of monitoring wells, surface water, sediment, and iron floc are organized under the heading of the environmental monitoring plan. The site investigation report deals with site geology and hydrology. Adding a reference to iron floc sampling in the site investigation report is redundant since it is covered along with other chemical testing requirements in the environmental monitoring plan. The language in the regulation has been retained.

363-7.4(b)(3)
Comment: This provision should clarify that leachate monitoring for both baseline and expanded parameters in both primary and secondary collection systems must be conducted on at least a quarterly basis. These improvements are particularly critical at landfills that treat leachate onsite for direct discharge, but also necessary to reduce the possibility that leachate with excessive concentrations of chemicals, metals, and radionuclides will be sent to POTWs.

Response: Any landfills that treat leachate onsite for direct discharge are subject to discharge limits under the State Pollutant Discharge Elimination System (SPDES) program in addition to the leachate characterization requirements of Part 363. Landfills that send leachate to treatment facilities are subject to any additional analytical requirements imposed by the treatment facility in addition to the leachate analyses required by Part 363. The language in the regulation has been retained.

Comment: The Michigan TENORM Disposal Advisory Panel White Paper (2014-2015) recommended that landfills accepting TENORM to monitor leachate and groundwater monitoring wells for Radium 226. This recommendation has also been supported by the more recent 2016 PADEP TENORM Study. Proposed Part 363-7.4(b)(3) specifies that the environmental monitoring plan must include leachate sampling points for each discrete leachate collection area of facility cell. As presented in Table 4, primary leachate collection systems will be required to be analyzed for expanded parameters on a semi-annual basis. Secondary leachate collection systems must be monitored quarterly for baseline parameters, which would not include radionuclides. While is

commendable that New York has proposed to require at least semi-annual monitoring for radionuclides, a greater frequency would be highly useful to evaluating influent conditions for leachate treatment systems. It is strongly recommended that the leachate monitoring for radionuclides is conducted on at least a quarterly basis. It is further recommended to closely evaluate NPDES permits for facilities that treat or transfer leachate off-site for additional treatment, such as POTWs. Evaluation of leachate monitoring data should provide the information necessary to determine if modification to NPDES discharge limitations or additional treatment is warranted.
See hard copy of comment #153 for other state case studies.

Response: The Part 360 regulations prohibit landfills from receiving TENORM or processed and concentrated NORM for disposal. If it is determined that radionuclides are an issue at a particular facility, then the Department has the ability to increase the frequency of the radionuclides monitoring. The language in the regulation has been retained.

Comment: The commenter supports the DEC's decision to require leachate sampling as part of the EMP for landfills. In addition to the regulations outline in this section the commenter recommends the DEC add language to specify a standard analysis of the samples, as well as specifically require testing for radiation. Leachates should be sampled and tested on a regular basis, rather than semi-annually.

Response: The semiannual sampling is sufficient to adequately characterize leachate. The language in the regulation has been retained.

Comment: We respectfully request some relief from excessive sampling of leachate at multiple locations throughout the landfill facility. It is expected that the water in the secondary liner system would have leachate characteristics that are similar to the primary leachate. While it is desirable to have sampling points available for each cell, unless there is an issue in the overall quality of the leachate stream at the tanks, sampling each cell location continually is a waste of resources. Suggested language from the commenter is in below:

(i) All sampling points should be located to minimize pumping of leachate before sampling. Sampling points in the secondary leachate collection system should be adequate to sample liquids beneath each discrete leachate collection area or facility cell. These locations must be available to sample each cell's secondary leachate should an increase in flow occur in the secondary liner system, or as directed by the Department. (ii) Leachate in the primary leachate collection system must also have sampling points available for each cell in the event the overall leachate for the site exhibits elevated levels of contaminants or other quality concerns and discrete sampling is requested by the Department. Primary leachate must be sampled semi-annually for expanded parameters at a sampling point that allows collecting the sample before any onsite treatment processes or prior to removal from the site. (iii) Leachate in the secondary leachate collection system must be monitored semiannually for baseline

parameters. (iv) When a waste stream and/or its leachate are already well defined, the Department may waive some of the required analysis.

Another commenter suggests that this provision be revised as follows: "*Leachate in the primary leachate collection system must be analyzed semi-annually for expanded parameters as part of the environmental monitoring program. After no fewer than five years of cell operation, the owner/operator may petition the Department to reduce the monitoring frequency and/or suite of parameters for individual landfill cells if it can be demonstrated that over a minimum 5-year operational or post-closure period, the identified constituents and their concentrations remain consistent or decrease."*
The above modifications are recommended because the current proposed rules provide for modification of the groundwater monitoring list based on leachate composition. It follows that modification of the leachate monitoring schedule and parameter list is also appropriate based on the identified constituents and their concentrations over time.

The commenter the following provision be reworded to read as follows: "Leachate in the primary leachate collection system must be analyzed semi-annually for expanded parameters as part of the environmental monitoring program *until no significant change in chemistry occurs, as supported by statistical analysis*."

Response: It is important to monitor the condition of individual landfill cells through primary leachate analysis in order to identify and locate problem areas within the landfill. Compositing of leachate samples could mask problems in a specific cell. The language in the regulation has been revised to allow a reduction to annual primary leachate sampling after a minimum of five years of cell use and with a demonstration that the concentrations of constituents are stable based on statistical analysis. Unique circumstances which are capable of being justified would be considered through the Part 360 variance procedures.

363-7.4(b)(3)(ii) and (iii)
Comment: Proposed Section 363-7.4(b)(3)(ii) and (iii)-Require an increase in water quality monitoring for the secondary system from two times per year to quarterly, which includes baseline and volatile organic compounds. The current regulation: Part 360-7.4 (after the first year of sampling, requires parameter sampling at a minimum of every six months).
The increased sampling in the secondary leachate collection system will increase costs by approximately $7,500 per year. Moreover, it does not provide any increased insight or environmental protection since the quality in the secondary leachate collection system does not deviate substantially from the quality in the primary leachate collection system. The previous testing monitoring requirement should be retained.

Response: The regulation has been revised to require semi-annual sampling of secondary leachate.

Comment: Part 363-7.4(b)(3)(iii) – The commenter proposes the following revised text for this provision: "*Leachate in the secondary leachate collection system must be*

monitored quarterly for baseline parameters. After no fewer than five years of cell operation, the owner/operator may petition the Department to reduce the monitoring frequency and/or suite of parameters for individual landfill cells if it can be demonstrated that over a minimum 5-year operational or post-closure period, the identified constituents and their concentrations remain consistent or decrease. The underlined modified text shown above are recommended because the current proposed rules provide for modification of the groundwater monitoring list based on leachate composition. It follows that modification of the leachate monitoring schedule and parameter list is also appropriate based on the identified constituents and their concentrations over time.

This will require additional time for sampling firms to safely complete, resulting in additional costs to the owner. The analytical costs will also increase depending on the site and number of secondary collection points. Why the proposed increase in sampling frequency when ALR's are taken daily and generally once established leachate data remains consistent? When leachate test results at a site or at a portion of a site are well defined, the Department may grant waivers that authorize reductions in leachate sampling and testing.

Another commenter suggests the following rewrite of this provision: **"**Leachate in the secondary leachate collection system must be monitored ~~quarterly~~ for baseline parameters. [Thereafter, leachate in the secondary leachate collection system must be monitored annually.]"

Response: The regulations have been revised to allow a reduction to annual secondary leachate sampling frequency based on statistical analysis. This is consistent with the revision to primary leachate sampling frequency described above. The regulation has also been revised to clarify that sampling and analysis requirements may be increased if the allowable leakage rate is exceeded.

363-7.4(c)(1)(ii)(c)(3)
Comment: Multiple commenters stated that the existing regulations require four quarters of monitoring, which represents all seasonal variations, the proposed regulations doubling this requirement to eight quarters is not necessary if the four quarters were required in the existing regulations was adequate. Please change this back to existing requirement.

Response: Existing Part 360 regulations do not specifically address the minimum number of measurements needed to establish existing water quality in the case of where an intrawell analysis is used. By allowing existing water quality at the landfill to be determined based on pooled data from all wells, pooled data from a subset of wells corresponding to a specific flow regime, or data from a single well (intrawell analysis), the proposed new regulations allow greater flexibility. However, to ensure that the calculated means and standard deviations have adequate statistical power, at least eight separate measurements are needed. Where the pool of monitoring points is reduced in number, the number of sampling rounds must be increased. The four

rounds of sampling required in the existing regulations assumes that data from at least two monitoring wells is being pooled. The intent and effect of the revised regulations is to provide increased flexibility and not to increase the number of samples required for analysis of existing water quality.

Comment: The use of intrawell trigger values is commonly used for locations with differing groundwater quality. Intrawell values are currently computed using 4 rounds of pre-operational data. The proposed regulations would require 4 additional rounds of baseline sampling (8 sampling events total compared to 4 currently), which will be an additional cost to the owner. Baseline sampling costs are around $400/sample, therefore an additional $1600/sampling location. Will operational monitoring be allowed to be utilized for the additional four rounds of monitoring? If not, it should be, to avoid significantly delaying access to new cell areas.

Response: Statistical power is increased when more samples are used to calculate existing water quality. This is normally done by pooling data from monitoring wells within the same flow regime. Intrawell analysis is an extreme case where every well is in a different flow regime and cannot be pooled with data from other wells. In this case, it is necessary to increase the number of rounds of sampling in order to maintain an adequate number of measurements for each analysis. The requirement for a minimum of 4 rounds of sampling in the existing Part 360 regulations is not intended to apply to the special case of the intrawell analysis which would be avoidable at the vast majority of sites. The requirement for a minimum of four rounds of pre-operational sampling at each monitoring point in existing regulations is separate and distinct from the requirement that there be a representative amount of data used to establish existing water quality for each flow regime.

363-7.4(c)(1)(ii)(d)(2)
Comment: The procedure to calculate Statistical Trigger Values (STV) has been modified. This can cause confusion for existing facilities and programs. To maintain continuity of existing programs it is suggested that the proposed modification to calculate STV's only be applied to facilities that apply/begin their programs after the date of adoption of the new regulations.

Response: The regulations have been revised to allow existing facilities with statistical trigger values that were previously approved by the Department to continue to utilize those trigger values for compliance purposes. New landfills and lateral expansions of landfills must comply with the proposed statistical procedures.

Comment: NYSDEC is insisting on statistical analyses of groundwater data at landfills as if the data sets were normally distributed. Samples sizes are almost always too small, and many data will not be distributed in normal fashions (too many non-detects, often). To increase the possibility of normal distributions, NYSDEC wants to pool different well results (363-7.4(c)(1)(ii)(d)(3)(i) and (ii)). NYSDEC also wants to not allow the use of data comprised mostly of non-detects (most organic compounds). All of this can be allowed but at the discretion of the analyst. NYSDEC should instead require

groundwater reports to be submitted with defensible statistical analyses, of whatever kind the analyst chooses to submit.

Generally, given a 5% significance level, and 25 or more parameters sampled at each well (for baseline parameters, excluding VOCs), it is a near certainty (p = 1 - 3x10-33) that at least one exceedance will occur for each well (if data distributions are random within the range generating the original mean and standard deviation). The math is made sillier when multiple sampling points are considered. In addition, it is likely that water quality at and near the site will change over time. Given tendencies towards development, it is likely that nearby water quality will degrade over time. If the landfill is located at a portion of the site that previously had not been the site of much work-activity, it is likely that additional traffic and activity will also lead to impacts on the local water. Since the intention of the regulation is to determine if containment has failed (not if the site has impacted water, or if other factors are causing water quality effects), a statistical approach is going to be confounded.

Some form of nuanced analysis of soluble salts is probably the most meaningful way of looking for containment failure impacting groundwater. We all recognize that leachate releases will be multi-parameter impactors; soluble salts are likely to be retarded little (if at all) by the geologic media. The issue with salts is there are multiple potential sources for them; some fingerprinting means or other sophisticated forms of analyses will best to determine if leachate is causing the effect. I have always been partial to Stiff diagrams, but other forms of analyses will also be suitable. It just seems counterproductive to insist on parameter-by-parameter comparisons to statistical distributions that will always result in putative 'exceedances" when most of the exceedances will be meaningless. That will promote a culture of providing excuses for all higher results, even those that should be more closely and carefully considered.

Response: It is recognized that much of the water quality monitoring data submitted in connection with solid waste management facilities will not be normally distributed and for this reason, non-parametric approaches (Type B statistical trigger values) have been added to the regulations as an alternative, where appropriate. The regulations, both existing and proposed, provide the flexibility needed for a nuanced approach which uses major ion chemistry (e.g., Stiff or Piper diagrams) or fingerprinting (e.g. Br/Cl ratios) to supplement parameter by parameter comparisons. Where environmental protection and public health are concerned, we must be conservative and avoid Type II errors (false negatives), even if Type I errors (false positives) may sometimes result. The regulations, both existing and proposed, continue to provide opportunities to evaluate the significance of exceeded trigger values with the understanding that these may not always be facility related.

363-7.4(c)(1)(ii)(d)(3)
Comment: The exclusion for 50% non-detected values is not clear as to what constituents are affected, and why data would be excluded. The exclusion of non-detects with higher detection limits does make sense. We suggest that DEC revise this section.

Response: The regulations have been revised to remove the reference to 50 percent non-detect values and to clarify that non-detects higher than applicable standards or higher than detected values within the data set may not be used as a basis for establishing existing water quality.

363-7.4(c)(2)(iii)
Comment: Has the winter sampling relief been removed on purpose in 363-7.4(c)(2)? If not, it is suggested to add a note concerning previously approved exclusions and wording to allow a petition for relief from the winter sampling requirement for facilities with at least 5 years of data and otherwise satisfy the requirements of 363-7.4(c)(2)(iii)(a), (c) and (d).

Response: The regulations have been revised to allow omission of winter sampling if the appropriate requirements are met.

363-7.4(c)(2)(i)
Comment: Sampling of water can be tricky. Times of week, times of day, times of month, and which months of the year can all make a difference in test results. You say, “the proposed revisions will allow baseline sampling to be conducted at the same time each years instead of the current requirement that baseline sampling rotate from quarter to quarter. I think you should do the sampling both ways to do the best possible sampling.

Response: The comment refers to the requirement to analyze groundwater samples for baseline parameters at the same time each year, instead of rotating the baseline sampling event. Sampling for baseline parameters at the same time each year will reduce temporal variability related to fluctuations in groundwater elevation, and allow for better statistical comparisons. The language in the regulation has been retained.

Comment: Operational water quality: "... the baseline sampling event must occur at the same time each year." We agree with this change, rotating the baseline event can be confusing.

Response: Comment noted.

Comment: We agree with collecting the baseline sample at the same time each year, but that it should be specified as corresponding to seasonal low groundwater conditions.

Response: Specifying sample collection to correspond with low groundwater conditions would provide a better base of comparison. However, if sampling corresponds with seasonal lows, it is more likely that there will be an insufficient volume in the wells for baseline parameters to be run. The procedure of conducting the baseline sampling event at the same time each year is intended to provide this consistency.

363-7.4(c)(2)(iii)(e)

Comment: The overall concept of reducing the amount of required groundwater monitoring for well-established and well-run facilities is good. But, what is the rationale of requiring baseline for both semi-annual events? Baseline sampling currently requires validation, which is expensive (and unwarranted and will be addressed in another comment). Furthermore, the allowance for omitting the winter quarter sampling has been deleted from Part 363, so landfills that are now sampling 3 times a year will not save anything by doing semi-annual baseline monitoring. One baseline sample is about equal in cost to two routine samples. Suggested language: "*(e) the facility must monitor semi-annually; once for routine and once for baseline parameters."*

Response: A reduction in sampling frequency should be accompanied by collection of more comprehensive data for those two sampling events. Facilities are expected to see a financial savings in reducing from three or four annual events to two, since much of the costs associated with monitoring are related to sample collection and reporting of results. Additionally, the allowance for omitting the winter quarter sampling has been reinstated.

363-7.4(c)(2)(v)
Comment: Calling a first-time detection of a parameter that previously was a non-detect a "significant increase" in 363-7.4(c)(2)(v) is a very large overreaction. Laboratory techniques improve over time and will result in lower detection limits and better sorting out of detections due to matrix interference. At a minimum, this type of first time detection should be its own subparagraph, detailing a more reasoned approach on what to do. For example, the requirement should be re-written as follows:

"a. Compare the parameter to standards described in 363-7.4(c)(3)(vi)(a); and
i. Notify the Department within 14 days if the parameter exceeds any standard;
ii. Confirm the finding with the laboratory in case of any error in their reporting;
iii. Resample the monitoring point within 21 days of the initial finding to confirm the presence of the parameter in that location;
iv. If confirmed and above a standard, initiate contingency monitoring, unless otherwise directed by the Department.
b. If no standard is available for comparison or the detection is below the standard, require mention of the first time detection in the next quarterly report narrative;
c. Require discussion on potential sources or causes for the detection; and
d. Require resampling of that monitoring point for that parameter for the next 2 scheduled quarterly events."

Response: The procedures proposed in the comment are already allowed under the proposed rules at 363-7.4(c)(2)(vi), particularly the demonstration provision in 363-7.4(c)(2)(vi)(c).

363-7.4(c)(2)(vi)
Comment: This paragraph describes the procedure for reacting to a significant increase detection during normal sampling and requires baseline monitoring of all the monitoring points, or a subset thereof as determined by the Department. This seems

punitive when considering that there could be a natural variation in a well that exceeds the trigger value for an innocuous parameter like TSS or sodium, or there was a lab error that detected something for the first time. In either case, this does not warrant sampling all of the wells for baseline parameters. Please consider that **(c)** come before (b), namely that the parameters in question be resampled during the next sampling event and an opportunity given to make a demonstration as to the cause of the reported increase.

Response: Exceedances of statistical trigger values frequently occur at operational facilities due to natural variability, turbidity interferences or other site factors, such as salt application or tracking. Clause 363-7.4(c)(2)(vi)(c) was expanded to clarify that both verification resampling and inclusion of a demonstration narrative in the quarterly monitoring report were acceptable. Under the proposed language in 363-7.4(c)(vi), which is effectively the same as the current regulations, a landfill owner or operator would receive the results from a sampling event and then make a determination as to whether or not there were any significant increases. The facility would then have until the next quarterly sampling event to either demonstrate to the Department that the significant increase was due to a cause other than operation of the facility [363-7.4(c)(vi)(c)], or prepare to sample and analyze for baseline parameters during the next quarterly sampling event [363-7.4(c)(vi)(b)]. This subparagraph has been revised to clarify this.

363-7.4(c)(3)(v)

Comment: The 24-hour requirement is too short a time frame to notify the Department, within 14 days the samples can be collected and analyzed, with the results returned. This should be consistent with the criteria for the previous sampling events. The commenter suggests that the “24 hours” be changed to “14 days after obtaining results”. Commenters suggest this provision to read as follows: If one or more parameters are detected at levels above the groundwater protection standard established under subparagraph (vi) of this subparagraph in any sampling event, the owner or operator must notify the Department within *10 working days after results are obtained and* identify the expanded parameters that have exceeded the groundwater protection standard, and notify local government officials within seven days of detection.

Response: The requirement to notify the Department within 24-hours of detecting an expanded parameter above the groundwater protection standard is only within the contingency monitoring program where there should be heightened preparedness for reacting to more toxic parameters exceeding the established groundwater protection standards. The 24 hour notification requirement is also required for ALR exceedances and is of greater concern as this type of exceedance could represent a leachate plume leaving the engineered liner system. Additionally, because the facility permit is issued through the Department, the Department should first be made aware of such an exceedance. Local officials may require faster notification, but the seven day notice requirement is a minimum.

363-7.4(d)(1)

Comment: Data below MDL is estimated and not supported by quality control, and should not be supported. The commenter recommends the following phrase be deleted:*"(including all peaks even if below method detection limits [MDLs]),"*

Response: Estimated values must be reported in order to understand relative levels and variability. The language in the regulation has been retained.

363-7.4(d)(7), (8), and (9)
Comment: The proposed requirement for tables and statistical analysis within quarterly environmental monitoring reports is more extensive and includes analysis above and beyond the current reports associated with the existing regulations (363-7.4(d)(7)). Additional analysis of trigger values is also required. Would existing sites need to reestablish A & B level trigger values? Will existing EMP & SAP for established sites need to be done? Additionally, the new regulations will require graphs (363-7.4(d)(8)) for each parameter that has exceeded a groundwater quality standard and the development of quarterly groundwater contour maps (363)-7.4(d)(9)) (generally produced during the annual landfill review submitted during the Fourth Quarter under current regulations) is rigorous and unnecessary for sites that do not have groundwater contamination indications. Quarterly reporting costs will have to increase to account for the additional proposed requirements. The increased costs may range from $5,000 to $10,000 per year depending on the site. New EMP & SAP documents would add $5,000 to $10,000 in revised reporting costs. The commenter believes this is an unnecessary cost and requests that the requirement for graphing and mapping should be limited to the annual report.

Response: The regulations have been revised to allow facilities with existing statistical trigger values that were previously approved by the Department to continue to utilize those trigger values for compliance purposes. The regulations have also been revised to allow submission of the requirements in 363-7.4(c)(7), (8) and (9) with the annual monitoring report, with the exception that the Department may require more frequent submission of updated groundwater contour maps where warranted. An example would be where a groundwater underdrain system has been installed as part of the landfill design and initial operation of this system can result in changes to groundwater flow patterns at the site.

363-7.5(c)(6)(vi)
Comment: Part 363-7.5(c)(6)(vi) should be revised to read as follows:
"Other than analyses related to the approved evacuation techniques, field analysis must be performed after volatile organic samples have been collected, either within the borehole using a probe or from the next sample collected. All field test equipment must be calibrated at the beginning of each sampling day and checked and recalibrated according to the manufacturer's specifications. Calibration data must be reported with the analytical results." The suggested wording is needed because it is unclear what is being sampled under this requirement. Is this for geochemical analysis or headspace sampling? Should be revised to insert "Field" in front of "analysis" for clarity.

Response: This section refers to geochemical analysis, i.e. field parameter collection & order of sample collection. The regulations have been revised to read “field analysis” to clarify this.

363-7.5(c)(7)(iii)
Comment: Sediment samples "must" be taken at each location from which surface water samples are taken ... ' This is not necessary and should be site specific as determined by the Department approved environmental monitoring plan. Ongoing sediment sampling is more relevant to Superfund sites. The language implies all surface water samples should be accompanied by a sediment sample. This may not be feasible: at our landfill, three surface water locations include 2 from bridges and one from a pier. Secondly, what is the intent? Thirdly, small streams may have their subsurface negatively impacted by repeated coring. One sampling station at our landfill is in a stream that was ditched for mosquito control; it is only 1.5 feet wide, and repeated coring on a quarterly monitoring schedule would negatively affect the bottom of the stream.

Response: The regulations have been revised to make this adjustment.

363-7.5(d)(1) and (2)
Comment: 363-7.5(d)(1) and (2) The first clause requires all laboratory analyses to be performed by an ELAP, ASP laboratory, but then the second insists that all standard operating procedures be listed in the environmental monitoring plan, and any changes incorporated into the plan by amendment. Why require certification if listing of procedures is also going to be required?

Response: Part 363-7.5(d)(2) requires that the SAP must contain the standard operating procedures for the laboratory’s activities related to the EMP. This citation does not require these activities to be listed separately as part of the SAP. This citation can sometimes be addressed by attaching the laboratory’s Quality Assurance Project Plan.

363-7.5(d)(1)
Comment: The ASP has been discontinued by the NYSDEC. Suggested Revision: The ASP requirement should be removed. The regulations should instead refer to the need to use a NYSDOH ELAP-certified environmental laboratory and current laboratory methods for analyses.

Response: The regulation has been revised to remove reference to the Analytical Services Protocol.

363-7.5(e)(1)
Comment: Data validation by an independent party is unnecessary for ongoing monitoring at landfills. It causes labs to generate large volumes of paper and is expensive for landfills. Currently, critical drinking water and wastewater treatment plants are not required to validate, which leaves landfills and some Superfund sites as the only

types of environmental infrastructure facilities required to have validation. The labs are already accredited by the state and audited periodically. If validation is to remain in the regulation it should only be required for existing water quality and contingency monitoring and applied only to events requiring expanded parameter monitoring of groundwater, unless otherwise directed by the Department based on site and/or facility specific considerations. The following suggested wording is offered for consideration: *"Groundwater sampling events for which expanded parameters are required for existing water quality or contingency monitoring must have that data validated by a person other than the laboratory that performed the analyses and who is acceptable to the Department. Validation for any other sampling events may be required by the Department if special circumstances warrant it."*

Response: Data validation provides an independent check on laboratory quality that can identify systemic problems or explain anomalous data. However, independent validation should be limited to groundwater samples. The regulations have been revised to clarify this. In most cases, independent validation will only be required once each year during the baseline parameter sampling event, and only on a minimum of five percent of the data.

363-7.5(e)(1)(i)
Comment: NYSDEC will allow the laboratory that did the work to report its own data validation. No one should report their own data validation.

Response: Allowing laboratories to validate their own data for routine parameter analyses is reasonable, and does not compromise the effectiveness of the monitoring program. The language in the regulation has been retained.

Comment: DEC should be aware that many certified laboratories do not perform data validations in-house and it is common practice to have data validation performed by independent data validation firms. Suggested Revision: The requirement that data validation must be performed by the laboratory that performed the sample analysis should be removed.

Response: The language has been revised to state that data validation for routine parameter analyses may be performed by the laboratory that performed the samples analyses.

363-7.5(e)(1)(ii)
Comment: Part 363-7.5(e)(l)(ii) should be revised to read as follows*: "For those sampling events for which baseline or expanded parameters are analyzed, the data validation must be performed by a person having experience with similar validation projects, other than the laboratory that performed the analyses and that is acceptable to the Department."*
The regulations should ensure that data validation is completed by a person with experience in the subject. Please see our proposed rewording above for clarification.

Response: The regulations have been revised to make this clarification.

Comment: The commenter requests clarification of the term "and that is acceptable to the Department." It is our understanding that the Department will not approve a data validator. If this is not the case, please provide commenter with a list of acceptable data validators.

Response: While the Department does not approve data validators, it does retain the discretion to find unacceptable a validator that it believes to be unqualified. There is a sufficient distinction for this provision to remain valid.

363-7.5(e)(2)(i)
Comment: The data usability analysis is only required by this Part, and this should be clarified in the regulations, as in the revision proposed below suggests:*"Part 363-7.5(e)(2)(i) The data usability analysis must be performed on all analytical data generated by the requirements of this Part for the facility and must consist of the following…"*

Response: The regulations have been revised to make this clarification.

363-7.6 Water Quality Analysis Tables
Comment: We disagree that radionuclide monitoring for groundwater, surface water, and sediment should only occur under a contingency sampling scenario. Table 3A should be made a requirement for facility environmental monitoring plans for groundwater, surface water, and sediment monitoring (not only leachate pools) with radionuclide sampling and analysis performed on at least a routine basis.

Response: Radionuclides are not restricted to contingency sampling scenarios. Radionuclides have been added to the list of expanded parameters. Leachate is typically tested for expanded parameters semi-annually.

Comment: DEC should require testing of all major ions in leachate in order to make a determination of ionic balances, which is an indication of the quality and accuracy of the water-sampling process. It would not add a significant cost by adding a few more of the common ions to the list to be tested.

Response: All of the major ions needed for charge balance calculations, Piper plots or Stiff diagrams are already included in the routine, baseline and expanded parameter scans (or can be derived from alkalinity). Analytical tools such as these calculations or plots are commonly included in monitoring reports. See proposed paragraph 363-7.4(d)(2).

Comment: Routine and Baseline Monitoring Parameters - It is recommended that the following metals be deleted from the lists of Routine and Baseline Monitoring parameters: Antimony, Beryllium, Cadmium, Chromium, Cobalt, Copper, Nickel, Selenium, Silver, Thallium and Vanadium. Many states have waived monitoring for the

indicated metals in lieu of inorganic indicators since the metals are infrequently detected in leachate in significant quantities and/or are not readily mobile in the subsurface. Other indicators required are more protective in that they are more frequently detected in leachate at higher concentrations, are more mobile in the sub surface, less likely to be attenuated, and thus are a reliable indicator of a leachate impact coupled with the analysis for the organic compounds listed as Routine and Baseline monitoring parameters.

Response: The parameter lists in 363-7.6 already include the common inorganic leachate indicators. The eleven metals listed in the comment are included in federal regulations (Appendix I of 40 CFR Part 258), are only included in the baseline and expanded parameter lists (with the exception of cadmium) in 363-7.6, and can all be analyzed by EPA Method 6010. The language in the regulations has been retained.

Comment: Table 1 Routine parameters now include COD, BOD, phenols, bromide, and total hardness, as well as arsenic. BOD, COD, and phenols are often difficult for laboratories to report consistently; arsenic is a redox-sensitive constituent that in and of itself does not signal a leachate release. Consider the greatest arsenic problem in the world was not a waste-related issue (in India-Bangla Desh). Arsenic is also typically ND in unimpacted groundwater. All detections will constitute a significant increase in that case, a very unnuanced approach. Barium and boron, which typically are detectable in Long Island groundwaters, offer better candidates if the roster of routine parameters is to be expanded. Because they are typically detectable, better statistical ranges can be developed for “background” purposes, and both tend to increase in concentration with anthropogenic impacts on water quality, including landfill releases.

Response: The parameters included in the routine parameter list are necessary to identify potential leachate indicators. Specifically, arsenic is an important indicator of landfill-derived groundwater quality impact and is also prevalent in background water quality within New York State. Arsenic is of special concern due to its toxicity and its prevalence in landfill-derived contamination plumes. The fact that arsenic is redox-sensitive does not diminish its importance as an indicator of landfill-derived groundwater quality impact. Leachate released from landfills can alter the geochemistry of the underlying aquifer by creating the chemically-reducing conditions that mobilize naturally-occurring arsenic. Arsenic is ubiquitous as a trace element in most geologic substrates in New York State. This mechanism is similar to the mobilization of arsenic in organic-rich deltaic sediments in Bangladesh and West Bengal. In either case, landfills or organic-rich sediments, reducing conditions are caused by the bacterial decomposition of organic matter in a subsurface environment where the supply of oxygen is limited warranting that arsenic be maintained as a routine parameter. The Department agrees that the parameters barium and boron be included for those landfills located in Nassau and Suffolk counties and have added them to Table 1.

Comment: Table 3A: Expanded parameters now include radionuclides (Radium 226, Radium 228, total uranium, and gamma spectrum). These analyses are usually not part of standard laboratory repertoires, and may require assistance from NYSDOH. With the

requirement for radiation detectors at sites, what is the rationale for adding these parameters? This requirement also adds an unnecessary lab cost of $260 per test. For landfill sites with numerous wells this could add up to thousands of dollars per year. The radionuclides analysis should be removed.

Response: Radionuclide parameters have been included to identify the standard background concentration radiation in leachate and to identify any increased radiation that may result from acceptance of prohibited wastes. This requirement is intended to complement the radiation detector requirements to ensure that no regulated radioactive wastes are received for disposal. Due to potential for confusion between gamma spectrum and radium testing and in order to reduce costs on the landfills, the gamma spectrum analytical requirement has been removed from the regulation.

363-8 DGEIS regarding waste acceptance
Comment: I urge DEC to prohibit municipal waste incineration and the disposal of incineration wastes in New York's municipal solid waste (MSW), industrial and construction and demolition (C&D) landfills until it has conducted an adequate environmental review that addresses the risks presented by incineration and the management and disposal of incineration wastes. The proposed regulations continue to allow combustion of certain types of solid waste without any consideration in the Draft GEIS of alternative methods of waste disposal or of the health and environmental hazards of incineration and disposal of incineration wastes. Burning trash emits carbon dioxide into our atmosphere and creates waste with high concentrations of heavy metals, polycyclic aromatic hydrocarbons, and dioxins. Dioxins are among the most dangerous known chemical compounds. The EPA considers dioxin-bearing wastes to be "acutely hazardous" and therefore subject to stricter management standards than other hazardous wastes. Action to reduce emissions of dioxin is required by the Stockholm Convention. These wastes are not appropriate in New York's MSW and C&D landfills.

Response: Municipal solid waste combustion and the disposal of municipal solid waste combustion ash has been a standard practice in the state for many years, and has been considered in previous rulemaking procedures. Any wastes received for disposal at a Part 360 landfill must be determined to not meet the definition of hazardous waste. For clarification, the disposal of combustion ash in C&D debris landfills in prohibited under current and proposed regulations.

Comment: The review conducted in the Draft GEIS is not adequate because it fails to identify all areas of relevant environmental concern, take a "hard look" at the environmental issues identified, and present a reasoned elaboration for why the identified environmental impacts will not adversely affect the environment. It is essential that an adequate environmental review of the risks of incineration and measures for disposal of incineration wastes be conducted before allowing these practices to continue.

Response: The Department has taken a hard look at the volumes of analytical data collected on municipal solid waste combustor residues and air emissions from these facilities located in the State. Likewise, the Department has considered the analytical data generated from the ash residue landfill leachates and have seen no concerning indicators that would signal that the proposed regulations regarding these solid waste management facilities should be changed. All pertinent and relevant environmental information and issues associated with these revisions to the Part 360 regulations were considered as part of this rulemaking.

363-8.1 Air quality monitoring

Comment: The commenter recommends air quality monitoring at landfills that are located within 2 miles of communities. Part 363 offers a comprehensive assessment for monitoring of groundwater and surface water bodies, of which are necessary and appropriate. However, Part 363 offers no substantive efforts to address odor, particulate matter and air quality concerns particularly for landfills that in close proximity to schools, businesses and residential communities. Numerous landfills so sited receive numerous complaints each year regarding air quality impacts and odors. Community members and teachers in some cases at nearby schools have requested air testing numerous times only to be told by the DEC “we don’t do that”. This is not acceptable. Landfills generate strong odors and they can be source of particulate matter. Odor and particulate matter are not just a nuisance; thy can significant threaten public health. Section 363-8.1should be enhanced to include:

- Communities that are “host communities” for a landfill deserve to know if their air quality is being adversely impacted. Air quality monitoring should be mandated if community members are requesting it. Air testing should include but not be limited to H2S, VOCs including BTEX and particulate matter including fine particulates at 2.5 microns.
- Section 363-8.1(b)(1) states “Operating cover must effectively control vectors, fires, odors, dust and blowing litter”. However, it is unclear what happens in the regulations when the landfill fails to meet these criteria. The commenter urges DEC to provide greater community protection form particulate matter. Particulate matter is a grave concern for public health protection. DEC has granted a particular landfill a special use permit to utilize ash as cover instead of sand. The results have not been favorable for the community near the landfill. The ash is generating odors and dust and therefore, the special use permit should be terminated. The landfill special permit specifies that they can use ash as cover as long as it contained 20% moisture content. The commenter receives numerous complaints from community members stating they can “taste ash” and can see it falling on their cars and property during windy, dry periods. When we discussed this with DEC in years past, the community was lead to believe it was their imagination. Testing to air will provide a definitive answer based on science and not speculations.

Response: Air quality monitoring requirements and regulations related to particulate matter are beyond the scope of this rulemaking. Existing and proposed regulations require that solid waste management facilities control dust and odor so that they do not create nuisances for surrounding communities. The proposed rules also include an enhancement of the Facility Manual to improve landfill performance and to strengthen the Department's ability to enforce compliance with related issues. Any facilities which fail to comply with the Department's regulations are subject to enforcement.

363-8
Comment: Commenter suggests that DEC consider requiring drilling wastes and wastes that contain background Radium concentrations are placed exclusively in dedicated cells constructed with discrete leachate collection and removal systems. It is noted that the greatest benefits provided by this approach will rely on reliable waste characterization prior to disposal.

Response: Additional waste control requirements, including separation of drilling wastes from leachate collection and removal systems and from final cover, are included in the proposed regulations. Requiring that these waste streams be placed in separate cells is not necessary, based on characterization data and in light of the controls in place at landfills regulated under the State's solid waste management regulations. The language in the regulation has been retained.

363-8.1(a)(3)
Comment: Commenter agrees with DEC that there should be a required six foot distance between where drilling and production waste is placed in relation to the leachate collection and removal system. The commenter recommends that this distance should be significantly larger. Testing has shown that leachate radiation levels have been increasing in landfills that accept drilling and production waste and setting a required between the drilling and production wastes will reduce the possibility of contaminating leachates. However, six-feet is not enough to ensure that drilling and production wastes will not end up in leachates. It is imperative that these wastes are kept from leachates, given that they are prone to failure and leakage. A distance greater than six-feet would help prevent soil and groundwater from being contaminated by drilling and production wastes. Finally, the DEC should add provisions that prevent the disposal of leachates, from landfills that accept drilling and production wastes, at public wastewater treatment facilities. These treatment facilities are not equipped to remove the contaminants and radiation found in drilling and production wastes. The untreated wastes are then expelled and can contaminate waterways, which poses a significant threat to the public health and the environment. Landfills accepting drilling and production wastes should be prohibited from disposing of leachates at public wastewater treatment facilities unless they are able to meet drinking water standards for radiation and do not contain toxic substances.

Response: The separation from leachate collection and removal systems is proposed in order to limit the impact of fines in the drilling wastes on the collection system. It is not related to any naturally occurring radiation in the waste. The evaluation and

acceptance of wastewaters at wastewater treatment plants is beyond the scope of this rulemaking.

Comment: The regulations should clarify that unmixed drilling and production waste may not be placed within six feet of the leachate collection and removal system or within 10 feet of the final cover. Please see the revised text italic text: "363-8.l(a)(3) Drilling and production waste may not be placed within six feet of the leachate collection and removal system or within 10 feet of any final cover *without mixing.*"

Response: The proposed provision would be in place to reduce the impact of fines from drilling waste on the leachate collection and removal system. Mixing of the waste with other solid waste will not reduce that potential impact. The language in the regulation has been retained.

363-8.1(a)(4)
Comment: The commenter strongly supports DEC's requirements for the installation of fixed radiation detection units at landfills, including provisions for regular background readings and calibration. However, DEC should amend this provision to specify the required type and capabilities of radioactive waste detection units. Otherwise, it will be left up to landfill operators to determine which technology to use – in turn risking that radioactivity in waste goes undetected.

Fixed radiation detection units, or portal monitors, do not actually quantify specific radionuclide isotopes (such as Radium 226). For drilling wastes, fixed radiation detectors are not an effective method to screen whether waste loads meet municipal landfill activity limitations for Radium 226 and/or Radium 228. This is because fixed radiation detectors are designed to detect energy, primarily gamma or neutron waves – not the activity levels (i.e,.as measured in pCi/g) for those radioactive isotopes.

Importantly, Radium 226 primarily emits alpha particles, which are extremely hazardous to the environment and human health but cannot be detected through a thin barrier (such as a metal or cloth side or top of waste hauling truck). Radium is particularly dangerous for health and environment because it bio-concentrates and bio-accumulates, and does not degrade significantly (e.g. Ra 226 has a half-life of 1,600 years). Given this, the increasing disposal of radioactive material in a landfills poses a strong risk of cumulative effects on surrounding soil and water, and in turn people and wildlife.

The complexities of radioactivity detection in E&P wastes further underscore the importance (discussed above) of conducting laboratory analysis on chemical and radiological characteristics. It also points to the critical need for the DEC to take a precautionary approach and prohibit this waste stream from entering landfills and landfill leachate from being sent to POTWs.

Response: The regulations intentionally did not require specific types or models of radiation detectors in order to not inhibit the use of improved and advanced detector

technology. Standard radiation detectors measure gamma radiation because virtually all radioactive materials emit gamma radiation. If the radioactive content of the waste exceeds the trigger threshold of two to five times background, the waste must be investigated to determine if it is regulated radioactive wastes and if it exceeds the 25 pCi/g limit.

Comment: The commenter believes that the cost of implementing the proposed program outweighs the risk of a radioactive material being improperly managed. It is our understanding that where radiation detection detectors are used that hazardous materials are rarely (if ever) identified, and that typical responses are triggered by isotopes related to patients undergoing medical treatments. In addition to the cost of the fixed detectors, the costs of handheld units (or consulting fees) for follow up identification, back up units in case of equipment failure, required calibrations, operational issues (including interruptions for false positive readings), and staff training should also be considered.

Response: The potential impacts of receiving regulated radioactive waste at the landfill are significant and can be minimized through use of radiation detectors. The Department acknowledges that the proposed regulations would increase costs for certain facilities, which would include the cost of purchasing equipment, training and maintenance. As the comment suggests, it is possible that the detectors would be triggered by isotopes related to medical treatments. However, it is also possible that a landfill could unintentionally receive disposal of processed and concentrated radioactive waste (TENORM). Since TENORM may not typically be disposed in solid waste landfills in the State, it is important to screen for this material. Once mixed with other waste, removal of TENORM would be difficult and costly, thus the cost to install radiation detectors to screen for TENORM is minimal compared to the cost of addressing improper disposal. To minimize costs on the regulated community, the Department proposes to require installation of detector at only those sites where TENORM may be present - landfills, municipal waste combustors, municipal solid waste processing facilities, and some transfer stations. The costs associated with the requirement were considered as necessary in the rulemaking process.

Comment: The results of the DEC hearings in the "Chemung County Landfill Expansion Responsiveness Summary" of July 29, 2016, make clear that further restrictive regulation of natural gas drilling waste and Naturally Occurring Radioactive Materials (NORM's) is not necessary.

Response: The experience gained through development of the Chemung County permit and related evaluations, include appropriate waste management methods, waste screening protocols, and radiation monitoring procedures, were used in the development of these regulations.

Comment: The commenter is pleased that the proposed regulations would require landfills to install and operate fixed radiation detection units to monitor all incoming waste (Section 363-8.1(a)(4)). This is a commonsense proposal to ensure that landfills

accepting municipal solid wastes are monitoring and documenting any radioactive waste that enters the landfill. However, it would be beneficial for DEC to include standardized procedures that landfill operators must follow to test for radiation, and provide clear guidance for when radioactive waste must be rejected by the landfill.

Response: The appropriate procedures for responding to radiation detector trigger events will vary facility to facility. The Department will review and approve radioactive waste detections plans on a facility-specific basis.

Comment: The final regulation should require radiation detection at all landfills (including C&D) [363-8.1(a)(4)], at garbage burning facilities [362-1.5(b)(7)] and at transfer stations that send materials to out-of-state landfills or garbage burning facilities [362-3.5 (e)]. Each of these facilities is required to have a fixed radiation detection unit to monitor all incoming waste that is set to detect levels at least two times, but no more than five times background levels. If the detector is triggered, the operator must document the origin of the waste, the hauler, the reading and the ultimate disposition of the waste. The facility's annual report must include information on any time the radiation detector was triggered. All landfills are required to have a radioactive waste detection plan and response procedure, though the procedures are not specified in the regulation [363-4.5(i)].

