July 21, 2017

Melissa Treers, P.E.,
New York State Department of Environmental Conservation
Division of Materials Management
625 Broadway
Albany, NY 12233-7260

RE: Proposed 6 NYCRR Part 360
Solid Waste Regulations

Dear Ms. Treers:

Thank you for the opportunity to present the following comments on the amended draft revisions to the Solid Waste regulations. The New York Construction Materials Association, Inc. (NYMaterials) is a not-for-profit, statewide trade association representing the business and regulatory interests of companies involved in the production of construction aggregates, ready mixed concrete and hot mix asphalt. These vital building materials are used in literally every construction project in New York. Our industries provide an annual stimulus to the economy of over $5 billion and provide employment for 30,000 families in the state. Our operations are aggressively regulated under a host of environmental statutes and regulations, and our record of mitigation and compliance is second to no other industry.

As we previously commented, the original Part 360 proposal would have resulted in the landfilling of vast quantities of this currently recycled material, which is contrary to New York’s waste reduction goals,
would require the mining and use of greater quantities of virgin material in place of the reused asphalt, concrete and other materials, and would vastly increase the cost of construction projects, including numerous taxpayer funded works. NYMaterials’ comments provided a roadmap to avoid this outcome without disturbing the Department’s laudable goal of a crackdown on “midnight dumpers”.

Unfortunately, the revised Part 360 proposal not only does not address these crucial issues, but as detailed in the following comments, adds substantial confusion to the proposal that was not present in the prior draft. Consequently, the Department’s current draft is simply unworkable.

6 NYCRR 360.12(c)(3)(viii) and (ix)

The Department incorporated new language into proposed 6 NYCRR 360.12(c)(3)(viii) and (ix) regarding pre-determined beneficial use determinations (“BUD”) for “recycled aggregate or residue” and “recycled material or residue generated from uncontaminated asphalt pavement and asphalt millings.” However, for material to qualify for these BUD designations, it must “meet[] a specification established by the Department of Transportation.” Id. Inexplicably, the regulation is silent as to which DOT specification it is referring to. None of the materials accompanying the revised regulation, including the Response to Comments and Regulatory Impact Statement, address this issue. Playing hide and seek with what specification the regulated community is required to meet to avoid having this material treated as C&D debris is unacceptable.

Based upon our members’ daily interactions with the Department of Transportation (“DOT”), we are aware that DOT has a specification for the allowable amount of RAP in a pavement mix. However, this specification is not relevant to the asphalt pavement or millings themselves when they are generated. Further, RAP is used in many applications other than DOT paving projects: private paving projects and other state agency and local governments also use this material. Regardless, the notion that the regulated community has to speculate as to which specifications were intended in this Part 360 provision illustrates perfectly why proposed 6 NYCRR 360.12(c)(3)(viii) and (ix) are impermissibly vague.

The Department’s June 2017 Assessment of Public Comments only magnifies the confusion. (“Response to Comments”). Preliminarily, we note that it was very difficult to analyze the nature of comments made because the Response to Comments did not identify the commenter, clarify that the comments were either verbatim or paraphrased, or provide an index identifying the comments received and the corresponding Department response. It was difficult to even track our own comments. We also observed, among other issues in the Response to Comments, that the Department actually stated in one response that the revised asphalt BUD, 6 NYCRR 360.12(c)(3)(ix) provides:

“recycled 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 for asphalt pavement for roadways, parking lots, or other paved surfaces.”

Response to Comments at 204. This is different language than that contained in revised §360.12(c)(3)(ix). This not only creates further confusion for the regulated community, but also illustrates that a workable provision that leaves out the DOT specification requirement is feasible.
The above referenced Response to Comment is consistent with NYMaterials proposed revisions in its prior comments and would allow the Department to regulate proper RUCARBs recycling efforts, while still addressing the “midnight dumpers.” We continue to urge the Department to utilize this approach, or simply remove the words “meets a specification established by the Department of Transportation” from proposed Section 360.12(c)(3)(viii) and (ix).

To the extent that the Department relies on the intended crackdown of midnight dumpers as the justification for the increased (and currently unworkable) regulation of RUCARBs, it is respectfully submitted that such justification is misplaced. Persons or entities operating illegally today are not going to change their behavior simply because the Part 360 regulations are more onerous. Indeed, it could be argued that it would make them less likely to comply. Tightening restrictions is not a carrot for compliance. On the other hand, increasing penalties and enforcement is. Proposed Part 360 does neither, but rather penalizes those who are already in compliance and threatens the entire RUCARB recycling program.

**Part 361 BUD MATERIAL**

One of NYMaterials’ primary concerns is maintaining a workable system between the BUD and C&D facility requirements to allow both the continued successful processing of RUCARBs as a replacement for new construction aggregate, and proper Department oversight that would not eviscerate the recycling and reuse of these materials. In stark contrast to this goal, revised Part 360 creates a virtual black hole for the regulated community: it is impossible to determine whether the requirements of proposed 6 NYCRR Subpart 361-5, C&D Handling and Recovery Facilities, apply when a BUD material is involved. In fact, the Department’s own regulatory proposal provides conflicting information.

