



**RIVERKEEPER.**

September 13, 2016

**VIA E-MAIL TO [SolidWasteRegulations@dec.ny.gov](mailto:SolidWasteRegulations@dec.ny.gov)**

Melissa Treers, P.E.  
New York State Department of Environmental Conservation  
Division of Materials Management  
625 Broadway  
Albany, NY 12233-7260  
(518) 402-8678

**Re: Comments on Proposed Regulatory Revisions for Solid Waste Management Facilities, 6 NYCRR Parts 360-374 and 621**

Dear Ms. Treers:

Riverkeeper, Inc., respectfully submits the following comments on the modifications to the regulations governing solid waste management facilities proposed for 6 NYCRR Parts 360-374 and Part 621.<sup>1</sup> There are many examples in New York of improper disposal of construction and demolition debris. The disposal of these wastes can occur in any number of ways – from unwitting customers contracting for fill on their property to wastes being illegally dumped by truck or by barge in locations throughout the State. Whatever the mechanism of the disposal, the materials themselves can contain dangerous contaminants that either directly erode into or leach into our water – whether lakes, streams, or wetlands. Abiding by the precautionary principle to keep these wastes contained and properly disposed of is a must. After the fact legal challenges to clean-up these materials often prove difficult because of the costs to remove and restore sites and insufficient financial resources necessary to perform the clean-up by insolvent parties responsible for the sites. We, therefore, thank the New York State Department of Environmental Conservation (“DEC”) for strengthening a number of environmental protections from this debris with the proposed regulatory revisions.

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<sup>1</sup> Environmental Notice Bulletins, dated March 16, 2016 and June 29, 2016.

The magnitude of the challenges posed by solid waste in the state, however, requires additional regulatory modifications to help prevent significant harm to the health and environment of New Yorkers. These comments are submitted in addition to the joint comment letter regarding gas and oil waste regulations that we submitted today in partnership with a number of other environmental groups. We request DEC consider our two comment letters and ask that the agency modify the proposals accordingly.

## **I. Tracking Requirements to Prevent Illegal Dumping of Construction and Demolition Debris and Historic Fill**

### *a. The Challenge of Illegal Dumping of Construction & Demolition Debris*

The illegal dumping of construction and demolition (“C & D”) debris throughout New York State, particularly on Long Island through the Hudson Valley and to the Capitol Region is widespread and commonly goes unnoticed and does not result in enforcement. There are many examples, with three in particular that illustrates the magnitude and the complexity of New York’s C & D debris regulatory dilemma. In at least three situations, illegal dumping could have been easily avoided if there were tighter transportation and disposal regulations. DEC staff is intimately familiar with each case, and Riverkeeper thanks the agency for its work in helping to bring these violators to justice. Illustrative cases include:

- In Columbia County, residents informed Riverkeeper about illegal dumping of C & D waste on a property with wetlands that are hydrologically connected to the Hudson River.<sup>2</sup> The individual responsible has racked up several violations and was even sent to jail in 2015 for criminal and civil contempt of court, after which he was released only to be allegedly seen dumping again. Despite Court orders to do so, the violator has failed to remove 18 years of dumped debris. The town has spent over \$250,000 fighting this individual to no avail.
- In Putnam County, a homeowner was convicted for having arranged to have his backyard filled with 40,000 cubic yards of C & D debris so he could build a pool house.<sup>3</sup> Some of the fill material eroded and was discharged into the Croton Falls Reservoir, a drinking source for nine million New York City and Hudson Valley residents.

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<sup>2</sup> Diane Valden, Cascino Ignores Army’s Order, The Columbia Paper (May 19, 2016), *available at* <https://www.columbiapaper.com/2016/05/cascino-ignores-armys-order/>.

<sup>3</sup> Press Release, Attorney General Eric T. Schneiderman, A.G. Schneiderman Wins Court Ruling Requiring Landowner to Clean Up Illegal Landfill That Polluted a Reservoir That Will Provide Drinking Water to New York City Residents (July 28, 2014), *available at* <http://www.ag.ny.gov/press-release/ag-schneiderman-wins-court-ruling-requiring-landowner-clean-illegal-landfill-polluted>.