Response: The regulations require radiation detectors at most facilities that manage municipal solid waste. The range of two to five times background is recommended by guidance in order to limit false positive trigger events. The regulations have been revised to require that trigger events be reported to the Department within 24 hours.

363-8.1(a)(4)(i)
Comment: DEC's proposal to require that all municipal solid waste landfills in New York install fixed radiation detection units at their entrances is not good enough. This requirement does not prevent radioactive fracking waste from entering New York's landfills.

Response: The highest potential for unauthorized disposal of regulated radioactive waste is at facilities that accept MSW. Therefore, the requirement for fixed detection equipment has been required at these facilities. The language in the regulation has been retained.

Comment: Typically, the sensitivity tests for the detectors are tests for uncontained sources of gamma radiation passing through the detectors at a speed of 3 miles per hour. If trucks drive through the detectors at speeds greater than 3 miles an hour, the detectors do not have time to react to radiation in the load.

Response: Radiation detectors are typically positioned on landfill scales. The truck stop at the scales to be weighed, and the detectors take readings while the truck is stationary.

Comment: Fracking waste materials coming into the landfill are contained in heavy metal truck bodies. Heavy metal truck bodies dramatically reduce the ability of the detectors to detect radioactivity in sources contained within the truck body. In addition, haul loads are not always uniform. Hot spots within the load may not be detected at all by the portal monitor.

Response: The sensitivity of the detectors is set low enough to detect radiation through the truck's body and to identify hot spots in loads.

Comment: The liquid component of drilling wastes collect at the bottom of the haul truck. The portal monitors are vertical scanning towers on either side of a haul truck that measure for radioactivity along their length and average the results. The hot area at the bottom of the truck can disappear in the average.

Response: Wastes which exhibit free liquids are prohibited from disposal at municipal solid waste landfills.

Comment: New York determined that fracking posed too great of a risk to be permitted. Now it must protect us from the threats of fracking waste.

Response: Waste from the fracturing and production of gas wells, such as production brine and flowback water, are considered bulk fluids which are prohibited from disposal at landfills. In order to ensure that these wastes are not disposed of in any form at Part 360 landfills, the regulations have been revised to clarify that these specific wastes are prohibited from disposal.

Comment: Portal radiation detectors do not detect the alpha emissions from Radium 226 and primarily measures gamma and neutron emission which are not strong from Radium 226. For radiation alarm event, consider specifying in the regulations specific agencies that must be contacted, a consistent and trackable notification procedure/format, and possible follow up actions, such as waste sampling or rejection protocol.

Response: Specific waste evaluation protocols will be develop on a landfill-specific basis and included in the landfill's facility manual. The regulations include requirements for reporting trigger events to the Department, and the regulations have been revised to require notification of trigger events to the Department within 24 hours.

363-8.1(a)(4)(ii)
Comment: DEC should at a minimum amend this provision by lowering the investigation alarm setpoint to no higher than 5piC/g. This is USEPA's concentration criterion for surface soil under CERCLA. This standard is based on gamma radiation detection, which is relevant to DEC's very limited proposal for radioactivity detection methods. It is also notable that industrial solid waste landfills nationwide generally follow an even lower limit of 3piC/g of radium for waste disposal.

Response: The three to five times background alarm set point is recommended by guidance developed by Argonne National Laboratory, a national leader in radiation research.

363-8.1(a)(4)(iii)
Comment: Background radiation readings at the facility must be measured and recorded at least daily." Background radiation is measured continually while the scale detectors are on. Also, background should not fluctuate significantly. Why does this need to be recorded daily?

Response: Daily measurement and recording of background measurement is a standard operation procedure of radiation detector operation.

363-8.1(a)(4)(iv)
Comment: The commenter encourages increase transparency, including requiring a report each time a waste load triggers a radiation hit as well as the information required in reports. When waste loads trigger radiation alarms at a facility, the landfill is required to document the date, name of hauler, origin of the waste, truck number, detection reading, and disposition of the waste. Text should be added to this section to require that the information be reported to the DEC and that the public be notified. This section should also include tracking requirements to ensure that the radioactive waste is properly disposed of.

Response: The regulation has been revised to require that radiation alarms events be reported to the Department within 24 hours. These notices will be maintained in the facility's operating records and files and their availability would be subject to the Freedom of Information Law. Notification of the public would not be prudent since the trigger of an alarm does not necessarily mean that regulated radioactive waste is present. Additional inquiry would be necessary in the event that the alarm is signaled and in some cases, such as the presence of waste from a patient undergoing medical treatment, there is no environmental concern nor a need for special handling of the waste.

Comment: When air and water testing is performed the public should not have to FOIL for this information but rather it should be made readily available on the DEC website. Notification to the public should be provided to alert them to the website.

Response: Solid waste management facility annual reports are available to the public on the Department's FTP site: ftp://ftp.dec.state.ny.us/dshm/

363-8.1 (a)(4)(v)
Comment: The radiation detector must be calibrated at least annually ... " Ludlum Measurements, the main manufacturer of detectors, sees no need for instrument recalibration as long as it passes the operational check with the source without indications of failure. Please consider this be changed to "at least annually or as recommended by manufacturer".

Response: The recalibration of radiation detectors is a standard operation procedure and is required to be done at least annually pursuant to the proposed 363-8.1(a)(5)(v).

363-8.1(a)(4)(vi)
Comment: The commenter supports DEC's requirement that "each instance in which the radiation detector is triggered by a waste load must be documented," including such details as the origin and hauler of the waste. However, as written there is nothing in the regulation that would prevent a landfill from transferring the waste that triggered the alarm to another location, potentially without is radioactive content being addressed prior to disposal. Nor does this section require further evaluation of the content of a "hot" waste load and potential risks to landfill personnel and the environment.

Response: The evaluation procedures for wastes which trigger the radiation detector alarm will be described in detail in the landfill's facility manual, which would also include procedures for handling the waste. The evaluation and appropriate disposal location will be coordinated through Department staff.

363-8.1(b)(2)
Comment: Commenter believes that spray-on material alternatives for daily Operating Cover should be included in the regulations, which would save both the facility and DEC the time approvals would require. Please see their suggested revisions: 363-8.l(b)(2) A minimum of six inches of compacted operating cover or spray-on material such as PosiShell, Short Paper Fiber or other similar blend of clay binders, reinforcing fibers and polymers that when mixed with water or leachate produce a spray-applied mortar if necessary, must be applied to all exposed waste at the close of each operating day, or at a more frequent interval if necessary, unless an alternative thickness or material is approved pursuant to section 363-6.21 of this Part.

Response: The use of alternative operating cover, including procedures to ensure that the alternative material effective for use and applied appropriately if a facility operator decision that requires Department approval for each alternative material. The language in the regulation has been retained.

363-8.1(b)(4) AOC requirement limiting it 20 percent of landfill's annual tonnage
Comment: Many commenters argued that the propose cap of 20% ADC will lead to higher disposal costs and might well be counterproductive from an environmental perspective as depending on their situation, landfills may switch to using other alternative cover material of at worst use virgin material to meet their regulatory obligations. Recommendations included increasing the threshold to 25%, 30%, or higher based on site-specific needs.

Response: The regulation has been revised to remove the 20 percent limit on alterative operation cover not counted toward the facility's annual tonnage acceptance limit, and to require that landfill permits identify the annual tonnage of alternative operating cover as a separate annual waste tonnage. In compliance with the transition requirements of

the regulation, this adjustment will be made to existing landfill permits upon permit modification or renewal. The change will allow landfill operators to justify the amount of alternative operating cover that they determine necessary based on their individual operating needs. This affords the flexibility requested in the comment.

363-8.1(b)(5)
Comment: Operational requirements for landfills containing ash as fill or cover should include procedures for management of ash to protect against air- and waterborne contaminants.

Response: The regulation includes sufficient safe guards and requirements to control dust and contamination of groundwater.

Comment: To protect landfill workers, waste haulers, and personnel handling leachate from a landfill containing incinerator ash, New York should require procedures including:

- Installation of air quality monitors that detect dioxins and other airborne toxins,
- Testing of leachate for dioxins and furans prior to initial disposal and then at least semi-annually,
- Worker training, such as hand washing before eating, and protective equipment to reduce potential inhalation and ingestion of ash residue.

Response: Occupational health and safety requirements are outside the scope of this rulemaking.

Comment: If AOC is covered with clean soil during storage, the run-off will not have to be managed as leachate. See the revised text in red: "363-8.1(b)(5) Alternative operating cover material approved pursuant to subdivision 363-6.2l(c) of this Part must be stored over a lined area of the landfill and run-off from the material must be managed as leachate unless the AOC is temporarily covered with clean soil.

Response: Soil cover is not sufficient to control leachate generated by contact with alternative operating cover. The language in the regulation has been retained.

363-8.1(b) new suggested section (6)
Comment: The commenter believes that DEC should include a regulation on how much cover material can
be stored at the facility, and how long the material can be stored for. We believe that a 90 day supply for 90 days would be sufficient. Please see the proposed regulation language for new section 363-8.l(b)(6): "(6) A stockpile of alternate operating cover material may not exceed a 90 day supply, for a period longer than 90 days, six inches of operating cover must be placed on top."

Response: The restriction of storage to lined areas of the landfill, in combination with the revised requirement to include the operator's stipulation as to the needed annual tonnage limit for alterative operating cover in the landfill's permit is sufficient. The specifics of these limits will be approved on a site specific basis as each landfill's physical conditions are different. The language is the regulation has been retained.

363-8.1(b) new suggested section (7)
Comment: For the purposes of resource conservation, the commenter believes that the re-use of Daily Operating Cover should be a viable option. Please see the proposed regulation language for §363-8.l(b)(7): "(7) Previously used daily operating cover may be stripped and re-used for daily operating cover if the surface does not exceed 10% of exposed waste."

Response: The regulation does not preclude the reuse of daily alternative operating cover as drafted. **T**he landfill operator would be able detail such procedures in the landfill's Facility Manual, which would be evaluated and approved on a site specific basis.

363-8.1(e)(1)
Comment: Several commenters argued that the **i**mposition of a state-wide mandate for active gas collection at a landfill will cost the commenter millions of dollars. The requirement negates our ability to recoup revenue from selling carbon credits. The mandate is the problem--we must voluntarily destroy the gas in order to sell the carbon credits. Thanks to an aggressive implementation of our active landfill gas collection system, the commenter has effectively captured our landfill gas and converted it to green power. The commenter is able to accomplish this task through re-investing carbon credit money in the collection system (wells and header lines). We understand that in New York State only two small landfills do not have active gas collection systems; DEC should work with those landfills directly to address this issue.

Response: The requirement for active gas collection and destruction has been removed. In its place, landfills which receive MSW must install horizontal gas collection network at every 20 feet of vertical waste placement and must provide a greenhouse gas reduction plan as part of their sustainability plan required as part of the permit application.

Comment: This should not exclude other beneficial uses of gas. Is this an immediate requirement for active collection from the construction of a new cell or facility? How long must this be active, through post-closure care?

Response: The requirement has been removed. See related discussions above and below.

Comment: We are very supportive of proposed section 363-8.1(e)(1) that requires that operating landfills have active gas collection systems that leads to either a flare or landfill gas to energy facility, thus destroying methane generated at New York's landfills. This is a critical improvement, given methane's significance as a potent GHG. *We'd ask that the Department modify the proposal to require gas collection only. Doing so will further reduce the health and ecological impacts of combustion related pollution.*

Response: In New York State all but two of the smallest landfills have active landfill gas collection systems utilizing landfill gas to energy facilities. These systems include a significant number of landfills which voluntarily collect and utilize gas to energy operations as well. In this State, 98 percent of all MSW being disposed is managed under systems that utilize effective active gas collection systems. Those landfills that operation systems voluntarily are able to sell offset credits and can use these credits to improve gas collection efficiencies at these sites, among other opportunities. Due to the comments received on the proposed regulations, the regulation has been modified to remove the requirement for active gas collection systems. The proposal retains the requirement for development of a landfill sustainability plan, which describes the methods that will be used to reduce greenhouse gas emissions from the facility.

363-8.1(e)(3) & 1(e)(4)
Comment: Proposed Section 363-8.1(e)(3) & (4) as they relate to the current regulatory provision "Part 360-2.16". The proposed regulations require the installation of four barriers (two geomembranes, one GCL and two feet of low permeability soil) to contain leachate and landfill gas. These redundant layers are sufficient to prevent the migration of landfill gas. In addition the requirement for an active system also collects gas, reduces pressures in the landfill and hence prevents gas migration. Suggested Revision: The installation of permanent gas monitoring wells or temporary monitoring locations and the monitoring should not be required since the layered lining system and new requirement for an active system will effectively control gas migration.

Response: The liner requirement for landfill construction can be effective in containing landfill gases, but collection and removal of the gas is necessary to ensure that the containment system of the landfill is not compromised. The collection and removal can be achieved either through active or passive gas collection.

363-8.1(e)(4)
Comment: Monitoring must be done below the wet or frozen zone if present; Monitoring should be performed during all seasonal conditions, not limited to when the ground has been wet or frozen. Please see our recommended revision in red text: "363-8.l(e)(4) monitoring must be performed at 100-foot maximum intervals where temporary sampling locations are used, or at 400-foot maximum intervals where permanent gas monitoring wells are constructed. Initial monitoring must be performed when atmospheric pressure and wind velocity are low and when the ground surface has been wet or frozen for several days."

Response: The regulation requires quarterly landfill gas monitoring at minimum. Only the initial monitoring is required to be performed under wet or frozen conditions. The language in the regulation has been retained.

363-8.1(f)
Comment: We appreciate and support the installation of standardized parameters for the testing of landfill leachate.

Response: Comment noted.

Comment: We appreciate and support the storage of leachate in tanks rather than open-air impoundments.

Response: Comment noted.

363-8.1(f)(2)
Comment: The commenter is in general agreement with this provision; however, the current Part 360-2.7(b){9)(i) allows the piping network to be sized for the peak flow attributed to a 24-hour 25-year storm to be removed from the landfill cell within seven days or Jess. This seven day timeframe should continue to be included in the regulations.

Response: The proposal has been revised to address this comment.

Comment: The previous regulations allowed 7 days to remove head from a storm event. Does this mean that head now may not exceed the 12 inch criteria during the storm? The commenter proposes the following revision to give a seven day allowance after a storm event to decrease the head back down to allowable levels. See proposed changes in red text: "363-8.l(f)(2) Leachate depth (head) above the primary liner system may not exceed 12 inches, except during and within a seven day period following storm events and in designed sump areas. Both the primary and secondary leachate collection and removal systems must be operated in a free-draining manner so as not to cause a leachate head buildup above the respective liner system."

Response: The regulation has been revised to include the seven day period following storm events.

363-8.1(f)(3)
Comment: If operating cover is defined as 363-8.1(b)(2) above, run-off that comes into contact with "intermediate" cover would have to be treated as leachate.

Response: The regulation has been revised to require run-off which comes in contact with any alternative operating cover generated from waste to be managed as leachate.

363-8.1(f)(5)
Comment: The 24-hour language creates an unreasonable operating requirement for facilities that typically do not operate 24/7. As written, we would have to remove even a ~ inch of rain within a 24-hour time period. Please see the following revision: "*363-8.l(f)(S) Stormwater within the secondary containment area of the leachate storage tank system must be removed so as to maintain a minimum of 100% containment capacity for the largest storage tank within the secondary containment area."*

Response: The regulation has been revised to address this comment.

363-8.1(g)(1)
Comment: Specify appropriate methods for cleaning leachate pipes, and require testing of leachate before and after pipe cleaning. The GEIS fails to evaluate potential adverse effects of cleaning of leachate collection and removal systems. The GEIS incorrectly states that cleaning of leachate pipes will reduce the potential for groundwater impacts. Moreover, the GEIS does not address the potential adverse impacts on surface water when leachate is processed at a wastewater treatment plant.

Response: A properly maintained leachate collection system will ensure that leachate will be properly removed from the landfill cell and will reduce the possibility of head buildup on the landfill liner, thereby reducing the potential for groundwater impacts. The potential impact on surface waters from wastewater treatment plants is beyond the scope of this rulemaking.

363-8.1(g)(2)
Comment: Why is the Department proposing a video inspection every two years? Experience at landfills shows that video inspection every two years is an unnecessary additional expense. The commenter recommends that should video inspection be required, and video inspections show the lines to be clean, a landfill can get a waiver from leachate cleaning requirements for that year.

Response: Video inspection is intended to identify any structural defects or blockages that have developed in the leachate collection and removal system. The regulations have been revised to allow the owner or operator to request a waiver from primary leachate collection and removal system cleaning based on the results of the video inspection. The requirement requires that waivers may not be issued in consecutive years.

Comment: While DEC has required landfill operators to conduct video inspections immediately after the leachate collection lines are first installed, this new requirement is imposed on collection lines that are in operation. It is our understanding the purpose of this requirement is ostensibly to identify evidence of clogging in leachate collection/detection lines and allow for remediation measures.
Based on the commenter's operational experience, unlike ashfill and municipal solid waste landfills, cleanfill landfills do not generate the kind of leachate that would clog collection/detection lines, and thus, such video inspections are unnecessary. Additionally, every time a camera is placed in the line the possibility increases that a camera can be lost and the line plugged indefinitely which can impede leachate collection. Also, while in recent years there have been reductions in size and improvements in capabilities of video cameras the practical limit to the length of camera lines is approximately 650 feet. Since the pipe length corresponds to the length of the landfill plus side slopes even if a camera could be placed from both ends this would limit the length and depths of cells to 1300 feet and effectively reduce available landfill volume within a given foot print. Assuming total pipe lengths of 2000 feet at a cost to video the lines at $3.30/foot,6 this could amount to $6,600, every two years or $3,300/year

Suggested Revision
The video inspection requirement should be removed at least with respect to cleanfill landfills. Due to differences in leachate characteristics between cleanfill landfills and MSW landfills, cleanfill landfill piping is not prone to clogging. Cleanfills should not be required to perform this inspection. In addition, it would not be possible to video all the piping, there is a potential for camera loss and impairment of the collections system, and effectively (but possibly unintentionally) a limit on optimizing landfill volume.

Response: The regulation has been revised to allow a waiver request from annual cleaning as described above.

Comment: Existing leachate collection and removal system infrastructure may not be able to support a video inspection, we propose that DEC only require this for landfills and portions of landfills constructed after the effective date of this Part, as in the revision in red text: *"363-8.l(g)(2) Video inspection of any primary leachate collection and removal system and secondary leachate collection and removal system constructed after the effective date of this Part, in accordance with this Part must be performed at least biennially."*

Response: The regulation provides for this concern by restricting the video inspection requirement to only systems constructed in accordance with the Part 363 regulations. The language in the regulation has been retained.

363-8.1(h) Operating Requirements
Comment: Pertains to current Part 360-2.17(j) requirement. The proposed regulation should provide that *any landfill constructed under the current regulations that has a double liner system including a composite liner in the secondary layer and good leachate accountability (i.e., less than 20 gallons/acre/day as required by the regulations) and is not impacting the ground water will be allowed to recirculate leachate.* This proposed regulation contradicts the requirement for sustainability noted in the New York State solid waste management plan since recirculation will reduce the trucking of leachate (e.g., reduce air pollution and release of greenhouse gases) and loading on sewage treatment plants (e.g., reduce the amount of water entering sensitive water bodies such as Jamaica Bay or Long Island Sound) and enhance biodegradation, which will increase landfill volume. Suggested Revision: The proposed regulation *should include an exception allowing double liner system landfills constructed under the current regulations to recirculate leachate.*

Response: Ash and papermill waste monofills and C&D debris and cleanfill Landfills on Long Island will not receive a benefit of waste mass stabilization from recirculating leachate and in certain instances, such as with ash monofills or papermill waste, the recirculated leachate cannot easily permeate the waste mass, contributing to leachate seeps. The language in the regulation has been retained.

363-8.1(h)(1)(iii)

Comment: 363-8.1(h)(1)(iii) should be amended to read as follows: *"…the cell's allowable leakage rate, based on a rolling 30-day average, measured in the secondary leachate collection and removal system has not been exceeded during the previous 12 months."*

Response: The allowable leakage rate is measured on a rolling 30-day average. The regulation states this in 363-8.1(f)(7). The language in the regulation has been retained.

363-8.1(i)
Comment: Why is sewage sludge excluded here and then specifically included in section (j) below?
We propose that DEC remove this exclusion, as in the revision below. An average of 20% solids would also allow for more flexibility, please see the added text in red text in the following revised text: "*363-8.1(i) Moisture content of waste. Wastes accepted for disposal must exhibit no free liquids and must contain an average of 20 percent solids. AU dredged materials and sludges accepted for disposal must be dewatered to 20 percent or more solids and exhibit no free liquid as defined by SW- 846 Method 9095 - Paint Filter Liquids Test, incorporated by reference in section 360.3 of this Title."*

Response: The 20 percent solids limit is set to reduce the amount of liquid introduced to the landfill, which thereby helps to reduce the amount of leachate which is generated. Basing the calculation on averages will likely increase the amount of liquid which is introduced. The language in the regulation has been retained.

363-8.1(j)(2)
Comment: The term sewage sludge should be changed to Biosolids, to match the definition in 360.2(b). The commenter proposes the following revision for this section: "*363-8.l(j)(2) Biosolids cannot be accepted for disposal from a sewage treatment plant that has a treatment process other than digestion or lime stabilization unless one of the following criteria is satisfied ..."*

Response: The regulation has been revised to make this adjustment

363-8.1(l)
Comment: Several commenters argued that this requirement is too restrictive. Non-friable asbestos can be handled as C&D debris and there is no need to provide limitations on its handling prior to it being covered. The commenter requests that part 363-8.1(1) be deleted in its entirety.

Response: The intent of the requirement is to keep asbestos from becoming airborne through processing or size reduction, which can happen with the use of heavy equipment. Special handling to ensure that asbestos fibers remain bound to the waste is appropriate, and the regulation has been retained.

Comment: Since there is no requirement in NYS for generators to test for this material, when non-friable asbestos waste is being disposed, it would be impossible for disposal

facilities to manage this condition. This is also similar to C&D processing facility requirements 361-5.4. The commenter recommends that this section should either be removed, or changed to match EPA requirements.

Response: The requirement does not refer to wastes received in the MSW stream. Instead, it refers to known asbestos-containing wastes which require special handling under existing regulation. The regulation has been retained.

363-8.1(m)
Comment: "…once a week a load must be dumped and thoroughly inspected for prohibited materials; a 'record of the results' must be retained." What results are to be created from this effort?

Response: The random inspection requirement is intended to help identify prohibited wastes, and should be used in combination with other waste control measures to reduce the amount of prohibited wastes that is received at the landfill.

363-8.1(o) Disposal Prohibitions
Comment: Many commenters argued to prohibit further acceptance of Marcellus Shale wastes in New York's municipal solid waste (MSW), industrial and construction and demolition (C&D) landfills until it has conducted an adequate environmental review that addresses the radioactivity risks presented by these wastes. Although the proposed Part 363 regulations appear to recognize that a radiation hazard may exist in waste entering New York landfills because they require radiation portal monitors and radioactive waste detection plans, the Draft GEIS does not identify Marcellus Shale wastes as a potential source of radioactive risk in New York solid waste landfills, does not address the radioactivity risks presented by Marcellus Shale gas drilling and production wastes and does not address which types of radiation portal monitors would have the capacity to detect the alpha and beta radioactivity contained in Marcellus shale wastes entering landfills in heavy metal truck bodies. The state of Pennsylvania recently conducted an extensive study of the radioactivity of Marcellus Shale wastes being deposited in Pennsylvania landfills but this study is not referenced in the Draft GEIS and the Draft GEIS makes no attempt to address the issue. DEC has been allowing large amounts of Marcellus Shale wastes from Pennsylvania to be deposited in three landfills located near the Pennsylvania border, the Chemung County landfill in Chemung County, the Hakes landfill in Steuben County and the Hyland landfill in Allegany County, on the ground that such wastes are "naturally occurring" without consideration of the radioactivity risks such wastes present and despite numerous requests to analyze these radioactivity risks. It is essential that an adequate environmental review of the radioactivity risks be conducted before any more Marcellus Shale wastes are allowed in New York landfills. Preventing harm from the waste from unconventional gas development was a specific reason why New York banned such development in the

state. DEC cannot be allowed to defeat the purpose of the ban by allowing this waste from other states to enter New York landfills.

Response: Processed and concentrated NORM is defined as a regulated radioactive waste under Part 380 regulations and as such is prohibited from disposal in landfills permitted under Part 360 without specific approval from the Department. The Department has previously determined that drill cuttings do not contain processed and concentrated NORM, and typically contain radiation levels that are similar to background radiation in the environment. Under the proposal, any waste – including NORM – exceeding 25 pCi/g is prohibited from disposal in a municipal solid waste landfill. In addition, radiation detectors are required at select solid waste management facility types in order to restrict the acceptance wastes which are prohibited from disposal, including regulated radioactive waste. The regulation prohibits the disposal of bulk liquids, and it has been revised to explicitly prohibit flowback water or fluids, production water or brine, fracturing fluids, or completion fluids generated from oil or gas wells.

Comment: We support the prohibitions in 363-8.1(o)(7) on the disposal of low-level radioactive waste and processed and concentrated Naturally Occurring Radioactive Material (NORM) waste, as well as in 363-8.1(o)(8) on concentrations of Radium 226 greater than 25pCi/g (though as discussed previously we believe this level should be set much lower). Regarding TENORM, we believe that oil and gas related drill cuttings meet the definition of TENORM and that DEC should clarify that they will be regulated as such. Metals and radionuclides do not degrade significantly in the environment over time, but as part of E&P waste their environmental mobility may be enhanced over natural conditions. According to the USEPA, TENORM includes “materials that have been concentrated or exposed to the accessible environment as a result of human activities:” in contrast, NORM is defined as materials that are left completely “undisturbed.”

For the purpose of the proposed regulations, however, we strongly recommend that DEC amends the list of disposal prohibitions to include drill cuttings, by revising 363-8.1(o)(7) to read “low-level radioactive waste, processed and concentrated NORM waste, including drill cuttings from exploration and production of oil and natural gas…”

DEC frequently insists that drill cuttings are simply “rock and soil residue” and “do not contain liquids with high concentrations of radioactivity.” The agency’s longstanding position that drill cuttings do not pose a threat to health of the environment does not have a credible scientific basis. Instead DEC appears to rely on a single 2010 study by a private consulting company (CoPhysics), as well as vies of a waste management company with a financial interest in landfills accepting drill cuttings.

Response: The Department has previously determined that drilling cuttings do not contain processed and concentrated NORM. Regulated radioactive wastes may not be disposed of at landfills without specific authorization from the Department, however, such determinations are outside the scope of this rulemaking.

Comment: Given the long history of poor supervision by the Commonwealth of Pennsylvania and a well-established practice *by* drillers to circumvent regulations there, we recommend that NYSDEC prohibit any form of gas and oil well brine, waste, drillings or other materials to be imported from anywhere outside of New York State.

Response: While both the existing and proposed regulations expressly prohibit bulk liquids from being disposed of in landfill, the proposed regulation has been revised to prohibit the disposal of flowback generated from oil or gas wells.

Comment: One key issue that is not identified or addressed in the Draft GEIS is the risk of radioactive Marcellus Shale wastes being deposited in New York solid waste landfills. Although the proposed Part 363 regulations appear to recognize that a radiation hazard may exist in waste entering New York landfills because they require radiation portal monitors and radioactive waste detection plans, the Draft GEIS does not identify Marcellus Shale wastes as a potential source of radioactive risk in New York solid waste landfills and does not address which types of radiation portal monitors would have the capacity to detect the alpha and beta radioactivity contained in Marcellus shale wastes entering landfills in heavy metal truck bodies.

Response: The radiation detectors which would be required under this regulation are capable of identifying radioactive wastes, including those that may be generated from gas exploration and production activities.

Comment: I urge DEC to prohibit the further acceptance in New York solid waste landfills of fly ash and the residue from air pollution control (APC) devices until it has conducted an adequate environmental review that addresses the risks presented by incineration and the management and disposal of incineration wastes.

Response: Wastes that do not meet the definition of a hazardous waste under Part 370 regulations are acceptable for disposal at solid waste landfills.

363-8.1(o)(1)
Comment: Does this regulation apply to waste tires in any form? This should provide an exemption for waste tires that are beneficially used.

Response: The requirement prohibits the disposal of wastes tires in any form as required by statute. However, the prohibition does not include the beneficial use of waste tires in landfill construction or operations. This use is must be authorized under the equivalent design standards of 363-6.21.

363-8.1(o)(3)
Comment: The discussion in the DGEIS relative to 363-8 regarding the prohibition on the disposal of source separated recyclables seems to ignore the part of ECL 27-26(3) where the “consideration of economic and technical feasibility shall guide the solid waste management programs and decisions of the Department…” The idea to prevent

source separated materials from being disposed is noble, but ignores an important aspect of the law, namely who is going to pay for it? This section should explain why it goes beyond the mandate in the current law.

Response: This requirement identifies wastes that are required by state law to be restricted from disposal, and refers generally to other source-separated recyclables that are source-separated as determined by municipalities under General Municipal Law 120-aa.

Comment: This regulation should clarify all source-separated recyclables, instead of all recyclables. See the revision in red text: *363-8.1(0)(3) source-separated recyclables, source-separated household hazardous waste source- separated electronic waste, source-separated rechargeable batteries, source-separated mercury- containing products, and other source separated recyclable items that are subject to legislatively enacted product stewardship programs in New York State;*

Response: The regulation has been revised to refer to "source-separated items that are subject to *legislatively enacted product stewardship programs in New York State* .

Comment: Prohibit a range of materials, including source separated recyclables and products for which EPR programs are in place, from disposal. ***We recommend that the final regulations be expanded to include organic materials, particularly from large-scale commercial and institutional generators.*** While natural gas extraction and delivery systems have taken the lead in methane emissions, landfills remain a close second. Methane is 84 times more potent a greenhouse gas then carbon dioxide. Organics are the primary source of degradable material that produces methane and landfill gas. Even when gas recovery systems are in place, estimates of "lifetime" or "integrated rate" recovery efficiencies can be as low as 20% (IPCC 4th Assessment Report, Chapter 10, at p. 600). For the same reason leachate recirculation should not be allowed. Organics also are high contributors to leachate production and cap destabilization. Being degradable material, organics are easily compostable to generate useful soil amendments and are is therefore a much higher use of organics. There is no reason to have organics in landfills and should therefore be banned

Response: The Department does not currently have statutory authority to prohibit organic materials from disposal**.**

363-8.1(o)(8)
Comment: Commenters advise that fixed radiation detectors are not effective to screen waste for Radium 226 and Radium 228 which range for 5 to 50 pCi/g depending on the respective states regulatory requirements. The commenter suggests that the Radium-226 limit of 25 pCi/g be lowered in the proposed regulations. The commenter advises that Radium-226 has a half-life of 1,600 years and is known to cause an array health effects as the basis to lower this threshold.

Response: Federal health risk assessments have concluded that 50 pCi/g is a safe concentration of radiation for disposal in solid waste landfills. The Department has chosen to limit the concentration of radioactive material to 25 pCi/g in order to ensure that landfills do not constitute a threat to human health or the environment.

363-8.1(p)
Comment: We appreciate new tracking requirements for several categories of waste, including drilling waste.

Response: Comment noted.

Comment: DEC should amend Part 371.1(e)(2)(v) to close the loop hole in state regulations that exclude E&P wastes from characterization as hazardous. We therefore support DEC's specification in this provision that special handling and disposal procedures for drilling and production waste must be included in the landfill waste control plans. However, this section should be expanded and amended to require that all landfill waste control plans include the analytical testing of oil and gas waste for it potentially hazardous characteristic (ignitability, toxicity, corrosivity, and reactivity), and if the waste tests as hazardous, it must be sent to a facility licensed to manage hazardous waste.

Currently waste management facilities in New York do not consistently require documentation of laboratory analysis to determine if wastes have hazardous characteristics. Testing parameters should include, at a minimum, all of those on NYSDEC's lists of substances with primary hazardous properties. Until landfills update their waste control plans to ensure comprehensive analytical testing, NYS DEC should prohibit them from accepting oil and gas waste.

It is vital for landfills to take measures to ensure greater protection against the impacts of E&P waste they accept. At the very minimum, the NYSDEC should require any landfill it permits to obtain documentation from waste transporters to certify that the specific load of waste in question has been thoroughly analyzed by a laboratory using USEPA TCLP analyses for Metals, Volatile Organic Compounds, Semi-volatile Organic Compounds, and total petroleum Hydrocarbons. These certifications should be made available to NYSDEC to ensure regulatory compliance and to the public upon request.

Response: The regulations associated with hazardous waste determinations are outside the scope of this rulemaking.

Comment: The commenter recommends that DEC set a higher standard for the solidity of drilling and productions waste that is handled and disposed of by landfills. Landfills are able to accept solid drill cutting waste because they are assumed to be less radioactive and contain less hazardous chemicals than flowback water. Many landfills have accepted loads of drill cuttings that have been predominately liquid. In these instances, it is likely that the "solid" drill cuttings contain flowback water as well as higher levels of contaminants. These regulations allow facilities to accept hauler's waste

so long as it is not leaking from the container and they are at least 20% solid. The commenter is concerned that without a higher solidity level, the DEC will not be able to ensure that the drilling and production wastes do not contain higher levels of contaminants and harmful chemicals that are commonly found in liquid drilling and production waste. Setting a higher solidity standard, especially for drilling and production waste, will reduce the chance of flowback water being illegally disposed of in NYS landfills. Additionally, accepted drilling and production wastes that are of solidity should be further tested for toxic contaminants that are found in flowback water.

Response: Drill cuttings and flowback water or production brines are generated at different stages of the gas extraction process. Fluids associated with drill cuttings are introduced in order to aid the drilling process. No flowback water and little brine are included in drill cuttings. The regulations have been revised to specifically restrict the disposal of flowback water or fluids, production water or brine, fracturing fluids, or completion fluids generated from oil or gas wells.

363-8.1(q)
Comment: The new training requirements requires training every 5 years: why not use pdhs from conferences as an option?

Response: The requirements does not explicitly restrict the use of professional conferences as a means of training. However, the training would have to be approved by the Department to ensure the training specifically addresses compliance with the Department's regulatory requirements.

363-8.1(q)(2)
Comment: Radiation detection system training should only be conducted by a certified Health Physicist, which should be incorporated into the regulations, as follows (see red text): "*363-8.l(q)(2) Training related to radiation detection system operating procedures and radiation investigation alarm response procedures must be conducted at least annually by a certified Health Physicist."*

Response: The appropriate individual to provide training will be established as part of a landfill's facility manual.

363-8.1(r)
Comment: Several commenters argued that **t**he deed description proposal should not be required for buffer areas and the filing requirement should be postponed until two (2) years prior to final closure of the site. In situations where there is a public-private partnership, future beneficial development such as an industry facility using waste heat adjacent to the landfill could be restricted. Developments after the deed description is filed may require modifications to the deed description and could encumber future development that is compatible with the landfill. All this information is available in the permitting documents, and all of it is subject to change over the life of the facility. Commenters also oppose the imposition of deed restrictions.

Response: The regulation does not require a deed restriction, but instead requires that a deed description be filed with the appropriate county clerk which identifies the limits of disposal within the property boundary among other information. Buffer areas are not identified in the requirement. It is likely that development around the landfill will be enhanced because of the clearly identified limits of disposal that are included in the deed. The language in the regulation has been retained.

363-8.1(s)
Comment: No time period for financial assurance is provided here. DEC should provide some guidance on how long to plan for.

Response: The specific requirements for financial assurance are included in proposed Section 360.22.

363-8.2(a) Added operational requirements for landfills in Nassau and Suffolk Counties
Comment: Proposed Section 363-8.2(a) as it relates to current regulatory provisions: Part 360-8.2.
The current and proposed regulations permit that "recognizable inert materials" can be disposed of in deep flow recharge areas of Nassau and Suffolk Counties. The NYSDEC interprets "inert material designated by the Department" as materials that meet the characteristics of 6 NYCRR Part 375 Table 6.8(b) for the protection of groundwater. However, using the groundwater standard is overly conservative because there are a number of protective layers, such as the liners and collection/detection systems, which would prevent the "inert material" from being in contact with the groundwater. Instead, "inert material" should be measured against the industrial soil standards in Part 375 Table 6.8(b). Landfills in the deep flow recharge area constitute an industrial use (NAICS CODE 562212). Therefore, landfills should be able to accept materials that meet industrial use standards. Otherwise, DEC has an illogically inconsistent position that the soil underneath a landfill can meet industrial standards but materials brought onto the landfill must meet a higher standard.
Suggested Revision
The soil standards for industrial use should be utilized as the standard to allow the disposal of inert materials in clean fill landfills.

Response: The restrictions on disposal included in this regulation are based on the statutory requirement established by the Long Island Landfill Law (ECL 27-0704). Disposal of waste based on industrial use criteria would be in conflict with the law and is beyond the scope of this rulemaking.

363-8.2(a-b)
Comment: NYSDEC continues to reduce acceptable materials to LI landfills beyond those specified in the Long island Landfill Law, although currently operating landfills a have no issues with leakage from their Part 360-compliant liner systems. Shouldn't the Department instead be seeking to increase the allowable materials as is legally

allowable, given that modern landfills appear to be capable of protecting the water source from contamination?

Response: The Long Island Landfill Law established both landfill liner requirements and restrictions on the types of wastes that may be received. As they are mandated by statute, both requirements must be included in the implementation of these regulations. Changes to statutory law cannot be made through rulemaking.

363-9.2(a)
Comment: In light of the limited tracking and reporting mechanisms in place with regard to E&P wastes, DEC should amend this section to require landfill operators to submit reports twice a year, rather than annually. DEC should specify in the section that data provided will be posted online and made easily accessible to the public. DEC should also make all drilling and production waste tracking forms available to the public in an online database.

Response: Part 364 has been revised to increase the tracking requirements on drilling and production wastes.

363-10 Closure Activities
Comment: This title should match what is listed in the Table of Contents for this part. Currently listed in the Table of Contents for section 10 is "Closure, Post-closure and Custodial Activities".

Response: The regulations have been revised to address this comment.

363-10.2(a)(1)
Comment: 363-10.2(a)(1) should recognize that a separate hydrogeologic investigation may not be required at closure for those facilities with an existing investigation conducted in accordance with 363-7.

Response: The regulation requires a hydrogeologic investigation the conforms with the requirements of 363-7. If such an investigation has already been performed for the facility, it is not necessary to duplicate it. The regulation states in 363-10.2(a) that **"**for existing sites where information is known through previous monitoring of the facility during its operating life, some or all of the requirements of this section may be waived upon approval of the Department."

363-10.2(a)(1)(iii)
Comment: This section should be more clear that separate pre-closure monitoring events are not required where the facility has performed routine operational monitoring prior to closure.

Response: The regulation has been revised to address this comment.

363-10.3(a) and (b)

Comment: The commenter understands the incongruity of 363-10.3(a) and (b) is due to an interpretation that the federal government's regulation will not allow final closure of the landfill to go on beyond 180 days after the last receipt of waste. We suggest there may be a way to allow a facility to fill its last area or cell in accordance with 363-10.3(a) and still meet federal requirements.

40CFR Part 258.60(g) states "The owner or operator of all MSWLF units must complete closure activities of each MSWLF unit in accordance with the closure plan within 180 days following the beginning of closure as specified in paragraph (f) of this section. Extensions of the closure period may be granted by the Director of an approved State if the owner or operator demonstrates that closure will, of necessity, take longer than 180 days and he has taken and will continue to take all steps to prevent threats to human health and the environment from the unclosed MSWLF unit."

The Department can make a determination that an extension of the closure time period is warranted if the facility can demonstrate it can prevent threats to human health and the environment during the period while the last cell is settling to final grade. Whatever requirements there might be at that time would be included in the facility's closure permit (363-10.1). It is suggested 363-10.3 (a) and (b) be amended to include at the end of the sentence "unless an extension is approved in the facility's closure permit."

Response: The regulation has been revised to allow for an extension of the final cover installation in (b). Five years is a reasonable amount of time for waste to degrade and meet closure design requirements. The language in (a) has been retained.

363-10.3(c)
Comment: How does facility closure compare to final capping of an area? DEC should clarify the difference. Will DEC allow an owner or operator to pull the cost of capping/final closureout of financial assurance for discrete areas?

Response: Closure of an individual landfill cell is required after the cell has reached its design capacity. Final closure of the facility takes place when all cells have been received final cover and no additional waste is received at the landfill. Whenever a cell receives final cover, the financial assurance instrument can be modified to remove funds dedicated for that activity from the instrument. However, costs related to post closure, custodial care, and corrective measures must be estimated for the facility in compliance with 360-22 as appropriate.

363-10.6(a)
Comment: There is no time frame for the post-closure care period specified, The commenter suggests this provision be revised by rewording this section go say*: "363-10.6(a) Post-closure care. A facility's post-closure care period continues for 30 years or until the owner or operator can demonstrate to the Department's satisfaction that the threat to public health or the environment has been reduced to a level where environmental monitoring and maintenance can be reduced."*

The commenter understands the intent of 363-10.6(a) is to create an undefined time for post closure care rather than a set period such as the current 30-year requirement. 30 years may well be too short a time period for final decomposition of buried waste, reduction and eventual elimination of landfill gases and reduction and stabilization of landfill leachate. However, by not having a time frame and not having other benchmarks to evaluate how the landfill is aging, this proposal is just not ready to be implemented. Keep the current requirement and work on a better post closure/custodial care program and implement those regulatory changes at a future date.

Response: The post-closure care period does not have a specific time period. Instead, it continues on a performance-based standard until the owner or operator can demonstrate to the Department's satisfaction that monitoring and maintenance can be reduce without a threat to human health or the environment. For financial assurance calculation purposes, a 30-year rolling average should be used, as is specified in proposed Section 360.22.

Comment: Based upon the Geosyntec presentation at the DEC/NWRA training course held on August 18, 2016, we recommend a more specific target reference to an achievable objective of functional stability. The recommended text is: "environmental monitoring and maintenance can be reduced based on a demonstration that a state of functional stability has been achieved. Herein, DEC adopts the definition of the target objective as "functional stability has been achieved when the facility does not pose an unacceptable threat to human health or the environment at the point of exposure (POE) in the absence of active controls." In the absence of a NYSDEC approved method or technical guidance document, this language infers a reference to EREF1 and ITRC2 technical guidance and/or other state guidance where functional stability has been adopted such as Washington3 and Florida4. This is a useful directive for owner /operators who seek guidance on compliance with such objectives.

Response: While the technical information on how to make landfill end-use determination evolves, the regulations would establish a flexible regulatory framework whereby the Department would be able to provide future guidance on the methods to demonstrate that the post-closure care period has ended.