Revised 6 NYCRR §360.12 provides the following: (a)(1) …. “The materials cease to be solid waste when used according to this section. This section does not apply to materials that are being sent to facilities subject to regulation under Part 361 of this Title.” The first sentence in this passage, as applied to RUCARBs, would mean that the RUCARBs cease to be a waste at the point it is generated, i.e. when the material meets the requirements for its intended use in recycled asphalt, or concrete.

However, the second sentence in this passage turns this on its head. “Part 361 of this Title” includes the regulations for Construction and Demolition Debris Handling and Recovery Facilities, or “facilities that process construction and demolition debris in order to extract recyclable or reusable materials.” Proposed 6 NYCRR § 361-5.1. Expressly listed within this subpart is “recognizable, uncontaminated…concrete and other masonry materials, brick,” fill, and “uncontaminated asphalt pavement or asphalt millings.” Id. at 361-5.2(a)(1), (2). It seems apparent BUD materials are also classified as C&D in Part 361-5. As such, the provision in §360.12 that renders RUCARBs a BUD material is nullified by the sentence that follows it in §360.12(a)(1). How is the regulated community to proceed with contradictory instructions juxtaposed in this regulatory scheme?

The confusion also raises several questions. Section 360.2(a)(3)(ix) provides that BUD materials are not solid waste. See also Response to Comments at 20 (stating that RUCARBS “are not solid waste once they meet the specifications for reuse” in the BUDs). However, revised Part 360 appears to be silent on whether BUD materials are also C&D Debris, but implies that they are. If they are not C&D Debris then the onerous requirements of Part 361 (including the 500 TPD limitation; storage length and spacing limitations, etc.) would not apply, as those requirements only apply to C&D Debris. The conflicting statements in

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§360.12(a)(1) preclude the regulated community from knowing for sure. There is also confusion regarding storage time. If the RUCARBs are C&D Debris subject to Part 361, the RUCARBs may be “stored without time restriction.” § 361-5.4(f)(1)(i). However, if the RUCARBs are not subject to Part 361, Part 360 limits storage to 365 days, unless other authorization is granted. §360.12(a)(3). See also additional conflicting statements at Response to Comments pp. 81, 199, 203, 204, 206, 214.

In our discussions with the Department regarding the interplay of the Part 360 RUCARBs BUDs and Subpart 361-5 we were advised that the asphalt BUD is intended to apply to asphalt millings that were already processed at the point of generation and would require no more processing to be beneficially reused. These BUD materials could be brought to a Part 361 facility, but would not be subject to the Part 361 requirements. We also learned that asphalt that was not milled, that could be in varying sizes, would be subject to Part 361 because it would require more processing. This reasoning is not sound from a technical perspective (it is standard practice to screen asphalt prior to reuse in hot asphalt mix, regardless of its size), but more importantly from an environmental protection perspective. As noted in our previous comments and recognized by the Department, this material is inert, regardless of its size or shape. This reasoning is also at odds with the express terms of proposed Part 360 and 361, which both apply to “uncontaminated asphalt pavement” and “asphalt millings”. See §360.12(c)(3)(ix); §361-5.2(a)(2). As both “processed” asphalt millings and “not yet processed” other asphalt pavement are both part of the BUD, and both part of Part 361, the regulated community is left more confused than when it read the original proposed revisions to Part 360.

NYMaterials’ original comments provided proposed regulatory language that would have addressed the above concerns as well, and we urge the Department to reconsider incorporating this language. In the absence of substantial clarifications, the regulated community is left without any certainty regarding the role of a Part 361-5 facility with respect to BUD materials.

**The 500 TPD Limitation**

NYMaterials appreciates that the Department made some changes to the quantity limits and storage requirements for C&D Handling and Recovery Facilities. Unfortunately, these changes do not resolve the substantial concerns raised by NYMaterials in its prior comments. As demonstrated below, even the proposed revisions will result in a massive increase in the landfilling of RUCARBs, a corresponding reduction in the recycling of these materials, an increase in the mining and use of virgin material, an increase in trucking and related air emissions, and an increase in construction costs to account for disposing of the materials instead of reusing them.

The Department received comments, including from NYMaterials, that an import limitation would not be workable as oftentimes construction projects generate well over 500 tons per day of asphalt millings. See, e.g. Response to Comments at 200. The increase in the current proposal to 500 tons per day based on a weekly average1 will not remedy this issue. NYMaterials has collected data from its members evidencing that they

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1 It is noted that the Response to Comments states that Subpart 361-5 provides for 500 tons per day on a monthly average. See Response to Comments at 198, 199, 200, 202, 203, and 204. This may just be a drafting error, but the lack of clarity makes it difficult to understand, much less comply with proposed Part 360.
receive between 1,000 and 2,000 tons per day as a result of even small construction jobs. The current proposed Part 361 requirements could not accommodate any of these projects.2