- In Ulster County, DEC fined a major New York City construction company for illegally dumping 30,000 cubic yards of debris on its property on the Hudson River in Kingston, leaving an enormous waste pile visible from the waterway.<sup>4</sup> Despite its fiscal resources, the company responsible claimed it was “unaware” its actions would be “frowned upon” by DEC.

These cases represent, anecdotally, the scope and scale of the illegal dumping problem. Building and demolition occur every day, particularly in New York City. There is no doubt that the sources of C & D debris will not cease. There is a need for clarity and restrictions for individuals and corporations to avoid violations of law and to prevent damage to our lands, streams, and forests when these materials are discarded. Under the current regulations, identifying and enforcing law has left communities and the environment unprotected. The proposed revisions to the part 360 regulations must be comprehensive to avoid future cases like these.

*b. Illegal Dumping of Historic Fill*

In addition to C & D debris, historic fill is another problematic waste that has evaded DEC regulation. DEC acknowledges that “excavated historic fill has been illegally delivered to registered C & D debris-processing facilities” where it has been combined in the finest fraction of the debris and marketed as topsoil for new development projects.<sup>5</sup> Historic fill can consist of municipal solid waste incinerator ash and coal ash, each of which can contain harmful minerals, ferrous and nonferrous metals, and polycyclic aromatic hydrocarbons (“PAHs”), among many other pollutants.<sup>6</sup> We support the proposed part 360.13 regulations which establish criteria for on-site/off-site use and disposal of historic fill.

*c. Proposed Waste Transport Tracking Requirements*

The geographic distribution of illegally disposed C & D debris, particularly in the Hudson Valley, warrant new tracking provisions for these industrial wastes. We support DEC's proposed provisions at Sections 364-1.2(e)(6) & (10) that would require registration for waste transportation. The proposed regulation would subject transporters of C & D debris and historic fill in certain quantities (more than 10 cubic yards in any single shipment) to the registration provisions of Section 360.15. *See*

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<sup>4</sup> Adam Bosch, Construction Company Fined \$50,000, Record Online (Apr. 21, 2011), *available at* <http://www.recordonline.com/article/20110421/News/104210330>.

<sup>5</sup> DEC, Draft Generic Environmental Impact Statement (DGEIS) on the Proposed Amendments to 6 NYCRR Part 360, et al., at 27 (Mar. 2016).

<sup>6</sup> NJDEP, Historic Fill Material Technical Guidance, at 11 (Apr. 29, 2013) *available at* [http://www.nj.gov/dep/srp/guidance/srra/historic\\_fill\\_guidance.pdf](http://www.nj.gov/dep/srp/guidance/srra/historic_fill_guidance.pdf).

proposed 6 NYCRR § 364-3.1(d). These registration provisions are crucial to help enforcement officers identify and prevent violations.

However, the proposed regulations create an exception from such tracking requirements for *recycled* C & D debris used in accordance with pre-determined beneficial uses in Section 361-5.6(a), stating the debris ceases to be waste if it leaves a facility subject to regulation under Parts 361 or 362. *See* proposed 6 NYCRR § 360.12(c)(4)(iv). Without a transport tracking process for individual pre-determined beneficial uses, disposal of what is claimed to be *recycled* C & D debris can more easily hide illegal dumping of waste. The recycled exemption can easily undermine the purpose and function of the regulatory changes in the real world. Part 361-5.6(a) describes which materials are pre-authorized for beneficial use, including:

- (1) Recycled aggregate or residues generated from uncontaminated, recognizable concrete and other masonry products, brick, soil, or rock 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 commercial aggregate. The material may also be transferred to a registered facility that accepts recognizable uncontaminated concrete, brick, soil, or stone.
- (2) Recycled material or residues generated from uncontaminated asphalt pavement 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.

The beneficial use determination should include the waste tracking obligation as a condition of the determination.

While the proposed changes do not include a “tracking” requirement for pre-determined beneficial use of recycled C & D debris, there is a yearly registration requirement for distributors of 10,000 tons or more of pre-determined beneficial use material. Distributors must submit a report on the wastes to DEC by March 1 of the following year. *See* proposed 6 NYCRR § 360-12(c)(6). This reporting protocol would result in an entirely self-regulatory scheme with no way for DEC to ensure operators comply with the limitations on materials authorized for beneficial use. The information is reported to the Department on annual reports and need a clearly defined enforcement mechanisms based upon these reports. DEC should instead prescribe requirements for a recycled C & D waste tracking document for *each shipment* over 10 cubic yards that identifies the type of waste being transported and lists the interim and final destinations.