363-10.6(a)(1)(iv)

Comment: Section 363-10.6(a)(l)(iv) should make clear that post-closure monitoring of wells consist only of those wells specifically selected for long-term monitoring purposes. The proposed language of annual baseline and quarterly routine monitoring should be changed to require the facility specific monitoring under a plan developed at closure. Modern permitted landfills with double composite liners can be effectively monitored by sampling the secondary leachate collection system. Landfills demonstrating that action leakage rates are stable, and where the quality of the secondary leachate is stable should not be required to also sample groundwater monitoring wells on a quarterly basis. This redundancy is expensive and unnecessary. Further, for modem double lined landfills equipped with a pore pressure relief system, the pore water can be monitored for evidence of a release. The requirement mandating quarterly monitoring should only

apply at facilities that do not have double composite liner systems and leachate accountability.

Response: After final closure, all monitoring points should be maintained and sampled for at least five years. After this period of time, the landfill may request a modification of the site monitoring conditions upon justification. Monitoring points and wells allow a comprehensive monitoring of the landfill, whereas monitoring of secondary leachate collection system and pore pressure relief system will produced a partial image of potential impacts. Moreover, all monitoring regulatory requirements should be equally consistent across the state, thus, the annual baseline and quarterly routine monitoring requirement will remain applicable for all landfills. A reduced frequency can be implemented when the landfill enters custodial care.

363-10.6(a)(1)(iv)(a)
Comment: Quarterly monitoring for landfill gas may not be needed where a landfill is not near the property line or proximate to structures where gas can accumulate. This requirement should be waived upon a demonstration there is no migration beyond the property line.

Response: Verification that landfill gases are not creating a dangerous situation is necessary. Part 363-10.6(a)(1)(iv)(b) incorporates the possibility of requesting a reduction in monitoring frequency after five years of post-closure monitoring.

Comment: Post-closure explosive gas monitoring to determine if the facility meets the requirements of subdivision 363-8.l(e) of this Part must be performed at least quarterly for a minimum period of five years. After this five-year period, the permittee may request that the Department modify the sampling and analysis requirements. If post-closure explosive gas monitoring indicates explosive gas levels exceed the requirements of subdivision 363-8.l(e) of this Part, appropriate actions must be taken and the Department must be notified within 24 hours. The requirement to notify DEC within 24 hours of an indication of gas above explosive gas levels should be consistent throughout all sections of this part.

Response: The regulation has been revised to clarify that reporting to the Department must take place within 24 hours of an exceedance.

363-10.6(a)(1)(iv)(b)
Comment: Suggest that wording be added to 363-10.6(a)(1)(iv)(b) to allow alternate monitoring scenarios as may already be approved in a site's Environmental Monitoring Plan. This would eliminate a suggestion of reverting to the actual wording of 363-7.4(c)(2) upon closure of the facility.

Response: Any alternative monitoring scenarios must meet the requirements in 363-7, whether the landfill is in active operation or post-closure care. The language has been retained.

Comment: The annual baseline and quarterly routine monitoring requirement in this provision is excessive for a
modern double-lined landfills with no evidence of a liner breach. Active monitoring of the secondary leachate collection system and/or the pore pressure relief system should justify a waiver from the requirement for quarterly monitoring.

Response: Verification of groundwater quality is appropriate for landfills in post-closure care. The language has been retained.

363-10.6(a)(1)(vii)
Comment: DEC should define a seismic event with a quantity or some scale of magnitude that would give cause for concern, either in sections 363-2 or as a definition in 360.2.

Response: This regulation has been revised to provide clarification in relation to seismic events.

Comment: The commenter believes an inspection after every 24-hour, five-year storm event is too frequent. The commenter requests this be changed to a 24-hour, 25 year storm.

Response: Inspection after a 24 hours, five-year storm event is a necessary precaution to ensure the integrity of the cover system has not been compromised. Moreover, this requirement has been prompted as a result of the increase on intensity and frequency of rainfall events which have had visible impacts on landfill cover systems, runoff trenches, and other landfill structures.

363-10.6(a)(2)
Comment: This is established through the annual reporting requirement. It is not necessary to update a plan every 5 years. The commenter proposes that the words “at least every five years” be deleted and substituted with the word “updated”.

Response: Five years is a reasonable frequency for the facility’s closure plan to be reviewed and modified as necessary. The regulation has been retained.

Comment: Item (i) should be changed to reporting on the status of items (i) through (vi) of paragraph (1). Lastly, a new item (vi) should be added to paragraph (2) to list any changes to the approved post closure plan by topic, author, date of submittal, and date approved by the Department since the original approved closure plan. Note the detailed discussions on various topics would be expected in the annual reports or quarterly environmental monitoring reports. This paragraph should be used to provide a general update on current conditions.

Response: The regulation has been revised based on these recommendations.

363-10.6(b)

Comment: Several commenters recommended that the regulation be revised to allow a landfill to exit custodial care and to rename the period to reference a confirmation period.

"*~~Custodial care~~ Confirmation Monitoring. A facility's ~~custodial care~~ confirmation monitoring period begins when the Department determines that the facility poses a significantly reduced threat to public health or the environment and that environmental monitoring and maintenance can be reduced or terminated. Confirmation monitoring continues until the owner/operator determines to the satisfaction of the DEC that the facility does not pose a threat to public health or the environment in the absence of active controls based on demonstration of functional stability. Once the facility has reached functional stability, then the regulatory care period for that facility is complete and it can be moved into non-regulatory custodial care. Custodial care could include activities such as protecting the final cover, controlling site access, or maintaining institutional controls, if appropriate.*"

"§363-10-6(b) Custodial Care Confirmation Monitoring. A facility's custodial care confirmation monitoring period begins when the Department determines that the facility poses a significantly reduced threat to public health or the environment and that environmental monitoring and maintenance can be reduced or terminated. Confirmation monitoring continues until the owner/operator determines to the satisfaction of the DEC that the facility does not pose a threat to public health or the environment in the absence of active controls based on demonstration of functional stability. Once the facility has reached functional stability, then the regulatory care period for that facility is complete and it can be moved into non-regulatory custodial care. Custodial care could include activities such as protecting the final cover, controlling site access, or maintaining institutional controls, if appropriate."

Response: Custodial care is essential for a sound environmental management of closed landfills. While landfills will be removed from post-closure care regulations upon consideration of the individual site history and upon demonstration that the facility poses a reduced threat to human health and the environment, there are still a series of operational requirements that need to be addressed at all sites to ensure that the level of threat to human health and the environment will be controlled.

363-10.6(b)(1)(iv)
Comment: 363-10.6(b)(1)(iv) must apply only to the monitoring points selected for the post-closure monitoring program (not all wells).

Response: This requirement will apply to all monitoring wells and points identified in the landfill's custodial care plan.

363-10.6(b)(l)(iv)(a)
Comment: Rather than baseline every five (5) years, have this requirement triggered if there is evidence of leachate in the secondary collection system.

Response: A sampling event every five years is reasonable to verify groundwater quality. The regulation has been retained.

363-10.6(b)(2)(iv)
Comment: The commenter asks the following questions: first time a cost estimate for custodial care is required is after (or near the end of) the post-closure care period? Also, The general approach for migrating from post-closure to custodial care will be to revise the most recent post-closure care plan (which must now be updated every 5 years) for the allowed reductions in O&M under custodial care and revise the cost estimate accordingly (for some period of time)?

Response: The cost estimate for custodial care is first required when the facility is closed, and can be revised according as cost estimates change.

363-10.7(c)(3)
Comment: Part 363-10.7 End use….(c)(3) a written certification by a professional engineer that engineering controls incorporated into the landfill closure design and/or the proposed structure are adequate to preclude any significant ~~risk~~ threat to public health and safety assuming normal occupation and use of the structure. Changing "risk" to "threat", as shown above in the marked-up excerpt from the draft regulations, is consistent with previous comments throughout this document and EREF and ITRC guidance documents.

Response: The regulation has been revised to address this comment.

363-11 Corrective Measures
Comment: The opening sentence of this section requires a corrective measures report if any expanded parameters are detected at levels exceeding the groundwater protection standards. This should be changed to refer to the facility's triggers for Contingency Water Quality monitoring using the statistically based significant increase over existing water quality value. There are many factors which could cause a parameter to exceed the groundwater standards. If the condition is not evident on resampling, or if it is not statistically significant, corrective measures should not be required.
Corrective measures will not be triggered by single occurrences of individual parameters exceeding the groundwater standards.

Response: It appears that the commenter is mistaking the groundwater standard (Part 703 standard) with the groundwater protection standard as defined in 7.4(c)(3)(vi). As defined, the groundwater protection standard can be either: (1) the Part 703 standard if it is higher than the trigger value; (2) the trigger value where there is no Part 703 standard; or (3) the trigger value when the Part 703 standard is lower than the trigger value.

363-12 Landfill Reclamation

Comment: DEC should create definitions for re-contouring and reclamation to further distinguish the two, and ensure that each term is being used properly.

Response: The regulation has been revised to include a definition for re-contouring.

Comment: Include a reference to ASTM E3033 Standard Guide for Beneficial Use of Landfills and Chemically Impacted Sites Regulations for NYS DEC's discretionary use for land development sites not in a regulatory cleanup program.

Response: ASTM E3033 Standard Guide for the Beneficial Use of Landfills and Chemically Impacted Sites may be used as a reference, but its use is not required by the regulations.

Part 364 Waste Transporters

Comment: Please clarifiy that the transporter, not the generator, is liable for complying with this Part.

Response: Part 364 regulates the mishandling and mismanagement of all regulated wastes transported from the site of generation to the site of ultimate treatment, storage or disposal. While many of the requirements apply to the transporters of waste, there are some requirements that will impact generators. For example, certain regulated wastes including regulated medical waste, infectious waste and C & D debris cannot be transported in the state without a tracking document that has been completed, signed and dated by the generator.

Comment: We support the intention of the proposed regulations to ensure that source separated recyclables are properly managed, including the processing of organics materials.

Response: The department acknowledges this comment.

Comment: The proposed revisions which expand the volume of materials that exempt composting facilities may process is commendable, however, there are no similar exemptions for the transport of source-separated organics to composting facilities. How is transfer of source-separated organics to composting facility by bike trailer regulated?

Response: The transportation of less than or equal to 2,000 lbs. of regulated wastes in a single shipment is exempt from Part 364, as indicated in paragraph 364-2.1(b)(5).

Comment: The proposed regulations do not address maintaining source-separated recyclables separate from waste as part of or during collection and transport to an authorized facility. The regulations should be enhanced to require collected source-separated recyclables are maintained separate throughout the collect and transportation process.

Response: The purpose of Part 364, as stated in Section 364-1.1, is to protect the environment from the mishandling and mismanagement of all regulated wastes transported from the site of generation to the site of ultimate treatment, storage or disposal and to protect a discharge of waste into the environment, except at a site approved for the treatment, storage or disposal of the wastes. Regulated waste under Part 364 does not include residentially-generated MSW or recyclables. On-vehicle mismanagement of industrial-commercial recyclables was not determined to be a significant environmental risk at this time.

Comment: The proposed regulations do address diversion of source-separated recyclables in the case of contamination. For a variety of reasons, material may arrive too contaminated to process at the intended facility. The proposed regulations are not clear about how such materials are to be evaluated and processed and should be enhanced to address operating criteria, addressing the collection, transport, and processing of source-separated recyclables.

Response: Acceptable contamination levels vary by industry and are beyond the scope of this rulemaking. If a particular industry deems certain source-separated recyclables are too contaminated for processing, the transportation of those materials as waste are subject to the requirements in Part 364.

Comment: NYS should establish standards for waste transporters to provide worker training and protective gear for transporters. Vehicles should prominently post procedures for protecting drivers, first responders, and the public in the event of a spill. Training materials should also be provided to first responders in counties along the transport route. Training should include guidance on wearing protective equipment, particularly in the event of fire.

Response: For the transportation of regulated medical waste, the draft regulations do contain a requirement that employees receive training in the transportation of hazardous materials. For transporters of other types of waste, the draft regulations specify practices and operating requirements designed to promote the safe handling of waste to ensure that such waste does not come into contact with the environment.

Comment: Many of the requirements in section 364-4, including the need for haulers to produce documentation and the ability of the department to do inspections of vehicles, lay the groundwork for better tracking and documentation of solid waste haulers. These new regulations are a step in the right direction however; they do not offer enough meaningful deterrence to illegal dumpers. Routine inspections of solid waste for haulers on drop-off and a digital tracking system would provide a more meaningful prevention strategy. We are highly concerned that these permits may not be effective at preventing the illegal transfer and dumping of solid waste. Simple changes, such as taking out 364-3.2(b) and instead requiring all transport vehicles be marked by their registered transporters could help the DEC target their inspections in a more meaningful way.

Response: The proposed regulations have been revised to require tracking documents for certain wastes. Registered transporters will be required to have their vehicles marked to make it easier to identify vehicles regulated under Part 364.

Part 364-1.1
Comment: Define "regulated wastes"

Response: Those wastes which qualify as regulated wastes are identified in the applicability section of Part 364 at 364-1.2, and the subset of wastes exempt from Part 364 are found in Section 364-2.1.

Part 364-1.2
Comment: The applicability of the draft revision to general wastes generated at a NYSDOT-owned facility associated with operating and maintaining highways is unclear. Please clarify which category of generator applies to a Transportation maintenance facility (institutional, industrial, commercial, other).

Response: Wastes generated by government agencies are categorized as "institutional waste" as defined in paragraph 360.2(b)(148).

Comment: Define "originating or terminating"

Response: "Originating or terminating" refers respectively to the beginning or end of a transportation cycle.

Comment: The proposed regulations decrease the types of materials considered exempt from Part 364 hauling permits and creates a registration requirement for certain types and quantities of waste. For example, waste vegetable oil and greases from restaurants, cafeteria waste, and food processing wastes are currently exempt. These exemptions should continue so that potentially burdensome waste tracking requirements and permits can be avoided.

Response: The department has determined that certain previously exempt wastes warrant increased regulatory oversight. In order to minimize the burden on the transporters of certain wastes, a registration requirement was developed instead of requiring those transporters to obtain a permit. The waste tracking requirements are for select wastes and follow general good business practice recordkeeping.

364-1.2(e)
Comment: Industrial-commercial is not a defined term. DEC should create a definition in 360.2(b) or use an already defined term in that part. Please see the following suggested revision: "§364-1.2(e) Industrial or commercial waste that originates at, is generated by, or occurs as a result of any industrial or commercial activity, including:…"

Response: “Industrial-commercial” is defined in ECL Section 27-0303. Section 360.2 provides separate definitions for both “industrial waste” and “commercial waste”.

364-1.2(e)(2)
Comment: The term Sludge is already defined in 360.2(b), and does not need to be re-defined in 364-1.2(e)(2).

Response: The definition of sludge in paragraph 364-1.2(e)(2) includes residues from the storage or use of liquids, which is not included in subdivision 360.2(b).

364-1.2(e)(4)
Comment: Currently there is an exemption in the regulations for "nonhazardous bottom and fly ash from incinerators and resource recovery facilities" from the waste transporter/regulated waste requirements. This exemption should be continued in the proposed regulations or at a minimum that an exemption be provided for "nonhazardous bottom and fly ash from municipal incinerators and resource recovery facilities. This is a waste stream that is generally given a beneficial use determination for use. At a minimum, it should not apply to ash residue that is approved (under a BUD) for use as alternative operating cover at landfills, by adding the following language, "except for those approved under a beneficial use determination."

Response: Non-hazardous bottom and fly ash from municipal solid waste combustors has been added to the exemptions in section 364-2.

364-1.2(e)(9)
Comment: Define “such as”

Response: In this instance, the phrase “such as” has the same meaning as “for example”.

Comment: The proposed regulations add commercial waste as a regulated waste; this is a large expansion of scope, and it is not clear why this is sought.

Response: Commercial waste has been regulated by Part 364, however some previously exempted industrial-commercial wastes, such as construction and demolition (C&D) debris, are no longer covered by a blanket exemption. Increased public and department concern over the mismanagement of some industrial-commercial waste types has led to the proposed expanded regulation of industrial-commercial waste.

364-1.2(e)(10)
Comment: Define expressions: “industrial” and “commercial” business? Does this include demolition contractors, recycler/dismantlers, homeowners, general contractors, national companies and brokers?

Response: An “industrial” business generally refers to an entity that manufactures goods. A “commercial” business generally refers to an entity that provides good or

services. Demolition contractors, recycler/dismantlers, general contractors and brokers are examples of commercial entities. “National companies” does not provide sufficient descriptive information for the department to make a sound decision on the type of entity. Neither term includes homeowners.

Comment: The department should reconsider treating construction and demolition debris as "regulated waste." This will have wide reaching and likely unintended negative impacts on the industry and will likely not achieve the goal of reduced illegal disposal. At a minimum, the department should provide an exemption for municipal hauling of construction and demolition debris in any quantity, as municipalities are not an audience that the department is trying to target by adding this to the list of regulated waste streams (i.e., municipalities are not illegally disposing of C&D). This requirement is unnecessary and burdensome for municipalities.

Response: Section 364-1.2 specifies the types of waste considered regulated waste under this Part. Section 364-1.2 does not specify C&D debris as a type of waste considered a regulated waste, it in fact specifies industrial-commercial waste is a regulated waste, of which C&D debris is an example of a type of industrial-commercial waste. Institutional waste (waste generated by hospitals, long-term care facilities, schools, prisons government agencies or other similar type facilities) has been added to the exemptions in section 364-2.1.

364-1.2(g)
Comment: The department should provide an exemption for municipal hauling of waste tires. Municipalities are not the audience that the department is trying to target by adding this to the list of regulated waste streams (i.e., municipalities are not illegally disposing of tires). This requirement is unnecessary and burdensome for municipalities.

Response: Institutional waste (waste generated by hospitals, long-term care facilities, schools, prisons government agencies or other similar type facilities) has been added to the exemptions in section 364-2.1.

364-2(a)
Comment: Multiple comments were received that objected to the total exemption for rail carriers who are engaged in waste-by-rail. It was stated that DEC regulates containment of waste for facilities that use trucking, so it must do exactly the same for facilities that use rail. The Clean Railroads Act gives the department jurisdiction before and during loading, just as with trucks. This includes how the waste will be contained in the rail car, just as the department decides how waste will be contained in a truck.

Response: Part 364 regulates the transportation of waste. The department’s jurisdiction under the Clean Railroads Act does not extend to actions of rail carriers while in transit. If the concern is with improper placement or disposal of wastes on or along railways, other regulations exist that address those issues.

Comment: I am very concerned about barges transporting increased industrial waste up the Hudson River. The Hudson is the source of the water we use in our homes, and is also a large part of the tourist industry that supports many of our river communities. It is very distressing to contemplate the increased risk of pollution, and the potential destruction of one of the most beautiful landscapes in our country. Please stop the increased transportation of industrial waste through New York State, and particularly on the Hudson River.

Response: This comment is beyond the scope of this rulemaking.

364-2(b)
Comment: We urge the department to amend Part 364 to clarify that FDA regulated commercial single use device reprocessors are not subject to the waste transporter requirements of Part 364. Please amend 364-2(b) to include the following language: "(25) Medical devices intended to be reprocessed or remanufactured provided the transportation complies with federal DOT regulations 49 CFR §173.134 as incorporated by reference in section 360.3 of this Title."

Response: The proposed regulations have been revised to address this concern.

364-2(b)(5)
Comment: We support the clarification that small shipments (under 2,000 pounds) of drilling and production wastes would not be exempt from tracking provisions. This is critical given the use of single trucks to transport such wastes from well sites.

Response: The comment is noted.

Comment: Loads of C&D less than 2,000 lbs. should be exempt, and should not be part of the exception to the exemption here. Please see the following suggested revision: "§364-2(b)(5) Regulated waste in quantities less than or equal to 2,000 pounds in any single shipment, (other than wastes identified in paragraphs 7-9 of this subdivision), except hazardous waste or source-separated household hazardous waste. Biohazard waste (including regulated medical waste (RMW)), and drilling and production waste."

Response: C&D debris can vary dramatically in density and therefore the department has determined that the regulation of C&D debris on a volume-based quantity is more practical. Ten cubic yards was chosen as the upper exemption limit as volumes over that amount in a single shipment are generally outside the abilities of non-commercial or non-industrial entities. The department determined 2,000 pounds as a practical upper exemption limit based upon that amount being a reasonable allowable load for a standard pick-up truck. Generally, vehicles beyond the 2,000 pound and ten cubic yard load capacities are vehicles used for commercial or industrial purposes.

Comment: The small load exemption increase in proposed Part 364 is arbitrary. Under proposed Part 364, relating to waste transporters, DEC seeks to increase the exemption

for small loads from 500 pounds, to 2,000 pounds. This arbitrary and drastic increase will increase a large number of truck loads from important registration and permitting requirements that protect the environment and human health and is strongly opposed.

Response: The department determined 2,000 pounds as a practical upper exemption limit based upon that amount being a reasonable load for a standard pick-up truck. Generally, vehicles with load capacities beyond 2,000 pounds are vehicles used for commercial or industrial purposes.

364-2(b)(5)
Comment: The exemption allowances in paragraphs 364-2(5) & (6) (exemptions and lack of registration requirement for C&D debris and Historic Fill up to ten cubic yards or under 2,000 lbs. in a single shipment) is set too high. Allowing shipments of this size to fly under the radar is giving the bad actors an opportunity to skirt the regulations by using many small loads instead of a few larger ones. Any C&D debris or Historic Fill load over 1,000 lbs. (or half of the current exemption) should be held to the registration requirements under Part 364. These smaller operators would be able to more easily comply with the tracking requirements if there were a computerized tracking system.

Response: As C&D debris can vary dramatically in density, the department has determined that the regulation of C&D debris on a volume-based quantity, not by weight, is more practical. Ten cubic yards was chosen as the upper exemption limit as volumes over that amount in a single shipment are generally outside the abilities of non-commercial or non-industrial entities. With respect to a computerized waste tracking system, the department is considering that option.

364-2(b)(6)
Comment: Multiple comments were received indicating that the minimum single shipment for C&D debris and historic fill is too low and should be raised to 50 cubic yards. Please see suggested revision:
"C&D debris and historic fill in quantities less than or equal to 50 cubic yards in any single shipment."

Response: Increased public and department concern over the mismanagement of some industrial-commercial waste, and specifically C&D debris, has led to the proposed expanded regulation of industrial-commercial waste. Ten cubic yards was chosen as the upper exemption limit as volumes over that amount in a single shipment are generally outside the abilities of non-commercial or non-industrial entities.

364-2(b)(6) and 364-2(b)(23)
Comment: The trucking permit requirements will result in increased vehicle emissions, increased project cost and a less beneficial use of reclaimed asphalt pavement. Construction is a "feast or famine" type of industry. It is very common to encounter very short time frames where an excessive number of trucks are needed on multiple jobs. When this occurs, it can be very difficult to find enough trucks without the added

requirement of finding trucks permitted to carry solid wastes. Contractors will be left with the following options:

a. Perform the work without enough trucks. This will result in lower production rates, will slow the project and will result in increased labor costs due to the work taking longer than necessary to complete. Even if public projects were exempt from this requirement, this will still increase costs for improvement projects that are necessary to help communities continue to grow.

b. Use trucks that do not have permits and underload them so they fall under the ten cubic yard limit. This will result in additional trucks on the road and additional truck trips, which will result in an increase in truck emissions and increased trucking costs.

c. Find a nearby site that will take the millings as clean fill material. While this would allow the work to be completed at normal production rates with a normal number of trucks, it would essentially be wasted aggregate and asphalt material.

Response: The transportation of asphalt pavement millings are exempt from the requirements of Part 364 under paragraph 364-2.1(b)(13) under a pre-determined BUD. The transportation, in quantities greater than ten cubic yards in a single shipment, of asphalt pavement that requires further processing to a specification before incorporation into a construction project will require a registration.

364-2(b)(6) and 364-2(b)(13)
Comment: Under the proposed revisions, trucks hauling of more than ten cubic yards of millings/RAP at a time may be required to obtain a solid waste transporter registration. This depends on how DEC interprets the pre-determined Beneficial Use Determination. If millings/RAP are considered a solid waste until the point of use (the asphalt plant) instead of the point of generation (milling) than registrations will be needed for hauling. This will add extra costs and should be excluded from this proposed requirement.

Response: The transportation of asphalt pavement millings are exempt from the requirements of Part 364 under a pre-determined BUD. The exemption for asphalt pavement millings begins at the point of generation. The transportation, in quantities greater than ten cubic yards in a single shipment, of asphalt pavement that requires further processing to a specification before incorporation into a construction project will require a registration. There are no fees associated with that registration.

Comment: The proposed regulation's exemption of C&D debris and historic fill transportation in quantities less than or equal to ten cubic yards in any single shipment directly challenges the DEC's intended goals of reducing environmental impact and preventing the mismanagement of regulated wastes whether accidental or intentionally disposed of. Although the exemption is intended to provide a break in reporting requirements for the waste transport facilities themselves, this exemption will only

produce increased transport vehicle traffic to bypass the extensive tracking requirements by shipping C&D debris in quantities under ten cubic yards in any single shipment.

Response: The ten cubic yard upper limit for exemption is not intended to provide relief to receiving facilities. As vehicles generally used for the transportation of industrial-commercial C&D debris exceed the ten cubic yard capacity, and the cost per yard transported increases as vehicle size is decreased, it is economically impractical to decrease load size to avoid the registration or permitting requirements. The department does not expect business practices, such as the use of smaller capacity vehicles which would increase vehicle trips per job, to significantly change due to transportation economics.

Comment: The proposed regulation's only impact on deterring illegal dumping of regulated wastes is that solid waste producers and transporters will illegally dump the wastes in smaller quantities underneath the ten cubic yard threshold, actually increasing the traffic, noise, and odors produced from solid waste and recycling facilities in order to bypass the reporting requirements

Response: The presence or absence of waste tracking or reporting systems will not in themselves prevent illegal acts from occurring. Additionally, “illegal dumping” provides no increase in traffic, noise and odors from solid waste and recycling facilities. Increased public and department concern over the mismanagement of C&D debris, an industrial-commercial waste, has led to the proposed changes in Part 364. As the cost effectiveness of waste transportation is directly related to load size, the department does not expect any significant increase in the use of more smaller-capacity vehicles instead of traditional sized vehicles for the transportation of C&D debris.

Comment: Multiple comments were received noting the proposed regulations include a C&D exemption for quantities less than or equal to ten cubic yards per shipment and include a requirement for waste tracking documents for all C&D loads over ten cubic yards. A clarification of mixed municipal solid waste and C&D loads is requested. Many 30 and 40 cubic yard roll-off boxes contain commingled C&D and MSW. It is their understanding that commingled loads will be handled as MSW. Please add language to the regulation to clarify this.

Response: Loads of commingled MSW and C&D debris are to be managed as MSW. The definition of C&D debris in paragraph 360.2(a)(64) specifically states the material must be uncontaminated; MSW would be considered a contaminate to C&D debris.

Comment: The proposed regulations that apply to transporters of regulated waste, which includes C&D debris generated or removed by an industrial or commercial business, needs to be clarified. It should be made clear that municipalities that transport C&D waste in quantities greater than or equal to ten cubic yards in any single shipment are exempt.

Response:
Institutional waste (waste generated by hospitals, long-term care facilities, schools, prisons government agencies or other similar type facilities) has been added to the exemptions in section 364-2.1.

Comment: Since most C&D debris is transported in tri-axle trucks (approx. 15 cubic yards) or larger, this exemption will only apply to a very small number of trucks. As a result of being subject to additional regulations, trucking companies will likely opt to get out of the business of transporting RUCARBS leading to even more truck traffic and trips, air pollution, fuel use, as well as extra transportation and disposal costs.

Response: With the increased public and department concern over the mismanagement of C&D debris, the department selected ten cubic yards as the upper limit for exemption from regulation because it is standard practice to use large capacity vehicles (greater than ten cubic yards) to transport C&D debris. The registration and waste tracking requirements are expected to have minimal impact on a transporter, requiring the completion of an annual registration form with no registration fee, simple waste tracking and the submission of an annual report. As the cost effectiveness of waste transportation is directly related to load size, the department does not expect any significant increase in the use of more smaller-capacity vehicles instead of traditional sized vehicles for the transportation of C&D debris.

364-2(b)(6) and 364-3.1(d)
Comment: It is unclear what a shipment is, please clarify.

Response: “Shipment” as used in 364-2.1(b)(6) and throughout this subpart, means an individual transport, which includes the combined quantities of truck-trailer combinations.

Comment: This regulation is unrealistic. Most C&D debris is transported from sites in quantities greater than ten cubic yards, and, as a result, a vast number of smaller transporters would be required to register upon passage of these regulations.

Response: The department recognizes that the regulations as proposed will require many currently exempt C&D transporters to obtain a registration. However this new requirement is in direct response to an increased public and department concern over the mismanagement of C&D debris. The registration requirement for C&D transporters is expected to have minimal impact and simply requires the completion of an annual registration form with no registration fee, submission of an annual report and compliance with basic operational standards.

Comment: It is unclear whether or not a residential transporter would be subject to registration. For example, a homeowner who transports 11 cubic yards of C&D debris to the local landfill may be subject to the registration requirement.

Response: The transportation of industrial-commercial waste, which includes C&D debris generated or transported by a commercial or industrial business, is regulated under Part 364. Part 364 does not address C&D debris from non-commercial or non-industrial sources and therefore does not regulate C&D debris that is transported by a homeowner.

Comment: Clarification and examples of instances using materials produced from excavation and road repair and construction should be provided to know when they are no longer considered solid waste. If it's less than 180 days stored and greater than 75% reused? Millings delivered to commercial use are not waste?

Response: The transportation of asphalt pavement millings are exempt from the requirements of Part 364 under a pre-determined BUD. The exemption for asphalt pavement millings begins at the point of generation. The transportation, in quantities greater than ten cubic yards in a single shipment, of asphalt pavement that requires further processing to a specification before incorporation into a construction project will require a registration.

364-2(b)(16)
Comment: The role and work activities of a veterinarian on house or farm calls with respect to medical waste management is very similar to the that of a public health nurse, and therefore request that "veterinarian" be added after "public health nurse" in this item.

Response: The proposed regulations have been changed to provide a veterinarian the same exemption as a public health nurse.

364-2(b)(22)
Comment: Why is it rational to base this on the ownership of the truck? In fact, historically, utility work has been far less professional than that performed by the commercial subcontractors retained by the utility.

Response: The proposed rulemaking states "owned or operated by" to allow for vehicles leased or otherwise not directly owned by the public utility or public railroad service.

Comment: The proposed regulation provides an exemption to regulated waste transported by a public utility or railroad service vehicle owned or operated by that utility or service. This exemption should be expanded to include public utility contractors transporting waste on behalf of the public utility, similar to the language afforded to public transportation in 364-2(b)(23).

Response: The proposed regulations have been revised to include similar exemption language for public utility and public railroad contractors as exists for public transportation agencies.

364-2(b)(23)
Comment: The restriction of transportation incidental to the vehicle primary function needs some clarification and flexibility. What if it is transported or moved by a front end loader?

Response: The intention of "incidental to the primary function of the transport vehicle" is to allow for non-routine, occasional transportation of regulated waste by a vehicle not specifically designed or intended for such use. Using a front end loader to move regulated waste on a public highway as part of public works project would be covered under that exemption. The department recognizes that that there will be instances where additional clarification will have to be provided based upon the facts of individual situations.

Comment: If this is acceptable, then why not all contract controlled entities on all public contracts for all amounts? If "agency's contract documents and specifications" assure proper operation, why is that not the case in
364-2(b)(22) and elsewhere? Such an amendment would materially decrease the costs imposed by this provision while achieving the policy goal.

Response: The exemptions allowed in the proposed rulemaking provide sufficient regulatory relief for most routine activities undertaken by contractors for public transportation entities.

364-2(b)(24)
Comment: Especially if it is wholly on site, what is the logic in requiring that the transporter be the generator? There is no logic supporting this provision.

Response: The proposed regulations have been revised to address this concern.

364-3.1
Comment: We fully support DEC's proposed revisions that would require registration for transportation of the identified wastes.

Response: The comment is noted.

364-3.1(a)
Comment: We request that the department clarify or provide an interpretation that, in this context, "generator" can include an isolated location of a larger organization, such as a remote laboratory belonging to a larger network of laboratories.

Response: The regulations have been revised to address this concern.

364-3.1(c)
Comment: Under the proposed definition 360.2(b)(53), Commercial waste means waste generated by stores, offices, warehousing and nonmanufacturing activities at industrial facilities.

Response: That is correct, however the department has determined the necessity of making the distinction that the greater than 2,000 pounds in a single shipment provision of subdivision 364-3.1(c) does not apply to the transportation of commercially-generated construction and demolition debris. Commercially generated construction and demolition debris is subject to the greater than ten cubic yards in a single shipment provision in subdivision 364-3.1(d).

Comment: Proposed subdivision 364-3.l(d) states "commercially generated", which should be consistent with subdivision 364-3.1(c). This term should also be defined in Part 360.2(b). Please see the following suggested revision: "§364-3.l(c) A transporter of commercial solid waste, other than commercially generated construction and demolition debris or historic fill, in quantities greater than 2,000 pounds in a single shipment."

Response: Subdivision 364-3.1(c) of the regulations applies to the transportation of commercial waste, which does not, by definition in paragraph 360.2(b)(53), include residential, institutional or industrial waste, while excluding all C&D debris. Subdivision 364-3.1(c) applies to all C&D debris, regardless of the materials origin, when transportation is provided by a commercial entity.

Comment: Commercial trucks carrying loads greater than 1 ton need to be registered.

Response: The transport of greater than 2,000 pounds of commercial solid waste in a single shipment, with the exception of C&D debris, requires registration. The transportation of greater than ten cubic yards of C&D debris requires registration.

364-3.1(c) and 364-3.1(d)
Comment: Please provide a cost/benefit value analysis associated with the quantity limit for a single shipment.

Response: As C&D debris can vary dramatically in density, the department determined that the regulation of C&D debris on a volume-based quantity is more practical. With the increased public and department concern over the mismanagement of C&D debris, in order to capture a majority of that waste being transported, the department selected ten cubic yards in a single shipment as the upper limit for exemption from regulation, as volumes over that amount in a single shipment are generally outside the abilities of non-commercial or non-industrial entities. The department determined 2,000 pounds as a practical upper exemption limit for other waste based upon that amount being a reasonable allowable load for a standard pick-up truck. Generally, vehicles beyond the 2,000 pound and ten cubic yard load capacities are vehicles typically used for commercial or industrial purposes.

364-3.1(d)
Comment: Transporting more than ten cubic yards of C&D in a single shipment will require registration tracking documents and recordkeeping. This may result in extensive tracking and limitations for construction projects. Exemption under 364-2 b.

(23) may provide relief for many situations involving the movement (transport) of material that is incidental to and associated with the work being conducted.

Response: The department has determined the waste tracking requirements for C&D debris follow general good business practice recordkeeping. Unless the transportation of C&D debris is being conducted in accordance with 364-2.1(b)(23), registration and waste tracking will be required.

Comment: Are houses of worship and schools considered non-commercial?

Response: Wastes generated by houses of worship or schools are categorized as "institutional waste" as defined in paragraph 360.2(b)(148). The proposed regulation has been revised to exempt institutional waste from the requirements of Subpart 364.

Comment: Are homeowners generators?

Response: Homeowners can be generators in cases where wastes are commercially transported. However Part 364 does not apply to waste transported by residential generators.

Comment: This section is applicable to transporters of regulated waste, which includes C&D debris generated or removed by an industrial or commercial business. Please clarify that municipalities that transport C&D waste in quantities greater than or equal to ten cubic yards in any single shipment will be exempt?

Response:
Institutional waste (waste generated by hospitals, long-term care facilities, schools, prisons government agencies or other similar type facilities) has been added to the exemptions in section 364-2.1.

Comment: We recommend the limit be raised to 50 cubic yards for the transportation of C&D or historic fill. Please see the following suggested revision: "A transporter of commercially generated construction and demolition debris or historic fill in quantities greater than 50 cubic yards in a single shipment. For the purposes of this paragraph, commercially generated means waste that is commercially transported but which may have been generated at a residential or non-commercial location."

Response: Ten cubic yards was chosen as the upper exemption limit as volumes over that amount in a single shipment are generally outside the abilities of non-commercial or non-industrial entities. With the increased public and department concern over the mismanagement of C&D debris, in order to capture a majority of that waste being transported, the department selected ten cubic yards as the upper limit for exemption from regulation.

Comment: When it comes to the transportation and disposal of C&D debris and Historic Fill, the best and most effective way to make sure transporters are following the

regulations is enforcement. The DEC needs additional staff, particularly officers, to effectively enforce the new regulations. The DEC should also consider forming a small specialized team dedicated to eliminating illegal dumping through monitoring, enforcement, and investigation.

Response: The department acknowledges this comment.

Comment: Generally trucks bringing in exempt C&D debris to a mine site are also there to pick-up a load of virgin stone. If the Part 360 regulations go into effect as written, it will create additional truck traffic, extra transportation fees, and unnecessary disposal costs since the trucks will need to make two trips. One trip will be to the landfill from the project site and then another trip from the landfill to the mine to pick-up processed stone aggregates. It should be noted that, due to federal regulations that limit the number of hours a truck driver can drive per week and the added time it will take to make the two trips, the proposed regulations will likely cause an increase in the number of trucks on the road to account for the driver hour limits.

Response: The comment references “exempt C&D debris”, which is presumably a reference to waste that is either not regulated under Part 360 or waste that is entitled to a beneficial use determination. In either case, for registered or permitted transporters the draft regulations do not require trucks used for transporting waste under Part 364 to be used exclusively for that purpose. It is therefore permissible for a truck to drop off C&D and then subsequently pick up stone. No additional truck trips are therefore necessary.

Comment: Eliminate the registration requirement for uncontaminated recognizable concrete, asphalt, rock, and brick (CARB) and uncontaminated soil for every load exceeding 2,000 pounds. The tracking and recordkeeping for every load of C&D exceeding 2,000 pounds would be an extensive undertaking. Loads restricted to uncontaminated recognizable concrete, asphalt, rock, and brick (CARB) and uncontaminated soil when mixed with these materials are managed separate from other C&D materials for appropriate uses. The quantities of these CARB materials can be very large and are often appropriately used within transportation projects or appropriately placed at off-site facilities. This tracking, recordkeeping and reporting for each shipment would be very difficult and would deter appropriate uses of these materials.

Response: Since C&D debris can vary dramatically in density, the department has determined that the regulation of C&D debris on a volume-based quantity, not by weight, is more practical. Ten cubic yards was chosen as the upper exemption limit as volumes over that amount in a single shipment are generally outside the abilities of non-commercial or non-industrial entities. The registration and waste tracking requirements are expected to have minimal impact on a transporter, requiring only an annual free registration, simple waste tracking and the submission of an annual report.

Comment: Please consider narrowing the requirements to those non-CARB C&D materials which have been the problem with improper placements.

Response: Public and department concern over the improper disposal of C&D debris is not limited to non-CARB materials and therefore, in the revised proposed regulations, the department has elected to regulate all C&D debris and has eliminated the subcategories for exemption.

Comment: The minimum volume that triggers the registration requirement of C&D debris, which is ten cubic yards, is too lax. We suggest DEC set a minimum volume for registration to 2,000 pounds.

Response: Pounds is a measure of weight, not volume. As C&D debris can vary dramatically in density, the department has determined that the regulation of C&D debris on a volume-based quantity, not by weight, is more practical. Ten cubic yards was chosen as the upper exemption limit as volumes over that amount in a single shipment are generally outside the abilities of non-commercial or non-industrial entities. With the increased public and department concern over the mismanagement of C&D debris, in order to capture a majority of that waste being transported, the department selected ten cubic yards as the upper limit for exemption from regulation.

Comment: The proposed regulations have the potential of causing environmental risk and/or contamination to a load due to the potential for unauthorized loading of a container by member of the general public which alters the solid waste type, or contaminated what was uncontaminated C&D debris, requiring disposal at an MSW disposal site instead of a C&D processing facility.

Response: The management of containers to prevent unauthorized or accidental contamination of wastes is beyond the scope of this rulemaking. Unless containers are secured at all times, there is always a potential for someone to contaminate a load of C&D debris with non-C&D debris. It would, however, be impractical to require closed containers used in the transportation of wastes regulated under Part 364 since most containers, such as roll-off, are open by design.

Comment: As part of the proposed regulations people that haul RAP or millings will be required to have a Part 364 waste transporter permit. Essentially, if municipalities aren't exempt from this regulation, then every single municipality truck in the state of New York at some juncture or another is probably going to be hauling millings or RAP for a mill-and-fill job in their local community. So you would have to have every single municipality register their trucks with a Part 364 waste transporter permit. Not to mention any independent hauler, who might be a one-man band, who owns a dump truck, and he's hired by a road construction company to haul millings and blacktop to and from the job, he's going to need it. So it's going to be quite a burden on the DEC with respect to processing a fair number of waste transport permits if these proposed regulations go through.

Response: The transportation of asphalt pavement millings are exempt from the requirements of Part 364 under a pre-determined BUD. The exemption for asphalt pavement millings begins at the point of generation. The transportation, in quantities greater than ten cubic yards in a single shipment, of asphalt pavement that requires further processing to a specification before incorporation into a construction project will require a registration.

364-3.2(a)
Comment: This subdivision is poorly drafted. What does "those types of waste" mean?

Response: "Those types of waste" refer to the wastes that require permitting under Subpart 364-4.

364-3.2(a) and 364-4.1(b)
Comment: Please explain the necessity, for transporters obtaining both permits and registrations. Since there is no registration process currently in place and many activities previously exempt have been pushed into registrations, many permit holders would be required to obtain both permits and registrations. To avoid and minimize redundant paperwork and reviews, all permit holders should also be authorized as a general condition of their permits to transport materials that are only subject to registration requirements – without requiring the filing of separate registration paperwork with the department.

Response: The proposed regulations have been revised to allow registrations to become a rider to permits. While registration will remain as necessary, the proposed revisions should eliminate a number pf previously proposed redundant acts, such as with the marking of vehicles and with reporting,

364-3.2(b)
Comment: Subdivision 364-3.2(b) should be taken out and instead require all transport vehicles be marked by their registered transporters as this could help the DEC target their inspections in a more meaningful way.

Response: The proposed regulations have been revised to address this concern.

364-3.3
Comment: Essentially all haulers must register and therefore all must record keep. Is DEC prepared to accept and administer this huge amount of data?

Response: The department is aware of the workload associated with this undertaking.

Comment: The impact on the service provider (transporter) is inordinate and affects safety, use of time, use of equipment, loss of work by the driver and by the solid waste company. A broker will have a minimal fluctuation in its service burden. The department states in the supporting documents that, "The proposed rulemaking does not impose additional paperwork requirements for the regulated community, with the

exception of certain waste transporters." This outlook is flawed because the significant paperwork burden will be on the shoulders of the solid waste transporter's driver, impacting daily operations.

