

# NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of the General Counsel, Deputy Commissioner & General Counsel

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APR 06 2023

## **RE: Construction and Demolition Debris/Fill Material Transition to Revised Part 360**

To Whom It May Concern:

This is to advise you, that subject to the terms set forth in this letter, the New York State Department of Environmental Conservation ("DEC" or "Department") will exercise its authority to utilize enforcement discretion with respect to certain provisions of 6 NYCRR Part 360, Part 361, and Part 364 of the Part 360 Series regulations that became effective on November 4, 2017. DEC will exercise this authority regarding the above provisions until either May 3, 2024, or amendments to the above provisions of the present rule are adopted and effective, whichever is earlier. All other provisions of the Part 360 Series remain in effect and will be enforced. This letter extends a prior exercise of enforcement discretion, dated April 27, 2022, set to end on May 3, 2023, and addresses the following: (i) materials used in cement, concrete and asphalt pavement; (ii) recycled aggregate from bricks, concrete pavement and/or asphalt pavement; (iii) construction and demolition facility fill material sampling requirements; (iv) fill material; (v) mixed loads; and (vi) grade adjustment.

The transition date set forth in Section 360.4(b)(2) and (3) and 360.4(f) for facilities subject to Subpart 361-5 is extended until May 3, 2024. As such, a facility required to obtain a Subpart 361-5 registration or permit will continue to operate pursuant to the facility's existing registration or permit and associated regulations until May 3, 2024, or amendments to the present rule are adopted and effective, whichever is earlier.

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

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

The Department will utilize its enforcement discretion with respect to facilities subject to the requirements of 6 NYCRR Subpart 361-5 and for materials that are destined for and/or stored at these facilities under the control of the generator or the person responsible for the generation, prior to processing or reuse, in conformance with



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6 NYCRR § 360.12 (c)(3)(viii), (ix), and (x).

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

The transporters handling these materials (i.e., materials destined for a facility under the control of the generator or the person responsible for the generation that are destined for and/or managed prior to reuse under 6 NYCRR § 360.12(c)(3)(viii), (ix), and (x)) are also not subject to 6 NYCRR § 360.4, 360.15, and Part 364.

**EXPLANATION:** The above provisions govern the following materials: asphalt and asphalt millings destined for reuse under Section 360.12(c)(3)(ix) or (x), or concrete, concrete products (including those that have reinforcing embedded), masonry products, brick, and rock destined for reuse under Section 360.12(c)(3)(viii).

When these materials are under the control of the contractor and destined for a DEC registered Solid Waste Management Facility that allows for the acceptance and processing of these materials, they meet the requirements of the pre-determined BUDs identified above and are no longer considered solid waste.<sup>1</sup>

Asphalt and/or asphalt millings under the control of the contractor and destined for an asphalt plant also meet the requirements of a BUD and are no longer considered solid waste.<sup>1</sup>

Asphalt plants may accept asphalt and asphalt millings and do not require a facility authorization under Part 360 or Part 361. Asphalt and asphalt millings received at an asphalt plant meet the requirements of a BUD and are no longer considered solid waste.

Facilities that hold a DEC registration for a Solid Waste Management Facility, issued prior to November 4, 2017, that allow for the acceptance and processing of asphalt, asphalt millings, concrete, concrete products (including those that have reinforcing embedded), masonry products, brick, rock, and soil are subject to the regulations in place prior to November 4, 2017.

The transporters handling these materials are not required to be registered and a manifest for the materials is not required.

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<sup>1</sup> De minimis amounts of soil, wood, concrete, brick, or asphalt present with these materials do not cause the material to be considered unrecognizable or contaminated.



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

**II. Recycled aggregate from bricks, concrete pavement and/or asphalt pavement**

The Department will utilize its enforcement discretion with respect to the use of recycled aggregate from bricks, concrete pavement, and/or asphalt pavement when used in or under asphalt pavement or other paved surface, if separated from other waste prior to processing and subsequently processed and stored in a separate area as a discrete material stream.

In addition, these materials, when destined for and/or managed prior to reuse at facilities subject to the requirements of 6 NYCRR Subpart 361-5 may be managed as a commercial product or raw material and are not subject to Part 360 or Part 361.

The transportation of these materials is subject to the waste tracking and registration or permit requirements of Part 364.

**III. Construction and demolition facility fill material sampling requirements**

This stay of enforcement also includes the sampling requirement contained in Section 361-5.4(e), which requires that facilities perform certain sampling on any fill material or residue leaving the facility for reuse. The Department will utilize its enforcement discretion with respect to this provision to delay the enforcement of this sampling requirement regardless of the timing of the registration or permit issuance to the facility. However, this enforcement discretion does not extend to the physical criteria that may otherwise be required to qualify fill material for beneficial use under Section 360.13. Also, facilities must not distribute fill material that contains any materials not authorized by the facility's registration or permit, and otherwise must meet the requirements of Section IV of this enforcement discretion letter, Fill Material.