*d. Waste Disposal Plan for C & D Debris*

Large scale C & D projects should be required to submit a waste disposal plan with the types of materials, estimated tonnage, transportation routes, and temporary and final destinations of wastes. C & D waste goes through several steps before it ends up at a final destination, so waste disposal plans are appropriate for enforcement officials to keep track of the location of the waste is at any given time. Typically, a contractor collects the debris in containers which a hauler then takes to a waste transfer station and/or processing center.<sup>7</sup> While transfer stations transfer waste to trucks to be taken to landfills, processing facilities a) accept specific, separated, materials such as metal; or b) extract recyclables from mixed loads before sending the balance to a transfer station.<sup>8</sup> With these disposal plans in place, DEC could ensure that each registered project operates in compliance with these waste regulations, and the agency could easily identify all unregistered C & D waste transporters and projects. These plans would provide many other benefits in addition to preventing illegal disposal. They would also promote recycling of C & D waste, ultimately leading to environmental benefits, such as resource conservation, energy savings, pollution prevention and even disposal cost savings.<sup>9</sup> Several municipalities in the country are already successfully requiring waste management plans to promote C & D waste recycling, and DEC should follow suit.<sup>10</sup>

*e. Increasing Penalties for Illegal Waste Disposal*

We urge DEC to join Riverkeeper in recommending to the legislature that these penalties be enhanced. We acknowledge that the financial penalty provisions for illegal waste disposal found in ECL § 71-1503 are not within the scope of DEC's authority. The current penalties of \$2,500 per violation and \$500 per day of ongoing violation are evidently not a deterrent, as evidenced by the many illegal dumping incidences described above.

## **II. Beneficial Use Determination for Navigational Dredged Materials**

The proposed revisions to Section 360.12(e) clarify the beneficial use program criteria for use of navigational dredged materials. Specifically, the changes require a testing protocol to determine if material is acceptable for use as fill material. These changes are an important water quality protection because navigational dredged material can often

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<sup>7</sup> NYC Dept. of Design and Construction, Construction and Demolition Waste Manual (May 2003), at 3, available at <http://www1.nyc.gov/assets/ddc/downloads/Sustainable/construction-waste-manual.pdf>

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 8.

<sup>10</sup> *Id.*

be contaminated by historical industrial discharges. Riverkeeper fully supports these necessary requirements. However, there seems to be an exception from these testing requirements for “NDM [Navigational Dredged Material] management in the footprint of the surface water where it is generated, or in the riparian zone, or to the upland management.” *Id.* at Section 360.12(e)(1). When such materials may be contaminated, they should not be deposited back into the area they were dredged from, as such operations can cause resuspension of contaminants. Instead, they should be properly disposed of in upland areas.

Where there is no potential for contamination, stream management operations should be authorized as a pre-determined beneficial use. In the case of such operations in the West-of-Hudson New York City drinking water supply watersheds for instance, some projects call for the removal of streambed sediment to be used to reinforce stream banks in an effort to prevent flooding. Riverkeeper joins Delaware County in support of a pre-determined beneficial use of navigational dredged materials where there is no history of industrial discharge and no potential for contamination. Such uncontaminated materials should be allowed to be redeposited within the same waterbody and within 800 yards of where they were originally dredged.

### **III. Additional Post Landfill Closure Activities**

The proposed revisions to Section 363-10.6 establish requirements for post-closure “landfill custodial care.” In addition to the final post-closure care plan when the last waste is received, the landfill must submit a plan at least every five years during the post-closure care period. This continues until the owner can show that “the threat to public health or the environment has been reduced to a level where environmental monitoring and maintenance can be reduced.” *See* proposed 6 NYCRR § 360-10.6(a). We support this proposed regulation as it would ensure ongoing public health protections and put operators on notice that they will be responsible for environmental impacts of landfills in perpetuity.