Response: The registration of certain waste transporters and the associated waste tracking documentation have no connection to worker safety and will have no negative impact on safety or the use of registered equipment. The department acknowledges that there will be an additional workload placed on transporters as a result of these proposed regulations, however the registration and waste tracking requirements are expected to have minimal impact, requiring the completion of an annual registration form with no registration fee, simple waste tracking and the submission of an annual report. Unless a waste transporter's company requires otherwise, a driver need only ensure that an appropriately completed and generator signed waste tracking document accompany each shipment, that the receiving facility signs for the waste delivery and that the signed waste tracking document is returned to the waste transporter for accounting purposes.

Comment: We suggest all large scale C&D projects be required to submit a waste disposal plan outlining the types of materials, estimated tonnage, transportation routes, and even temporary and final destination for waste. With these plans in place, DEC can ensure that each registered product operates in compliance with waste regulations.

Response: Waste control plans are a good planning tool for larger facilities, which is why Part 360 requires a waste control plan for some facilities. However, Part 364 does not address the generation of waste. It instead addresses the transportation of waste once it is generated. Since the transportation of waste itself is generally over a short duration of time, the costs associated with the development of a waste control plan is not proportionate to the risk posed by the waste while in transit. The use of a waste tracking document and the requirement for transporters to obtain a registration or a permit provides the Department will all the information necessary to determine whether waste is being properly transported.

364-3.3(a)
Comment: Define "relating to the waste being transported".

Response: Waste transporters subject to Subpart 364-3 registration will be required to specify which waste category or categories they will be transporting. The registration documentation presented to authorized representatives of the department or any law enforcement official must therein specify the same waste-specific category as being transported.

364-3.3(c)
Comment: NO. It is foolish policy and the opposite of cost/effective to blindly limit the delivery of undefined material to a costly receiver here if law permits delivery to something other than an "authorized facility". The provision must require that all delivers be in compliance with the law.

Response: The language used in subdivision 364-3.3(e) has been changed to effectively communicate that waste deliveries must be to a receiving facility that can legally accept that waste.

Comment: Under the proposed regulations, transporters are obligated to deliver waste material to a receiving facility authorized to accept the waste. During the transition period it is not clear from the regulations whether the registered facilities which are obligated to obtain permits will be authorized to accept waste and if so whether transporters will be reticent to use such facility to avoid repercussions. A provision should be added to rectify/clarify that transporters can continue to utilize registered facilities until such time as there is a departmental notification that they have become unregistered.

Response: The language in Section 360.4 Transition has been revised to clarify the requirements and acceptable practices during the transition period. Registered facilities may operate under their existing authorizations during the transition period. At this time, the department has no plans for notifying transporters when receiving facilities are no longer register or permitted and it remains the responsibility of the regulated transporter to deliver wastes to an authorized facility.

364-3.3(d)
Comment: We support the generation of a manifest for this type of waste, but the receiving facility should be required to be furnished with and retain a copy of the manifest as a permanent record. This will create a permanently searchable database of material accepted into a facility.

Response: The proposed regulations have been revised with respect to the tracking document requirements, which have been relocated to section 364-5.2.

Comment: Given the toxic and potentially hazardous and radioactive nature of drilling and production wastes, NYSDEC should include them in the waste tracking documentation requirements of Part 364-3.3(d) and in turn develop a standardized form for all transporters of E&P wastes disposed of in New York State.

Response: The draft regulations required waste tracking forms to be used for non-exempt drilling and production waste.

Comment: Will a completed waste tracking form be required for each container picked up?

Response: Yes, a completed waste tracking form is required for each individual shipment.

Comment: A cradle-to-grave computerized tracking system through a real-time DEC database should be established. The most effective step DEC can take to track and manage C&D transport and disposal is to
Create a cradle-to-grave digital/computerized tracking system and database, which should be updated in real time. This type of system would have numerous benefits to enforcement by making violations readily apparent. Updates to the transport status of each truckload would be required at departure from the generation site and again at arrival of the designated disposal site. Tracking occurs by simply entering the weight and type of materials into a central data base upon departure and disposal. Each of these status updates should be required to be reported by the transporter and confirmed by the generator and the designated disposal site. If DEC officers had access to such information in the field by simply logging on the data base, they would be able to immediately determine if a particular load is being properly tracked – and if it is – where it's coming from, and where it should be going just by the transport vehicle's license plate or registration number. That aspect alone would be a major deterrent for any bad actors who would attempt to circumvent the tracking system. DEC would also be able to maintain records, which would assist investigations into illegal dumping. This should not entirely replace the requirement of carrying a hard tracking document, but would be a huge step up accurately tracking and maintaining records of C&D disposal throughout New York State.

Response: The department agrees that a computerized system would be preferable to the tracking of paper, however, a system capable of being used for the tracking of shipments is not presently available.

Comment: The tracking system should require the disposal facility to notify the generator of receiving the material, and the DEC should be notified as well, and it would be best if all of this could occur in real time through a cradle-to-grave computerized tracking system and database.

Response: The tracking document requirements have been revised in the proposed regulations. Further, the department agrees that a computerized system would be preferable to the tracking of paper, however, a system capable of being used for the tracking of shipments is not presently available.

Comment: This regulation must also clarify that C&D Debris must tracked from the point of generation to the first receiving facility. Requiring the C&D Debris to be tracked continuously would be too onerous of a task to be placed on the receiving facilities. The requirement to track C&D Debris to the final destination should be placed on the generator. See the following suggested revision: "§364-3.3(d) A waste tracking document, prescribed by the department, is required for the transport of RMW and other biohazard waste, construction and demolition debris, and historic fill. A waste tracking document must accompany each load and be presented to authorized representatives of the department or to any law enforcement officer upon request. Construction and Demolition Debris must be tracked from the point of generation to the first receiving facility, i.e. transfer station, processing facility or disposal facility."

Response: The tracking of C&D debris is to ensure the material is ultimately delivered to an authorized facility for recycling or disposal. The first receiving facility is not in all cases the final receiving facility and thus the suggested language would not satisfy the intent of subdivision 364-3.3(f), however the tracking document requirements have been revised in the regulations.

Comment: Industry should be able to review the draft tracking form before its final publication.

Response: It is not standard department practice to release draft forms for public comment, however the department will consider input from stakeholders on waste tracking documents once developed.

Comment: This section makes no mention of industrial waste and requirements for tracking, manifesting or the requirement for the generator to provide a Waste Characterization Profile Form. DEC should consider the need to establish guidance and standards.

Response: Transporters of industrial waste are not eligible for registration under this Part. The procedures for determining the acceptability of a waste for disposal are included in a landfill's permit and waste control plan as required in Part 363.

Comment: The proposed regulations require a tracking document for each C&D load.

Response: The rulemaking requires a tracking document for certain waste types, including industrial-commercial waste, of which C&D debris is included. A waste tracking document is required for certain C&D debris and fill material transported in individual shipments of ten cubic yards or greater.

Comment: Transportation of C&D debris should be required to be tracked and document the facility of origin, the transporter and the intended destination.

Response: The tracking requirements for C&D debris will include the recording of information such as waste generator, waste transporter and receiving facility.

Comment: The driver will be the first point of impact for tracking documents as multiple sheets will be included in the driver's daily responsibilities and will result in a very cumbersome paper trail.

Response: The management of documentation is the responsibility of the registered waste transporter. How that document management is implemented is beyond the scope of this rulemaking**.**

Comment: The stipulation that the "Intended receipent must certify that it received the material for Registered and Permitted Transporters" included in [361-5.7(b) under "C&D

debris tracking from registered and permitted facilities", but it is recommended that it is reiterated under Part 364 so the procedure is clear for the transporters for the purpose of eliminating any potential confusion.

Response: Tracking document requirements have been revised in the proposed regulations.

Comment: The proposed regulations establish new operating requirements, which prescribe that waste tracking documents must accompany each load and be presented to authorized representatives of the DEC or any law enforcement officer upon request. The proposed regulations require waste transfer stations to serve as the record keepers for all of the participants in the recycling process, including the transporters to the receiving facilities. In effect, the waste transfer station will be legally responsible for guaranteeing the lawful conduct of the vehicles, persons involved in transportation and processing, and the facilities themselves. This new heightened standard of documentary upkeep unreasonably burdens facilities, forcing each to chase every participant for complete records of all the events in the chain. Each waste transfer station is responsible for the legal compliance of all participants in the chain or events, from the transporters and truckers to the receiving facilities. This responsibly now extends further to guarantee and ensure that all locations receiving materials and all the transporters shipping them operate in a fully lawful manner. In turn, this shifting of legal obligation onto the transfer station employees themselves will created inconsistent results in the absence of government-funded educational training programs for all participants and technology to aid proper compliance, none of which are allocated for in the proposed regulations. The transfer of legal accountability implicitly establishes that once the product (whether defective or not) is input into the stream of commerce, each and every actor within that stream is held to reasonably foresee any third party actor's negligence in inspecting and recording the intake and export of all solid waste products and recyclables. This is an unconscionable distribution of liability that cannot be reasonably transferred from the DEC to the facilities themselves.

Response: The waste tracking requirements do not impose the requirements and legal obligations suggested in the comments. While a receiving facility is obligated to ensure that it is authorized to accept the waste received, transporters and receiving facilities are individually, not cumulatively, responsible for the function each performs. With respect to tracking documents, the transporter is responsible for obtaining a signature on the tracking document confirming receipt by the receiving facility and to return a copy of that tracking document to the generator and the department. The recordkeeping requirements for the receiving facility are not in excess of standard good business practice.

Comment: The construction and demolition debris tracking system contemplated by the proposed regulations appears to set an initial responsibility, if not culpability, on transporters of materials, even for soil and rock. At the Long Island Workshop on the proposed regulations the department was questioned about why the responsibility for the identification of the nature and characteristic of the materials and culpability of

misidentifying and ultimate disposal liability was not on the generator. Department representatives responded that the department did not have statutory authority to impose this on the generator. If that is true, the department should get such statutory authority and then promulgate appropriate regulations in accord with such authority. It makes more sense to require that the generator know and take responsibility for the material before it is on a truck rather than put that responsibility on the transporter once it is on the truck, or on a receiving Registered or even Permitted facility. This is particularly important in the case of contractors who are in many cases removing and transporting material for and from public works projects including for the State.

Response: Changes in the law are beyond the scope of this rulemaking. However, the transportation of certain fill material and asphalt pavement millings are exempt from the requirements of Part 364 when meeting the applicable pre-determined BUD requirements. Paragraph 364-5.1(b)(2) of the proposed regulation have been revised to require the generator to sign a certification regarding the information in waste tracking documents.

364-3.4(a)

Comment: The requirement of maintaining records as it applies to transporters is supported, but should be extended to the generators and receiving facilities as well. All of these entities should be required to file this documentation with the DEC, and the DEC should maintain these records as well. This tracking process could be significantly enhanced and more easily implemented through a computerized tracking system. The days of paper tracking logs are long gone and NYS needs to join the computer age. Please consider adding the following suggested revision:
"364-3.4(a) Records of all C&D transport must be maintained for a minimum of three years by the transporter, the generator, and receiving facility, and also filed with the DEC."

Response: Subdivision 360.19(l) requires regulated receiving facilities to maintain records of wastes received for a period of seven years from record creation. The proposed regulations have been revised to address this comment. Subdivision 364-5.2(f) requires transports to keep copies of waste tracking documents for a minimum of three years. As the transporter must also provide the department with copies of all waste tracking documents, sufficient records will exist for department review.

Comment: Subdivision 364-3.4(a) should be amended to ensure public access to waste tracking records. Please consider adding the following suggested revision:
"These records must be provided to the department within five business days and will be made available to the public upon request to the department."

Response: Waste tracking records submitted to the department are subject to the Freedom of Information Law. The disclosure of these records would be determined under the implemented regulations of that law.

Comment: The proposed regulations require all transport of all regulated wastes (meaning commercial wastes and C&D now) must be retained for 3 years and include location picked up, location & name of receiving facility, and quantity of waste.

Response: That is correct.

364-4.3(b)
Comment: This provision is grossly unfair and is an unnecessary because under the law, renewal applications have no more "rights" than new applications.

Response: The requirement to submit a permit renewal application 30 days prior to permit expiration is to provide the department with sufficient time to review, process and authorize a renewed permit. The processing of a new permit application requires additional actions by the department which generally increases processing time above that for permit renewal applications. Failure of a permittee to submit a permit renewal application 30 days prior to permit expiration may result in the permit expiring prior to re-authorization, preventing the permittee from being able to legally transport regulated waste.

364-4.4(b)
Comment: The change of plates, vehicles or facilities cannot constitute a modification. It must be a simple requirement to notify DEC of updated information. The NYC BIC process concerning new plates, vehicles, etc. is an example of a competent approach. As an incentive to the change, DEC can charge fines for non-compliance.

Response: Part 364 permits specify the vehicles, identified by license plate number, authorized to transport regulated waste. The addition or removal of a vehicle or a change in vehicle license plate number or a modification to a receiving facility is critical to the accuracy of the permit. The modification procedure for a permit whether for changes in vehicles or receiving facilities has been and will continue to be uncomplicated and handled by the department in a timely manner.

364-4.6(a)
Comment: The term of the permits should be for a longer period such as 2 years or 3 years plus 2. Needlessly burdensome on DEC and the industry. DEC has a history of being less than prompt on renewals. If the objective is to generate fees, fees can be annual without a permit renewal.

Response: The one year permit term is specified in statute [ECL §27-0305(8)] and cannot be changed without a change in enabling legislation.

364-4.6(b)
Comment: Define "change of ownership".

Response: Change in legally responsible entity.

364-4.6(c)

Comment: There must be a cure period after notice. As an incentive to make this change, DEC can charge a penalty fee for the cure period compliance.

Response: The existing regulations which implement the regulatory free program already provides for the imposition of fees and penalties. The proposed regulations do not propose any change to the regulatory fee process, but simply includes a notice in Part 364 that a permittee is responsible for a regulatory fee.

364-4.6(d)
Comment: This is an absolutely improper provision. Failure to update vehicles, lists etc. are the exact insignificant violation that should never be a basis for enforcement on the permit or registration. These are the insignificant violations that can generate fees for DEC, but nothing else.

Response: Part 364 permits specify the vehicles, identified by license plate number, authorized to transport regulated waste. The addition or removal of a vehicle or a change in vehicle license plate number or a modification to a receiving facility is critical to the accuracy of the permit. Regulatory fee are imposed solely on the number and types of vehicles permitted, as such permit modifications to change vehicle storage locations or to add or remove destinations facilities or waste categories do not result in assessed fees. The modification procedure for a permit whether for changes in vehicles or receiving facilities has been and will continue to be uncomplicated.

Comment: This provision is too broad and no “time window” for notice is provided.

Response: The decision to add vehicles, receiving facilities or waste categories lies solely with the permittee and occurs without the department’s prior knowledge.

364-4.6(f)
Comment: What is the mechanism and the timeline to notice the transporter? Will transporter receive such information for all receiving facilities actions immediately?

Response: Impacted transporters will be notified upon permit renewal or at another time determined to be appropriate by the department. The transporter is ultimately responsible to ensure that the receiving facilities on its permit can legally accept the waste prior to its transportation.

Comment: Establish a specific document that is necessary for the transporter to receive from the receiving facility and upon which it can rely. A change in status of the receiving facility is often beyond the knowledge of the transporter and always beyond its control. There needs to be a simple documentary test. If the transporter receives this document, it has accomplished its obligation.

Response: Regulating the communication between the receiving facility and the transporters that use that facility is beyond the authority of the department.

364-4.6(g)
Comment: Even if staff were Solomon-like in their resistance to absolute power, the provision is simply an attempt to reach the following power: If staff "knows" that a citizen permittee, registrant or applicant is less sensitive to environmental concerns that they would like, staff does not need to wait for the citizen to actually disobey the law, staff can simply rule that they "know" he is unsuitable.

Response: The proposed regulations do not present a potential for staff to make independent decisions insulated from review. Every action of the department is reviewable either pursuant the Uniform Procedures Act or in a court of law and every permit denial or revocation and the basis of such denial or revocation, is subject to review.

364-4.8(a)
Comment: Must provide detailed criteria for "closed and secure".

Response: "Closed and secure" means that the cargo-carrying portion in the transport vehicle fully encloses the waste being transported so that no waste discharges to the environment.

Comment: Does this mean during delivery of an empty roll-off container, the gate must be closed with box chained, etc.?

Response: If a roll-off container being delivered contains any residue from prior use, the gate must be closed and, if necessary, the container covered in a manner that prevents the discharge of any residuals to the environment.

364-4.8(c), 364-4.10(a)(2) and 364-4.10(a)(4)

Comment: This subdivision is poorly drafted. This is a very poor policy to limit to the facilities listed in the application documents as compliance will be impossible. It is irrational to significantly burden the industry by prohibiting lawful facilities from receiving waste just because DEC staff doesn't know which lawful facility. Destinations change repeatedly due to price competition and the driver has no idea what is on the facilities permit. The object of the regulation should be to ensure environmental safety not staff control of details. The department should limit the undefined "regulated waste" to lawful places of deposition. It is impossible for a transporter permit to list a receiving facility that is only designated by the generator that day. The only rational policy is for the transporter to identify where the waste was delivered to, not to predict all deliveries a year before when obtaining a transporter permit.

Response: A Part 364 permit is a "living" or "dynamic" document that can and is expected to be modified over the life of the permit. Permittees may have multiple receiving facilities listed on their permit and may add or remove receiving facilities as business needs require. Department staff routinely process numerous permit

modification requests daily for transporters that need to add new receiving facilities and/or waste types to their permits**.**

364-4.8(f)
Comment: This provision is a catch all and too broad. Cite the actual regulation and any successor provisions.

Response: The regulation will be revised to include the citation "…Article 2 Section 14-f of the New York State Transportation Law…", however successor provisions cannot be predicted and therefore cannot be cited.

364-4.8(g)
Comment: The complete prevention of leaking may not be possible with the available technology, however leaking should be as well resisted as possible. Please see the following suggested revision: "§364-4.8(g) All wastes must be properly covered or contained during transport so as to resist leaking, blowing, or any other type of discharge into the environment."

Response: ECL Section 27-0301 states that "It is declared to be the intent and purpose of this title to protect the environment from mishandling and mismanagement of all regulated wastes transported from the site of generation to the site of ultimate treatment, storage or disposal and to prevent a discharge of wastes into the environment, whether accidental or intentional, except at a site approved for the treatment, storage or disposal of such wastes." The use of "resist" would not meet the intention of the ECL and the regulations will remain unchanged.

364-4.8(g) and 364-4.8(h)
Comment: Define "properly".

Response: "Properly" is generally understood and defined in this instance as "of sufficient design and integrity".

364-4.8(i)
Comment: Define "appropriate".

Response: "Appropriate" is generally understood and defined in this instance as "as reasonable and prudent**".**

364-4.8(j)
Comment: The industry norm for roll-off is for an empty roll-off container to be dropped off (staged) for future loading. The transporter is notified by the generator that the roll-off container is ready for pick-up. How does the department propose to have transporters wait with empty roll-off containers? Has the department considered the potential safety risk to an operator during loading? Some facilities do not allow anyone near a container or transfer trailer during loading, and that facility subsequently moving

the loaded container out of traffic into a separate area awaiting pick-up. What is the department's position?

Response: A roll-off container is not a transport vehicle by definition and thus is not subject to the requirements of subdivision 364-4.8(l). Trailers staged for loading that are no longer attached to the power unit (truck or tractor) will be treated for purposes of subdivision 364-4.8(l) the same as roll-off containers.

Comment: The department proposes drivers/operators must remain with the transport vehicle? What does the department propose for staged containers?

Response: A roll-off container is not a transport vehicle by definition and therefore is not subject to the requirements of subdivision 364-4.8(l).

Comment: The requirement for operators to remain with the vehicle during loading and unloading places the operator in an area of high risk and does not recognize generating locations and disposal locations may have specific safety programs about "unauthorized personnel" in loading areas.

Response: The department does not intend for operators to assume unreasonable safety risks and respects reasonable limitations on operator presence during loading operations, however the operator's liability for the contents of the waste being transported is not diminished should the operator not be present during or able to observe loading operations.

364-4.8(k)
Comment: This is a very bad provision. There are comprehensive and detailed requirements in the law of NYS concerning food and health regulations. To create a one sentence catchall perhaps contradicting all other laws or omitting important details is a recipe for very bad and inconsistent results.

Response: The provision requires compliance with any and all applicable federal and state regulations governing decontamination. Stronger language does not exist.

364-4.9(e)(2)
Comment: Please identify the process by which disinfectants will be registered with the department and the mechanism DEC will use to identify and communicate the registered disinfectants. We note that disinfectants are safer to transport in their original containers than in sprayers and request that this item be modified to read "…by the department *and* a sprayer capable…"

Response: That requirement has been removed from the proposed regulations**.**

364-4.9(e)(3)
Comment: Should the required plastic bags be red biohazard bags? Please identify a standard acceptable to the department here.

Response: That requirement has been removed from the proposed regulations.

364-4.10
Comment: The new tracking system for preventing illegal dumping is a little bit anemic, and so we would like to offer the gold standard, which we believe will be very simple, but also very cost effective and very quick. It won't take any time at all for the transporters. And that's what we call a computerized system, here in the millennium. It would be a cradle-to-grave tracking system that is computerized in real time, and no confusion. We don't need to know where the paperwork is. We don't need to know anything other than we log on and find out where it went, where it came from, and how much was.

Response: A computerized system, such as the one suggested in the comment, is not presently available.

364-4.10(a)
Comment: Multiple comments noted that this section will require tracking for several new categories of waste, including drilling and production waste and that these new provisions were fully supported, and are necessary to ensure that E&P wastes (including from high-volume hydraulic fracturing operations in other states) are not illegally dumped - a common problem in and other states.

Response: The department acknowledges receipt of this comment.

Comment: It should be identified what material is exempt.

Response: The wastes that are exempt for the requirements of the proposed regulation are identified in section 364-2.1**.**

Comment: Under the proposed regulations, C&D cannot be accepted by a transporter, or transported, without a tracking document.

Response: C&D debris in quantities less than or equal to ten cubic yards in a single shipment is exempt under this rulemaking. The transportation of greater than ten cubic yards of C&D debris in a single shipment will be subject to regulation and the waste tracking documentation requirements will apply.

Comment: It appears that the DEC is intending to expand the power and responsibility of the “generator” which seems to have been given decision-making abilities and seems to have no risk. Generator decision-making will impact every activity of a transporter. Is there a provable correlation between generator disposal decision making and reducing illegal dumping?

Response: The rulemaking requires the generator to sign, date and certify the waste tracking documents. The waste tracking documents must specify the waste type and

the intended receiving facility. The selection of the receiving facility can be agreed upon by pre-arrangement between the generator and the transporter, though it is not required. There is no practicable way to correlate the selection of a receiving facility to an illegal dumping activity. The presence or absence of a waste tracking or reporting system will not, by itself, prevent illegal dumping.

Comment: Multiple comments were received regarding the "authority" of a generator to designate the receiving facility on the waste tracking document.

Response: The department is requiring waste tracking documents to monitor the movement of certain regulated wastes throughout the state, to deter illegal disposal and to assist enforcement efforts. The rulemaking requires the generator to sign, date and certify the waste tracking document. The tracking document must specify the waste type and the intended receiving facility. The rulemaking is silent on who selects the receiving facility, in the first instance, so long as the receiving facility is specified prior to transport and that the transporter has the receiving facility listed on its permit or registration.

Comment: Some proposed changes are undeliverable as presented. The department seems to have drafted these proposed regulations from a perspective that a single generator affects a load and the disposal site selection and alternative selection. What does the department propose as a solution when there is a commerical route?

Response: Wastes that are containerized or transport vehicles that are compartmentalized may collect wastes from multiple generators and deliver to multiple receiving facilities as long as the tracking documentation remains distinct and accurate for each transaction**.**

364-4.10(a)(1)
Comment: Define "quantity". What does the department propose to define quantity, for example, a staged, loaded roll-off ready for pick-up from a location which has no scale? Or is the department suggesting that pick-ups from sites without scales estimate cubic yardage? Example: the generator estimates 3 tons in a container and the disposal destination records 5.5 tons from its certified scale. This guestimate is problematic and not deliverable. Weight is determined by certified scale at the disposal facility or yardage recorded on the disposal ticket at other types of disposal locations.

Response: The language in the proposed regulations has been changed to accommodate this concern.

Comment: What if the load contains waste from more than one commercial customer - does each generator have an obligation to choose a disposal facility?

Response: Wastes that are containerized or transport vehicles that are compartmentalized may collect wastes from multiple generators and deliver to multiple receiving facilities as long as the tracking documentation remains distinct and accurate

for each transaction**.** The rulemaking is silent on who selects the receiving facility as long as the receiving facility is specified on the waste tracking documents prior to transport and the transporter has the receiving facility listed on its permit or registration.

364-4.10(a)(4)(ii)
Comment: Multiple comments were received questioning the appropriateness of requiring a generator to designate an alternate facility in the instance that delivery could not be made to a facility indicated on waste tracking document.

Response: The regulations have been revised to address this concern. In cases where the receiving facility specified on the waste tracking document is unable to accept the waste, the transporter may elect, upon notification to the generator, to either deliver the waste to an alternate receiving facility or to return the shipment to the generator.

364-4.10(a)(5)
Comment: The solid waste collection service provider (transporter) and the generator share the goal of legal disposal. Will generators receive violations from the department for failing to approve or select an alternative disposal location?

Response: The proposed regulation has been revised to allow the transporter to elect to take the waste to an alternate facility or to return the waste to the generator.

Comment: What does the department propose for securing permissions for an alternative disposal site if the first facility rejects the load or is otherwise not authorized to accept the load?

Response: This requirement has been removed from the proposed regulations.

Comment: The department may not be aware that the roll-off business is built on effective reuse and placement of containers. Customary operational procedures include: empty containers are returned for additional use by the generator or replaced with an empty container that is a different size or strength; brought to another location; or returned empty to the proposed registered company's staging yard for future use. The effect of this proposal will result in wasted time for drivers who would have to wait for rerouting or returning containers to the generator site or to a staging area if the generator site is not open and loss of use of equipment for next placement.

Response: The rulemaking is not expected to impact roll-off business practices beyond the requirements of either registration or permitting, and the waste tracking documentation requirements, as applicable. The rerouting or returning of rejected containers to a generator would generally be due to a failure of appropriate selection of receiving facility for the subject waste type. Compensation for loss of equipment use and manpower are contractual issues to be negotiated between a transporter and generator and outside the scope of this rulemaking.

Comment: The ideas contained in this rulemaking proposed revision would resonate with brokers which subcontract collection. Brokers function with phones and computers, work with contracts, may be the only contact to the "generator". When a site is under contract with a broker, is the broker in the chain of approval for an alternative disposal location?

Response: This requirement has been removed from the proposed regulations.

Comment: The proposed rules creates the possibility for a likely scenario for a transporter picking up a roll-off container, attempting to return the loaded (unemptied) container to the generator and having no access to the generator site. What would the transporter do with the loaded container – leave it unprotected for the generator – risking unauthorized use by parties other than the generator, protect the loaded container and risk an "unauthorized storage or transfer station violation"?

Response: The communication between transporter and generator is a business related variable that is beyond the scope of this rulemaking. The transporter knows what waste types and to which facilities he is authorized to transport and is not restricted by these regulations from assisting the generator with receiving facilty selection. The selection of the receiving facility can and probably should be agreed upon by pre-arrangement between the generator and the transporter, the same as with any standard business contract. The department has no authority over the business decisions made by transporters or generators but strongly recommends all generators and transporters exercise due caution when entering into contracts.

Comment: Solid waste collection service providers (transporters) frequently operate 24 hours a day. Picking up a loaded container Saturday at 4:30 a.m, bringing it directly to a disposal facility during its customary operating hours, discoverning that a facility is closed and then attempting to reach the generator for an alternative disposal location, returning the loaded container to the generator's location because the generator cannot be reached and discovering there is no place to put the container? What happens? During this time, the generator has hired a different transporter and what does the transporter do?

Response: The communication between transporter and generator is a business related variable that is beyond the scope of this rulemaking. The selection of the receiving facility can be agreed upon by pre-arrangement between the generator and the transporter, though it is not required. The department has no authority over the business decisions made by transporters or generators.

364-4.10(a)(6)
Comment: This subdivision needs to be clarified. If this provision is intended to refer to keeping waste separate on the vehicle, there is no possibility of there ever being compliance. This is impossible or ridiculously costly to comply with for de minimis policy benefit.

Response: Wastes that are containerized or transport vehicles that are compartmentalized may collect wastes from multiple generators and deliver to multiple receiving facilities as long as the tracking documentation remains distinct and accurate for each transaction. The segregation of wastes during transportation has been successfully implemented for many years in a number of waste management fields.

Comment: This is the responsibility of the generator on the generating location because the transporter employees do not load or handle the waste.

Response: There may be cases where both waste requiring tracking documentation and waste that does not are transported in the same vehicle. This could be due to the handling of containerized waste or the use of compartmentalized vehicles. The loading of waste is not solely a generator activity, so this provision remains valid.

Comment: Smaller scale transfer facilities may often have to place different types of waste into the same roll-off box to be transferred to the final disposal facility. Requiring a waste tracking document after this point will create an unneeded burden on transfer and hauling operations. Please see the following suggested revisions: "§364-4.10(a)(6) Waste requiring a tracking document must be kept separate from waste not requiring a tracking document until delivered to the first receiving facility. Subsequent transportation, i.e., from a transfer station to the disposal facility, does not require waste segregation or a tracking document except as subject to 360-4.l0(b)."

Response: The suggested language would not satisfy the intent of the rulemaking. In instances where different types of wastes must be transported in the same roll-off container, the use of a multi-compartment container would be required.

364-4.10(a)(7)
Comment: Please see the following suggested revisions to this recordkeeping requirement: "§364-4.10(a)(7) The transporter must return a copy of the waste tracking document to the generator within two weeks and keep a copy of the waste tracking document for a period of three years from the date the waste was accepted by the transporter. These forms must be available to the department upon request."

Response: The regulation have been changed to require the transporter to return a copy of the waste tracking documents to the generator and the department. The regulations also require the transporter to keep those records for a minimum of three years.

364-4.10(d)(1)
Comment: This is impossible or ridiculously costly to comply with for de minimis policy benefit.

Response: The time frame and effort involved to complete the required reconciliation is expected to be minimal and doing so provides the transporter with proof of receipt at an

authorized receiving facility for wastes transported in addition to providing the department with complete and accurate waste tracking data.

Comment: Does this requirement include returning a box when the generator has not given approval to take the container to an alternate receiving facility? The obligation of the transporter should cease upon the return of the loaded container to the generator. When a generator selected site is closed for any period, what does the transporter do with the loaded box? Decide an alternate receiving facility; store it with notice to department and risk violation for an unauthorized transfer station?

Response: The return of a loaded container to a generator is not an accounting discrepancy and not subject to reporting under subdivision 364-4.10(d). With respect to the return of a loaded container to the generator, communication between transporter and generator is a business related variable that is beyond the scope of this rulemaking. The department has no authority over the business decisions made by transporters or generators.

Comment: DEC should clarify that this requirement applies to the transporter receiving the waste, and not another facility. Please see the following suggested revision: "§364-4.l0(d)(l) within 15 days of the transporter receiving the waste, a report must be filed with the department describing the discrepancy and the attempts the transporter has undertaken to reconcile it; and…"

Response: The regulations have been revised to address this concern.

364-4.10(d)(2)
Comment: What documents are being referred to?

Response: Copies of the original tracking documents for which the discrepancy report is being filed.

Part 365 Regulated Medical Waste and Other Infectious Wastes

Part 365 General Comments

Comment: The definition of biohazard waste is impermissibly vague and overly expansive as follows: The proposed regulations define biohazard waste as "regulated medical waste [(RMW)] and other solid wastes that present a risk similar to or greater than RMW due to the presence of infectious agents." RMW and infectious agents are both defined in NYSDEC regulations. However, RMW comprises a broad range of waste products from used sharps and medical products to animal specimens and chemical and biological agents used in medical research, which present wildly varying degrees of risk. Many types of RMW do not present risk at all. Defining biohazard waste in comparison to the risk posed by RMW leaves no way to reasonably determine whether a given material is, in fact, biohazard waste. Even if one could calculate the "risk" posed by any given type of RMW, there is no single measure of risk posed by RMW as a category. The New York Court of Appeals has held that a regulatory definition must provide "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." The definition, as currently proposed, does not comply with that requirement. In addition to being impermissibly vague, the proposed definition is excessively broad, capturing everything from highly communicable chemical agents to spoiled food. As drafted, the proposed regulations will impose substantial new burdens on the state's food manufacturers and food safety network, with potentially significant economic and public health impacts. Therefore, food waste products should be excluded from the definition of biohazard waste under Section 365-1.2.

Response: The regulations have been amended to address this comment. The definitions and criteria have been revised to narrow the scope to regulated medical waste and other infectious wastes that are specifically defined in the regulations.

Comment: The proposed regulations arbitrarily expand the statutory regime governing RMW as follows: The proposed regulations are in effect a regulatory expansion of the statutory regime governing RMW. NYSDEC incorporates many of the RMW treatment and disposal requirements into its new "biohazard waste" regulations. The RMW Program was established in response to a 1980s crisis governing the improper disposal of medical waste, and the legislature specifically chose to limit such regulations to medical facilities. NYSDEC does not have the discretion to enlarge the scope of that statute under the guise of new "biohazard waste" regulations. In contrast to the "syringe tide" that led to the enactment of the RMW law, NYSDEC has not identified a single case of human health or environmental damage from the lawful disposal of food waste. The "infectious agents" in food waste are only hazardous to humans if consumed, and pose no threat if disposed along with other municipal solid waste. There is no rational basis for NYSDEC's proposed regulatory expansion.

Response: The proposed regulations were designed, in part to revise definitions for regulated medical waste, standards for infectious agents and waste treatment, and waste container labeling requirements. While the Department has broad authority to regulate all forms of solid waste handling, treatment, storage and transportation, the regulations have been revised to limit the scope to those wastes of significant concern. The references to food waste are not included in the revised proposal.

Comment: NYSDEC has not adequately analyzed the economic or environmental impacts of its biohazard waste regulations. NYSDEC's Job Impact Statement states, without any supporting analysis, "the proposed regulations themselves will not negatively affect employment opportunities." This is not the case; the proposed regulations of food waste are already discouraging investment and job creation, and the regulatory burdens imposed on farmers and food manufacturers could have an adverse employment impact in regions where jobs are currently scarce. NYSDEC's Rural Flexibility Analysis states "most generators choosing to treat RMW or other biohazard waste on-site will incur no additional costs since many, especially those based in healthcare, academic or research institutions already have autoclaves in place for processing their waste." This is untrue with respect to many food producers, however, and even those facilities that have autoclaves on site will incur additional compliance costs that could result in disproportionate rural impacts. NYSDEC's Regulatory Impact Statement acknowledges that "[r]equirements have been added for … contaminated food supply waste," but states "[t]hese new requirements are unlikely to add significant cost to the management of these waste streams." No support is offered for that conclusion, which ignores the substantive compliance obligations imposed by NYSDEC's new food regulations. By increasing the cost and burden of food testing, NYSDEC's proposed regulations create a perverse incentive for food manufacturers to minimize such testing. However, the proposed Generic Environmental Impact Statement for the proposed rules fails to consider the potential environmental and human health impacts with respect to food safety.

Response: The regulations have been substantially revised to clarify that they do not apply to routine food testing.

Comment: Several different sections of the regulation have confusing time frames for the generator, transporter and treatment facilities. It is recommended that these requirements should be consistent with the New York Department of Health (NYSDOH) regulations under Public Health Law 1389 AA-GG and Regulations of 10 NYCRR, Part 70. It is recommended that the state create one time limit and remain consistent or create a chart to explain their time limits more clearly.

Response: The regulations have been revised to more clearly convey the requirements for generators, transporters and treatment facilities. There are proposed time frames applicable to generators, commercial transporters, transfer and treatment facilities regulated by the Department. RMW generation rates will vary based on the

size, type of facility and volume of waste handled. Based on the Department's experience the proposed time frames are reasonable. However, the 14 day storage for bulk packages (roll-off containers) at the generator has been extended to 21 days and the 90 day time frame for storage of sharps by the generator has been deleted. Guidance to assist with compliance will be developed once the regulations are promulgated.

Comment: It is recommended that the container markings be consistent with the current United States Department of Transportation (USDOT) requirements and only be required to be on two opposing sides in accordance with the USDOT hazardous materials regulations, and that the requirement to have the date of transport placed on the containers be removed.

Response: The Department agrees. The provisions for container marking and dating have been amended.

Comment: The regulations require the generator to obtain a copy of the New York State medical waste tracking document (tracking document) from the receiving facility; the receiving facility must sign and return the tracking document to the generator. This is a hazardous waste requirement that is being placed in the RMW industry. There is no current federal regulatory requirement for the shipping document to be returned to the generator for RMW. Because this is a new generator requirement, it should be clearly communicated to the generator that it is their responsibility to obtain this documentation. Additionally, the regulations should be clearer as to "who" this applies to including whether it is applicable to hospitals.

Response: To be clear, the regulations impose the obligation to notify the generator of receipt of the waste on the receiving facility. This is not a new requirement. Current regulations require returning the medical waste tracking document to the generator and includes all generators of regulated medical waste. The requirement is based on Environmental Conservation Law 27-1504, which requires the Department to include in regulation a system that provides generators with assurance that waste is treated by the receiving facility. Transmission of the tracking document electronically would be acceptable, although the Department cannot demand that such form be transmitted electronically.

Comment: Prior to the first shipment of biohazardous waste, the generator must confirm in writing/electronic communication from the designated transfer or treatment facility that it is authorized to accept the waste and has the capacity to accept that quantity of waste. If this will be a requirement now newly imposed on RMW generators, it will require further clarification to them. Additionally, if these regulations do not apply to hospitals who else would be required to have these in place? Many hospitals have had agreements in place for years. This will be a new requirement for them.

Response: Most generators, including hospitals, have contracts with permitted RMW transporters that already bring the waste to permitted transfer or treatment facilities.

Use of the NYS Medical Waste Tracking Form in accordance with these regulations further ensures that the waste is being delivered to authorized facilities.

Comment: The proposed rule requires the generator to give alternate disposal facility instructions to the transporter if an emergency arises at the receiving facility and that the transporter contact the generator for authorization to deliver to another receiving facility. The industry would like to understand what constitutes an emergency according to the NYSDEC. This could be more of a complicating issue for a generator since they are not intimately involved in the process once the waste leaves their sites. This is also problematic if the larger hospitals do not have to comply with this regulation. It is recommended that the NYSDEC remove this section of the requirement or provide greater clarity on how and who they expect to comply with this requirement.

Response: Generators can address this in their contracts with transporters by requiring the transporter to identify alternate disposal locations in the event of an emergency. The Department would consider an emergency any event which prevents the receiving facility from being able to treat the waste, such as the shut down of the normal designated treatment facility, a spill, an act of nature, a high risk waste stream unable to be treated at the facility, etc.

Comment: Often the generator relinquished control of the waste once the hauler picks it up; therefore, the determination of the treatment site is left up to either the hauler or the original destination facility. This happens for several reasons, such as original destination facility is at treatment/storage capacity, or is in shut down, or an emergency has occurred at the facility. Additionally, haulers require the flexibility to choose what treatment plant is best suited for logistics and costs. This section also requires the hauler to let the generator know in advance who is treating their waste. Often the original destination facility makes the determination that the waste will go to another treatment facility, not the hauler. The hauler typically doesn't really know that the original destination facility cannot take their waste, until the waste is on the way. This is very limiting for the small transporters and shouldn't be included. Additionally, the generator is usually not involved in this process once the waste has been relinquished to the transporter.

Response: Flexibility to address logistics and cost can be included and identified in contracts between the generator(s), transporters and treatment facilities. Use of the NYS Medical Waste Tracking Form in accordance with these regulations further ensures that the waste is delivered to authorized facilities identified in the contract between the generator and transporter. There are only a limited number of RMW treatment facilities in New York State. The transporter and generator can include more than one destination on their permit and agreement, respectively.

Comment: Section 360.3 References (a)(7) outlines the regulations incorporated by reference from 49 Code of Federal Regulations (Transportation) sections related to the USDOT Pipeline Hazardous Materials Safety Administration (PHMSA) hazardous

materials regulations (Hazmat). These regulations themselves are preemptive in nature as outlined in 49 CFR107 Subpart C – Preemption. Several parts throughout Part 365 related to the marking, labeling, container specification, and shipping documentation are different than the PHMSA Hazmat regulations. Specifically under 49 CFR 107.202 Standards for determining preemption (revised as of October 1, 2015) calls out that these specific operations would be preempted under these regulations. NYSDEC should ensure that the requirements laid out throughout Part 365 be in full conformance with the PHMSA Hazmat regulations to avoid any preemptive issues and to ensure that transporters are capable of conforming to both sets of regulations.

Response: The proposed regulations have been amended to address this concern pertaining to the marking, labeling, container specification, and shipping documentation to comply with the USDOT PHMSA Hazmat regulations.

Subpart 365-1 General

Section 365-1.1 Applicability and 365-1.3 Exempt facilities

Comment: The regulations do not clarify how they will be applied to the generator, however, there are numerous requirements for the proper identification, segregation and storage of RMW at the point of generation which must be conducted by the generator. For example**,** it is unclear when the clock starts for storage timing. Does the time start at the initial placement of waste or once prepared for transport? The proper segregation of different waste streams, which are later required by the transport or treatment facility to be reported on, and other areas of concern. Without the generators at all facilities being held responsible to comply with these regulations, it will be challenging, if not impossible, for the transporters and treatment facilities to fully comply with the proposed rule. It is suggested that the NYSDEC clarify the applicability of these regulations and appropriately address accountability for compliance. It is essential for the NYSDEC to specify who is and who is not covered by this regulation.

Response: Storage at the generating facility begins when the container is filled and moved to a central storage area for preparation for transport. However, the revised regulations have been organized to clearly differentiate what activities are the responsibility of the generator. Generators are, by definition, the person responsible for subjecting a material to regulation, however, generators are responsible for pre-transport handling and storage, which may have been confusing in the draft rulemaking. That concern has been addressed in the revised proposal.