**IV. Fill Material**

Per Section 360.2(b)(107), Fill Material means soil and similar material excavated for the purpose of construction or maintenance but does not include overburden generated from mining operations regulated pursuant to Part 422 of this Title.



Per Section 360.13, fill material can qualify for direct beneficial use as General Fill, Restricted-Use Fill, or Limited-Use Fill. Section 360.13(e) provides the testing requirements for fill materials to qualify and Table 2 in Section 360.13(f) distinguishes the characteristics that are necessary for fill material to meet these three types of use.

The definition of Fill Material references “similar material,” but does not define what constitutes “similar material.” This definition should be enforced consistent with the following:

“Similar material” is to be understood to mean any durable, granular material, other than those materials specifically excluded below, that contributes to the function of a material as fill – meaning that it can be excavated, transported, placed, and compacted for construction purposes and meets an engineering specification for the purpose for which fill is needed (grade adjustment, structural, barrier, berm, etc.).

“Similar material” can include particles of sand, gravel, rock, ceramic tile, asphalt pavement, brick, glass, crushed concrete, or other durable human-made material that contributes to the function of the material as fill, but the type of similar material that can be included depends on the type of fill material as discussed below.

1) General Fill:

- a. General Fill can include sand, gravel, and rock.
- b. De minimis amounts of particles of glass, concrete, asphalt, ceramic tile, and brick do not cause the material to be considered unrecognizable or contaminated.
- c. Ash, slag, or pieces of metal (e.g., pipes, etc.) may not be present in General Fill in any amount.
- d. General Fill may be used in any setting where fill material meets the engineering criteria for use, except on agricultural land used for raising livestock or producing animal products for human consumption.

2) Restricted-Use Fill and Limited-Use Fill:

- a. Similar materials as it applies only to Restricted-Use Fill and Limited-Use Fill can include sand, gravel, or rock and particles of slag, ash, glass, ceramic tile, asphalt pavement, concrete, brick, or other granular, compactible non-soil constituents.

3) Similar materials as applicable to General Fill, Restricted-Use Fill, and Limited-Use Fill do not include plastic, gypsum wallboard, wood, paper, and other material that may readily degrade or produce odors, whether recognizable or not.

## **V. Mixed Loads**

Facilities that hold a DEC registration for a Solid Waste Management Facility, issued prior to November 4, 2017, are allowed to accept mixed loads of asphalt, asphalt millings, concrete, concrete products (including those that have embedded reinforcement), masonry products, brick, rock, and soil at their facility, provided the facility's registration allows for the processing of each of the materials in the mixed load.

De minimis amounts of wood that are present with these materials do not cause the material to be considered an unauthorized mixed load, or to be unrecognizable or contaminated. Unauthorized waste that is transported and delivered to a registered solid waste management facility must be adequately segregated, secured, and contained in order to prevent leakage or contamination of the environment and must be removed within seven (7) days after receipt. Disposition of such waste must be to a facility or location authorized to receive it. (See Section 360.19(c)(4)).

Transporters may deliver mixed loads of material specified above to the facilities specified above. All transporters who deliver mixed loads to the facilities specified above must use trucks registered under the Part 364 Waste Transporter program. In addition, transporters who deliver mixed loads generated in New York City to the facilities specified above must complete a Part 364 waste tracking document that must accompany the load.

## **VI. Grade Adjustment**

Except in Nassau or Suffolk Counties or the New York City Watershed, materials consisting only of recognizable, uncontaminated concrete products (including those with embedded reinforcement), asphalt pavement (not including asphalt millings), brick, and rock from construction and demolition activities, may be used for grade adjustment when the following conditions are met:

- 1) The material is received at a project that is authorized by an approved local building permit or other municipal authorization, if required;
- 2) The material is only accepted during daylight hours between sunrise and sunset, except for night deliveries associated with municipal or state highway projects after a one-time notification to the appropriate Department regional office;
- 3) The material does not include residues from C&D debris handling and recovery facilities;
- 4) The material is placed above the seasonal high groundwater table and no material is placed in a surface water body or wetlands; and
- 5) De minimis amounts of soil or wood included with these materials are acceptable under this determination.



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

Sincerely,

A handwritten signature in blue ink, appearing to read 'TS Berkman', with a long horizontal flourish extending to the right.

Thomas S. Berkman  
Deputy Commissioner  
& General Counsel