- One operator takes in 1,200-1,775 tons per day for each of 8 projects they have worked on in the past two years.
- Another operator reports that it has five hot mix asphalt plants that received large amounts of RAP on a daily and weekly basis. The operator exceeds 3,500 tons per week at the first facility 16 weeks a year. The second facility exceeds this amount for 7 weeks a year. The third, 14 weeks. The fourth, for 3 weeks. The fifth facility would exceed the 500 tpd limitation for 19 weeks.
- Another operator reports more than 500 tpd at least 25 weeks a year, at up to 3 facilities.
- One operator reports 20,000 to 80,000 tons of RAP during its operating season. During operations, this company receives 1,200 tons per day or more on nearly all days.
- Another operator has a number of Part 360-registered facilities. One of these facilities, during the summer months when construction is at its peak, receives more than 10,000 tons per month to as much as nearly 40,000 tons per month. A second facility received 38,000 tons in one busy construction month. A third facility reported three months of heavy RAP receipts, ranging from 17,000 tons per month to over 40,000 tons per month.
- One operator receives up to 200,000 tons per year between its facilities.
- Another operator receives more than 2,500 tons per week up to 5 times a year, and more than 3,500 per week up to 4 times per year.
- One operator receives more than 3,500 tons per week 4 weeks each year.
- Another operator reports that they can have days that exceed 500 tons per day.
- Operator reports that the asphalt is being milled at a rate of 1,000 to 2,500 tons per day. In fact, a 6.3 mile New York State Thruway Authority project is generating 1,500 tons of RAP each night.
- Another operator reports that, based on their experience with multiple facilities accepting RAP, that an average production day for a New York Thruway Authority project may see upwards of 3,000 tons of milled RAP.

This data demonstrates the plight created by the current revision. These operators have varying needs depending on the time of year and the jobs they take on. Others complete large jobs and regularly manage quantities of RAP far beyond the 500 ton per day limit. This revision would either have these operators send these vast quantities (hundreds of tons per day, per facility) to a landfill, or would require them to undergo the cost and regulatory burden of obtaining a full Part 360 landfill permit (and taking on the additional community resistance due to an aggregate producer now also being dubbed a “landfill”). This is to say nothing of the increased environmental impacts resulting from transporting these materials to landfills and the rapid decrease in available airspace that could result. To avoid an unworkable one-stop-shopping regulatory fix and backtracking on the success of the recycling process for the most commonly recycled material, while increasing landfilling and regulatory costs, the Department should revise Part 361 to remove the daily tonnage limitation.

Other Concerns

NYMaterials has several other concerns related to the proposed Part 360 regulations:

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2 We note that some of NYMaterials’ data was generated from Construction & Demolition Debris Processing Facility Annual Reports which were filed with the Department for currently registered facilities. This data is readily available to the Department, but was apparently not consulted in determining the C&D facility requirements.
- The Department’s asserted concern regarding impacts related noise and trucks is without basis. Many, if not all, of these trucks would be returning to the asphalt or concrete plant anyway to pick another load of asphalt or concrete. If the currently proposed Part 360 is implemented, these trucks that were reducing greenhouse gas and traffic impacts by back hauling RUCARBs would cease to provide that benefit and instead RUCARBs would be hauled elsewhere to be landfilled. NYMaterials also notes that the Response to Comments did not reflect any community concerns regarding noise and traffic generated by the transport of RUCARBs.

- The 365-day storage limitation is not sufficient. The use of recycled asphalt is not as predictable as the vast quantities generated, and the time it may take to work the quantities produced into new asphalt can take time depending on new asphalt demand. This limitation will prevent the ultimate reuse of this material and instead result in increased landfilling.

- Our members are highly concerned about the costs of permitting under the new Part 360. These increased costs are unnecessary when a workable solution already exists as described in these and our previous comments. Further, the Regulatory Impact Statement does not adequately consider or describe these costs. See Regulatory Impact Statement at 47.

- Finally, NYMaterials maintains all of its comments set forth in its prior comment letter, attached.

We cannot emphasize enough that the revised Part 360 proposal is unworkable. Not only will the current proposal result in a substantial reduction in recycling (contrary to the State’s goal to increase recycling), it will create an increase in landfiling and construction costs. All of these adverse environmental and economic impacts will result at the same time that the Department’s asserted concern with “midnight dumpers” would be left unaddressed. The Department, and the public, would be better served by increasing enforcement against the midnight dumpers while maintaining a workable scheme to allow the unfettered recycling of RUCARBs to continue.

In sum, the proposed revisions to Part 360 achieve no environmental benefit, create an onerous and unnecessary regulatory scheme that does nothing to address the issue that was its genesis, and does so at the expense of the very industry that is at the center of the nation’s most successful recycling program.

The member companies of the New York Construction Materials Association appreciate this opportunity to provide comments on the Part 360 revisions. We standing ready to provide any additional details you may require. We would also appreciate the opportunity to meet with the Division of Materials Management to discuss these comments in greater detail.

Sincerely,

David S. Hamling
President & CEO