Section 365-1.2 Exclusions and 365-1.3 Exempt facilities

Comment: Under section 365-1.2 and 365-1.3 the proposed regulations outline what types of wastes and facilities are excluded or exempted by the regulations (respectively**).** In some cases this is confusing both for the generators and for the transportation/treatment facilities. There is a significant portion of the regulations under Section 365-1.4 that is dedicated to the generator requirements. These requirements

have impacts on the way the waste is identified, labeled/marked, and stored at generator facilities, some of which are different from the regulations laid out by Public Health Law 1389 AA-GG and the regulations of 10NYCRR, Part 70. The reason for the concern is that these changes will create confusion for the generators and could create compliance challenges for transportation and treatment facilities. If sections of 365 are not applicable to hospitals, residential health care facilities, diagnostic and treatment facilities, and clinical laboratories, then it significantly limits the number of generators that would be impacted by the rule. However, that would have a tremendous impact on the ability of transporters/treatment facilities to ensure compliance. Some sections in the regulations present significant changes in the way that waste must be handled. It is important that generators understand their responsibility and how it will impact them as well as how it impacts the management of waste downstream from the generator. NYSDEC should clarify for whom and how these regulations will be applied to generators such that compliance can be achieved by all parties.

Response: All NYS generators of regulated medical waste must comply with the packaging, marking and labeling requirements that pertain to transport, treatment and disposal of the waste. Any differences in regulations that may be applicable to healthcare facilities are necessary due to the differences in the types and volumes of waste that may be generated by those facilities, or reflect changes in federal requirements since 10 NYCRR Part 70 was promulgated 11 years ago. To address the concern raised in the comment about the use of exclusions and exemptions, the exclusions contained in Section 365-1.2 have been removed from the revised proposal and the category of what is or is not included in the definition of RMW is addressed in Section 360.2.

365-1.2(j)

Comment: This item needs to be amended as follows: Medical devices intended to be reprocessed or remanufactured provided the transportation complies with USDOT regulations for transportation of used healthcare products as defined in 49CFR 173.134(a)(8), as incorporated by reference in section 360.3 of this Title.

Response: This provision has been amended to exclude used healthcare products that are not being transported for handling or treatment as RMW.

Section 365-1.3 Exempt facilities

Comment: This section that identifies the facilities that are exempt is not clear. The Public Health Law and NSDOH Regulations of 10 NYCRR, Part 70 state that these regulations govern hospitals, residential healthcare facilities, diagnostic and treatment facilities and clinical laboratories. However, there are several generator requirements throughout the proposed part 365 that would appear to be significant to generators**.** The regulations should more clearly identify which entities are addressed in these regulations and which must comply with the requirements under Part 365.

Response: The list of facilities exempt from the permitting requirements for Part 365 is now located in Section 365-2.1 and the applicability of Subpart 365-2 is contained in Section 365-2.1. Facilities located at or operated by a hospital, residential health care facility and diagnostic and treatment centers (defined in section 2801 of the Public Health Law) and clinical laboratories (defined in section 571 of the Public Health Law) are not required to obtain a permit for treatment storage or disposal. Such facilities however, may qualify as a generator and would therefore be obligated to comply with Subpart 365-1.

365-1.3(a)

Comment: The proposed language that defines a hospital or residential health care facility should reference Section 2801 of the Public Health Law which contains language that defines a hospital or residential health care facility.

Response: Section 2801 of the Public Health Law provides the meanings of words or phrases and defines hospitals, nursing homes, residential healthcare facilities, and diagnostic and treatment facilities, and Section 571 of the Public Health Law provides meanings for clinical laboratories as it relates to the applicability of 10 NYCRR Part 70 for the management of regulated medical waste. These laws and regulations are incorporated by reference in this Part.

365-1.3(b)

Comment: Suggested language is proposed as follows: “This exemption also includes consolidation, storage or transfer of RMW at facilities such as industrial facility medical clinics and Limited Service Laboratories that employ a doctor or nurse practitioner who oversees limited healthcare services provided by the facility. The waste must only be generated while dispensing medications or administering healthcare at individual households, industrial facility medical clinics, or the physical location of the Limited Service Laboratories. The volume of RMW and unused medications cannot exceed 50 pounds per month for these types of business and the waste must be packaged and treated as RMW.”

Response: Agreed. The definitions in Part 360 have been amended to reflect this exclusion.

365-1.3(c)

Comment: The criteria of 6 NYCRR 365-1.3(c) requires storage of RMW in refrigeration, even though current practices may demonstrate that putrifaction will not occur and increases the handling and transportation of a very small quantity of RMW due to the shortened on-site storage timeframes.

Response:. The Department agrees that the proposed rules contained storage requirements that would require increased handling of waste when no putrification was likely to occur. Therefore, the relevant provision has been amended to address this

comment. Generator requirements related to storage are located at subdivision 365-1.2(b) of the revised proposal.

Section 365-1.4 Generator requirements

365-1.4(a)

Comment: Will the documentation in the operating, etc. plans associated with existing Part 360 permits for RMW treatment facilities satisfy the requirement for a written waste plan?

Response: Provided that the existing plan includes all the components needed for a waste control plan as proposed in the revised rule, an existing plan would be sufficient. However, a waste plan from an incident can be different than a conventional RMW waste management plan and may generate volumes of waste that may include the need for alternative packaging, storage and treatment. A typical RMW waste management plan may not include the necessary information for all contamination incidents. Therefore, Department staff should be consulted to determine whether a site-specific plan meets the requirements in the proposed rules.

365-1.4(b)

Comment: Add clarifying language such as “radioisotopes contaminated with biohazards.” To reduce the risk of biological exposure or release associated with the storage or transportation of radioisotope-contaminated biohazard waste, NYSDEC should also include a provision for treating mixed rad/bio waste for the biohazard when the radioisotopes have a long (e.g., greater than 1 year) decay time.

Response: The regulations have been amended to address this comment. The generator would have the option to hold the waste until the radioactive isotopes decay to background levels or treat the waste as prohibited radioactive material.

Comment: NYSDEC needs to revise the regulations identifying the separation of different types of medical waste only where there are different disposal and handling requirements for those wastes.

Response: The Department believes waste separation is important. This provision addresses the need for waste separation so that it may be appropriately handled, packaged, transported and treated.

365-1.4(b)

Comment: This section states "high-risk waste containing infectious agents" however this term is not defined. According to the OSHA blood borne pathogens standard and industry best practices all waste workers observe universal precautions when handling RMW. It is unclear what would constitute a "high-risk" Select Agent. Additionally, Select Agents - as defined under Section 360.2(236) is identified as those that are regulated by a separate set of regulations. These regulations require the management of these

wastes and proper destruction of the agents on site by the generator or Select Agent registrant. The management of these materials should be addressed separately altogether. Additionally, if Part 365 is not applicable to all generators then this separation will become problematic for transporters and treatment facilities, as the separation of wastes must start with the generator. This section also includes other definitions. These are defined under section 360.2 but could be confusing for the reader. Specifically the differences between pharmaceuticals, biologicals, mixed or dual wastes all have specific meanings. It is not clear why these should be separated from each other if the intent is for all of them to be incinerated. We would recommend that this be revised to clarify that materials destined for incineration be combined and identified as such, rather than separating each item out separately. This will also ensure that there is less potential for diversion.

Response: The regulations have been amended to address this comment. Significant revisions have been included to better define the types of wastes that would be governed by the proposed regulations.

365-1.4(f)(1)(i)

Comment: The primary receptacle, if it is a bag, should not be required to be red in color. This is subjective and there are some bag manufacturers especially for autoclave bags that use a clear liner with specific markings complying with Federal OSHA and USDOT regulations.

Response: The Department agrees that the color of the bag should not be dictated by regulation. The proposed regulations have been amended to address this comment.

Comment: This generator requirement to maintain the container in an upright position would be impractical to enforce and therefore, it is recommended that it be removed. Again, this is in the generator section which would not apply to many generators.

Response: The Department believes that containers must be placed in upright positions to maintain a secure leak free package.

365-1.4(f)(1)(vi)

Comment: Properly closed at all times can lead to operational and safety problems in laboratory and clinical settings and is impractical and potentially unsafe to keep bags and containers closed until filling them. It is suggested that the following statement be added to the beginning of the sentence:" Primary containers in laboratory and clinical settings must be kept in secure locations (e.g., access-restricted rooms) when in use and must be properly closed when moved to other locations. In other settings, primary containers must be…" Also, it is suggested that marking be separated from closure requirements for primary containers and using the phrase universal biohazard symbol instead of biohazard warning sign to avoid confusion with OSHA warning signs.

Response: The regulations have been amended to address this comment. The revisions are consistent with the suggested modifications.

Comment: Are commercially manufactured containers restricted to such containers that are manufactured for the purpose of holding biohazard wastes (e.g., burn boxes) or can any commercially-manufactured container be used? Also, the comma after transport appears out of place.

Response: Containers used for the packaging and transport of RMW or other infectious waste must conform with USDOT requirements.

365-1.4(f)(2)(iii)

Comment: This section goes beyond USDOT PHMSA regulations. There are containers that have been constructed that meet and exceed PGII packaging criteria that would not mandate the use of a primary container and would be able to serve as both a primary and secondary container. NYSDEC should recognize this regulation and not mandate that there be a primary container. USDOT combination packaging requirements are based on testing criteria that must be met according to the regulations laid out in the HMR. It is recommended that the NYSDEC reference the requirements in the USDOT PHMSA regulations since it is already incorporated by reference to these rules.

Response: The regulations have been amended to address this comment and provide the ability for containers to serve as both primary and secondary containers. USDOT references have been added to the regulations.

Comment: This section references USDOT 49 CFR 173.197 as the reason for setting these requirements. This reference has been taken out of context and has been expanded beyond the intent of the regulations by USDOT. The only section requiring the marking of the generator information is under section 173.197 e) inner packagings authorized for large packagings, Carts, and BOPs. After September 30, 2003, inner packagings must be durably marked or tagged with the name and location (city and state) of the offeror, except when the entire contents of the Large Packaging, Cart, or BOP originates at a single location and is delivered to a single location. The NYSDEC regulations go beyond the USDOT PHMSA regulations, which is preemptive. This includes the requirement that each individual secondary container must have the name and address of the waste generator, date of transport and be marked predominantly with signage. It is recommended that the NYSDEC incorporate the USDOT regulations by reference and not go beyond the USDOT regulations. Additionally, the section mentions that the containers be marked with signage indicating that the contents are "pharmaceuticals, mixed or dual wastes or toxic drug waste" and this would be a new requirement. There is also concern that by requiring the marking of these materials this could create an issue for diversion. It is recommended that it would be that the generator identify if these materials must go for incineration or the type of treatment rather the specifying that there are pharmaceutical wastes. If there are hazardous

wastes, they should be marked according to United States Environmental Protection Agency (USEPA) and USDOT regulations.

Response: The regulations have been amended to address this comment and the proposed criteria have been updated accordingly.

365-1.4 (f)(2)(iv)

Comment: This requirement goes beyond the USDOT PHMSA preemptive regulations for marking of hazardous materials when in transport. This is currently not required in the state and would create a major additional burden for all generators, transporters and processing facilities. The cost of compliance with this requirement would be significant and ongoing (as many reusable containers are permanently marked for example). It is requested that the NYSDEC remove this section and requirement as the marking and labeling of hazardous materials should follow long established USDOT regulations.

Response: The regulations have been amended to address this comment and the rules now provide that marking be consistent with USDOT requirements.

365-1.4(f)(2)(v)

Comment: If a red bag is used as the primary container for RMW that is placed in a reusable secondary container that is a gondola or wheeled cart, does the red bag primary container qualify as the liner for the reusable secondary container?

Response: The properly marked red or other color plastic bag may serve as a primary container or the liner.

365-1.4(f)(2)(vi)

Comment: It is requested that the department consider rewording this section. Currently, disposable containers such as those made of cardboard that are not contaminated are being recycled throughout the country. This is a major environmental benefit to avoid landfill disposal of these materials. Additionally, reusable containers, once properly cleaned can be sent for plastic recycling. It is recommended that the NYSDEC amend this section to allow for these types of beneficial end uses of containers.

Response: The Department agrees that recycling of these containers should be allowed. The proposed regulations have been amended to address this comment.

365-1.4(f)(2)(viii)

Comment: It is not practical to determine whether a reusable container includes cultures and/or stocks or other specific contents and if properly packaged in primary containers should not contaminate the secondary container. It is suggested that decontamination of the secondary container only need occur where a) the primary container has broken or evidence of leakage is found and b) secondary containers are returned by commercial waste handlers to their customers. In situations where

secondary containers are used and reused exclusively by the same generator (e.g., lab or clinic), and no breaks or leakage occurs, a requirement to decontaminate reusable secondary containers every time they are used would be a significant operational burden with no tangible benefit.

Response: Although RMW is commonly contained in a bag within a reusable container, there is the potential for the internal surfaces of the reusable container to be contaminated with pathogens. This may occur if the bag collapses within the container, if waste is inadvertently deposited between the bag and liner, and if the bag is punctured. Also, reusable sharps containers are not lined with a bag. Decontamination methods must ensure that any pathogens that may be present are reduced to eliminate the risk of transfer to waste handlers and during reuse of the container. Therefore, the Department believes that this provision adequately addresses the need for cleaning and disinfection.

Comment: The NYSDEC references "a department-approved disinfectant". Industry standard has been that washing and cleaning procedures employ an USEPA approved hospital grade disinfectant. Does the NYSDEC intend to have a separate list of approved disinfectants? If so, then the reference for the section should be included in the regulations. Does the NYSDEC intend to go through an approval process for each disinfectant that a facility may propose to use? How long will such an approval take? What are the criteria the NYSDEC plans on using for the approval? It is recommended that the NYSDEC adopt the USEPA list B which is updated and continuously monitored with criteria already established. Additionally, this section discusses if the waste in the container includes cultures and/or stocks or if the waste has a high bioburden, etc. All wastes are treated the same way and packaged the same way so there is no way to know if there are these materials. All waste containers should be cleaned independent of the contents.

Response: Before applying any EPA-registered disinfectant product, users must read the label to determine if the product is approved for the intended use site or pest. In most cases, the Department agrees with the USEPA lists of disinfectants and further determines whether a disinfectant proposed for use at RMW processing facilities is suitable during the permit application process. The Department manages registration of pesticide products that are offered for sale, sale into, distribution, and use in New York State. As part of the Pesticide Product Registration Program, the Department maintains a web accessible database of pesticide products that have been registered in New York State. The Department intends that before purchasing or using a disinfectant product, the user should verify New York registration of the product by consulting the New York State Pesticide Administrative Database (NYSPAD). Products can be looked up by USEPA Registration numbers and product name. Department approved labeling for New York State products can be reviewed online to confirm label identified sites and use directions.

365-1.4(f)(2)(ix)(b)

Comment: Proper exposure to chemical disinfectants can result in disinfection without exposure to 180 F water. It is requested that the wording be changed to "…a minimum of 15 seconds, or exposure to a chemical…" Also, how will NYSDEC determine and communicate which disinfectants are department approved?

Response: The Department can identify numerous examples where reusable containers were not cleaned adequately and/or temperatures of water used for cleaning did not reach 180- degrees F, or insufficient concentrations of disinfection solutions were used or omitted and therefore, presented the potential for exposure to blood borne pathogens. This provision is intended to require a redundancy for decontaminating reusable containers.

365-1.4(f)(2)(x)

Comment: Reusable containers (e.g., 96-gallon Toter wheeled biohazard waste carts) are routinely reopened when waste is added to the cart. As worded, this would prohibit routine use of the containers without specific approval by NYSDEC. This needs to be reworded to prevent this prohibition.

Response: The proposed regulations have been clarified so it's clear that waste can continue to be added to secondary containers as needed.

365-1.4(f)(2)(xi)

Comment: Some reusable containers do not have locking mechanisms and therefore the language should be changed to "…and that the lid is closed."

Response: The regulations have been amended to address this comment.

Comment: The requirement for the use of both hot water and exposure to chemical disinfectant is unnecessary and can have detrimental effects on the disinfectant effectiveness as well as on the containers' longevity. Currently the industry standard and the requirement in many other states is one or the other, not both. Many disinfectants break down or decompose at a faster rate at higher temperatures. There does not appear to be any scientific evidence that this is a more effective cleaning method. It is recommended that the NYSDEC revert back to the original requirement that there either be an approved disinfectant used or that the high temperature is maintained.

Response: The Department can identify several examples where reusable containers were not cleaned adequately and/or temperatures of water used for cleaning did not reach 180- degrees F, or insufficient concentrations of disinfection solutions were used or omitted and therefore, presented the potential for exposure to blood borne pathogens. This provision is intended to require redundancy in the decontamination of reusable containers.

365-1.4(f)(2)(xiii)(d)

Comment: This section of the regulation outlining the requirements for roll-off containers has sections that are not currently required (and are not required in any other part of the country). This will have significant cost implications (thousands of dollars per unit of which there are approximately 80 in rotation in our inventory throughout the north east) that will impact the use of these types of containers in the state. There are over two dozen generators using these types of roll-off containers. Major changes would come from the following: the requirement that there be a plastic liner installed, six inch fully welded or seamless steel barrier, one-inch lip around the perimeter of each opening. Since these requirements do not exist today each of the roll-off containers in use today would need to be retrofitted. These costs would be extended to the generators. Generators utilize these containers due to space limitations in their facilities for individual or smaller containers, therefore, it may not be an option for them to switch to such a system. It is requested that these additional and burdensome requirements be removed from the regulations. Due to the significant requirements already in place for roll-off containers an inner liner is not warranted. It is recommended that the liner requirement be removed. It is also recommended that identification number labeling in this section be specified or that the USDOT regulations be referenced for proper marking of the containers.

Response: The requirements concerning the roll-off containers have been removed and labeling has been revised to be equivalent to USDOT requirements.

365-1.4(f)(2)(xiii)(*g*) and 365-1.4(f)(2)(xiii)(*h*)

Comment: This new time requirement will create a significant undue burden on the generator. Many generators do not fill these roll-off containers within 14 days. There are a limited number of roll-off containers due to current cost. This will impact this type of operation in the following ways: need to purchase more roll-offs; currently no facility in the state is permitted to be able to manage this waste material in state so more trucks will be required to go out of state with the waste; more cost of transportation back and forth on the highway; greater environmental impact from trucks both from emissions but also on road wear and traffic. As stated before many generators select this method due to limited space in their facilities. The recommendation is for the NYSDEC to reconsider the time line for generators and put together a more reasonable time frame such as 30 days or unless the waste become putrescent to be removed within 48 hours. It is also unclear if these regulations apply to hospital facilities where these are utilized.

Response: The regulations have been amended to address this comment and recognize the need for additional time for storage.

365-1.4(g)

Comment: Biohazard waste in laboratory and clinical settings is commonly stored at the lab or clinic over the weekend when the containers are closed at the end of the workday on Friday after the associated waste storage or treatment facility is closed. Please reword this requirement accordingly. Also, in the event of a major public health

emergency, such as a wide-area release of *Bacillus anthracis*, the criteria for short-term accumulation of biohazard waste be waived, or extended for a period longer than 24 hours. Because of the large amounts of biohazard waste anticipated and the limited number of treatment, storage and disposal facilities available, nation-wide, short-term storage of waste is not feasible.

Response: In the Department's experience, storage of waste in a clinical laboratory up to 72 hours is adequate and consistent with the NYS DOH requirements. Storage of contaminated waste in the event of a wide area release would be determined on a case-by-case basis in accordance with Subpart 365-4.

365-1.4(g)(1)
Comment: OSHA's standard 1917.14 states that: "Cargo, pallets and other material stored in tiers shall be stacked in such a manner as to provide stability against sliding and collapse." OSHA doesn't specify stacking height requirements. Due to the limiting nature, this will require additional floor space at generator locations as well as at any transfer or treatment facilities, and may create safety concerns. This will require additional handling by drivers/plant employees to restack the waste from inside the trucks down to the proper height at the plants/transfer stations; thus increasing the risk of exposure to blood borne pathogens (BBP) or other safety related issues, such as back injuries, etc. If it is applicable to the truck this would require a significant increase in the amount of trucks that would be needed to pick up waste since 25% of the capacity would be no longer usable. It is recommended that the sections limiting stacking height to six feet be removed from the regulations.

Response: The Department has identified concerns with over-stacking of containers including compressed, compromised and leaking packages that may create potential health and safety concerns for facility employees and visitors. This provision does not apply to truck trailers used for transport of RMW.

365-1.4(g)(2)

Comment: In both laboratory and clinical settings, small amounts of human pathological waste (e.g., skin lesions) or animal carcasses (e.g., research mouse carcasses) are co-disposed with RMW in biohazard waste containers. Please address this by adding the word bulk to the beginning of the sentence**.**

Response: Skin lesions and mouse carcasses incidental to research or clinical settings may occasionally be disposed with RMW unintentionally. This may cause treatment concerns at receiving facilities if more than an occasional mouse carcass or skin lesion is found. This provision now in proposed paragraph 365-2.6(b)(3) identifies the need for appropriate separation and treatment approval of these wastes for proper disposal.

365-1.4(g)(3)

Comment: This section is different than regulations under SEC 70 REGULATIONS 70-2.2 (d)(2) – it states that the "sharps containers shall be removed from patient care

areas within thirty (30) days or upon the generation of odors or other evidence of putrefaction, whichever occurs first, without regard to fill level." Who will this section be applicable to? There are several different sections of the rule with different timetables. It is recommended that the state create one time limit and remain consistent or create a chart to explain their time limits more clearly.

Response: This provision applies to all generators regulated in accordance with this Part. The proposed time tables are intended to address a variety of generators and the waste stream likely to be generated.

365-1.4(g)(3)(ii)

Comment: Why is there a limit to the service life of a sharps container set at 90 days in the absence of odors or evidence of putrefaction? This would cause an unnecessary disposal of sharps containers that are not full and an increase in waste disposed for no discernible reason.

Response: This provision has been amended in the revised proposal to delete the 90 day storage requirement.

365-1.4(g)(3)(ii), 365-1.4(g)(4)(ii) and 365-1.4(g)(4)(iii)

Comment: As written, this requirement will result in unnecessary disposal of partially empty containers. In laboratory and clinic settings, waste may accumulate gradually and some containers may not be filled in 6 or more months. It is suggested that this requirement be restricted to full containers and putrescent waste by deleting item 1.4(g)(3)(ii).

Response: The Department agrees. The suggestions have been incorporated into the revised regulations.

365-1.4(g)(4)

Comment: This section is worded to seem as though sharps containers must be stored in a refrigerated area. It is assumed that this was in error or that there is a misunderstanding in the way it reads and it is recommended that it be deleted or modified to be clear. Sharps containers today are not refrigerated.

Response: The regulations have been amended to address this comment. Refrigeration of sharps containers would not be required.

365-1.4(g)(5)

Comment: Additional clarification is needed regarding whether the storage requirements would apply in the scenario of a wide-area release of *Bacillus anthracis*, and whether it would be necessary to store *Bacillus anthracis* waste saturated with bleach or other approved anti-microbial agent at a temperature at or below 0 degrees Fahrenheit.

Response: Subpart 365-4 addresses “Other Infectious Waste Management Facilities”. Storage of waste from a wide-area release of *Bacillus anthracis* would be determined on a case by case basis in accordance with Subpart 365-4.

365-1.4(g)(10)(i)

Comment: Instead of generic signage language, it is suggested that this item require display of the universal biohazard symbol that is readable from a specified distance.

Response: The Department agrees, the regulations have been amended to address this comment.

365-1.4(g)(10)(v)

Comment: Please define/provide guidance on the meaning of “appropriately ventilated.”

Response: Additional guidance has been provided in the revised regulations.

365-1.4(g)(4) through 365-1.4(g)(10)

Comment: It is recommended that the NYSDEC consider eliminating the complex timeframes.

Response: The timeframes provided in this provision address the types and volumes of waste associated with the types of generators regulated by the Department.

365-1.4(h)(5)

Comment: Hazardous materials are required by USDOT to have specific information on shipping documentation per 49 CFR 172.202. It does not require that there be an approved shipping document provided all the necessary information is included. It is unclear what medical waste tracking documents would be approved by the NYSDEC in order to comply with the requirements of the proposed rule and still comply with the USDOT PHMSA regulations. The proposed rule requires transfer facilities sign and date the tracking documents when they take possession of the waste, however current forms do not afford for more than two transporters. There needs to be an ability to have transporters to move waste appropriately through their systems while maintaining proper shipping documents, however recording of each location or stop creates additional burden for operators. There is still a requirement to have tracking documents when you have non-shredded sharps. However, once treated, it should be identified as solid waste and not subject to tracking documents (see preemption determination). Alternative disposal facility must be noted on original tracking document if it is used. It is recommended that USDOT shipping papers be used instead of this due to crossing multiple jurisdictions.

Response: The NYS medical waste tracking document is a four-part form that is compliant with USDOT shipping paper requirements and has been used consistently since the inception of the RMW Program. However, if the proposed rules are adopted,

the Department will have to evaluate all existing forms to determine whether any updates are needed to reflect updated standards. As to the concern about the need to track treated waste, the NYS ECL requires sharps to be both treated and destroyed prior to landfill disposal but tracking following treatment is not required.

Comment: This section references USDOT 49 CFR 173.197. It is believed this was done in error as this is not the main section in the USDOT regulations that sets standards for the marking and labeling of containers for RMW. The proper marking and labeling of RMW is identified through 173.134 and through the hazardous materials table 172.101 for proper marking and 172.200 - 172.204 for shipping papers. It is recommended that the shipping document requirements already mandated by the preemptive section of the USDOT regulations be used as the requirements for the shipping document rather than a NYS medical waste tracking document.

Response: The regulations have been amended to address this comment. References to USDOT have been clarified.

365-1.4(i)

Comment: Please clarify that this requirement applies to situations where select agents or toxins are worked with in a manner requiring BSL-3 or BSL-4 precautions. Also, please clarify in this context, “site of generation” can include a university campus and associated buildings or properties where there is a central, NYSDEC permitted RMW treatment facility.

Response: Proposed Subpart 365 has been revised that the requirement that waste requiring BSL-3 or BSL-4 precautions must obtain a permit. As to the concern expressed about the use of a central permitted RMW treatment facility, the proposed rules would consider a university as a whole as the site of generation.

Comment: Additional clarification is required regarding whether this provision would apply, or if a variance could be issued, given a wide-area release involving *Bacillus anthracis*. During the 2001 response to *Bacillus anthracis* in NYC, valuable items belonging to individuals impacted by the release, including those of historical significance, were not pretreated prior to transport to a treatment facility. It was not possible in this scenario to pretreat items prior to transport and may not in similar scenarios going forward.

Response: Subpart 365-4 addresses “Other Infectious Waste Management Facilities”. Valuable items intended for reuse are not considered as a waste for the purposes of this Part.

Comment: This section is specific to generators, however it is unclear which generators are affected by this rule. This is of significant concern for waste management facilities as there is no way to audit the waste to ensure proper compliance. There should be specifications of what types of facilities are impacted by these rules and there should also be targeted outreach for those facilities in order to ensure their compliance with

these requirements. Additionally, most transporters manage waste based on the USDOT reference to Category A wastes. Not all BSL3 materials are on the Category A listing which will make this confusing. It is recommended that the NYSDEC refer to the USDOT regulations for the proper segregation and management of Category A materials versus Category B materials, which once disposed are considered RMW.

Response: The proposed rules have been revised and would require that waste generated in labs working with infectious agents at BSL 3 or BSL 4 precautions, to be treated prior to leaving the site of generation or packaged and managed in accordance with USDOT requirements pertaining to Category A or Category B infectious substances.

365-1.4(i)(1)

Comment: Please define “disinfection” in this context.

Response: Disinfection is defined in Part 360.

365-1.4(j)

Comment: This section is very confusing for the generator. Additionally, it is still unclear which generators are covered by this section. If the NYSDEC is concerned about the pharmaceuticals being managed improperly, it is recommended that the NYSDEC be clear and simple in their proposal. If the intent is to ensure that pharmaceutical wastes are not inappropriately managed through sewage, solid waste or water systems that should be made clear. If it is the intent of the NYSDEC that autoclaving pharmaceuticals is not acceptable then it should recommend the type of destruction. Leaving it for the generator to understand or assume which method of destruction is appropriate technology is difficult as most generators are not clear on the types of technologies. Please clarify if the intent is incineration here.

Response: The proposed regulations have been amended to further clarify the requirements. Pharmaceutical waste must currently be incinerated but the Department recognizes that alternative treatment systems may be developed.

365-1.4(j) and 365-1.4(k)

Comment: Currently generators do not separate anatomical and biological waste; or pharmaceuticals with needles from those without needles. Because such wastes typically are incinerated, they are often disposed in the same container (e.g., Pathological/Biological; Pharmaceutical with and without needles). These types of more specific segregation will create a burden to the generator for extra labor hours, as well as storage space within valuable healthcare units, such as the emergency room or the operating room, to name just a few generation sites.

Response: The proposed regulations have been amended to address this comment. Segregation would not be required, but would dictate the treatment options.

Comment: The proposed rule states that controlled substance must be disposed according to Department of Health rules. The rules should reference the federal DEA and the NYS Bureau of Narcotic Enforcement instead of the NYS Department of Health.

Response: The regulations have been revised to more closely reference the appropriate entities.

Comment: Based on the proposed definition, it states that pharmaceutical wastes cannot be autoclaved, except any biological drug waste (that is not RCRA) can be treated with autoclave or other approved treatment system. This section is confusing and should be clarified/simplified, especially if it is not to be enforced at hospitals, or the responsibility of the transporter or treatment facility. If the intent is to ensure that the materials are properly separated and then sent to the appropriate treatment technology, commingling of the materials should be allowed providing the generator specify the contents on the outer container, therefore allowing for the proper transport and treatment of the waste. It is suggested that segregated pharmaceutical waste be identified on the container specifically but rather identified for the specific treatment method (i.e., “Incinerate Only”).

Response: The regulations have been clarified to address this comment.

Comment: Opioid abuse and prescription drug addiction has increasingly become a major problem in the country and in the state. This is a tremendous opportunity for the NYSDEC to provide for the proper management of pharmaceuticals through these regulations that could be beneficial to this end. We applaud the NYSDEC efforts to address this very important issue; however we feel that there are aspects of these regulations that fall short. For example within Part 365 NYSDEC provides requirements for the management of pharmaceutical wastes for generators, yet it is unclear which generators this is applicable to (365-1.4(j) and (k)). This waste stream should be properly separated at the point of generation, but calling out the specific waste type on the marking of containers could draw attention to the materials. It is recommended stating that the material be marked for the proper disposal requirement (such as incineration) without calling attention to the waste inside. The NYSDEC regulations have several conditions to be identified for the different types of wastes generated. There are also specific requirements under Section 70-2.3 for pharmaceuticals. It is requested that the department simplify the pharmaceutical waste section considerably to ensure compliance by generators, specify the type of treatment it desires clearly, and remain consistent with the NYS Health Department requirements to minimize confusion.

Response:. The proposed regulations, at 365-1.2 (c)(5) reflect that pharmaceutical waste which can’t be separated from other waste should be marked with the words “incinerate only” and would not require the waste to be identified as pharmaceutical waste. Similarly, marking requirement for secondary containers would not require the container to reflect the content of the waste.

365-1.4(k)

Comment: Simplifying this for the generator would help ensure compliance.

Response: The proposed regulations have been amended to simplify the requirements for generators.

365-1.4(l)

Comment: The NYSDEC has stated that certain facilities are not regulated by these regulations. This should be clarified because otherwise this section, if applicable to hospitals and the reprocessing industry could have a significant effect on the ability to recycle certain instruments. This section specifies that the generators recovering or recycling biohazard waste for reprocessing of medical devices or reuse must comply with section 365-2.4(h). This referenced section eliminates the ability for the reprocessing of these devices. Again, this needs to be clarified as to who this applies to and how.

Response: The regulations have been amended to address this comment. Reprocessing instruments segregated at the source from RMW is not regulated by the waste management provisions of Part 365.

Comment: Subsection (l) should be amended to read: Generators recovering or recycling biohazard waste in order to repurpose or recycle materials, must comply with subdivision 365-2.4(h) of this Subpart for management of this material.

Response: The regulations have been amended to address this comment.

365-1.4(m)

Comment: Please clarify that in this context, “site of generation” can be a university campus.

Response: The regulations have been amended to address this comment.

365-1.4(n)

Comment: This section has several different issues related to the tracking document: (1) It creates a problem for facilities which may make more than two transfers through transportation or treatment facilities. There is not enough space available for there to be signatures for each transfer. This will create significant operational issues for transporters who may also be transferring to different locations with the same waste material; as well as putting undue burden on facilities out of state that may transfer the waste. This would be outside the jurisdiction of the state. (2) Treated Sharps: Additionally, there is no clear explanation of why recognizable sharps should be on a separate document that would still indicate that the waste had not been treated. Once the waste is treated the waste is safe to send to the final facility (landfill or otherwise). There is no separation of sharps in many cases from the rest of the RMW. It is recommended that the NYSDEC maintain the current tracking process for the shipments through transfer stations. It is also recommended that once RMW is treated

and no longer infectious that there be no further requirement to maintain that it is not a RMW, regardless of whether it contains sharps. The USDOT requires that the hazard must be present in order to represent that hazard exists. The current tracking document used in NYS could potentially put the transporter out of compliance with USDOT regulations due to the way the shipping name is assigned on the document in section 11. It is recommended that the documents conform to USDOT regulations**.**

Response: RMW transporters must comply with the 6 NYCRR Part 364 Waste Transporter Permits requirements. In accordance with the requirements of Part 364, transporters may choose to consolidate or remanifest to a single tracking form all shipments of RMW less than 500 pounds. For each tracking form initiated by consolidating on a new form, the transporter must maintain a consolidation log indicating all shipments consolidated or remanifested on that form and the log must accompany the new tracking form. The Environmental Conservation Law requires sharps to be both treated and rendered unrecognizable prior to disposal. Permitted disposal facilities authorized to accept treated RMW can only accept the waste if the sharps are destroyed in accordance with their permit and the Law. However, if the proposed rules are adopted, the Department will evaluate all existing forms to determine whether any updates are needed to reflect updated standards.

365-1.4(n)(2)

Comment: If the generator contracts with a commercial hauler, it is suggested the burden of verification here should fall on the transporter, not the generator.

Response: This requirement has been removed in the proposed regulations.

365-1.4(n)(4) and 365-1.4(n)(5)

Comment: These two sections are issues that are handled by the transportation/treatment facilities today. While the generator should be more aware of their responsibilities to the waste and where things are going, it is not believed that these two sections are reasonable. Additionally, this could cause more of an administrative burden on both the generator and the transporter/treatment facility without any benefit. The generators usually rely on the transporters to provide and distribute copies of the tracking documents. If this was to go the other way around this would be a major change in the industry and create a tremendous burden on generators of all sizes to be able to comply with. Shipping documents are technical documents that must comply with USDOT regulations and NYSDEC regulations today. It is recommended that these requirements be removed or that there be an additional approval for transportation/treatment facilities to help facilitate in these activities.

Response: The proposed regulations have been amended and the revised rules do not contain a requirement for the generator to instruct the transporter on how to address waste which cannot be accepted at the generator's selected receiving facility.

365-1.4(n)(8)

Comment: This section is similar to the USEPA hazardous waste regulations and requirements for the return of the documents. It is recommended that the department clarify that these documents can be received and maintained in an electronic format.

Response: If the proposed rules are adopted, the Department will have to evaluate all existing forms to determine whether any updates are needed to reflect updated standards, including receiving and maintaining the forms in an electronic format.

Section 365-2 RMW Management Facilities

Comment: There is a need for clarification as to which entities (especially those highly regulated by other state and federal agencies) are subject to, or exempt from certain sections of the proposed rules that involve the handling of RMW, whether the regulations are consistent with federal law or with other state agency requirements, and if not, whether there is scientific evidence to support the divergence from other laws or requirements. Also, there are concerns about proposed requirements that would require onsite disinfection or treatment that may render certain devices unreprocessable, and would be inconsistent with USFDA and CDC requirements.

Response: The Department has identified inconsistencies in how RMW and other infectious waste is managed in NYS. Provisions put forth in the proposed regulations provide appropriate measures, technical requirements and security precautions to prevent or minimize the potential for an impact from RMW and other infectious waste handling, treatment and disposal to public health or the environment. However, the regulations have been amended to address this comment and the revised proposal clarifies which entities would be exempt from Subpart 365.

365-2.1(a)

Comment: Sharps management regulations are impractical for one time collection events, which may result in fewer opportunities to safely manage sharps generated by the residential and farm communities.

Response: There are many approved sharps collection kiosks located throughout the State that have helped to ensure that household sharps are safely disposed.

365-2.2(b)

Comment: If these sections are not clarified to be applicable to all generators it will create significant compliance risk for transporters/treatment facilities. Blending terms from BSL and USDOT (Category A or B Infectious Substances) within the regulation will cause confusion as the terms do not easily match up. Currently the USDOT regulations specify the difference between Category A and Category B infectious substances which are established by the World Health Organization (WHO). This differentiates between the highest infectious substances to be transported and those materials that can be managed as RMW (Category B). Some infectious substances that are in the Biosafety Level 3 category are considered Category B materials and would only be subject to the

requirement for RMW. This has been consistent throughout the U.S. through USDOT rules. There have been no reported incidents with this protocol which has ensured the proper and safe management of RMW. There is a listing of select agents that are put together with the CDC/USDA and these are often the materials that are covered by BSL 3 and 4 listings however they do not correlate directly to Category A infectious substances as identified in 49 CFR 173.134. The State should deviate from the USDOT established regulations that all generators and transporters are already accustomed to because this could create greater confusion for the proper management of these wastes. The regulations should reference the PHMSA regulations as it relates to the proper classification, packaging and transport of these materials.

Response: Generators of waste that may be contaminated with infectious agents from BSL 3 or 4 laboratories often treat the waste when removed from the laboratory. This provision addresses the treatment, not the transport. However, the Department agrees that waste contaminated with infectious agents requiring transport as Category A or Category B infectious substances must comply with PHMSA requirements.

Section 365-2.3 Permit application requirements for transfer, processing, and/or treatment facilities

Comment: The new regulations dictate how the waste must be managed at the receiving facilities. The proposed rule implies that the waste be treated on a rotation based on identification of its type, age on arrival, date of arrival and duration of storage on site. This is not how processing facilities operate. While there is still control over the time waste is on site, waste processing could be dependent on the type of waste received, wastes to be blended for maximum treatment parameters, the need for local waste vehicles to be emptied versus long hauled wastes, etc. This should be left to the discretion and management of the company. This regulation is too prescriptive and restrictive to facility operations. It is recommended that the state require that the facility identify through their operating plan and permit how they will manage and control wastes so that they are responsible but have operational flexibility.

Response: Depending on the type of waste, when it was produced, ambient conditions, integrity of the packaging and how it was stored and handled previously may impact the waste's potential to produce odor and attract vermin or pests if the waste is not processed upon arrival at the facility. Facility operating procedures must manage the waste in a manner that ensures that the problems with odor, litter and vermin/pests do not occur, address any problem wastes and include measures as appropriate to reduce or contain problems. However, the proposed regulations have been amended and the revised rules, if adopted, will allow more flexibility in the processing of waste.

Comment: The NYSDEC has placed significant requirements on new facilities that plan to accept waste. Section 365-2.3 requires facilities to have a waste control plan. This is not an unreasonable requirement; however there are elements of this section that will be challenging to comply with. For example, under (a)(1) of this section, it requests a

description of the quantity of waste with the expected average and maximum daily and annual amounts, on a weight and volume basis, for the first 10 years of operation of the facility. These quantities must be specified for each individual type of RMW and for the total amount of waste accepted. A new facility will be challenged to be able to project this information with any degree of accuracy. Will a new facility be limited to the numbers provided? It would be impossible to know this information. Rather the NYSDEC should be focused on the capacity and capabilities of the equipment to be used as the applicant provides. This should be based on the size of the facility and the capability of the equipment subject to change based on validation.

Response: Provisions included in the proposed regulations describe the objectives that facilities must achieve to obtain a permit to operate and include requirements pertaining to capacity and equipment capability. The provisions of this regulation are considered to be the critical standards for RMW and other infectious waste facility installations and operations in NYS. Permit applications for installations and operations in part, must cover the types and quantities of waste for the projected life expectancy of the facility, technical requirements, security precautions, residue disposal sites and treatment methods. Based on the information provided in the permit application, the Department can better assess the ability of the facility to manage the waste. The Department recognizes that exact projections are not possible but the facility should provide the best reasonable projection possible.

Comment: Will facilities already permitted under 6 NYCRR Part 360 be “grandfathered” for the requirements of this section?

Response: Section 360.4 of this Title provides the transition requirements for permitted facilities, in part, as follows: **“**(2) For existing permitted facilities, transporters and events, the permit in effect immediately before the effective date of this Part is continued until the expiration date of the permit, and the facility must comply with the conditions of the permit and the solid waste management facility regulations in effect on the day when such permit was issued for the duration of that permit, unless a modification under Part 621 of this Title is approved or as otherwise specified in this section. At the time of permit renewal the facility, transporter or event must comply with the criteria as of the effective date of this Part and Parts 361, 362, 363, 364, 365, and Subpart 374-2 of this Title that pertain to the type of facility, transporter or event unless otherwise excluded under this section. Nothing in this paragraph shall be construed to limit or prohibit Department-initiated modification of such permit under the provisions of Part 621 of this Title.”

365-2.3(a)(1)

Comment: The majority of this section will be very difficult to comply with at a commercial treatment facility in addition to the fact that this will require all locations to provide proprietary information to the NYSDEC about who their customers are, which could then become public record. This is not a current requirement. A description of the

expected average and maximum daily and annual amounts on weight and volume basis for the first 10 years is an unreasonable expectation for a new facility. It is recommended that the NYSDEC require the facility to identify in their permit application the type of equipment to be used, the types of waste that equipment can manage and then determine the maximum operating parameters based on the efficacy of performance and manufacturers specification of the equipment. The NYSDEC wrote this section with the expectation that there will be an ability to audit the waste fully (see (2) of this subpart) which, with RMW and the potential safety implications to workers, cannot be achieved. Transportation/treatment facilities must rely heavily on the generator properly segregating and identifying the waste for the appropriate treatment technology required. It is recommended that the NYSDEC hold a stakeholders meeting with the identified transportation/treatment facilities registered in the state to better understand operations so that this section can be written in a manner that facilities can comply with.

Response: The proposed regulations have been amended and the revised rules do not contain a requirement for a ten year projection.

365-2.3(a)(6)

Comment: Under this section the NYSDEC is dictating how the waste is to be rotated on site at a treatment facility through the process. This requirement is onerous and will have major implications on the movement of waste through a treatment facility. For example, some companies base routes for local pick up's on a schedule to accommodate for traffic and hours offices are open. When they return to the facility they would take priority so that local route waste can be removed and new containers are prepared for the next day's route. If NYSDEC mandates the rotation of waste this could disrupt this process and the ability to service generators in the state. NYSDEC should not mandate the logistics of a facility rather the NYSDEC should set guidelines for how long the waste is to be maintained on site and then allow for the facility to determine rotation of waste in order to ensure compliance with the set requirements. It is recommended that the NYSDEC modify this section to state: "how the transfer, processing, or treatment will be managed to ensure compliance with all applicable time and storage requirements" It should be incumbent upon the facility to identify how it will comply.