### **IV. Five-Year Time Limit for Case-Specific Beneficial Use Determinations and Registered Facilities**

The proposed revisions to Section 360.12(a) would require DEC to re-evaluate each case-specific beneficial use determination every five years. Previously there was no requirement for review, and beneficial use determinations would last indefinitely even when circumstances changed. In the case of waste from gas and oil production brine, for instance, the constituents of waste authorized under a beneficial use determination could change drastically over time. Moreover, new information may become available that would support modification or rescission of existing beneficial use determinations. A five-year maximum time limit for beneficial use determinations is appropriate to

provide DEC an opportunity to reevaluate its determinations based on the most recent available data.

Similarly, facilities registered under Section 360.15(f) must resubmit applications every five years for renewal. Requiring updates every five years allows for close monitoring of facilities, ensuring no significant changes to the facilities without oversight and providing DEC an opportunity to impose reasonable conditions where necessary. Riverkeeper supports this revision.

## V. Containment Standards for Waste-by-Rail Operations

The proposed Part 360 regulations exempt transport of waste by rail from operating requirements in Part 364-4.8(g) which mandate that “[a]ll wastes must be properly covered or contained during transport so as to prevent leaking, blowing, or any other type of discharge into the environment.” See proposed 6 NYCRR § 364-2(a). The loophole allows for precipitation to enter uncovered railcar containers. The precipitation may then leach through the waste and enter the environment without treatment along the route of train corridor, potentially exposing vast areas and waterways to contamination. During dry conditions, dust can blow off the uncovered containers, contaminating air, soil and water in areas surrounding the train routes.

DEC can and must act to protect public health from waste leachate from trains. While the Interstate Commerce Commission Termination Act (“ICCTA”) regulates railroad commerce, several courts have held that states are not preempted from establishing reasonable regulations for railroads. In *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, the court determined that “according to the [Surface Transportation] Board, state regulation is permissible if it passes a two-part test: (1) it is not unreasonably burdensome, and (2) it does not discriminate against railroads.”<sup>11</sup> Indeed, the ICCTA preemption clause “‘does not usurp the right of state and local entities to impose appropriate public health and safety regulation on interstate railroads,’ so long as those regulations do not interfere with or unreasonably burden railroading.”<sup>12</sup> Furthermore, the Board has made clear that the Section 10501(b) is not meant to interfere with states implementing federal environmental statutes, “unless the regulation is being applied in such a manner as to unduly restrict the railroad from conducting its operations or unreasonably burden interstate commerce.”<sup>13</sup> Ending the regulatory exemptions for waste by rail in the proposed part 364 regulations would protect public health by preventing leachate and blow-off from contaminating air, soil and water without being

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<sup>11</sup> *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 253 (3rd Cir. 2007).

<sup>12</sup> *Id.* at 252 (citations omitted); 49 U.S.C. § 10501(b).

<sup>13</sup> *Humboldt Baykeeper v. Union Pac. R.R. Co.*, 2010 U.S. Dist. LEXIS 52182, at \*8 (N.D. Cal. May 27, 2010).

unreasonably burdensome, since containment or covering are economically feasible. There are several operators, such as Tunnel Hill Partners in the Bronx, that have successfully utilized sealed containers in their waste by rail transport services.<sup>14</sup> Additionally, there would be no discrimination against railroads because most other land transporters of waste are already required to meet these requirements.

Riverkeeper respectfully requests that DEC *end the exemptions* for waste-by-rail transport in the proposed Part 360 regulations to ensure the protection of the environment.

## VI. Conclusion

Riverkeeper looks forward to continuing to work with DEC and other stakeholders to implement an environmentally responsible waste handling and disposal program in New York State.

Riverkeeper is a member supported environmental watchdog organization dedicated to defending the Hudson River and its tributaries and to protecting the drinking water supply of nine million New York City and Hudson Valley residents. Through enforcement and litigation, policy and legislative efforts, as well as educational outreach, Riverkeeper focuses on three overarching problems facing Hudson River communities: preserving the New York City Watershed, restoring the Hudson River ecosystem, and improving public access to the Hudson River.

Thank you for your consideration of these comments.

Respectfully submitted,



John Parker  
Director of Legal Programs

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<sup>14</sup> Tunnel Hill Partners, *Trans-Load*, available at <http://tunnelhillpartners.com/affiliate-services/trans-load/> (last visited July 22, 2016).