

NYSDEC Proposes New Solid Waste Rules with Critical Changes to Beneficial Use Determinations

The New York State Department of Environmental Conservation (“NYSDEC”) recently extended the public comment period to September 13, 2016 for the revisions proposed to the State’s regulations governing solid waste management. Those regulations are currently found primarily in Part 360 of Title 6 to the New York State Code of Rules and Regulations (“NYCRR”). NYSDEC has proposed significant changes to these regulations, involving both substantive and organizational changes, with the proposed solid waste regulations to be subdivided into a new Part 360 series (proposed Parts 360, 361, 362, 363, 365, and 366). Revisions have also been proposed to amend several other related regulations, including the waste transportation rules under Part 364. The full text of the proposed regulations can be found on NYSDEC’s website at <http://www.dec.ny.gov/regulations/81768.html>.

The impact from the proposed revisions will affect some industries more than others. For example, facilities processing and handling construction and demolition (“C&D”) debris will be faced with a revised definition for the term (*compare* 6 NYCRR § 360-1.2(b)(38) *with* proposed 6 NYCRR § 360.2(b)(64)), registration and permitting obligations (proposed 6 NYCRR §§ 361-5.2(a)(1)-(6) & 361-5.3), significant new requirements for storing C&D materials (proposed 6 NYCRR §§ 361-5.4(a), (f)(1)-(3)), and expanded obligations for tracking C&D debris leaving their facilities (proposed 6 NYCRR § 361-5.7). Under the proposed regulations, landfill operators will see substantial new responsibilities following the closure of a landfill, including an extended and potentially costly post-closure care period and more stringent financial assurance requirements. See proposed 6 NYCRR §§ 360.2(b)(73), 360.21 & 360.22(c)(1)(vi) and Subpart 363-10. New provisions have also been proposed at section 360.20 that would add criteria for the hiring of an environmental monitor, upon NYSDEC’s direction, to be paid for by facilities at any time during construction, operation, closure, or post-closure.

However, the extensive, substantive changes NYSDEC has proposed to the regulations concerning Beneficial Use Determinations (“BUDs”) likely will impact all industries. BUDs refer to certain wastes that NYSDEC has determined will cease to be considered “solid waste” when beneficially used in a particular manner, and therefore, need not be managed as solid waste. See 6 NYCRR § 360-1.15(a); proposed 6 NYCRR § 360.12(a). NYSDEC establishes BUDs either through “pre-determined BUDs” enumerated in the regulations or through case-by-case decisions following individual users’ BUD applications.

The proposed regulations will impose new provisions and limitations on all BUDs currently in existence and any future BUDs. Several new pre-determined BUDs would be added, some existing pre-determined BUDs would be amended, while still other existing BUDs would be removed entirely. *Compare* 6 NYCRR § 360-1.15(b) *to* proposed 6 NYCRR § 360.12(c)(1)-(4). Existing pre-determined BUDs that are “inconsistent” with the new Part 360 series will become ineffective 120 days after the effective date of the new regulations, but they may be eligible for case-specific BUDs. Proposed 6 NYCRR § 360.4(p). In addition, after each calendar year of operation, anyone distributing 10,000 tons or more of any material subject to a pre-determined BUD must submit a report to NYSDEC about it. Proposed 6 NYCRR § 360.12(c)(6).

Revisions are also proposed to the process for obtaining and retaining a case-specific BUD. New details would be necessary in the BUD application (e.g., detailed analytical data about the waste’s characteristics and those of any analogous raw material for which the waste is proposed to be an effective substitute) and a new report to NYSDEC would be required after each year of operation. Proposed 6 NYCRR § 360.12(d)(2) & (9). The criteria for granting a BUD would change somewhat as well, though the overall concepts for approval are the same. See Proposed 6 NYCRR § 360.12(d)(3).

Under the existing solid waste regime, a case-specific BUD lasts indefinitely once granted. Thus, many companies are operating today with case-specific BUDs for materials and processes that NYSDEC may have granted decades ago. Critically, the proposed regulations would render *ineffective* 180 days after the new regulations take effect all existing case-specific BUDs that were granted more than 5 years before the new regulations take effect. Proposed 6 NYCRR § 360.4(p). Entities holding those older case-specific BUDs must submit new petitions for approval to NYSDEC in accordance with the new BUD procedures. Existing case-specific BUDs that were granted within 5 years or less of the effective date of the new regulations will remain valid for only 5 years from their issuance date (unless specifically addressed by later NYSDEC action), and then new petitions for approval will be necessary as well.

Going forward, any approved case-specific BUD will be valid for only 5 years from its approval date; renewal must be requested and approved by NYSDEC. Proposed 6 NYCRR § 360.12(d)(7). NYSDEC stated that a renewal period is necessary to provide it with another look at BUDs periodically so it can determine if modifications are warranted. Thus, under this proposed regime, businesses operating with BUDs, whether currently in effect or granted sometime in the future, would have significantly less security for their operations because there will be no certainty that a BUD will continue to be approved by NYSDEC or that it will not be modified during a renewal.

Other changes are proposed to the BUD regulations as well. A list would be added of uses considered unacceptable for beneficial use. Proposed 6 NYCRR § 360.12(b). New restrictions on storing material that will be beneficially used would be added as well, which appear aimed at curtailing speculative accumulation. Specifically, the proposed regulations provide that unless otherwise approved, materials cannot be stored for more than 180 days before they are beneficially used. Proposed 6 NYCRR § 360.12(a)(3). A showing will also be required for all waste materials that, during any calendar year, the amount of material that left the site for beneficial use or disposal constituted at least 75% by weight of the total material produced during that year. Proposed 6 NYCRR § 360.12(a)(3).

The proposed regulations incorporate some timeframes to allow facilities to come into compliance with the new requirements that would be imposed. However, these timeframes are relatively short, ranging from 60 to 180 days from the effective date of the proposed regulations, depending on the category into which an entity falls. Proposed 6 NYCRR § 360.4(a)-(j). Given these limited timeframes and the significant changes proposed to the solid waste regulations under Part 360 and other related Parts, any entity concerned that it may be affected by the proposed changes should provide comments to NYSDEC before September 13 and begin the process early of evaluating how best they can come into compliance when the new solid waste regulations are adopted.

If you have any questions about this *Information Memo*, please contact [Kevin M. Bernstein](#), [Virginia C. Robbins](#), [Michelle R. Billington](#), any of the [attorneys](#) in our [Environmental and Energy Practice Group](#), or the attorney in the firm with whom you are regularly in contact.



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