Response: The regulations have been amended to address this comment.

Comment: The new regulations dictate how the waste must be managed at the receiving facilities. The proposed rule implies that the waste be treated on a rotation based on identification of its type, age on arrival, date of arrival and duration of storage on site. This is not how processing facilities operate. While there is still control over the time waste is on site, waste processing could be dependent on the type of waste received, wastes to be blended for maximum treatment parameters, the need for local waste vehicles to be emptied versus long hauled wastes, etc. This should be left to the

discretion and management of the company. This regulation is too prescriptive and restrictive to facility operations. It is recommended that the state require that the facility identify through their operating plan and permit how they will manage and control wastes so that they are responsible but have operational flexibility.

Response: The regulations have been amended to address this comment.

365-2.3(d)

Comment: While the NYSDEC concern for safety is understood and appreciated, and that the facilities need to ensure the proper safety of their equipment and management of their employees, this section seems to go beyond the regulatory scope of the NYSDEC. Additionally, many regulations are now in existence that cover these issues in depth. The concern here would be that these would become permit conditions that cannot be changed without significant effort or permit modifications. Additionally there are some requirements that overlap federal regulations (such as OSHA Blood borne pathogens requirements) that are redundant and unnecessary. It is recommended that the NYSDEC refer to these other regulations as referenced and not place redundant or unnecessary requirements on the facilities. NYSDEC could incorporate 29 CFR 1910.1030 under Section 360.3 (a)(4) as it has done with other OSHA regulations. The NYSDEC could recognize the requirements in these other sections as a way to show compliance with this part rather than require that they become part of the permit. These permit conditions also expose the facility information to competitors where there may be business confidential information or proprietary ways that operations are being conducted.

Response: This provision is similar to the USDOT requirements for safety training. Employees of RMW and other infectious waste management facilities must know how to perform their tasks or jobs without creating risk to themselves or others. They should know how to practice safe handling procedures and how to use personal protective equipment which protects them and prevents accidents, injuries and illness. They must know how to react to emergencies or what to do if a leak, spill or other incident occurs.

365-2.3(i)

Comment: Is it a self-certification that the facility conforms with the existing local zoning laws, etc.? It would appear that the zoning information and conditional use information is already required under this section. Should it not be that this information be sufficient? It is recommended that this section be removed or modified.

Response: This is required by law.

Section 365-2.4 Design and operating requirements for transfer, processing and/or treatment facilities

365-2.4(e)

Comment: There are currently some facilities with operations where there is no gate. There would be concerns about the operation of those locations. In some cases it is not physically feasible to have an exterior gate to the facility. So long as the NYSDEC recognized other means of security, this requirement would be acceptable. Identifying, locating and permitting a facility is a difficult and expensive proposition and therefore existing facilities with existing permits would be at risk if this is not a flexible requirement. Perhaps modifying the language to state: "entry to the facility must be controlled and secured at all times" and the facilities must identify how that is done.

Response: The regulations have been amended to address this comment.

365-2.4(e)(1)

Comment: Must have entry to the facility controlled at all times through use of gates or other means. Security at a facility should be left up to the operations based on the location and capability of the operator. This can be managed through a permitting process allowing the operation to have the necessary flexibility. Not all facilities are in stand-alone buildings. The key is that operations must maintain the waste materials in a secure fashion at all times. The use of gates does not necessarily meet that requirement. It is recommended that the NYSDEC remove the specificity of the gate and leave in the regulations that the facilities must be properly secured at all times to prevent unauthorized access to the facility.

Response: The Department believes that this provision as written allows for flexibility for the facility to choose a controlled entry method to include but not be limited to gates, video surveillance, card access systems, etc.

365-2.4(e)(3)

Comment: While this section makes sense while in transport, there are no blocking and bracing mechanisms used within facilities while materials are in storage. There are specific locations where wastes are typically managed through a process or at a transfer facility. It is requested that this requirement be clarified to be specific to transport only.

Response: The proposed regulations have been amended at 365-2.5(e)(3) as follows: “RMW must be completely contained and secured during storage and with appropriate blocking and bracing when moved.”

365-2.4(e)(5)

Comment: It is unclear why this requirement is now being placed on generators, transporters and treatment locations. There is no such requirement in other states, it is not federally mandated by USDOT or OSHA. We believe that this will create several problems. First it places unreasonable space constraints on the facilities storing the waste, which are often already limited on space (again, unclear how this applies to hospitals). Second it becomes a potential safety hazard as it is being loaded/unloaded

onto vehicles. Lastly it creates operational inefficiencies as it is not clear if this requirement also pertains to the waste while it is on the truck. It does not appear to be so, which means the employees would have to load a truck at a different height than a stationary storage location. If it is applicable to the truck this would require a significant increase in the amount of trucks that would be needed to pick up waste since 25% of the capacity would be no longer usable.

Response: Storage of waste material must not create a hazard. USDOT and OSHA do not provide specific direction concerning safe stacking and storage but does identify, in part (29 CFR 1910.176(b)), that stacking must be limited in height so that that containers are stable and secure against sliding or collapse. However, the regulations have been amended to address this comment at proposed paragraph 365-2.5(e)(5) as follows: Containers must be stored in an upright, stable and controlled manner that minimizes the potential for leakage. The top of the stacked containers must not be more than six feet above the level of the floor. The containers must not be compromised by the manner of storage.

365-2.4(e)(12)

Comment: Placement of RMW into hoppers recommended to be conducted under negative pressure using HEPA filter wherever possible. Currently most facilities do not operate their waste handing processes under negative pressure. These operations have been in place in some locations for over 25 years without incident. This is not a normal protocol or a requirement in other state or federal regulations. This would be a very costly and onerous requirement for all facilities that process RMW It would appear that this specific recommendation would be very subjective for an inspector (as it is mostly a suggestion not a requirement) and there is no scientific basis for the requirement. It is recommended that the department remove this recommendation from the regulation.

Response: Potential emissions from RMW and other infectious waste management facilities may include pathogenic micro-organisms, chemicals and pharmaceuticals, and body fluids. It is necessary to minimize and monitor emissions from facility operations that may be generated during the handling of breached packaging, dumping of waste into consolidation bins, the treatment process and the cleaning and disinfection of reusable containers. Facilities must have operating procedures and equipment to identify, prevent and control potential emissions. However, the regulations have been amended to address this comment at 365-2.5(e)(9) as follows: “RMW must not be compacted or compressed. RMW dumped into bins for consolidation or treatment must be controlled to minimize aerosolization.” The provision for monitoring emissions has been removed.

Comment: This section is a suggestion, however, this is not currently in place for most if not all facilities operating an autoclave facility. There have been no incidents to necessitate the use of these types of devices. There is also no evidence to support that this requirement is beneficial. It is recommended that this section be removed.

Response: Potential emissions from RMW and other infectious waste management facilities may include pathogenic micro-organisms, chemicals and pharmaceuticals, and body fluids. It is necessary to minimize and monitor emissions from facility operations that may be generated during the handling of breached packaging, dumping of waste into consolidation bins, the treatment process and the cleaning and disinfection of reusable containers. Facilities must have operating procedures and equipment to identify, prevent and control potential emissions. However, the regulations have been amended to address this comment at 365-2.5(e)(9) as follows: "RMW must not be compacted or compressed. RMW dumped into bins for consolidation or treatment must be controlled to minimize aerosolization." The provision for monitoring emissions has been removed.

365-2.4 (e)(17)

Comment: Removing treated waste from a facility within seven days can be infeasible for some (especially small) treatment facilities and therefore, it is requested that: "or a period approved by the NYSDEC on a case-specific basis" be added following "seven days".

Response: The regulations have been amended to address this comment. The revised proposal at 365-2.5(e)(4) provides that treated waste may remain at the facility for 30 days following treatment.

365-24(e)(16)

Comment: This is a very subjective section and will be very dependent on the inspector. This will depend on the time of year, etc. It is recommended that the state determine a time frame in which wastes should be refrigerated (recommend 7 days) or frozen (after 30 days) and not leave it to a subjective determination of what is putrescent.

Response: The proposed regulations at 365-2.5(e)(18) specify that the facility must be cleaned and maintained daily because of issues related to contamination, infection control, potential exposure to infectious materials, increased risk of slip, trip, and fall injuries, and possible needle sticks.

365-2.4(f)(1)

Comment: It is requested that the language for this item be amended to include "other methods acceptable to the department". In addition to the "fixed radiation detection unit…" described in the regulations.

Response: This provision is now found at 365-2.5 (b) and requires a fixed radiation detection system, and is appropriate for monitoring incoming regulated medical waste at a facility. Fixed portal systems are more robust than hand held detectors and can adequately screen incoming waste vehicles or containers by detecting traces of

radiation emitted from an object that may be associated with medical waste, and can prevent the potential for contaminating a facility that could result in costly clean up.

365-2.4(f)(3)

Comment: The requirement for daily background checks is not a necessary activity and one that is not required elsewhere. If the background is high, what is the facility supposed to do? We agree with the weekly requirement and recommend that the NYDEC eliminate the daily background check requirement.

Response:. This provision is now found at proposed paragraph 365-2.5(b)(3) and is necessary to provide a reference point for differentiating between incidental background and a particular source of radiation of concern that may enter the facility.

365-2.4(g)
Comment: Sharps consolidation Containers – The proposed rules require bio-challenge testing of the 2-step cleaning and disinfection of reusable containers to be done annually using a biological indicator or soil marker approved by the department. Note that USFDA already requires retesting of containers and tracking of use, so as written, the proposed rule would potentially conflict with the USFDA requirements, or at a minimum be redundant. Additionally, such testing would be burdensome to perform and only represent a small percentage of the total number of containers. It is suggested that, as with treatment equipment, the validation of parameters used to wash and sanitize containers meets the proposed intent of the regulation**.**

Response: This provision is now found at proposed paragraph 365-2.6(m)(5). The USFDA regulates reuse of sharps containers as a medical device but does not regulate other types of reusable containers. The USFDA does not have a definition for “clean” devices. The Department’s provisions for cleaning and disinfection are consistent with OSHA and USFDA requirements and the required annual bio-challenge testing provides a measure of scientific testing/support through sample analysis. This provision ensures that facilities can demonstrate that their cleaning and disinfection process is able to render contaminated waste containers safe for reuse.

365-2.4(g)(1)

Comment: Processing facilities may use different types of mechanical means to properly remove the lids from reusable sharps containers. The OSHA regulations mandate that the lids cannot be removed manually. It is recommended that the NYSDEC adopt the same rule or reference it to remain consistent and allow for the mechanical (not necessarily "automated") process of removing the lid.

Response: The regulations have been amended to address this comment and manual opening of reusable sharps containers would not be allowed, per proposed 365-2.6(m)(1).

365-2.4(g)(6)

Comment: It is recommended that the department state that the containers be properly cleaned prior to final disposition. This allows for the recycling of these materials. Currently the plastics are recycled to make new containers and this would not allow for that practice to continue.

Response: The Department agrees that recycling of reusable containers should be encouraged, provided that the containers are decontaminated prior to recycling. The proposed regulation which would have required empty containers to be treated as RMW is not in the current proposed rules.

365-2.4(h)

Comment: Proposed Subpart 365.2-4 should be revised to distinguish and differentiate between RMW to be recycled and used medical devices being sent to licensed facilities to be reprocessed and reused. Specifically, Section 365.2-4(h) would appear to require new processes involving more extensive sorting, handling and pre-treatment by hospital staff (as solid waste generators) even where used medical devices are sent to a reprocessor which treats and reuses medical equipment consistent with USFDA guidelines. Currently, hospitals are not required to undertake such efforts. This would result in both increased cost and complexity to the existing process and would increase significantly costs to both generators and reprocessors without any apparent increased benefit to proper treatment, storage and disposal of RMW.

Additionally, pre-treatment should not be required for items intended for reprocessing. For example, if the new regulations will require the autoclaving of these devices prior to off-site shipment, it could potentially cause significant issues with the quality and/or functionality of the devices and very likely inhibit their ability to be reprocessed and reused. This process should be distinguished from RMW being sent off-site for recycling, where the product will no longer be used for its intended purpose. The apparent lack of a distinction in the proposed regulation would seem to defeat the purpose of reprocessing and reuse and would likewise run contrary to one of the underlying purposes of the regulations to reduce the solid waste stream. It is requested that NYSDEC provide clear distinctions between these two different processes and remove reprocessing and reuse from the requirements of Subpart 365.2-4.

Response: Proposed Subpart 365 has been amended to distinguish between RMW sent for treatment and medical devised destined for reuse. Healthcare facilities that source separate medical devices would be exempt from Subpart 365-2.

Comment: This section is overly prescriptive and burdensome for the facility attempting to provide services to recover devices. In addition, specifically requiring reports that include a full summary of recovered devices or materials is an issue for facilities as proprietary or confidential business information could become publicly disclosed. This section also requires that facilities report the way devices are recovered, stored, processed or treated. It is believed that this is not necessary and should not be a requirement. Ultimately the reprocessing facilities make the determination if the product

is usable or not. Additionally, the reprocessing facilities must maintain records of the instruments that were accepted and how they were cleaned under their USFDA 510K requirements. We do not see a purpose for this information. This section requires that the material be treated prior to being sent to a recovery facility. This requirement would end all reprocessing at a transfer or treatment facility operation in the state. This would cause a very valuable recycling opportunity to be eliminated. Materials that are being reprocessed are done so under USFDA regulations and the reprocessing requirements of the USFDA 510K held by the reprocessor for their specific instruments. Under these regulations the material management and processing through an autoclave would render the material no longer reusable because it would have been altered. This regulation is overly onerous and eliminates an important application that has been safely in place and used in NY and throughout the country for over 15 years. No materials generated from neurosurgery can be recovered – we understand the concern about the potential for materials like Creutzfeldt-Jakob disease being difficult to eliminate, however these cases are very rare. Perhaps there may be exclusions for cases where there is a suspected case instead of an outright ban. This same restriction is not held for the reprocessors who collect from the hospitals directly. The materials must be treated on site prior to being sent off site for reprocessing, reuse or recycling – this is an issue for the reprocessors they would not want anything done with the instruments as this could hinder their ability to reprocess the devices – See the comment above regarding the USFDA issues around this requirement. Reprocessing of medical instruments is already a heavily regulated process. It is believed that the requirements in this section are not appropriate and recommend that the NYSDEC reconsider it. There are safe and environmentally feasible ways to conduct such an operation without treatment of the instruments and it is recommended that the NYSDEC consider meeting with stakeholders to understand the process and explore options for alternative requirements.

Response: As stated above, healthcare facilities that source separate reusable medical devices would be exempt from Subpart 365-2 under the revised proposal.

365-2.4(h)(1) through 365-2.4(h)(10)

Comment: The NYSDEC's concerns regarding the proper management of recovered material for reprocessing is appreciated, however this section and the way it was written will completely eliminate the ability for any facility to operate a recovery process within the state. The fact that the waste must be disinfected or treated on-site prior to being sent to a reprocessing facility will render that device useless and unable to be reprocessed. The reprocessing of devices are strictly governed by the USFDA. The reprocessing company must obtain a 510K for each type of device to be recovered and the process it will use. They must maintain control of that. To treat the material would mean that the 510K procedures would be compromised. Additionally, some of these instruments have delicate parts that if exposed to the time and temperature of a normal autoclave function would destroy the instrument. If the intent is for the department to

eliminate device recovery and reprocessing in the state then there should be a clear statement. The way the rule is written today it would eliminate the current system that has been in place for many years for the safe recovery of reprocessible devices, which will also have a tremendous impact on the healthcare industry which relies on these products (both in availability of devices and thousands of dollars). It is also adverse to the goals of the department to minimize waste going to landfill and greater re-use. It is recommended that the NYSDEC reconsider this entire section and work with stakeholders to come up with a regulatory section which will allow for the continuation of reprocessing in the state.

Response: The regulations have been amended to address this comment and the requirement is now located at 365-2.5(f). Re-use of single use medical devices is a growing trend and there are an increasing variety of products labeled single use that are being used more than once. These devices are disposed by many but not all healthcare facilities into the RMW stream. Once disposed as an RMW by the healthcare facility, they are an RMW in NYS. Commercial facilities processing RMW currently sort and separate the RMW to recover these wastes and send them to the reprocessor rather than the hospitals. In accordance with the proposed provision, single use medical devices may be sent to a reprocessor for preparation for reuse without treatment in accordance with USFDA requirements.

Comment: NYSDEC is urged to evaluate the preface language and/or strike some requirements outlined in subsection 365-2.4(h). As proposed, requirements 1-10 could inadvertently make spent SUDs unrecoverable, may duplicate USFDA requirements and exceed USDOT requirements. It is assumed that the intent of subsection (h) to apply requirements 1-10 to RMW recovery and recycling other than USFDA regulated SUD reprocessing. Therefore, it is recommended that subsection (h) be amended as follows: “(h) RMW recovery and recycling. Any recovery of RMW for repurposing or recycling of materials, not required to be registered and listed with USFDA pursuant to 21 CFR 807.20(a)(4), must comply with the following:”

Response: The proposed regulations have been amended 365-2.5(f) to address this comment.

365-2.4(h)(5)(i) and 365-2.4(h)(5)(ii)

Comment: It is unclear as to why this section was included under RMW recovery and recycling. It was not clear if the idea was for the cleaning and disinfection of secondary containers that were used for the storage and transportation of these materials or if it was intended to state how reusable containers, if they are to be recycled, must be cleaned prior to sending them to a recycling facility. Please clarify.

Response: The proposed regulations have been amended at 365-2.5(f) to address this comment.

365-2.4(h)(6) through 365-2.4(h)(10)

Comment: It is unclear as to why this section was included under RMW recovery and recycling. It was not clear if the idea was for the treatment of these materials (devices that were recovered). Please clarify.

Response: Paragraphs (h)(6) and (h)(10) are not included in the revised proposal.

365-2.4(i)(3)

Comment: Annual inspection by Industrial Hygienist – Industrial Hygienists (IH) are utilized to conduct occupational hazard assessments. An IH would not necessarily understand or be able to evaluate a facility's compliance with their permit conditions. This is more of an engineering design requirement. If the NYSDEC requires an annual inspection it should be an inspection conducted by a qualified individual knowledgeable of the industry and its operations. The inspection should be based on the engineering requirements in the permit and regulatory applicability.

Response: The regulations have been amended to address this comment and dictate that the individual must be qualified for the type of inspection required.

Comment: Can institutions self-inspect or do the inspectors need to be a (contracted) third party?

Response: Inspectors must be a done by a third party.

Comment: The registration requirements for Certified Industrial Hygienists (CIH) are not the same for Professional Engineers (PE). CIHs are focused on worker safety and PEs are focused on equipment and facilities. It is suggested that these inspections be performed by PEs.

Response: The regulations have been amended to require qualified individuals to perform the inspections, which will vary depending on the operations occurring.

Comment: This is a new requirement and one that is overly burdensome, costly, and unnecessary. It is believed the facility operators and safety/environmental teams are best equipped to perform these as most Industrial Hygienists do not understand how medical waste facilities function. This is not a reasonable request and it is requested that this be removed. Without identifying what they would be looking for, there is no rationale for this requirement. Findings of such an inspection would not necessarily prove to be useful. The NYSDEC may consider a different type of inspection perhaps related to the conditions outlined in the permit which would be more feasible and helpful in ensuring compliance.

Response: A third party inspection is appropriate to verify the applicable requirements are being followed.

Comment: The annual inspection specified by this section should be performed by a "qualified individual." It is believed that a qualified individual should not be limited to only an individual certified as an industrial hygienist, but could also include a biosafety

professional registered with the American Biological Safety Association (ABSA) as a certified biosafety professional or registered biosafety professional (CBSP or RBP) or a Principal Engineer familiar with the facilities equipment or application for permit. Also, it is requested that this section be amended to allow the annual inspection be performed by an individual from within the facility or from a similar facility.

Response: The regulations have been amended accordingly.

365-2.4(i)(5)

Comment: It is understood that the NYSDEC would expect that the waste not be considered treated until the results of the testing programs are approved with a "new unit", but this is also a requirement for the 5 year revalidation for a facility that has been in operation. This is an unreasonable request. There is no time criteria for how long the NYSDEC could take to review those results and approve, which could mean that a commercial operation would have to stop all operations. Many of these operations have been in place without problem for the last 20-30 years. It is believed that this is an undue burden on existing operations and there should not be a requirement for the 5 year validation testing. Additionally, it is believed that the 5 year validation testing is not necessary for units that have been operating in good standing. It is requested that the NYSDEC remove the 5 year validation requirement for commercially operating facilities with no issues or that the requirement be removed for the waste to not be considered treated for such facilities.

Response: This provision is now located at 365-2.6(i). RMW waste loads and its treatment can vary substantially. Periodic evaluation of both the physical and microbiological aspects of the treatment process are necessary as part of the initial validation life cycle. Treatment devices must routinely undergo operational bio-challenge, validation and re-validation testing to assess whether they are delivering the effective desired treatment cycles in a consistent and reproducible manner.

365-2.4(j)(3)

Comment: Why is it necessary to place biological indicators in each load? Please clarify the requirement for using biological monitors such as chemical indicators in each load and bio-challenge testing at specific intervals (e.g., every 40 hours of processing time under the new regulations. Conducting bio-challenge testing with each load of waste treated would create significant operational and financial burdens.

Response: This provision is now located at 365-2.7(h). All permitted facilities in NYS are currently testing each load treated with biological indicators. A treatment process cannot be fully verified by inspection or evaluation of parametric monitoring alone. Parametric monitoring only validates that the process achieved time and temperature during the treatment cycle. It does not provide sufficient information to ascertain with any confidence that a varied waste stream has been properly treated. Chemical indicators (integrators) provide feedback on the treatment cycle immediately but

generally are not as sensitive to sub-optimal treatment conditions as biological indicators. Biological indicators serve as a model for the bioburden resistance and population in an evaluation of the treatment process, are considered to be the most sensitive type of treatment indicators and provide the most information about a treatment cycle**.** However, this provision has been amended to reduce the number of times biological indicators must be used for most facilities.

Comment: The requirement for bio-challenge testing to be performed with each load is not necessary and this is overkill considering that most if not all treatment devices have very sophisticated parametric monitoring equipment built in. Testing of each load will cause a marked increase in operating costs due to an increase in the numbers of biological indicators used and processed, especially for facilities with multiple treatment devices. It is proposed that these sections be changed to reflect a bio-challenge testing requirement schedule as follows for each treatment device: Once every two weeks of operation for RMW generated in a laboratory operated at BSL2, once weekly for RMW generated in a containment area operated at BSL3, and every load for RMW generated in a containment area operated at BSL4 or RMW containing select agents.

Response: This provision is now located at 365-2.7(h). All permitted facilities in NYS are currently testing each load treated with biological indicators. A treatment process cannot be fully verified by inspection or evaluation of parametric monitoring alone. Parametric monitoring only validates that the process achieved time and temperature during the treatment cycle. It does not provide sufficient information to ascertain with any confidence that a varied waste stream has been properly treated. Chemical indicators (integrators) provide feedback on the treatment cycle immediately but generally are not as sensitive to sub-optimal treatment conditions as biological indicators. Biological indicators serve as a model for the bioburden resistance and population in an evaluation of the treatment process, are considered to be the most sensitive type of treatment indicators and provide the most information about a treatment cycle**.** However, this provision has been amended to reduce the number of times biological indicators must be used for most facilities.

365-2.4(k)(4)(ii)

Comment: This section is perhaps misleading. It is recommended that rewording of this section to read: "…ensure all waste that was processed by the system since the last run when the unit was in compliance, is identified as untreated waste and document that the waste was properly retreated."

Response: The regulations have been amended to address this comment. The suggested text was incorporated into 365-2.6(j)(8)(ii).

365-2.4(o)

Comment: This section is overly burdensome and costly with no safety or environmental benefit. This section is very prescriptive. These units have been

operating for a very long time with a proven record of compliance. This should be part of the evaluation of the department when making these requirements and should be placed on individual facilities based on their compliance history. Additionally, this may be sensible for facilities that operate regularly, but some facilities may operate less frequently - such as once a month. In such a case it could take several months to get to 40 hours. There is no other state that has such a prescriptive and costly requirement for validation, especially for a proven method of treatment. It is requested that this section be removed or modified to account for alternative time frames based on the compliance history of the facility.

Response: This provision now located at 365-2.7(h) and identifies standard design and operational characteristics of autoclaves or moist heat treatment systems that have been used for more than 100 years. The principles of science with regard to autoclaves or moist heat treatment systems related to the methodology for the development, validation and bio-challenge testing, and routine operation of these processes are incorporated in this provision.

365-2.4(o)(5)

Comment: If demonstrated to be effective during validation testing, can fewer pre-vacuum cycles or steam pulses be allowed?

Response: The regulations have been modified to allow fewer cycles or pulses.

365-2.4(q)

Comment: This continues to be a burden on operations in the state of NY without any safety benefit. Most states have removed this requirement from their regulations. At the federal level both USDOT and CDC recognize that once the waste from a commercial or onsite operation is run through a properly validated treatment, it is no longer potentially infectious and does not pose a risk. In fact, under USDOT regulations, it is no longer RMW and should not be declared as a hazardous material when in transport. This is an unnecessary burden also for emergency responders who, during an emergency, would take precautions against infectious substances when responding that do not exist. It is believed that this is unnecessary in the rule and should be removed. If the NYSDEC is concerned about ensuring the receiving facility knows what the materials that are being delivered are, then the requirement could be made that a bill of lading be accompanied with the waste (which is currently an industry best management practice anyway).

Response: Treated RMW does not need to be tracked but it is still considered commercial waste subject to regulation under Part 364 Waste Transporters. The definition of wastes covered by Part 364 are outlined in State law.

Section 365-2.5 Treatment requirements

365-2.5(a)(1)

Comment: Some Select Agents affect plants only. It is suggested that language such as “worked with at BSL-3” be inserted following Select Agents or Toxins”. Also, please clarify that in this context, “site of generation” can include an institution with a NYSDEC or NYSDOH permitted central RMW treatment facility, not an individual containment area within an institution.

Response: The regulations have been amended to address this comment.

365-2.5(a)(2)

Comment: This continues to be a burden on operations in the state of NY without any safety benefit. Most states have removed this requirement from their regulations. At the federal level both USDOT and CDC recognize that once the waste from a commercial or onsite operation is run through the treatment, it is no longer potentially infectious and does not pose a risk. Further destroying the needles adds an extra step in any process that typically requires shredding; this means that additional sharps are created in the process. These shredding operations tend to be very labor intensive and maintenance intensive producing a greater risk of injury from these operations to the workers during clean out and maintenance for cuts than if the sharps were left whole and part of the consolidated waste that was treated. It is recommended that this be removed. This has been removed from most all other states' requirements across the country.

Response: Treatment and destruction of RMW sharps prior to landfill disposal is required by both the Public Health Law and Environmental Conservation Law. Landfill managers want to ensure that their employees are safe from potential needle sticks. Once sharps containers are in the garbage truck, the containers are likely to break open from the compaction. Solid waste facility workers are at risk for needle sticks from trash on tipping floors, recycling lines and in landfill operations.

365-2.5(a)(3)

Comment: It is recommended that this section be slightly modified to be more-clear. The definition of dual or mixed wastes can be found under 360.2, however, it would be helpful to be more-clear in this section. Are the dual wastes referring to the biohazard mixed waste or the mixed waste? Perhaps it doesn't matter, but it would be helpful to understand if there is a difference. It is also recommended that it is clearly stated that any pharmaceutical wastes that are a hazardous waste mixed with RMW must be managed (hence the mixed waste definition) as hazardous waste. Since the management of these materials by law will be a new requirement for many generators it will be very important to be consistent and clear in the generator section of these rules (again clarifying who the generators are that fall under these rules) so that proper identification and segregation starts at the generator since waste management facilities cannot open and fully audit the waste.

Response: The proposed regulations have been amended at 365-2.6(b)(1) to address this comment.

365-2.5(a)(3)(iii)

Comment: Under the pharmaceutical waste section the NYSDEC calls out certain treatment requirements. While it is understood that some intravenous liquids are non-hazardous, not all are and a blanket statement that they may all be disposed in the sanitary sewer is misleading. It may be helpful to clarify here those liquids which are acceptable. There are some solutions that while not a hazardous waste by federal or state standards may have properties which would be detrimental to the environment. The NYSDEC may want to reconsider and limit these types of liquids to things like saline solutions or nutritional supplement solutions for example.

Response: The regulations have been amended at 365-2.6(b)to address this comment as follows: "An autoclave cannot be used for treatment of RMW containing or mixed with hazardous waste and/or toxic drug waste."

365-2.5(a)(4)

Comment: It is common practice to co-dispose small quantities of human and animal tissue in biohazard bags where the relative quantity is much smaller than the amount of waste in the bag. Please clarify that small quantities of pathological waste in this context can be co-disposed with other RMW.

Response: The regulations have been amended at 365-2.6(b)(3) to address this comment as follows:"An autoclave cannot be used for treatment of recognizable human organs or body parts, or animal body parts or carcasses unless in small quantities (e.g., tissue or mouse carcasses, etc.) and approved by the department, or provided the NYSDOH has approved the autoclave model as an alternative treatment technology for those wastes."

365-2.5(a)(5)

Comment: Please provide a definition of "bulk animal bedding".

Response: The regulations have been amended to clarify at 365-2.6(b)(4).

Comment: The NYSDEC references BSL 3 or 4 waste. This is a new requirement. This was addressed in the generator section as well. It is recommended that to remain consistent with the USDOT regulatory requirements that the Department reference Category A materials. Otherwise this will be a major change for the generator community to separate out the BSL3 materials.

Response: This provision addresses RMW and other infectious waste that is generated from work with infectious agents requiring BSL 3 or 4 precautions. Category A and B agents refers to agents that require packaging for transport prior to the waste being treated. Although many BSL 3 and 4 agents, if untreated, would require Category A or B packaging, not all BSL 3 agents are considered Category A or B. The CDC BMBL recommends treatment of waste contaminated with infectious agents from laboratories using BSL 3 or 4 precautions. This provision now located at 365-2.4 requires that

facilities that have BSL 3 or 4 capabilities treat the waste prior to it leaving biocontainment and obtain a permit to operate.

365-2.5(c)(1)(ii)

Comment: This is a new requirement and one that is overly burdensome, costly and unnecessary. If it is the intent of the NYSDEC to require this for on-site facilities perhaps NYSDEC should specify that. This is not how current commercial facilities operate. The requirement to perform three steam pulses would require reprogramming of all facilities currently in operation. What are the safety or environmental benefits to this requirement when current operations have been in existence for 20-30 years without issue?

Response: The regulations have been modified to address this comment.

265-2.5(c)(2)(ii)

Comment: This section is overly burdensome and costly with no safety or environmental benefit. This section is very prescriptive. These units have been operating for a very long time (over 20 years) with a proven record of compliance. If needed they could be required to do the initial validation but ongoing testing is costly without any value. The biological indicators that are purchased already come with a certification of compliance. It does not make sense to require lab testing to further prove its compliance. This should be part of the evaluation of the NYSDEC when making these requirements and should be placed on individual facilities based on their compliance history.

Response: Biological indicators (BI) have a shelf life and consist of a known number of microorganisms when prepared and known resistance characteristics to the mode of treatment, in or on a carrier and enclosed in a protective package. BIs are unstable at elevated temperatures which may cause accelerated aging or change in the population of the indicators. Facilities normally purchase large quantities of BIs in advance and these are not normally stored in accordance with the certificate of compliance included with the BIs. Consequently the stated microorganism population may change prior to its use and will not accurately measure treatment. The Department is aware that of a number of low population assay results when improperly stored BIs are subjected to quality assurance testing. It is necessary to verify BI populations on a regular basis.

365-2.5(c)(5)(ii)

Comment: It is requested that the requirement for using thermocouples and other temperature monitoring devices be made specific to the type of treatment device (e.g., for rotating autoclave systems such as the Tempico - Rotoclave) that achieve homogeneous conditions within the treatment chamber, using free floating temperature monitoring devices in addition to the system's on-board temperature (and pressure) monitoring devices would be redundant and impractical. To achieve this, it is requested the statement "For treatment systems that do not cause the waste being treated to be

commingled by tumbling or other means of disrupting the waste containers…" be added to the beginning of this item.

Response: The regulations have been amended to address this comment.

365-2.5(c)(6)

Comment: It is agreed that each lot of commercially purchased biological indicators should be independently verified for the accuracy of population count, but it is not agreed that thermal resistance can be accurately repeated. Most if not all commercially available biological indicators include a statement on the manufacturers label that the D-value cannot be accurately reproduced unless tested under the exact conditions in which it was obtained. As such, any commercial lab that may be available to verify the population of a commercially available biological indicator will not perform D-value testing.

Response: This provision has been amended to remove the requirement for testing for thermal resistance of biological indicators.

365-2.5(c)(8)

Comment: It is believed that the requirements of this section are unnecessary and overly burdensome. Quarterly testing of the biological indicators will significantly increase operating costs in the form of increased, unnecessary, third party testing and the loss of costly biological indicators used for the extra verification testing. If the biological indicators are stored at the manufacturers stated environmental conditions and lot verified prior to use for population counts, then any further testing of the population should not be required so long as the indicators are not used passed the lot expiration date.

Response: Biological indicators (BI) have a shelf life and consist of a known number of microorganisms when prepared and known resistance characteristics to the mode of treatment, in or on a carrier and enclosed in a protective package. BIs are unstable at elevated temperatures which may cause accelerated aging or change in the population of the indicators. Facilities normally purchase large quantities of BIs in advance and these are not normally stored in accordance with the certificate of compliance included with the BIs. Consequently the stated microorganism population may change prior to its use and will not accurately measure treatment. The Department is aware of a number of low population assay results when improperly stored BIs are subjected to quality assurance testing. It is necessary to verify BI populations on a regular basis. However, this provision has been amended to remove the requirement for testing for thermal resistance of biological indicators.

365-2.5(d)

Comment: The last section of this statement: " In certain situations where the waste poses a greater risk (e.g., a higher bioburden waste), the NYSDEC may require a

greater reduction." is very broad and open. If this is intended to cover issues like highly infectious diseases (like the Ebola situation) it is recommended that the NYSDEC write a separate section to address that potential and make it clear what they would like to see have done. This leaves it too open to interpretation, enforcement and potential liability for facilities.

Response: The regulations have been amended to include examples.

365-2.5(d)(1)

Comment: How will the "certain vegetative bacteria… and similar organisms" be determined and communicated? What will be the characteristics of agents to be placed in this group? Also, please clarify the 6-log reduction here that refers to *G. stearothermophilus* spores and not the agent itself.

Response: For alternative treatment systems that may include chemical or other forms of treatment, the most resistant biological indicator *Geobacillus stearothermophilus* may not be a suitable biological indicator. Alternative microbial groups may be necessary to be used in efficacy evaluation. The biological indicator would be chosen on a case-by-case basis based on its relative resistance to the inactivating agent used in the treatment system. A comparison of conditions used in the literature to those used in the treatment process would be made to determine if relative microbial resistance can be altered (i.e., lowered) as a result of the type of treatment process conditions. Approval of the treatment system would be determined on its efficacy evaluation for the resistance characteristics of the biological indicators used.

365-2.5(d)(3)

Comment: This requirement is not clear. It is not clear if the sharps used in the work with cultures and stocks themselves must be destroyed. This requirement would also imply that these materials would need to be shredded. This would require that the generator separate out these materials and identify them. Again, the USDOT and CDC recognize that once these materials are treated to remove their infectious potential, that they are no longer a RMW. It is unclear why NYSDEC would insist on further destruction once treated.

Response: Treatment and destruction of RMW sharps prior to landfill disposal is required by both the Public Health Law and Environmental Conservation Law. Landfill managers want to ensure that their employees are safe from potential needle sticks. Once sharps containers are in the garbage truck, the containers are likely to break open from the compaction. Solid waste facility workers are at risk for needle sticks from trash on tipping floors, recycling lines and in landfill operations.

365-2.5(e)(5)

Comment: Validation required every 5 years – The proposed rule states that waste will not be considered treated until the results of the validation testing programs have been approved in writing. This is problematic for existing facilities that already treat waste.

This period consists of the time from when samples are sent for testing until the time when NYSDEC approves the results. As written, this requirement is overly burdensome, especially for a long standing facility which has operated without issue and historical data showing no issues. The idea that the materials would not be considered treated until approved by the state is unreasonable, especially when considering there is no time limit established for the state to respond. It is unspecified in the regulation how long the NYSDEC would take to evaluate the results. Most commercially operating facilities do not have capacity or the ability to hold waste on site for long periods of time while awaiting a result and could fall into a separate compliance issue. It is recommended to remove this requirement and using the annual testing to show compliance.

Response: Waste loads and their properties may change over time or include interfering substances, the operation parameters may vary from the original validation test, control systems become unreliable, the treatment cycle may be different, pre-vacuum or pulsing cycles may be altered, steam-air and steam-water-air cycles may be impacted by the change in waste loads or the door gasket may be compromised. Revalidation every 5 years is a reasonable check on the performance characteristics of a treatment device. Most sample results may be obtained within 24 to 48 hours from most laboratories and Department review and approval of the revalidation testing and test results must comply with Uniform Procedures.

365-2.5(f)

Comment: Bio–challenge testing plan – Testing once every 40 hours for spores creates a cost burden. For facilities that operate 24 hours per day, this requirement would be to test once every 2 days. Given that the test takes approximately 48 hours to read, retesting would be done prior to receiving the previous test results. For facilities that may operate less frequently, such as once per week or once per month, this would be less meaningful as it may take several weeks or months to conduct spore testing. It is suggested instead that testing should be limited to once per week when operating, and if a facility is not operational fully for a week, at a minimum, weekly testing should be conducted during the waste processing period.

Response: The regulations have been amended to address this comment.

Comment: The proposed rules require that bio-challenge testing must be sent out for 3rd party evaluation every 200 hours of operation. Most equipment does not have an hour meter to track hours. As written, this requirement would be very costly and overly burdensome. This requires coordination and management of samples and the third party facility continuously. It is recommended to continue to use the current industry-wide accepted testing methodology that consists of periodic 3rd party evaluation. It is suggested that conducting this evaluation at an annual frequency rather than based on 200 hours of operation would be simpler for tracking and ensure that all equipment was checked at a reasonable frequency.

Response: Third party evaluation of biological indicators used during bio-challenge testing is currently done at all RMW treatment facilities. These evaluations provide evidence that facilities are meeting indicative standards for treatment and are required for ongoing operations. Third party evaluations verify that a spot check of the typical load of the treatment process is able to render RMW safe on a regular basis. Proposed revisions have reduced the frequency of bio-challenge testing to the first and third load each day for the first 30 days, once per day after the first 30 days, and after 6 months every forty hours of operation. The evaluation of biological indicators by a third party after every 200 hours of operation is proposed to remain.

Comment: The requirements in this item represent a significant operational burden and appear to conflict with the purpose of validation testing (i.e., to demonstrate the effectiveness of specific treatment cycle parameters). This requirement would require many more samples, transportation to a laboratory and associated waste generation than validation testing alone.

Response: Third party evaluation of biological indicators used during bio-challenge testing is currently done at all RMW treatment facilities. These evaluations provide evidence that facilities are meeting indicative standards for treatment and are required for ongoing operations. Third party evaluations verify that a spot check of the typical load of the treatment process is able to render RMW safe on a regular basis.

Comment: This section has several issues associated with ensuring facility compliance (1) 40 hour Bio-Challenge Testing: For commercial operations which operate machines on a routine basis with approximately 24hrs/day, 7 days per week, this requirement is overly burdensome and unnecessary. Perhaps if the NYSDEC is concerned about those units that do not operate regularly this section could be included. However, for facilities that are commercially operated this is an extreme cost. These facilities which have been operating for 20-30 years have proven that commercial systems when run properly with the necessary operational controls in place do not typically fail. Bio – challenge testing plan – once every 40 hours amount of spores to be tested creates a cost burden. For facilities that operate 24 hours a day, this requirement would be to test once every 2 days. Given that the test takes approximately 48 hours to read, retesting would be done prior to receiving the previous test results. It is suggested instead that testing should be limited to once per week. This will increase the testing media cost by 2/3rds and that does not include the increase in labor hours.

Response: The regulations have been amended to address this comment.

Comment: The requirement for bio-challenge testing to be performed with each load is overkill considering that most if not all treatment devices have very sophisticated parametric monitoring equipment built in. Testing of each load will cause a marked increase in operating costs due to an increase in the numbers of biological indicators used and processed, especially for facilities with multiple treatment devices. It is proposed that these sections be changed to reflect a bio-challenge testing requirement

schedule as follows for each treatment device: Once every two weeks of operation for RMW generated in a laboratory operated at BSL2, once weekly for RMW generated in a containment area operated at BSL3, and every load for RMW generated in a containment area operated at BSL4 or RMW containing select agents.

Response: The regulations have been amended to address this comment.

365-2.5(h)

Comment: We are unclear on this requirement. Does this mean that each load sent off site needs a certification? Does the department intend on certifying? It is unclear why it would be required to have both a certificate and the RMW tracking form. This seems to be overkill for a waste which is no longer a hazardous material. It is our understanding that this certification from the NYS Health Department has not been updated and is currently difficult to obtain. It is also especially insignificant for treated waste that is going out of state for final disposal where those facilities do not understand what the document is for. It is recommended that these requirements be consolidated and as mentioned in sections above that they be replaced by a bill of lading identifying the waste as treated RMW.

Response: Both the Public Health Law and Environmental Conservation Law require the use of a Certificate of Treatment. The form is posted on both the NYSDOH and the Department's website. The NYS Medical Waste Tracking Form must only be used for untreated waste and if sharps have not been destroyed during the treatment process. RMW transporters must inform out-of-state disposal facilities of the need for using the form.

Section 365-2.6 Recordkeeping and reporting requirements

365-2.6(b)

Comment: The proposed regulations require an annual report that includes the quantity and types of waste received, by source, volume and weight including monthly summaries and annual totals. While this may seem reasonable, waste is not collected this way, meaning the types that are identified in the criteria are not separated out by the processing facility. They are only identified when coming in if they are to be sent for incineration or not, even though this is currently loosely required it is not done by all the generators. The processing facilities do not have a reasonable way to audit the waste due to concerns for employee safety and OSHA restrictions. It is also a concern for the industry that all the information about the generator (confidential business information) becomes public record. This section further breaks down the identity of the quantity and type of untreatable, bypass and unauthorized waste by volume and weight and the locations it was sent including monthly summaries and annual totals. While it is understandable that there should be a way to identify and ensure proper management of non-conforming waste, this is overly burdensome and should be adjusted to allow for the facility to properly manage any non-conforming waste. We recommend that this

requirement be changed to the following: Identify wastes processed at the facility; Identify wastes passed through for treatment at another location, and identify wastes that were rejected due to nonconformance with the regulations or permit conditions of the facility. This makes this a reasonable report and easy for the facility to comply and the department to read and understand. We would request that the documentation of generator information be specifically removed. Summary of all monitoring data for each load – This section has overly burdensome requirements on the treatment facilities. It is not clear what this information would be used for or why it is necessary? It is believed instead that it would be reasonable to request parametric testing information, spore testing results, operator logs, and treated waste logs. However, the level of detail proposed is beyond any other state or federal regulatory requirement. Many of these technologies have been proven to be very effective and seldom fail. It is recommended that the NYSDEC reconsider this section and conform to the industry standard recordkeeping requirements that are already established. The state references the requirement already provided for under Section 70-2.3(h) which states no facility shall transfer or release treated RMW without a Department of Health certificate of treatment. Requiring two different forms is redundant and unnecessary. Further, calling it a RMW still (specifically for sharps once treated) is against the USDOT preemptive authority determination. While it is believed this seems to be an outdated and unnecessary requirement, we would request that the NYSDEC simply reference this section and not have any additional requirement for the transport of treated RMW.

Response: The recordkeeping requirements have been revised in the current proposal and do not include a requirement on receiving facilities to record detailed volume and weight information. Instead the proposal would have facilities report the quantity of waste and types of waste by specified categories. As to the concern that receiving facilities do not always know the exact content of each container received, it is acceptable for receiving facilities to rely on information supplied by the generator in order to categorize a waste type. As to bypass waste, revised rules would require a summary of wastes received that could not be managed. The proposal would not require detailed volume, weight or type information but instead would require a summary of what was received and where it was ultimately sent. This type of information is valuable to the Department so that waste handling and treatment can be understood and appropriate regulatory controls are in place to make sure such waste is not improperly disposed

Comment: This section places a significant amount of requirements for the receiving facility. Some of this information could potentially be considered proprietary (such as the source). Additionally the facility will be relying strictly on the generators specification of what the wastes are. (1) The quantity of waste received, this will be heavily dependent on the information provided by the generator. Again, we are unclear as to the need of the significant amount of effort it will take for generators to separate out materials rather than to specify what treatment technology is needed for the wastes generated. With respect to the bypass of waste, it unclear what information the department is needing

and for what purpose. Does the NYSDEC need to know the waste that is bypassed because the facility is being used as a transfer station, or is it trying to understand if there was unauthorized wastes (like radioactive or hazardous waste which should be separated out and properly managed)? It would be helpful to have clarity around this to ensure proper recordkeeping for the annual report. This section would need to be modified if any section of the certification and testing is modified.

Response:. The recordkeeping requirements have been revised in the current proposal and do not include a requirement on receiving facilities to record detailed volume and weight information. Instead the proposal would have facilities report the quantity of waste and types of waste by specified categories. As to the concern that receiving facilities do not always know the exact content of each container received, it is acceptable for receiving facilities to rely on information supplied by the generator in order to categorize a waste type. As to bypass waste, revised rules would require a summary of wastes received that could not be managed. The proposal would not require detailed volume, weight or type information but instead would require a summary of what was received and where it was ultimately sent. This type of information is valuable to the Department so that waste handling and treatment can be understood and appropriate regulatory controls are in place to make sure such waste is not improperly disposed

365-2.6(b)(1)

Comment: The current version of the Annual Report Form for RMW treatment facilities requires only annual totals to be identified. Please provide a report form that includes monthly totals.

Response: Monthly totals are included in the proposed reporting requirements of this provision. However, the Department recognizes that it may be necessary to evaluate and revise forms if the proposed rules are finalized.

365-2.6(b)(4) and 365-2.6(b)(5)

Comment: As written, this item would require an enormous amount of data to be included in annual reports. It is requested that this information be required for initial validation testing only and that henceforth only a certification that the operating parameters met minimum requirements established by the regulations and/or validation testing be required for annual reporting.

Response: The proposal have been amended to address this comment. The current proposal would require facilities to submit in their annual report a summary of the RMW managed, a summary of waste which could not be treated and a description of any conditions that required corrective actions. The current proposal retained most of the recordkeeping requirements in the draft rules, however, the workload associated with annual reporting would be reduced if the revised rules were adopted.

Subpart 365-3 Household Medical Waste Sharps Collection Facilities

Section 365-3.3 Registered facilities

365-3.2(a)

Comment: Where collection stations are provided for client convenience (such as for diabetics to deposit syringes used to self-administer insulin, such as at a Human Services Building) and emptied/removed only by a licensed medical waste disposal company and not by on-site staff, the requirement for the facility to develop a State Dept. of Health approved policy and procedures and be registered with the AIDS Institute, should be removed from the regulations. Only facilities that employ staff to actually handle and/or administer sharps should be subject to the additional requirements.

Response: The proposed regulations have been amended to address this comment. The proposed rules would now provide at 365-2.2 (a) that facilities hosting a collection kiosk are exempt as follows: “Sharps collection drop boxes and kiosks provided for collection from homeowners, provided the sharps collected are managed as RMW.”

Subpart 365-4 Other Infectious Waste Management Facilities

Section 365-4.1 Applicability

Comment: This section states under "Applicability" that this subpart applies to facilities that store, handle, or treat biohazardous waste that is not RMW. It is not clear what this means or what type of facilities this would be referring to? Does the NYSDEC plan on further identifying what type of waste this would be within the rule? It was clarified under the impact statement document, however, it would be helpful to have that clarity within the rule.

Response: The regulations have been amended to address this comment. The use of biohazard to refer to RMW and other solid waste which do not meet the definition of RMW has been modified in the proposal.

Comment: Any food contaminated in some manner as to make it unsuitable for human consumption is now classified as or must be handled as bio or biohazard waste, and manufacturers must treat it the same as RMW. For example, they must be contained in aseptic packaging. Material used in validation testing and quality control and assurance testing is now to be regulated as RMW. The regulations are too vague and leave too much discretion to NYSDEC staff. For food and beverage producers, left over products that are not composted or put into a sewage disposal system are considered industrial waste and subject to the same analytical, testing, and disposal requirements as true industrial waste under the new regulations.

Response: It was not the intent of the Department to regulate any food waste that is not fit for human consumption as RMW. The proposed regulations have been amended to address this comment.

Comment: Food waste handling is currently safe and well handled; there is no need for revising the regulations to handle food waste differently. Changing the regulations for food waste handling will place a significant financial burden on an industry with low margins and in direct competition with out of state businesses. These businesses are vital to the local economy as they provide a significant market for local agricultural producers. This requirement should not apply to the local wine, craft brewing, cider, distilling, businesses as well as the food processing industry.

Response: The proposed regulations have been amended to clarify that it does not apply to food processors.

Comment: Please provide clarification on food processing and manufacturing facilities and what is classified as "contaminated food waste." There is concern that food waste, like milk, will be subject to medical waste requirements, thereby increasing the cost of New York's milk processors to do business.

Response: As stated above, it was not the Department's intent to regulate all food waste as RMW. The proposed regulations have been amended and the revised proposal makes clear that the proposed rules would not apply to milk processors.

Comment: The NYSDEC proposed new solid waste regulations that would for the first time subject food and beverage companies' QA testing and waste disposal to extensive new requirements previously reserved for medical waste production. Intuitively and practically, there's no comparison between food, beverage and agriculture and medical waste. It's apparent that the New York State legislative body that granted the NYSDEC governance over medical waste generators had no intention of including food and agricultural waste. The risk of disease from medical waste and food waste is so drastically different. The risk from food waste is no more significant than that of normal household waste. So under existing laws and regulations, RMW is limited to stocks, cultures and other waste product generated for and from medical or veterinary research for treatment purposes. However, the recently proposed regulations would establish a new category of biohazard waste, which includes other solid wastes that present a risk similar to or greater than RMW due to the presence of infectious agents. According to the NYSDEC, this category includes, among other waste products, contaminated food supply waste as stated in the summary. While not specifically addressed in the proposed regulations, farms, dairies, butchers and other establishments that conduct food or beverage safety testing involving pathogens are potentially subject to these new requirements. Due to the lack of the specificity in this definition, this permits the NYSDEC to solely determine what is classified as biohazard waste. Again, this can include quality control procedures, food and beverage, manufacturing waste and forms of agricultural waste. The proposed requirements for biohazard waste generators include preparation of a written biohazard waste plan; separation of biohazard waste from other waste streams; on-site storage of biohazard waste in red bags or other designated primary and secondary containers; on-site treatment requirements for certain biohazard waste; manifest requirements for all transportation of biohazard

wastes; recordkeeping requirements documenting the quantity, type, treatment and disposal of all biohazard waste generated on site. So you can see this will significantly increase the cost of disposal for businesses and increase in cost which is unnecessary since what is done today is safe in all aspects of current disposal practices. It is believed that these new and unnecessary regulations would cost on the low side a quarter of a million dollars a year up to a million dollars a year or more for our large plant.

Response: The proposed regulations have been amended to clarify that foodstuff testing and management are not subject to the criteria proscribed in proposed Part 365.

Comment: If adopted, these regulations could in theory criminalize the food industry by holding food and beverage manufacturers and validation testing processes to the same standards as medical waste producers. For example, the broadness under several of the new definitions, such as biohazard waste, an infectious agent, leaves the door open to legal interpretations that could subject food companies, to strict compliance with proposed regulations, which could include prosecution by district attorneys, which would potentially subject food companies to alternative interpretation county by county throughout the state, negative publicity and damage to New York's food industry reputation and ramped-up cost of waste disposal for no good reason.

Response: In response to public comment, the Department reconsidered the use of the term biohazard as it was used in the draft rules. Several commenters raised concern that it would apply to wastes which do not meet the definition of regulated medical waste. Therefore, the proposal has been revised to make explicit that Part 365 would not apply to the food and beverage industry.

Comment: The proposed additions and changes to the regulations will essentially allow our food waste and food testing waste stream to be defined as medical and hazardous waste. To be specific, the definition of infectious agents and RMW has been revised and it can be including of the bio level 2 organisms. Bio level 2 organisms in fact include all of the pathogens in the USFDA Bad Bug Book. The food industry has been safely handling level 2 organisms for decades. The USFDA actually has rules for laboratories required by the PMO to handle the waste stream in a laboratory, and also there are requirements of labs that they adhere to protective practices while folks are in the lab. That includes limited access to the lab, protective clothing and also that micro-organisms are essentially autoclaved or chlorine sterilized, chemically sterilized prior to disposal. So it is believed that the past history of the industry shows that practices of waste handling have been and, is projected, to continue to be safe and effective, and changes to the regulation are not necessary.

Response: The proposed regulations have been amended to clarify that they do not apply to the food and beverage industry.

Section 365-4.3 Permit application requirements for transfer, processing, and/or treatment facilities

Comment: Will facilities already permitted under 6 NYCRR Part 360 be "grandfathered" for the requirements of this section?

Response: Part 365 has been rewritten and reorganized to separate the requirements for generators, and treatment, storage and disposal facilities. The requirements for treatment of regulated medical waste has also been separated from requirements that apply to the handling of solid waste that is not regulated medical waste. The current proposal does not include a permitting requirement for facilities that treat other waste which does not qualify as regulated medical waste, therefore, the concern raised in the comment is moot. However, any existing permit held by a facility that treats regulated medical waste would be subject to the transition rules found at Section 360.4 of the proposed rules. Existing permits would remain in effect until such time that a permit is renewed, at which time the permitted facility would be expected to comply with the proposed rules when the rules become effective.

365-4.3(e)

Comment: Removing treated waste from a facility within seven days can be infeasible for some (especially small) treatment facilities and it is requested that "or a period approved by the department on a case-specific basis" be added following "seven days".

Response: The regulations have been amended to address this comment.

Section 365-4.5 Treatment requirements

365-4.5(3)(ii)

Comment: Previously validated alkaline hydrolysis systems may be permitted to operate at lower temperatures (e.g., 300 degrees Fahrenheit) and it is therefore requested that this requirement be changed from "302" to "300" degrees Fahrenheit.

Response: The regulations have been amended to address this comment.

Section 365-4.6 Recordkeeping and reporting requirements

365-4.6(b)(4)

Comment: As written, this item would require an enormous amount of data to be included in annual reports. It is requested that this information be required for initial validation testing only and that henceforth only a certification that the operating parameters met minimum requirements established by the regulations and/or validation testing be required for annual reporting.

Response: The regulations have been amended to eliminate this requirement.

Part 366 Local Solid Waste Management Planning

366 - General

Comment: The DEC should maintain the existing regulatory requirements related to recycling and continue to provide incentives for municipalities to reduce and recycle waste in the revised solid waste regulations. The existing requirements are necessary to implement the planning requirements of the Solid Waste Management Act of 1988 and bring privatized landfills into the program. The existing regulations require a determination that the size of a landfill be "appropriate" "based on projected quantities and composition of solid waste [generated] . . . within the planning unit." 6 NYCRR sec. 360-15.9(g)(1).

Response: An evaluation of the appropriate types and sizing of facilities is a required component of the alternatives evaluation in subdivision 366-2.5(b) of the draft regulations.

Comment: The Act mandates municipal source separation and segregation of recyclable or reuseable materials from solid waste pursuant to local laws requiring the reuse or recycling of everything for which "economic markets" exist. This requirement implements the policy of the Solid Waste Management Act of 1988 (Act) to make landfill disposal the least favored method of waste management. See ECL sec. 27-0106; Gen. Mun. L. sec 120-aa. The Act thus targets the "end-of-pipe" problem of landfills—which are not environmentally sound solutions to waste management—and uses market incentives to reduce waste generation and reduce reliance on landfills. The existing regulations require municipal waste planning units to measure their success achieving the goals and policy of the Act by reporting their annual recycling rate. If its recycling rates are poor, the Department is supposed to require the planning unit to adopt aggressive measures that have a demonstrated ability to increase the rate.

Response: The revised regulations continue the local planning requirement envisioned in the Act and current regulations however, they have been revised to only use the reporting metric identified in the state solid waste management plan (*Beyond Waste*) of measuring for a decrease in the amount of waste managed through thermal treatment and disposal. This is a more accurate method for measuring the total diversion from thermal treatment and disposal including waste reduction, product stewardship, and recycling.

Comment: Recycling rates rose in New York when DEC enforced the planning requirements in the Solid Waste Management Act of 1988 and required that privately operated landfills accept waste only from areas within successful planning units. Recycling rates ceased to increase when DEC stopped enforcing these requirements and began allowing planning units to privatize operations of county landfills.

Response: The historical data and facts do not support this assertion. There was no decrease in DEC's enforcement in this area as outlined.

Comment: The proposed regulations abandon recycling rates as a measure of success in reducing waste for landfill disposal in violation of the requirements of the Solid Waste Management Act of 1988, and DEC has done this without any analysis in the Draft GEIS of the environmental effects of eliminating these requirements on landfill disposal rates, or consideration of alternative measures.

Response: The draft regulations include a companion metric of recycling rate. However, the regulations have been revised to only use the reporting metric identified in the state solid waste management plan (*Beyond Waste*) of measuring for a decrease in the amount of waste managed through thermal treatment and disposal. This is a more accurate method for measuring the total diversion from thermal treatment and disposal including waste reduction, product stewardship, and recycling. The revised regulations continue the local planning requirement envisioned in the act.

Comment: Incentives for waste reduction need to be increased in the revised regulations, not removed.

Response: Required evaluations for waste reduction have not been removed and remain in the revised regulations.

Comment: LSWMP requirements as drafted are highly prescriptive and potentially onerous given a planning unit's wasteshed characteristics and materials management opportunities. Combined with the potential for plan non-acceptance and the associated potential of repayment on grant awards and the premature closure of waste management infrastructure under a non-specified time frame, feels like a hostage situation and not lean or efficient. Allow LSWMP flexibility.

Response: The consequences described in the comment are not intended outcomes of the LSWMP process. The regulations have been further revised and clarified to help streamline the LSWMP development, review, approval and update processes. For instance, it has been clarified that waste composition and facility information from the department is available for use in developing LSWMPs. The scope and detail related to non-MSW streams has been reduced as well as the proposed reporting requirements. Review time frames for the department have also been added.

Comment: We are concerned that local enforcement efforts will need to be expanded to meet the proposed rule changes. We ask DEC to provide support services, including funding to localities, for the planning and enforcement of their LSWMP.

Response: The department will continue to provide state assistance to municipalities for waste reduction and recycling capital and education as well as household hazardous waste management through grant programs outlined in Part 369.

Comment: “Benefits” supporting a planning unit’s Local Solid Waste Management Plan (LSWMP) should be defined in the new regulations specifically as environmental benefits. As proposed, and under the current Part 360 regulations, financial benefits without any demonstrated environmental benefits may be considered to offset

environmental burdens or adverse impacts of a LSWMP that fails to achieve acceptable disposal diversion goals. Such financial benefits so credited in the past include municipal revenue obtained by leasing a municipal landfill to a private operator, reduction in local taxes resulting from such revenue, and contributing to the municipality's compliance with the state's two percent tax cap.

Response: As outlined in the ECL and the regulations LSWMPs must embody sound principles of solid waste management, natural resource conservation, energy production and employment-creating opportunities. Consideration of fiscal impacts and capabilities is a component of that evaluation.

Comment: Mixing planning with environmental regulations does not work. Regulations intend to prevent negative impacts while planning encourages behaviors sought. The regulatory approach adopted here is too heavy-handed. DEC is using planning for data collection needs, which is wrong. Suggestion to aggregate most data in the existing regions to simplify the task of determining overall State compliance with goals in *Beyond Waste*. Regulations should not be written as if planners have intentions of abandoning progressive waste management. We are certainly not going to achieve 90% waste diversion through 10-year annual spreadsheet approximations of 15 waste stream components. This rigid planning approach does not generate entrepreneurial and innovative solutions. We should address the reality that recycling isn't the absolute virtue it is sold as but merely a spiral that delays materials' disposal for a time. No proposed alternative, but I will submit to working with others, and hope we can present some coherent options for you to consider in place of what to me is an unworkable and inherently flawed approach.

Response: The regulations have been further revised to help streamline the LSWMP development, review, approval and update processes. The requirements of Part 366 were drafted with the understanding that planning is not a regulatory program and that each planning unit will develop their own unique plan considering their needs and abilities.

Comment: The proposed regulations do not reflect a working, effective state-local partnership as required by ECL §27-0107. The proposed Part 366 regulations should be thoroughly revised to re-assign state and local roles, stress the collection of common databases for use by all localities, acknowledge global markets for recyclable commodities, recognize state-wide limitations on municipal budgets, eliminate unnecessary duplication of efforts, encourage private sector investment, and eliminate aspirational projections and schedules.

Response: The regulations have been revised to address many of these concepts. For example, the revised regulations have been clarified to make it clear that waste composition and facility information from the department is available for use in developing LSWMPs. The scope and detail related to non-MSW streams has been reduced as well as the proposed reporting requirements. Review time frames for the department have also been added.

Comment: These proposed regulations are very different than the technical regulations that are rightly designed to protect public health and the environment. The planning process is different for each planning unit in this diverse State – one size does not fit all.

Response: The regulations allow for the different characteristics of the planning units across the State and provide the framework to create unique LSWMPs to reflect those differences.

Comment: Rather than streamlining, the new regulations appear to increase the workload, dramatically increase costs and time of preparation for LSWM planning.

Response: The Department acknowledges that the proposed regulations pertaining to LSWMPs contain additional details for an approvable plan. However, the revised regulations have been refined to help streamline the LSWMP development, review, approval and update processes. For example, it has been clarified that waste composition and facility information from the department is available for use in developing LSWMPs. The scope and detail related to non-MSW streams has been reduced as well as the proposed reporting requirements. Review time frames for the department have also been added.

Comment: DEC should not use the LSWMP approval process as leverage against planning units; this will only harm the citizens of the planning unit.

Response: Proper planning for solid waste should be an asset to the local citizens of the planning unit, both environmentally and fiscally. In addition, the revised regulations have incorporated timeframes for approval of LSWMPs to ensure that the review and approval process does not become an impediment to waste disposal at municipally owned facilities.

Comment: The regulations needs to be clearer that the owner of a permitted facility does not need an approved LSWMP to submit a grant application or transfer station permit, only to be covered by one. For example, a transfer stations in a County a may be owned by individual municipalities while the LSWMP has been written and adopted by the County. A municipality or other entity that is seeking funding to assist in conduct a HHW collection event, e-waste collection event, or close a landfill should not be handicapped or held hostage to delays that may be associated with a planning unit's failure to prepare a LSWMP or, frankly, DEC's inability to perform a timely review and approval of a LSWMP. This simply prevents the implementation of environmentally beneficial projects.

Response: The regulations have been revised to clarify the requirements for coverage under a LSWMP and the timeliness of the review of a draft LSWMP. The circumstances related to HHW collection or landfill closure were not included in the draft regulations or the revisions.

Comment: The proposed Part 366 does not simplify or streamline the preparation of LSWMPS for municipalities, as stated in the brief discussion of the new regulations as set forth in the Regulatory Impact Statement. To the contrary, the new regulation compounds the flaws in current regulation, substantially increases costs and time of preparation, and encourages unrealistic assessments and fanciful projections for local programs. The additional burden on local planning units to revise LSWMP every 2 years is burdensome and will divert scarce local resources from implementing projects that actually reduce waste and increase diversion, reuse, and recycling; thus this requirement should be removed. Further DEC does not have nor is it likely to be allocated the resources necessary to adequately keep up with the existing flow of LSWMP's no less the contemplated updates. In general, the proposed Part 366 should be withdrawn and re-considered in their entirety.

Response: In response to comments received, the regulations have been clarified and further revised to streamline LSWMP development, review, approval and update processes. For example, it has been clarified that waste composition and facility information from the department is available for use in developing LSWMPs. The scope and detail related to non-MSW streams has been reduced as well as the proposed reporting requirements. Review time frames for the department have also been added. The requirement for an annual data report has been eliminated, the requirements for the biennial updates has been adjusted to better capture the limited scope of the updates, and the language related to the optional two-year planning period extension has also been clarified.

Comment: LSWMP's should be required to assess the applicability of the State's Beyond Waste Plan as it exists or may be updated and replaced. Further, the State's Plan should be revised to assess its success and failures, and that update used to tailor grant programs to more effectively achieve the goals of waste reduction, diversion, recycling, and reuse

Response: The regulations do require a consideration of the goals and objectives of the state solid waste management plan (currently *Beyond Waste*). Changes to the State Solid Waste Management Plan are beyond the scope to this rulemaking.

Comment: Planning is not the same process as engineering, construction, and operation – and therefore it makes no sense to try to dictate a particular planning outcome -- that doesn't and cannot reflect the unique local circumstances including not only physical conditions but also local public policies and perhaps most importantly local fiscal priorities -- within regulations that were created to protect human health and the environment. Trying to impose one dictated process upon planning units across the state – by mandating an ever increasing reduction in waste requiring disposal -- would completely disregard the unique conditions on the ground in each municipality and ignore the impacts of general economic conditions. Further, the whole process ignores the issues beyond the control of local planning units; individually the planning units are small and cannot impact general industry standards and practices and overall societal priorities. These need to be set on a larger scale at the state and national level.

Response: As identified in the ECL, solid waste management planning in New York State is envisioned as a state-local partnership. The State, through its State solid waste management plan, and the municipalities and planning units, through their local solid waste management plans, together accomplish the needed solid waste management planning in the State. The regulations allow for the different characteristics of the planning units across the State and provide the framework to create unique LSWMPs to reflect those differences.

Comment: Local Solid Waste Management Planning (LSWMP), with the frequent required updates and reporting, is another unfunded mandate. Many municipalities and waste planning units are exporters. Those planning unit's LSWMPs and updates, not surprisingly, is to continue exporting solid waste. With the consolidation that has occurred in the industry, there are few options. The siting and permitting of a new landfill in most areas is not feasible or likely. The cost and difficulties in obtaining permits, especially in the downstate areas, further limits innovation and investment for solid waste management and recycling facilities. Planning is best performed at the state level removing this unfunded mandate from local government.

Response: The blueprint for the current state-local partnership of solid waste management was incorporated into the ECL in 1988 as part of the Solid Waste Management Act and has been carried out in the State since that time. The roles and responsibilities for both the State and municipalities have not fundamentally changed nor have the requirements of the regulations with respect to planning. However, based on comments received, the regulations have been further revised and clarified to help streamline the LSWMP development, review, approval and update processes.

Comment: Common databases should be developed and used whenever possible. One common comprehensive waste characterization data base should be available to all planning units. Local plans should be able to rely on this data unless there is evidence that local circumstances require adjustments.

Response: Planning units can use any available data, including information available from the department, to develop their LSWMPs. In an effort to assist planning units with this planning component, the department currently has waste composition and characterization data available for each planning unit as well as statewide information available on the Department website.

Comment: NYSDEC should organize the data submitted in annual reports by facilities, systems and transporters in a useable format, available to all.

Response: This information is currently available and the department will continue to make improvements to the formatting, access and usability of the data.

Comment: Accurate figures in reporting should be encouraged, and planning units should not be penalized for reporting unforeseen or disfavored results, including increased waste generation or stagnant or falling recycling rates. Supporting information

in local plans should be limited to relevant data only. Extensive research and justification to decline impractical options should not be required. Plans should report what is useful, and lends itself to comparison by and for other planning units. Targeting unrealistic goals should be discouraged.

Response: Reporting accurate data has always been expected and encouraged from all planning units. Planning units have not been penalized for reporting accurate information, regardless of the outcome. As indicated in previous responses, the regulations have been further revised and clarified to help streamline the LSWMP development, review, approval and update processes as well as the data reporting required.

Comment: Global markets for recycled materials are now a fact of life, and their role, both positive and negative, should be acknowledged. Analytical tools and services to assess trends in these markets should be developed in partnership with the state, the private sector, and the federal government. A reliable reporting and analytical service for markets should be developed and made available to local solid waste planning units and their contractors by subscription.

Response: This is outside the scope of this rulemaking. However, Empire State Development is a partner with the department with respect to recycling market research and information.

Comment: More study and attention by the State should be devoted to successful facility development in New York and other states. Local planning units can host, or invest in, or direct waste to new facility development if sufficient information allows adaptation to the locality, and financial projections are sound. A common mechanism to obtain and provide this information to all units should be developed.

Response: This is outside the scope of this rulemaking. However, Empire State Development is a partner with the department with respect to recycling market and business development.

Comment: DEC should define the elements that constitute an acceptable plan, and the acts or omissions by a planning unit that will render a plan ineffective. Penalties should be graduated and proportionate. “Exile” of all waste in a planning unit from access to NYS facilities should not be considered. The “no plan –no permit” consequence should be limited to new construction permits per statute, not renewals or modifications.

Response: The regulations have been revised to better define the elements of a plan and the revocation process and procedures to address this concern.

Comment: There should be greater use of targeted State aid to develop facilities and collection systems that work. Such efforts should generate detailed discussion of how and why a given program element succeeds.

Response: This is outside the scope of this Part. However, the department will continue to provide state assistance to municipalities for waste reduction and recycling capital and education as well as household hazardous waste management through grant programs outlined in Part 369. Additionally, a new subpart 369-5 addresses targeted priority area municipal waste reduction and recycling projects.

Comment: The proposed Part 366 regulations regarding Local Solid Waste Management Planning pose significant concerns to local planning units and solid waste managers. We feel these draft changes represent a departure from what was intended by the State Legislature when it set forth requirements for local solid waste management plans in the Solid Waste Management Act of 1988. We appreciate the willingness of the Department to sit down and discuss our suggested changes. Please refer to the specific detailed suggested revisions provided below for each of the proposed Sections of the regulations.

Response: The regulations have not departed from and continue to reflect the local solid waste management planning requirements and process set forth in the ECL and were previously incorporated into regulation. However, based on meetings the department has had with various stakeholders and in response to comments received, the regulations have been further revised to help streamline the LSWMP development, review, approval and update processes.

366-1.1
Comment: Please see the following specific suggested revisions to Section 366-1.1 Purpose and applicability.

Purpose and Applicability: Note: Add new subsection (a) title 'State Local Partnership" authorized by ECL 27-0106. Renumber and revise balance of section to conform.

This Part describes the roles and responsibilities in solid waste management of planning units and the department in the state-local partnership called for in ECL §27-0106(2), and specifies the standards for the content, review and approval of a local solid waste management plan (LSWMP). LSWMPs are required for municipalities seeking new permits under Parts 362 and 363.

(a) State Local Partnership.

The core responsibilities of planning units and the department in the management of solid waste generated and disposed of in the state lie in, respectively, planning and operation of facilities by local government, and the provision of guidance and assistance by the department. The planning and operational responsibilities of local government include the preparation of local solid waste management plans (LSWMPs), and where appropriate, operation of facilities, contracting with the private sector for services, local regulation of solid waste services and facilities, financing, and construction of facilities, and other activities authorized by law. The responsibilities of the department include, i) preparation of a state solid waste management plan, and ii) guidance and assistance to

local government and planning units in the preparation and implementation of LSWMPs, and activities undertaken in furtherance of such LSWMPs.

The purpose of this section is to more particularly set forth the roles of planning units and the department, in recognition of the continuing evolution of technologies, markets, economic conditions and other factors with influence on the management of solid waste throughout the state, and to eliminate unnecessary costs and duplication of effort on the part of planning units and the State. To this end, specific tasks for planning units and the department are set forth in the following subsections, subject to the transition provisions set forth in Part 360.4.

i. It shall be the responsibility of the department to identify and promulgate comprehensive waste composition figures for urban, suburban and rural areas for use and reference by planning units. It shall be the responsibility of planning units to account for variations in such figures at the local level, whenever attributable to local industries, economic conditions, land uses, population or other causative factors.
ii. It shall be the responsibility of the department to provide for electronic filing and collation of all collection, disposal, processing, marketing and transportation data required from all sources pursuant to solid waste and transport regulations, and shall make such data available to the public on its website. It shall be the responsibility of planning units to review and identify any of such data that is relevant to the preparation and implementation of its LSWMP.
iii. It shall be the responsibility of the department to prepare and update as needed, a generic compendium of technology which may be relied upon by planning units in the preparation of LSWMPs. It shall be the responsibility of planning units to prepare a supplemental technology assessment for any proposed major change in technology to be implemented in accordance with its LSWMP.
iv. It shall be the responsibility of the department to undertake a periodic review of recyclables markets across the state, not less frequently that twice per year, and shall publish such review to all planning units.

(b) Any planning unit may submit a draft LSWMP for review and approval.

(c) An LSWMP must:

(1) satisfy the scope set forth in section 27-0107 of the ECL for LSWMPs;
(2) take into account the objectives of the state solid waste management policy set forth in section 7-0106 of the ECL;
(3) take into account the goals and objectives of the current state solid waste management plan; and
(4) lead to a sound, long-range, sustainable solid waste management system for a planning unit that embodies, as may be appropriate to the circumstances,

sound principles of solid waste management, natural resources conservation, energy production, and employment creating opportunities.

(d) This Part also includes requirements for annual planning unit reports and LSWMP biennial updates, which will establish an on-going process for evaluating the performance of the LSWMP's objectives and establish a structure for the modification of the implementation schedule and objectives, as necessary.

(e) An LSWMP must plan for the sound management of all non-hazardous waste generated within the planning unit for a 10-year planning period.

(f) The LSWMP will be considered to be in effect when it has been approved by the department in accordance with this Part.

(g) Any changes to planning unit membership must be approved by the department in a new LSWMP or in a biennial update as appropriate that addresses membership changes in accordance with this Part in order to render the LSWMP effective for all member municipalities.

(h) Submittals under this Part are not subject to Part 621 of this Title.

Response: The regulations have been revised to incorporate the concept of state-local partnership and several of the suggested wording changes.

366-1.1(a)
Comment: Delays in obtaining LSWMP approval from the Department will result in municipalities experiencing delays in receiving grant money as well as delays in getting solid waste facility permit applications approved.

Response: The regulations have been revised to incorporate department review time frames for LSWMPs.

Comment: The requirement for a local planning unit to have an approved LSWMP in order for their permit applications to be deemed complete creates an unfair advantage for privately owned landfills as they do not have to adopt or pay for the development and updating of a LSWMP. Thus, this requirement for local planning units should be removed from the regulations or another method for leveling the playing field between municipal and privately owned facilities should be found and implemented.

Response: This requirement remains in the ECL and accordingly the regulations as well.

Comment: Language requiring an approved LSWMP for all permit applications except construction permits should be removed until appropriate statutory authority is in place, and then added only for the planning unit.

Response: The department formerly issued separate construction and operation permits for solid waste management facilities. That structure and practice has long been revised and only a single permit that covers construction and operation is issued. Accordingly, the language is reflective of the actual long-standing circumstances and practice.

366-1.1(c)(3)
Comment: The new mandate that local plans reflect the State's aspirational goals expressed in the current state plan "Beyond Waste" should be removed and replaced with a requirement to consider and evaluate the goals in the state plan as they may be appropriate to apply to the LSWMP.

Response: The regulations have been revised to address this concern.

366-1.1(c)(3)&(4)
Comment: 366-1.1(c)(3) and (4) SWMPs must "reflect" the goals and objectives of the State SWMP, and lead to a sound, long-range, sustainable system that results in progressively increasing recovery of recyclables and reduces disposal (reiterated in 366-2.5, and 366-2.7(2) and (3)). It has been shown that the most environmentally sound means of managing portions of the waste stream does not necessarily lead to increasing recyclable recovery or reduction in (thermal) disposal (for instance, environmental impacts have been shown to be less for WTE of food wastes for a LI municipality, compared to AD or composting). A more nuanced phrasing would be better.

Response: The regulations have been revised to address this concern.

366-1.1(f)
Comment: Multiple comments were received indicating that given the historically delayed response for LSWMP approvals, there are concerns with the requirement that all annual planning unit reports and biennial updates be approved by the Department for the LSWMP to be considered to be in effect. It is suggested there be a review time limit set for the Department to complete these approvals be similar to the Uniform Procedures Act, and if those time limits are not met the reports or updates should be considered approved by a certain date.

Response: The regulations have been revised to incorporate department review time frames for LSWMPs.

366-2.1
Comment: Please see the following specific suggested revisions to Section 366-2.1 Description of planning unit.

Section 366-2.1 Description of planning unit

The LSWMP must include a description of the planning unit. If the planning unit is a county, a town in Nassau or Suffolk counties or a public authority organized to serve a particular area and serves all constituent municipalities within its borders, Form A Planning Unit Description may be used for this purpose. If the planning unit does not serve all municipalities within its borders, a supplement to Form A shall be provided to describe the municipalities not served by the planning unit.

Form A shall include:

(a) the geographical size and location;

(b) the population, including estimates for rural, urban and suburban populations;

(c) a list of all planning unit members including all municipalities, agencies, and authorities along with a description of each member's role and responsibilities;

(d) a brief description of the historical solid waste management practices within the planning unit, including quantitative and qualitative data collected during the previous planning period for the solid waste generated in the planning unit during the previous planning period, and how they evolved into the current practices.

Form A shall be supplemented, where applicable, with-

(e) a description of any significant or special characteristics or circumstances pertaining to the planning unit which substantially alter the volume or composition of waste generated as would be expected in the department's applicable generic waste composition data. Examples of such characteristics include major population centers, large or significant industries, institutions, commercial activity, high-volume organic waste generators, agricultural activities, significant seasonal variations of population and land use, and state or federal parks, along with their effect on waste generation, materials recovery and program implementation; and

(f) a summary of changes to the planning unit since approval of the previous LSWMP, and their quantitative and qualitative impacts on the planning unit, neighboring planning units or other neighboring jurisdictions, including but not limited to, planning unit membership, solid waste management practices, waste generation and/or composition , materials recovery and program implementation.

Response: The regulations have been revised to incorporate several of the suggested wording changes.

366-2.2
Comment: Utilizing standard data, while requiring waste composition characteristics but not requiring a waste audit seems counter-intuitive. Since waste generation may be area specific perhaps a waste audit should be required or not include waste characterization.

Response: To avoid duplication of effort and mitigate costs for municipalities, the regulations allow for the use of combination of data available from the department as well as other information available to the planning unit.

Comment: The proposed regulations includes a requirement for a quantification and characterization of all solid waste generated in a planning unit in a SWMP, with 366-2.2(a) including particular categories of MSW, C&D, industrial waste, biosolids, and scrap metal. The regulation says that if actual data is not available or is incomplete, estimates may be developed. 366-2.2(b) wants projections of changes based on population changes. There are a number of issues here. (1) expansion of the scope of SWMPs. The 1988 era part 360 required projections of MSW only; in the late-2000 iterations, the department pressed for C&D estimates. The proposed regulations add biosolids, industrial waste, and scrap metals. Commercial and institutional wastes, C&D, industrial wastes, and scrap metals have never been primarily the responsibility of municipal waste systems. Biosolids often are, but are primarily the responsibility of the STP generating them. (2) in the downstate region, most waste facilities service multiple jurisdictions. Teasing out the division of wastes among the planning units will be near to impossible. (3) waste generation no longer varies with population, either on the national level or especially at the local level, and the relative composition of waste stream components are not constant. Thus, this basis for projection is not sound. (4) it is difficult to understand the intention of this regulation. Solid waste systems are now mature. Large changes in them are not foreseen, and if they are to be made, will not depend on knowing the composition of the local industrial waste stream, or the amount of scrap metal managed through local processors. It seems likely that NYSDEC would like to have a better State-wide accounting of solid waste streams, and is using municipalities to do the data collection. It serves no local planning purpose.

Response: In response to the four issues noted: 1) this is not an expansion of LSWMPs as these have been the requirements since the inception of the LSWM Planning program and regulations; 2) facilities, through their, contracts with transporters and other means, can provide estimates; 3) waste generation varies by population density and location across the State; and 4) the regulations have been revised to address this concern for detailed data related to C&D debris, industrial waste, biosolids and scrap metal.

Comment: Please see the following specific suggested revisions to Section 366-2.2 Waste generation and materials recovery data.

Section 366-2.2 Waste generation and materials recovery data

The LSWMP must include a presentation of the quantity and compositional characteristics of all solid waste generated and expected to be generated within the planning unit and material recovery data for the planning unit, [from information compiled by the department and reported on its website]. If actual data is not available or is incomplete, estimates may be developed based on available information

acceptable to the department. The data presented shall be set forth in Form B Waste and Recyclables Generation Data and must include:

(a) The data compiled and published by the department, including but not limited to: all waste from all waste categories, including municipal solid waste (i.e., residential, commercial, and institutional), subdivided into individual components by type, including, but not limited to: various paper grades (e.g., newspaper , corrugated cardboard, paperboard , and office paper); metal; glass; plastics; organics, including yard trimmings, food scraps (which includes organics from high- volume generators); textiles; construction and demolition (C&D) debris; industrial waste; biosolids and scrap metal.

(b) Projections of waste generation quantities for each year of the planning period based on estimated population changes.

(c) Identification of the information, [other than information reported by the department], used to develop the analysis, along with an explanation of projections with all assumptions.

(d) A summary assessment of any data gaps and informational needs, if any, must be included identifying their nature and scope.

Response: The regulations have been revised to incorporate several of the concepts and suggested wording changes.

366-2.2(a)
Comment: Subdivided categories may differ in areas based on selling ability. Should not be a requirement if would not produce any value in inbound vs. outbound sales.

Response: This information has planning value for evaluating the types and amounts of material remaining in the waste stream that may potentially be targeted for reduction or recovery enhancements.

366-2.3
Comment: The LSWMP must include a description and assessment of all solid waste management facilities and programs relating to management of waste generated within the planning unit as well as waste generated outside the planning unit but managed at facilities within the planning unit. Not all Planning Units have this information readily available to them especially in instances where the private sector manages their own waste and recyclables stream and these materials are not processed through a facility within the Planning Unit or even within the state. In addition, private sector businesses often refuse to provide information to the Planning Unit.

Response: The regulations have been revised to address this concern.

Comment: 366-2.3 wants to make SWMPs more comprehensive, identifying and tracking all wastes flowing from and coming to the planning unit. This is not feasible in the downstate area of the State.

Response: This type of basic waste management flow information has always been requested and expected of planning units and is considered a fundamental component of responsible solid waste management planning.

Comment: Many planning units diligently work to gather this information, but it is not readily available especially in instances where the private sector manages their own waste and recyclables stream and these materials are not processed through a planning unit-owned facility. The Department should consider including language, such as, "based on available data" or "if data is readily available to the Planning Unit" be added to Parts 366-2.2, 366-2.3, and 366-2.4.

Response: The regulations have been revised to address this concern.

Comment: The Department should consider making the annual facility reports more readily accessible to the Planning Units' staff for those facilities that are located within the Planning Unit. If the Department is requesting data regarding management of waste generated or diverted, it would seem to be a duplication of efforts for the Planning Unit to also request this information. A standard reporting system, possibly web-based, should be developed by the Department to share with the Planning Units.

Response: The regulations have been revised to address the duplication of effort concern. The department will continue to make improvements to the formatting, access and usability of the data.

Comment: Please see the following specific suggested revisions to Section 366-2.3 Existing solid waste management system.

Section 366-2.3 Existing solid waste management system

The LSWMP must include a description and assessment of all solid waste management facilities and programs relating to management of waste generated within the planning unit as well as waste generated outside the planning unit but managed at facilities within the planning unit. The descriptive information for existing facilities and programs shall be set forth on Form C Existing System and drawn from information compiled by the department and reported on its website, and supplemented as necessary from information available to the planning unit and acceptable to the department. The description and assessment must include:

(a) an identification and description of every facility (including any facilities outside the planning unit to which solid waste from the planning unit is delivered), including their location , size and capacity and the type and amount of solid waste originating within the planning unit and managed at each facility;

(b) for facilities located in the planning unit that receive solid waste from outside the planning unit, an identification of the type and amount of waste received from outside the planning unit and the planning unit(s) from which it originated;

(c) an identification and description of any agricultural operations managing any organic components of municipal solid waste (MSW) or food processing waste;

(d) an identification of the types and amount of waste managed from each generating sector, including the residential, commercial, institutional, and industrial sectors, as well as C&D debris, biosolids and scrap metal;

(e) a detailed description and summary of the following: the current waste reduction, reuse and recycling programs conducted by the planning unit [or constituent municipalities] by material type and generating sector including recyclables collection and processing programs; organics recovery programs; public outreach and education programs; efforts to enforce local disposal and recycling laws; volume-based pricing incentives or other financial incentives; recycling market agreements; local hauler licensing; recycling data collection efforts; and

(f) a summary assessment of the current solid waste management system including: facilities and programs administered by the public sector, identification of facilities and programs operated by the private sector and any data gaps and information needs.

Response: The regulations have been revised to incorporate several of the suggested wording changes.

366-2.3(a)
Comment: 366-2.3(a) requires the planning unit to identify all facilities and programs relating to the management of wastes generated within the planning unit. Wastes have been expanded to include commercial and institutional MSW, C&D, biosolids, industrial wastes, and scrap metals. The planning units in downstate will need to track the transfer station and disposal sites used by all transfer stations, recyclables brokers, scrap metal dealers, yard services, etc. This is not feasible.

Response: The wastes have not been expanded from previous local planning requirements. However, the regulations have been revised to help address the data management concerns.

366-2.3(b)
Comment: 366-2.3(b) requires SWMPs to track wastes brought to local facilities from outside the planning unit (types, amounts, sources). Again, not feasible, and probably meaningless, given competition and changing markets that will lead to non-constant inputs to the facilities.

Response: Waste received from outside the planning unit and managed within the planning unit is important in understanding the flow of waste within the planning unit and the impacts on and by neighboring jurisdictions and planning unit waste management decisions.

366-2.3(c)
Comment: 366-2.3(c) requires identification of all agricultural operations managing organic wastes. Difficult to imagine how this will be accomplished.

Response: The regulations have been revised to reflect that all known operations should be identified.

366-2.3(d)
Comment: 366-2.3(d) specifies that the planning unit must specify amounts of types of residential, commercial, and institutional wastes, C&D, industrial wastes, biosolids, and scrap metals. The planning purpose is ….?

Response: This is a requirement of the ECL that requires LSWMPs to provide for or take into account all solid waste generated in the planning unit.

366-2.3(e)&(f)
Comment: 366-2.3(e) and (f) wants a specification of all programmatic and physical elements of the waste systems in the planning unit. This presumably includes all private facilities. This is not feasible.

Response: The regulations have been adjusted to address this concern.

366-2.4
Comment: Please see the following specific suggested revisions to Section 366-2.4 Existing administrative structure.

Section 366-2.4 Existing administrative structure

The LSWMP must include a description and assessment of the existing administrative and financial structure of the planning unit including:

(a) an organizational chart(s) depicting the entities and staff responsible for implementing each element of the solid waste management system, including but not limited to, operations, administration, finance, outreach and education, enforcement, data collection and evaluation, and LSWMP updates and reports;

(b) the financial structure and costs for all solid waste management facilities and programs operated or administered by the planning unit and/or its member municipalities. The financial information for existing facilities and programs shall be set forth on Form D Financial Information, and supplemented as necessary to

identify revenues and funding sources by the planning unit. Information on form D and supplements shall include:

(1) costs, including capital investments, insurance, operation, maintenance, closure and post-closure costs if applicable, administration , and financing;

(2) revenues, including fees, fines, and recyclables or recovered energy revenues[, general fund contributions, special district charges]; and

(3) funding mechanisms that are used to finance any facility operations, maintenance, and programs and events administered by the planning unit or its members;

(c) an identification of all laws and policies related to solid waste management within the planning unit~~,~~. Information regarding local laws and policies shall be set forth on Form E Local Laws, and supplemented as necessary by the planning unit. Information on Form E and supplements shall include a checklist of whether the planning unit and/or constituent municipalities has adopted and is enforcing:

(1) the source separation laws adopted pursuant to section 120-aa of the General Municipal Law (GML);

(2) waste importation and/or disposal prohibitions, flow control or local hauler licensing laws;

(3) local product stewardship resolutions or green procurement and sustainability orders;

(4) contracting mechanisms and laws (e.g., those applicable to purchasing or districting);

(5) zoning laws or building permits; and,

(6) local environmental justice requirements.

Supplements to Form E shall describe any other local laws adopted or used to implement the solid waste programs of the planning unit, provide an assessment of their effectiveness, and describe any proposed amendments, or new legislation to be considered.

(d) a summary assessment of the current administrative and financial structure of the planning unit that identifies both strengths and deficiencies in the current structure.

Response: The regulations have been revised to incorporate the substantive content of several of the suggested wording changes.

366-2.4(a)
Comment: 366-2.4(a) is sloppily written and could be interpreted as requiring the planning unit to provide organization charts and other administrative information for private entities in the planning unit or managing planning unit wastes.

Response: This section and subdivision have been revised to address this concern. This regulation incorporates the mandate contained in subparagraph 27-0107(1)(b)(iv) of the Environmental Conservation Law which requires planning units to identify parties responsible for implementation of a LSWMP.

366-2.4(b)
Comment: Financial structure and costs for all solid waste management facilities and programs operated or administered by the planning unit and/or its member municipalities - Information is not available or provided to the Planning Unit from member municipalities.

Response: Planning unit member municipalities have a responsibility to participate with the planning unit in fulfilling the local planning requirements on their behalf.

Comment: Much of this information may not be available to a planning unit, especially for the private sector.

Response: This information is expected from the planning units and their member municipalities, not the private sector. The regulations have been revised to clarify this expectation.

366-2.5
Comment: Alternatives evaluation and selection- Overall this proposed section is written as if this is the first time the Planning Unit is assessing their solid waste and recycling program. For many Planning Units, local solid waste management planning is an ongoing practice and decisions pertaining to solid waste and waste diversion programs were selected during the first generation plans. It is suggested that the term "alternative evaluation and selection" be replaced with "program evaluation and selection".

Response: While the suggested wording has not been incorporated into the revised regulations, the regulations have been revised to address the introduction or enhancements of program elements to the program.

Comment: We are concerned with the requirement of addressing the 15 items in part 366-2.5(a). The “at a minimum” language is excessive and should be modified to “for example”. It is possible that some of these programs or analyses are not applicable to every Planning Unit.

Response: The regulations have been revised to address this concern related to the items that may not be applicable to all planning units.

Comment: The availability of economic markets for recyclables and other diverted materials are not mentioned in these proposed regulations, unlike the current requirements such as 360-1.9(f)(5)(iii). Economic sustainability is also important in any recycling, reuse, diversion, composting, or related project, and this should be included as an important criteria in assessing various alternatives to landfilling of waste.

Response: Markets for recyclables are identified as an evaluation component in subdivision 366-2.5(a), are inherent considerations necessary as part of the remaining alternative evaluations steps and are a basic requirement of local source separation laws or ordinances adopted pursuant to section 120-aa of the GML.

Comment: Please see the following specific suggested revisions to Section 366-2.5 Alternatives evaluation and selection.

Section 366-2.5 Alternatives evaluation and selection

The LSWMP must acknowledge review of the department's generic technology compendium and indicate on Form F Alternative Technology Checklist the specific technologies used or proposed for use within the planning unit. A supplemental description of the technology and its uses within the planning unit shall accompany Form F. The supplement shall discuss the capability of the technology to decrease the amount of waste managed through disposal and thermal treatment by increasing waste reduction, reuse and the recovery of recyclables and energy generation to the maximum extent practicable over the term of the planning period.

(a) The department's generic technology compendium and Form F shall assess, at a minimum:

(1) waste reduction programs;

(2) development and implementation of reuse programs;

(3) recyclables recovery programs for paper, metal, glass, plastic, and textiles;

(4) organics recovery programs for food scraps, yard trimmings, and biosolids;

(5) programs to develop or improve local markets for recyclables;

(6) enforcement programs ;

(7) incentive-based pricing;

(8) education and outreach;

(9) data collection and evaluation efforts;

(10) local hauler licensing programs, including assessment of laws preventing commingling of recyclables with waste;

(11) low control and districting potential;

(12) construction and demolition debris reduction , including deconstruction, reuse and recovery programs;

(13) private sector management and coordination opportunities;

(14) management of waste through thermal treatment technologies; and waste disposal options set forth in the department's generic technology compendium.

(b) Alternative Evaluation. The planning unit shall evaluate alternatives available for program elements which the planning unit has determined to be inadequate. For each alternative evaluated, the following must be addressed:

(1) Administrative/Technical Impacts. The planning unit shall identify those alternatives are economically and administratively feasible for implementation within the first three years of the planning period. If feasible, the evaluation must include the following discussion:

i. the estimated quantitative and qualitative impact of each alternative on the various components of the waste stream;

ii. the appropriate types and sizing of facilities or programs necessary , based on the projected quantities and composition of the solid waste to be generated by the planning unit;

iii. a summary of the cost data used for evaluation, including consideration of any available life-cycle analysis data for the various alternatives;

(2) Jurisdictional Impacts. An analysis of potential quantitative and qualitative impacts to existing waste reduction and recovery efforts, and to neighboring planning units and other neighboring jurisdictions, including:

i. an assessment of interest in participation by other neighboring planning units or other neighboring jurisdictions;

ii. alternatives that would be available if any neighboring planning units or other neighboring jurisdictions participated; and

iii. input received from any neighboring planning units or other neighboring jurisdictions; and

(3) Legal Impacts. A list of laws, resolutions, rules, regulations, or ordinances that are applicable or necessary to implement each alternative evaluated.

Response: The regulations have been revised to incorporate some of the suggested wording changes.

Comment: 366-2.5(a) should have an additional item added to the list of 15 detailing any impacts, i.e., reductions or potential future inconsistency determinations, to existing waste management facilities utilized by the planning unit, whether based inside or outside that unit.

Response: Aspects of waste reduction, reuse, recycling and waste processing and disposal have elements identified for evaluation in this subdivision.

366-2.5(a)(4)
Comment: Regarding the collection and processing of organics, we have concerns that current market forces and local infrastructure are not yet strong enough to ensure that source separated organics are collected and kept source separated, then composted or processed for beneficial reuse. We would like DEC to consider protections for all generators that electively choose to pay for composting service in order to ensure they are getting what they pay for: the composting or beneficial reuse of organics. One solution would be for a LSWMP to specifically spell out how each planning unit's designated enforcement agency will oversee the collection, transportation, and processing of source separated organics and any material that the generator aims to recycle, regardless of whether they fall under local regulations.

Response: Evaluations for enforcement programs and assessment of applicable local laws as well as an administrative structure evaluation are identified as components for evaluation in this section.

366-2.5(a)(6)
Comment: The proposed Part 366 Local Solid Waste Management Planning (LSWMP) provides very thorough planning requirements for localities and we commends DEC on the focus it places on enforcement plans for these localities. However, the proposed

regulation does not require the locality to specify by whom or how enforcement will be done. Currently there are multiple agencies responsible for overseeing different aspects of waste management in a particular locality. For example in New York City, the NYC Department of Sanitation enforces recycling laws on the generators, but the Business Integrity Commission is responsible for enforcing on the haulers. We recommend a requirement be included for LSWMPs to define responsibility for overseeing and enforcing each process of waste management, including source separation, collection, transfer, processing and disposal. In the current system, gaps in oversight encourage lower diversion rates because of the undefined extent of responsibilities.

Response: Evaluations for enforcement programs and assessment of applicable local laws as well as an administrative structure evaluation are identified as components for evaluation in this section.

366-2.5(b)
Comment: The availability of economically viable markets should also be a consideration when assessing material recovery and waste stream projections as it is in the current requirements. The availability and familiarity of material recovery and waste stream projections for industrial waste may be difficult to quantify due to the private nature of most industrial entities. This data is often not reported to the Planning Units. Language related to availability of data to the Planning Unit should be included.

Response: Markets for recyclables are identified as an evaluation component in subdivision 366-2.5(a), are inherent considerations necessary as part of the remaining alternative evaluations steps and are a basic requirement of local source separation laws or ordinances adopted pursuant to section 120-aa of the GML. The regulations have been revised to better reflect the availability of data.

366-2.5(b)(4)
Comment: 366-2.5(b)(4) requires considering potential alternatives if, hypothetically, neighboring planning units participated. For Long Island, would that require evaluating all the iterations available for the 15 planning units and New York City (with each borough being considered separately), including multiple cooperative efforts?

Response: The potential participation by and potential impact on neighboring jurisdictions and is identified in the ECL and has long been a tenant of local solid waste management planning. For certain planning units on Long Island, the City of New York would be a neighboring planning unit to consider, however, each borough in the City are not considered separate planning units.

Comment: 366-2.5(b)(4) should have an additional item describing input it received from facilities that currently manage that unit's solid waste or portions thereof.

Response: The paragraph is focused on neighboring jurisdictions. Input received from facilities that currently manage that unit's solid waste would be included in the waste generation and materials recovery data section 366-2.2, the existing solid waste

management system section 366-2.3, the existing administrative structure section 366-2.4 or the public comments received on the draft LSWMP as applicable.

366-2.5(c)(3)
Comment: 366-2.5(c)(3) requires that after the various alternatives have been evaluated, and preferred alternatives and programs to be pursued will [are] selected by the planning unit. A summary must be provided for each selected alternative or program that includes: an identification of expected environmental, economic and social impacts to the planning unit, to neighboring planning units, and other neighboring jurisdictions. This proposed standard does not go far enough to address environmental justice.

Response: The regulations have been revised to address this concern in paragraph 366- 2.5(b)(2).

366-2.6
Comment: LSWMPs should contain broad objectives and strategies, and as data and strategies develop, LSWMPs should allow the development of more detailed implementation projects. Each of the implementation projects require a significant amount of research and planning, consensus building with elected officials and often with industry partners, and finally education of the public in order to implement. Any development of a detailed implementation schedule in a LSWMP would be a crude guess at best and unrealistic. The regulations should be revised to allow more flexibility and eliminate the requirement for a very detailed implementation schedule with individual tasks delineated.

Response: The concern expressed in this comment is one of the main purposes of the biennial update outlined in subpart 366-5.

Comment: Please see the following specific suggested revisions to Section 366-2.6 Implementation plan and schedule.

Section 366-2.6 Implementation plan and schedule

The LSWMP must include an implementation schedule, with appropriate detail, for new programs and facilities proposed by the planning unit, and major milestones for existing elements of the plan, such as necessary permit renewals, expiration or termination of major contracts, major new procurements, and other expected events that will require action on the part of the planning unit over the planning period.

Response: The regulations have been revised to incorporate many of the suggested wording changes.

366-2.7
Comment: The many variables in capturing materials recovered and waste generated renders projections for recovery an impractical planning tool. Perhaps the Department should reconsider this section and utilize a strictly formulaic approach (with respect to

projections) to ensure all planning units are reviewed with the same basic premise by the Department.

Response: Each planning unit is different and accordingly, each LSWMP, implementation schedule and associate projections will be different. Projection of reduction of processing through thermal treatment and disposal is a reasonable generic metric to be used to help measure achievement and success of a planning units efforts.

Comment: Please see the following specific suggested revisions to Section 366-2.7 Material recovery and waste stream projections.

Section 366-2.7 Material recovery and waste stream projections

The LSWMP must include composition and quantity projections for all solid waste generated within the planning unit each year throughout the planning period, based on actual or estimated solid waste generation data. These projections should take into account the implementation of the programs identified in the implementation plan and schedule developed as part of section 366-2.6 of this Part and any population or waste composition changes anticipated during the planning period.

(a) Projections must be provided for each material type for each year of the planning period based on the implementation schedule.

(b) Projections must be accompanied with an explanation of the assumptions and data used for:

(1) projected waste generation based on projected population, including the percentage of each generating sector;

(2) projected percentages of recovery of MSW, industrial waste, C&D debris, and biosolids; and

(3) projected quantities of waste generated in the planning unit that is managed through disposal and thermal treatment.

Response: While the suggested wording has not been incorporated, the regulations have been revised to reflect several changes that address many of the concerns expressed in the comment.

366-2.7(b)
Comment: Proposed 366-2.7(b) fails to include a discussion of potential energy production benefits [per ECL 27-0107(1)(c)] as one of the factors to be addressed in the LSWMPs material recovery projections.

Response: Energy production is intended to be included as an integral component in the requirements and the alternatives evaluation section 366-2.5. However, the

regulations have been revised to also include the energy production note in the ECL in section 366-1.2 as well as paragraph 366-2.5(b)(1).

Comment: The Department must consider an alternative way to calculate material recovery quantity projections. With the introduction of light weighting, product stewardship laws, the changing blue bin, and technology supporting a calculation based on old methodologies does not give the planning unit nor the Department valuable information. Recently, there have been several other methodologies presented to capture variables in the recovery of material. We suggest the Department first recommend a proper calculation method to be used by all planning units to reflect the changes described and then update Part 366 to incorporate the adopted methodology.

Response: The regulations have been revised to only use the reporting metric identified in the state solid waste management plan (*Beyond Waste*) of measuring for a decrease in the amount of waste managed through thermal treatment and disposal.

366-2.7(b)(2)
Comment: The requirement to show progressively increasing percentages of recovery is troublesome. The DEC must recognize that the availability of economic markets, lack of control over private sector activities and changes in the physical nature and composition of recyclables impact diversion rates. As proposed, Part 366 ignores the statutory *requirement" ... consideration of economic and technical feasibility shall guide solid waste programs ..."*

Response: The regulations have been revised to only use the reporting metric identified in the state solid waste management plan (*Beyond Waste*) of measuring for a decrease in the amount of waste managed through thermal treatment and disposal. The revised regulations continue the local planning requirement envisioned in the Act.

Comment: The requirements for providing projections for MSW in various categories should be removed. In a rural county this is so variable depending upon a single large construction or demolition project, the success of a summer tourism season that it doesn't make sense. A better measure is the amount of recyclables and documentation on quantities of other materials diverted from being landfilled and reused in some manner should be used.

Response: The regulations have been revised to only use the reporting metric identified in the state solid waste management plan (*Beyond Waste*) of measuring for a decrease in the amount of waste managed through thermal treatment and disposal. The revised regulations continue the local planning requirement envisioned in the Act.
Comment: The availability and familiarity of material recovery and waste stream projections for industrial waste may be difficult to quantify due to the private nature of most industrial entities and them not providing recovery data to the Planning Units. Language related to availability of data to the Planning Unit should be included.

Response: The regulations have been revised to address this concern and require projections for only MSW.

366-2.7(b)(3)
Comment: Proposed 366-2.7(b)(3) should be modified to distinguish between thermal treatment with and without energy recovery. The proposed regulations should be revised to become consistent with the state solid waste policy, which provides a higher priority to thermal treatment with energy recovery than thermal treatment without energy recovery.

Response: The regulations identify consideration of the state solid waste management policy as a general criteria of a LSWMP. The evaluation of the thermal treatment technologies or alternatives in Section 366-2.5 is the appropriate location for a planning unit to distinguish between thermal treatment with and without energy recovery.

366-3.1
Comment: This section would require a minimum public comment period of 45 days for a draft LSWMP, a public meeting to receive comments, and preparation of a responsiveness summary. The current regulations allow some flexibility for the Planning Unit to decide on the length of the comment period and whether a public meeting is held. The public meeting should continue to be optional and held at the discretion of the Planning Unit. The responsiveness summary requirements should be modified to only require responses to substantive comments specific to the draft LSWMP.

Response: The public comment period is an important component of local solid waste management planning and to ensure consistency of public opportunity for involvement in the process, the basic requirements will remain the same with minor revisions to the regulations in the revised proposal.

Comment: 366-3.1 should be amended to require proper public notice and to inform all affected solid waste management facilities currently managing all or a portion of the planning unit's solid waste of the availability of the draft plan.

Response: The regulations have been revised to address this concern.

Comment: Please see the following specific suggested revisions to Section 366-3.1 Public participation.

Section 366-3.1 Public participation

The planning unit must solicit and address public comments on the LSWMP, as follows:

(a) Prior to submission to the department, a draft LSWMP must be released by the planning unit for a public comment period of no less than 45 days.

(b) A public meeting must be conducted by the planning unit, during the public comment period, to present an overview of the draft LSWMP and to receive comments.

(c) A responsiveness summary must be prepared by the planning unit, that includes:

(1) number of attendees (excluding planning unit representatives);

(2) a list of both substantive written comments and those substantive comments expressed by participating attendees; and

(3) a response to each substantive comment individually or by appropriate grouping.

(d) The responsiveness summary identified in subdivision (c) of this section must be included as part of the draft LSWMP submitted to the department for review and approval.

(e) Once the department has notified the planning unit that it has determined the draft LSWMP adequately addresses all elements identified in this Part, if either the department or the planning unit conclude that the draft plan differs significantly from the first draft, the planning unit must solicit public comments on the final draft LSWMP in accordance with the procedures identified in subdivisions (a) through (c) of this section.

(f) The responsiveness summary prepared for the final draft LSWMP, if required, must be included as part of the final draft LSWMP submitted to the department for review and approval.

Response: The regulations have been revised to incorporate the substantive content of the suggested wording changes.

366-4.1
Comment: This section does not provide any specific time periods for the DEC's review, written notification, or approval of the draft LSWMP. Significant delays by DEC to review LSWMPs promptly will result in additional work for Planning Units that may have to revise draft plans and solicit additional public comment (Part 366-4.1(c)) because of the length of time elapsed waiting for review. It is recommended that review timeframes be included to assist Planning Units with their review and approval schedules.

Response: The regulations have been revised to incorporate time frames for LSWMP review.

Comment: A time frame to render a plan approved, if the Department does not disapprove it within 30 days should be included.

Response: Although the specific time frame suggested has not been incorporated, the regulations have been revised to incorporate department time frames for LSWMP review.

Comment: Language regarding reviewing a plan within 30 days of its submittal should be added.

Response: Although the specific time frame suggested has not been incorporated, the regulations have been revised to incorporate department time frames for LSWMP review.

Comment: DEC should be held to a fixed period to review and approve local plans.

Response: The regulations have been revised to incorporate department time frames for LSWMP review.

Comment: Please see the following specific suggested revisions to Section 366-4.1 LSWMP approval process.

Section 366-4.1 LSWMP approval process

Draft LSWMPs submitted to the department for review and approval by a planning unit must be in a format acceptable to the department.

(a) The department will review the draft LSWMP to determine whether it contains and adequately addresses all required elements identified in this Part and will provide written notification to the planning unit of its determination. The draft LSWMP shall be effective and approved upon submission unless, within thirty (30) days of receipt the department issues to the planning unit a written notice of incompleteness with applicable comments.

(b) If the department determines the draft LSWMP does not adequately address all required elements, the planning unit will be advised of the deficiencies and will be required to resubmit a revised draft LSWMP for review and approval.

(c) If, in the determination of either the department or the planning unit a revised draft plan differs substantively from the first draft, the planning unit must solicit public comment in accordance with Subpart 366-3 of this Part. A responsiveness summary must be submitted to the department as part of the final draft LSWMP, which will include all changes based on public comments, with a letter summarizing these changes.

(d) Once the department has determined that the final draft LSWMP adequately addresses all required elements identified in this Part, the department will provide

written notification to the planning unit that the final draft LSWMP addresses all required elements of an LSWMP.

(e) The planning unit must then submit to the department the following:

(1) a final LSWMP including all corrections, changes and/or revisions resulting from any department review;

(2) a resolution(s) of adoption from all necessary planning unit members, which states that the planning unit or planning unit members, as applicable, will:

i. adopt the LSWMP, effective upon department approval of the LSWMP;

ii. implement and maintain the solid waste management system described in the LSWMP; and

iii. submit annual planning unit reports and biennial updates.

(f) Once the department has determined that the final LSWMP and adopting resolution or resolutions are complete and acceptable, the department will approve the LSWMP, in writing. The LSWMP, as approved, will then be the LSWMP in effect for the planning unit for the 10-year planning period it describes.

(g) Following approval of the final LSWMP, the planning unit may request from the department, or the department may provide on its own initiative, further comments on the LSWMP to identify and address areas or programs which could be improved, including but not limited to information regarding successful experiences of other planning units or facilities with respect to technical operations, finance, administration, procurement, exercise of legal powers or other activities that may be adaptable to the planning unit. The purpose of such comment should be to foster communication and fully exercise the capabilities of the department and the planning unit as a state/local partnership envisioned by ECL §27-0106(2). A LSWMP shall remain in effect during the exchange of any such comments and information.

Response: Although the specific time frame suggested has not been incorporated, the regulations have been revised to incorporate time frames for LSWMP review.

366-4.1(a)
Comment: The criteria to be considered by the Department when determining whether approval of a LSWMP is to be withdrawn lacks specificity. More detail should be provided. Although the Department would be required to issue a written declaration that specifically outlines the reasons why the LSWMP is no longer in effect, this notice should provide planning units with adequate notice and opportunity to correct any

deficiencies that may be identified by the Department prior to the LSWMP approval being withdrawn.

Response: The regulations have been revised to address this concern.

366-4.1(e)(2)
Comment: Requiring resolutions of adoption from all planning unit members will require additional time as municipalities must individually go through the resolution process.

Response: To demonstrate commitment to the LSWMP of all the members, resolutions are necessary.

366-4.2
Comment: 366-4.2 gives reasons why NYSDEC can declare a SWMP to be invalid or revoked; given that an effective SWMP is required to assess NYS disposal sites, this would make that planning unit a state pariah.

Response: A mechanism for withdrawal of approval of a LSWMP is a necessary component of the regulations to address an instance where a LSWMP is no longer being carried out in accordance with the ECL, the regulations or the LSWMP itself.

Comment: The language allowing DEC to declare an LSWMP to be no longer in effect should be removed from the regulations. At a minimum, the proposed regulations should provide planning units with adequate notice and DEC's poor track record in timely review of LSWMP's, it is unrealistic to propose an expansion of the DEC's LSWMP review workload to include annual LSWMP reports and biennial LSWMP updates as called for by the draft regulations, so this requirement should be removed.

Response: The regulations have been revised to incorporate a procedure for a planning unit to object to a declaration by the department that a LSWMP is no longer in effect as well as department time frames for LSWMP review.

Comment: Please see the following specific suggested revisions to Section 366-4.2 LSWMP revocation and succession.

Section 366-4.2 LSWMP Revocation and Succession

(a) The department may declare an LSWMP to be no longer in effect if the planning unit abdicates all or a substantial portion of its responsibilities under ECL §27-0106(2) and ECL §27-0107.

(b) If the department determines that an LSWMP is no longer in effect, the department will issue a written declaration that specifically outlines the reasons why the LSWMP is no longer in effect, and establishes what must be provided to bring the LSWMP back into effect. The planning unit shall have a right to object to such a declaration. Within 15 calendar days of receipt of such written

declaration that a LSWMP is no longer in effect, the planning unit may submit a written objection to the department giving reasons why the LSWMP should not be declared ineffective, or requesting a hearing, or both. Submission of such objection shall stay the declaration that the LSWMP is no longer in effect. Within 30 days of submission of a written objection, the planning unit may submit comment and evidence in support of such objection for determination by the Commissioner. Failure by the planning unit to timely submit a statement will result in the department's action becoming effective on the date specified in the written declaration.

(c) Upon determination by the department that successful implementation of the LSWMP is no longer viable due to significant internal or external changes (e.g., major facility or administrative restructuring) the department may deem the LSWMP no longer in effect, and require that a new LSWMP be developed.

(d) Any change in the membership of a planning unit requires department approval. Any increase or decrease in the size of a planning unit must be approved either through approval of a new LSWMP or biennial update. The new LSWMP or biennial update must address the effect of the change on all impacted planning units. Any planning unit member seeking to become a new planning unit or join another planning unit, must first obtain department approval. An LSWMP for the new planning unit must then be approved before the entity leaves its current planning unit.

(e) A draft 10-year LSWMP must be submitted to the department no less than one hundred eighty days prior to the end of the previous planning period.

Response: The regulations have been revised to include many of the concepts and much of the suggested wording.

366-4.2(e)
Comment: 366-4.2(e) requires new SWMPs to be submitted one year ahead of time; current approval times for (less complicated) SWMPs has run over 4 years for some planning units. Is the State to add more personnel to the planning section? In addition, submission 1 year ahead makes it unlikely that the data collected for the SWMP will be applicable. Say a SWMP was due to expire in March of 2017. The new SWMP would be submitted in March 2016, presumably using (at best, 2015 data) to plan for 2018-2028?

Response: The regulations have been revised to add time frames for review of LSWMPs and the regulations have also been revised and relocated to change the time frame for submission of a successor LSWMP from 1 year to 180 days.

366-5.1
Comment: Not all generation data is readily available to the Planning Units and therefore the information reported in the biennial reports should be expected to be

completed to the best of the Planning unit's ability, which may mean it is incomplete. This should be taken into account by the department when reviewing the annual planning unit reports.

Response: The biennial report should be completed based on the information available.

Comment: We appreciate the adjustment to the annual planning unit report to May 1st of each year as opposed to April 1st when the facility annual reports are due. This will allow for Planning Units to gather the completed facility reports from generators and processors to compile into the Department accepted format.

Response: The regulations have been revised to eliminate the annual reporting requirement and instead will be only required as part of the biennial updates.

Comment: Consider changing the date for planning unit report to June 1st.

Response: The date was revised to May 1st from the current March 1st requirement. This adjustment of 60 days is sufficient time to appropriately aggregate the required data.

Comment: It would be helpful for the planning unit to have access to the DEC database in order to capture waste data from those generators that are not included under the authority of the planning unit (i.e., hazardous waste generators) and for generators that do not respond to requests for information. Another option is for the Department's data-gathering structure to be updated to obtain information from all generators which can be uploaded to a combined database. This information could be sent to the planning units for use in planning.

Response: This information is currently available and the department will continue to make improvements to the formatting, access and usability of the data.

366-5.1(b)
Comment: Planning Units do not readily have access to contact information and registration/permit number especially for material directly handled by private industry. It should be noted this information will be provided to the best of the Planning Units ability. This should be taken into account by the department when reviewing the annual planning unit reports.

Response: The regulations have been revised to address this concern.

366-5.2
Comment: As specified in the proposed regulations, once the biennial report is submitted to the department, the department will review and determine whether or not it contains all matters required and follow with written comments. A review timeline should be included in the regulations and if the department does not provide a timely review, the biennial update report should be considered approved by a certain date.

Response: The regulations have been revised to incorporate department time frames for LSWMP biennial updates.

Comment: The proposed regulations includes some rather strict and numerous reporting requirements for Planning Units. Although we have heard during the state-wide workshops that the process is intended to be more streamlined and efficient for Planning Units, the revised regulations do not portray that. Our concern is that more responsibility will be placed on the Planning Units that already are stretched thin personnel wise and fiscally.

Response: The regulations have been revised to help streamline the LSWMP development, review, approval and update processes as well as the data reporting requirements.

Comment: Please see the following specific suggested revisions to Section 366-5.2 LSWMP biennial update.

Section 366-5.2 LSWMP biennial update

(a) An LSWMP biennial update must be submitted to the department for review and approval no later than May 1 of every other year following approval of the LSWMP.

(1) Upon submittal, the LSWMP biennial update shall be deemed approved and the LSWMP expiration date extended two years from most recent approved expiration date. The Department has 30 days from receipt of the LSWMP Biennial Update to issue a written notice of incompleteness and applicable comments and requesting resubmittal of the LSWMP biennial update if necessary.

(2) Once the department has determined that the LSWMP biennial update effectively addresses those elements identified in this section, the department will provide written notification to the planning unit that the LSWMP biennial update is approved.

(b) An LSWMP biennial update consists of a summary report, any revised sections of the LSWMP that reflect changes to the LSWMP, and a revised implementation schedule and associated projections.

(1) The summary report must include:

i. any changes to the planning unit structure;

ii. actual waste generation, recycling and disposal data and comparisons with and reasons for deviations from projections;

iii. A discussion of any changes to solid waste management practices;

iv. a summary of outreach and education activities;

v. a description of efforts to ensure compliance with local recycling laws; and

vi. the status of conformance with the implementation schedule, including discussion of reasons for deviating from the implementation schedule.

(2) Revised sections of the LSWMP may result from:

i. new or updated data,

ii. obstacles preventing the planning unit from implementing tasks and/or achieving the goals of the LSWMP, or

iii. changes in the planning unit structure.

iv. A revised implementation schedule and waste projections must comply with the requirements of sections 366-2.6 and 366-2.7 of this part.

Response: Although the specific time frame and wording suggested has not been directly incorporated, the regulations have been revised to incorporate department time frames for LSWMP review.

366-5.2(a)
Comment: We believe that the new requirement for DEC approval on the biennial updates is excessive, overly burdensome on the Department, and may lead to delays, if planning units are waiting to DEC approval. We suggest that the biennial' approval requirements be entirely eliminated, and instead that the Department have an opportunity to review and comment on the submittal.

Response: Although the specific suggestion has not been incorporated, the regulations have been revised to incorporate department time frames for LSWMP review.

Comment: The requirement for a 2-year update of every LSWMP should be removed from the regulations, allowing local planning units to update the plans when it becomes necessary to amend time frames and goals. The state's lack of resources to update its Beyond Waste Plan as mandated by statute is telling, and should be an indicator that imposing an even shorter mandate on local governments to update their LSWMP's every two years is untenable

Response: The regulations have been revised to clarify the intent of the biennial update and reporting requirements. The requirement for an annual data report has been eliminated, the requirements for the biennial updates has been adjusted to better capture the limited scope of the updates, and the language related to the optional two-year planning period extension has also been clarified.

Part 369 State Assistance Projects

Part 369
Comment: State grants are made available for education, planning and coordination. Monies should be redirected to developing and invigorating markets/uses of recyclables.

Response: The comment is noted. Monies are appropriated each year from the Environmental Protection Fund to be used by Empire State Development for the purpose of market development. The relevant provisions of the Environmental Conservation Law for this state assistance program allow for contracts for waste reduction or municipal recycling projects with municipalities only.

Comment: A universal change to Part 369 to allow for funding electronic waste collection and disposal is recommended.

Response: The legislation authorizing state assistance payments to municipalities targets recycling efforts, and expenditures related to the collection and processing of recyclable material by municipalities. The electronic waste program, in contrast, is a product stewardship program that puts the onus on manufacturers to bear the cost of electronic waste collection and disposal. Since the electronic waste collection program has its own established program for statewide collection of waste that it not specifically directed at improving recycling efforts by municipalities, it is the Department's position that use of state assistance funds should not be used for electronic waste collection and disposal.

369-1
Comment: How will current pre-application projects already on the Department's waiting list be handled?

Response: Projects already on the waiting list will be able to remain eligible for funding pursuant to the transition provisions of section 360.4.

360-1.2(b)
Comment: Would private or public colleges or universities be considered eligible applicants? How about not-for-profit organizations such as Cornell Cooperative Extension?

Response: Under the applicable provisions of the Environmental Conservation Law for this state assistance program, colleges or universities are not eligible applicants since they are not municipalities, and not-for-profits are eligible only for funding of beverage container assistance projects.

369-1.6(a)(2)
Comment: This language is too vague. How will the Department determine what constitutes "a failure to make satisfactory progress ... "?

Response: If the contract contains a schedule for completion of a project, and the schedule is not met, or if the contract expires without the terms being fulfilled, that will considered a failure to make satisfactory progress.

369-2.2(b)
Comment: The department should not utilize a static number of years in this section. Perhaps utilize standard amortization years based on vehicle, equipment or structure. Would it be better to reference a manufacturer's life expectancy, useful life or term of bond?

Response: The requirement as written provides a benchmark, however the provision allows an applicant to offer for consideration alternate timeframes if appropriate. For applicants who are unable to determine the expected useful life of equipment, the timeframes in the regulations will apply.

369-2.3(c)(l)(i)
Comment: Requiring projects to be included in a LSWMP or CRA may not always be appropriate. Some projects may not have been contemplated at the time the LSWMP was submitted. For example, a new technology that is proven may not have been contemplated but should still be grant eligible. The Department should reconsider the language in this section and other sections that contain this language.

Response: To address the concern raised in this comment, the text in paragraph 369-2.3(c)(1) has been revised to change "included" to "consistent with." For projects not consistent with the LSWMP, there is a mechanism to modify the plan. The proposed Part 366 includes biennial updates for local plans. A key provision of these updates is that planning units may update the actual plan or implementation schedule, allowing it to stay current with new technologies or opportunities. Therefore, projects not initially contemplated will be able to be added to the LSWMP. Similarly, the CRA may be updated at any time.

369-2.4 (a)(16)
Comment: A number of commenters expressed concern with this provision. If equipment reaches the end of its useful life, is it still ineligible for replacement under the grant program? Numerous commenters believe that replacement of equipment that has reached the end of its useful life should be eligible for replacement. Additionally, replacement equipment that upgrades the previous system by increasing efficiency or incorporating new technology should be eligible for assistance. Are recycling bins for curbside collection included under this section?

Response: Due to the significant wait list for funding, the Department included this provision in an effort to focus funding at expanding programs, rather than merely

sustaining them. In evaluating the comments relative to this, the provision will be eliminated, allowing replacement items to remain eligible.

369-2.4 (a)(1)
Comment: A number of comments asked that the term "fully dedicated" be changed to "primarily dedicated" or something similar. It is difficult to commit to fully dedicated recycling equipment due to situations such as inter-department sharing within municipalities.

Response: The Department agrees that sharing of equipment amongst departments is beneficial, especially with smaller municipalities. The provision has been modified to allow for equipment not fully dedicated to recycling (but utilized at least 50% of the time for recycling) to be funded at 50%.

369-2.2(b), 369-2.4(a)(1),
369-2.4(a)(16)
Comment: Instead of prohibiting the efficient use of equipment that can be used for other things as well as for recycling collection, processing, or transportation, ranking should be given depending on the percentage dedicated to recycling collection, processing, or transportation.

Response: This is a funding program for recycling equipment, and while sharing equipment to allow for other uses is beneficial to many operators, only equipment dedicated to recycling is eligible for funding.

369-2.1(b)
Comment: How will the Department handle those grant application already on the State list that have eligible costs older than one calendar year?

Response: They will remain eligible. The transition provisions of 360.4 will be revised to address this concern.

369-3.1
Comment: Commenter understands the rational for one-year contracts, given the Department's annual funding allocation, however this will add to the administrative burden of the program, and will increase the potential for program discontinuity. Also notes that outreach planning efforts often begin months in advance, and a yearly program may inhibit this process.

Response: The department disagrees this will add to the administrative burden of the program; well run programs will not need to change significantly from year to year, however by allowing the programs to be evaluated annually the department will be able to assist programs that are having functional difficulties. Outreach planning efforts are a continuous part of a well operating program, and should be able to work within the annual contract period.

369-3.3(d)(1)(i)(a)
Comment: Several commenters have asked the Department to reconsider this provision, suggesting that requiring the outreach portion of the expenditures to equal the personal services expenditure will drastically reduce the amount of funding the municipality will be eligible for, and may result in the demise of programs or positions. It was further suggested that personnel services have historically been the largest portion of education costs, with outreach materials generally produced in house at low cost, and are often now being replaced by electronic means such as social media. In some cases, municipalities have been able to encourage vendors to take on the production and distribution of outreach materials.

Response: The department agrees that this provision as written may negatively impact some existing programs and perhaps prevent start-up of new programs. Applications will be evaluated to ensure the education and outreach plan is effective in reaching the population receiving services, thus the provision of concern has been modified to remove the 50% provision.

369-3.3(b)(1)(ii) and (iii)
Comment: Commenter states there will be no previous data available for proposed projects, and requests that these subsections be removed or further clarified.

Response: This language will be modified to reference predicted improvements, based on earlier data, if available. Applications should demonstrate the impact on existing programs that have had on disposal and diversion rates.

369-4.1(c)(7)
Comment: Several commentators state it will be difficult to effectively plan HHW collection if they do not know in advance that the department can provide 50% reimbursement. They feel this change from the current requirements will cause significant problems and ask 50% sharing continue.

Response: This is not a change from the existing requirements, which include the same provision for circumstances where annual appropriations may be insufficient to fund all programs at 50%.

Comment: The setting of a maximum dollar value does not recognize nor reward municipalities that aggressively market and hold multiple HHW events.

Response: This provision is in place only if the annual appropriations are insufficient to fund all programs at 50%. The department may also choose to reduce the percentage across the board if necessary.

369-4.4(a)(10)
Comment: The program should not exclude costs directly related to solid waste generation at HHW collection events. This includes reasonable program and event expenses associated with empty containers (from material consolidation), plastic sheeting, spill prevention and control and miscellaneous materials and packaging. These items are a necessary and implicit cost.

Response: This grant program may only reimburse direct costs incurred from collection, handling and disposal of household hazardous wastes. Associated costs for solid waste disposal are not eligible.

369-4.1(c)(2)
Comment: Limiting the application window to January and February for projects completed the previous year forces municipalities to fully budget and fund events, and then guess at a level of recompense from the State.

Response: Approximately half of the HHW grant applicants come in for projects completed the previous year, and the other half for proposed projects. Having all applications come in after completion will allow the department to encumber the exact amount of funds needed for reimbursement, maximizing the amount remaining for recycling grants.

369-4.3(d)(2)
Comment: This section still does not contain sufficient language to guide DEC in determining a level of private funding that must be present before state grant funding will not be approved. The DEC has consistently maintained that any level of funding from a private operator of a municipally owned landfill precludes the municipal owner from receiving any grant funding. Various DEC staff have stated that this rule only relates to the private operator's direct funding of a HHW collection event, others that any funding or payments from a private operator to the municipality precludes receipt of these grant funds. This rule needs to be clarified and included in the regulations. The existence of private funding should not preclude receipt of grant funds for these programs. If anything, private funding provides evidence of a broader support for the proposed program and better leverages state grant money to have more positive projects undertaken.

Response: Since the authorizing legislation for the state assistance program defines eligible costs in a manner that excludes assistance from the federal government or other assistance received by the municipality, any other funding or grants must be deducted from the total project cost prior to reimbursement from this program. Therefore, if a private operator is paying for the program then it is not eligible for reimbursement. However, if a municipality is bearing a portion of the costs, then that portion may be eligible. The important thing to remember is that a municipality may only be reimbursed for monies they expend, and they may not be reimbursed elsewhere for the same costs.

369-5
Comment: Guidance and eligibility requirements need to be added to this section.

Response: Eligibility requirements and associated guidance for specific targeted priority projects will be created in concert with a notice of availability as outlined in 369-5.1.

Comment: In support of the proposed 369-5. The final Part 369 should include the proposal to create a new category for "Targeted Priority Area Municipal Waste Reduction and Recycling Projects" (369-5). This will allow the Department to dedicate EPF funding to a particular priority area, such as organics recycling, implementing best practices for curbside programs, etc.

Response: Agreed.

369-6.2(b)
Comment: This will preclude a municipality with an operating landfill to apply for funding to close an earlier phase or cell. Are there any uncapped landfills left around the state? The environmental review materials do not fully document the magnitude of the landfills closed before April 9, 1997 to justify this as a cutoff date. Further explanation is needed, especially when grant funds have been provided by the state in the past to close landfills or sections thereof that were closed after this date.

Response: The department is currently inventorying and investigating all known historic landfills in the state. Some will require funding for proper closure. Any landfill operating after April 9, 1997 was required to have a fully funded surety mechanism in place to fully pay for closure and post closure, thus there should be no need for the grant.