

## TRANSACTION-BASED LIABILITY AND NEW YORK'S BENEFICIAL USE DETERMINATION PROGRAM

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### I. INTRODUCTION

Since 1993, the State of New York has encouraged generators of solid waste to identify and utilize environmentally sound recycling and reuse of solid wastes generated within the state in an effort to conserve landfill capacity and to preserve environmental assets.<sup>1</sup> One of the least well-known or understood mechanisms for meeting these objectives is New York's Beneficial Use Determination (BUD) program, which permits generators and recyclers of solid wastes to avoid the often cumbersome regulatory approvals associated with handling of solid wastes and, at the same time, reduces or eliminates costs associated with disposal of such wastes. The BUD program has phenomenal potential to preserve landfill capacity by eliminating solid wastes from the waste stream that are otherwise suitable for reuse as a substitute for a commercially available product. For example, excess soil generated from a construction site might be beneficially reused pursuant to the BUD program as fill materials on another construction site without meeting complex regulatory and permitting requirements. Indeed, the largest subdivision of materials considered to be solid wastes that have the potential to be beneficially reused consists of those materials generated from construction and demolition (C&D) activities, such as soil, rock, brick, asphalt, and concrete.<sup>2</sup> Consequently, reuse of such materials

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1. See, e.g., DIV. OF SOLID WASTE, N.Y. STATE DEP'T OF ENVTL. CONSERVATION, FINAL ENVTL. IMPACT STATEMENT FOR REVISIONS/ENHANCEMENTS TO 6 NYCRR PART 360 SOLID WASTE MGMT. FACILITIES RS 1-30 (May 1993) [hereinafter FEIS] (discussing a proposal by New York State to grant "beneficial use determinations" for ash and other solid wastes, exempting them from the usual regulatory requirements).

2. The statute reads:

*Construction and demolition (C&D) debris* means uncontaminated solid waste resulting from the construction, remodeling, repair and demolition of utilities, structures and roads; and uncontaminated solid waste resulting

is imperative if New York intends to meet its recycling goals, preserve landfill airspace, and protect sensitive environmental assets.

However, due to a lack of consistency in the way the BUD program has been interpreted by its administering agency and the courts, and a general misunderstanding by the regulated community as to how the program operates, the BUD program has been underutilized as an alternative to conventional disposal options. The BUD provisions are found within Part 360 of the solid waste regulations<sup>3</sup> and permit C&D solid waste to be beneficially reused in several ways.<sup>4</sup> The purpose of the BUD regulations is to promote reuse of solid waste, as opposed to disposal, in order to reduce the volume of materials that are ultimately deposited in landfills, thereby preserving landfill capacity for nonreusable materials.<sup>5</sup> When materials are beneficially reused in accordance with the BUD provisions, they cease being a solid waste for the purposes of Part 360, and therefore are exempt from the complex regulatory requirements applicable to management, transportation, and disposal of such wastes.<sup>6</sup> However, if the New York State Department of Environmental Conservation (NYSDEC) determines that the materials are not being reused in accordance with the BUD regulations, the materials again become a solid waste subject to the Part 360 requirements.<sup>7</sup> NYSDEC responds to such misuse by

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from land clearing. Such waste includes, but is not limited to bricks, concrete and other masonry materials, soil, rock, wood (including painted, treated and coated wood and wood products), land clearing debris, wall coverings, plaster, drywall, plumbing fixtures, nonasbestos insulation, roofing shingles and other roof coverings, asphaltic pavement, glass, plastics that are not sealed in a manner that conceals other wastes, empty buckets 10 gallons or less in size and having no more than one inch of residue remaining on the bottom, electrical wiring and components containing no hazardous liquids, and pipe and metals that are incidental to any of the above. . . . Also, waste contained in an illegal disposal site may be considered C&D debris if the department determines that such waste is similar in nature and content to C&D debris.

N.Y. COMP. CODES R. & REGS. tit. 6, § 360-1.2(b)(38) (1995).

3. *Id.* §§ 360-1 to -17.6 (2006).

4. *See id.* § 360-1.15 (2003).

5. *See* Lehigh Portland Cement Co. v. N.Y. State Dep't of Env'tl. Conservation, 614 N.Y.S.2d 674, 675 (Sup. Ct. 1994).

6. N.Y. COMP. CODES R. & REGS. tit. 6, § 360-1.15 (2003); *see also* Henner, Declaratory Ruling 27-31 (N.Y. State Dep't of Env'tl. Conservation Apr. 11, 2000), [http://www.dec.ny.gov/docs/legal\\_protection\\_pdf/27\\_31.pdf](http://www.dec.ny.gov/docs/legal_protection_pdf/27_31.pdf) [hereinafter Henner Ruling].

7. *See* Henner Ruling, *supra* note 6, at 4 ("A beneficial use material can once again become a solid waste if discarded by its manager or owner.").

implementing enforcement actions for violations of Part 360.<sup>8</sup> Penalties for violations, found within the Environmental Conservation Law (ECL) include both civil and criminal sanctions that may be imposed against any entity that violates Part 360.<sup>9</sup> In light of the environmental liabilities that may occur for violating the BUD regulations, generators of solid waste have conservatively opted to continue to use conventional disposal options such as landfills, rather than risk exposure to environmental liabilities that may result from a misinterpretation of the BUD regulations. As a result, New York's landfill capacity and environmental assets may be at risk.

Paradoxical interpretations of the BUD program by its administering agency have further compounded the problem. Recently, the NYSDEC—the BUD program's administering agency—issued a declaratory ruling,<sup>10</sup> which discussed several provisions of NYSDEC's BUD regulations<sup>11</sup> and their applicability toward the reuse of C&D materials.<sup>12</sup> The declaratory ruling is riddled with internal inconsistencies and provides several legally binding conclusions that are drawn without reference to supporting materials. The primary issue addressed in the ruling is whether a fee can be assessed by a party that reuses C&D materials when such reuse is conducted under the BUD program.<sup>13</sup> Landfills typically charge fees for disposal of C&D materials at their facilities.<sup>14</sup> Contrary to this, the declaratory ruling holds that when C&D materials are beneficially reused under the BUD regulations, a fee cannot be charged by the entity that accepts the materials, nor should it be paid by the generator of the materials.<sup>15</sup> Importantly, if NYSDEC discovers that a fee is being assessed, an enforcement

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8. *See, e.g.*, *People v. Adinolfi*, 823 N.Y.S.2d 662 (Sup. Ct. 2006).

9. N.Y. ENVTL. CONSERV. LAW § 71-2703 (McKinney 1997 & Supp. 2008).

10. Element Env'tl. Strategies, LLC, Declaratory Ruling 27-35 (N.Y. State Dep't of Env'tl. Conservation Sept. 28, 2006), <http://www.dec.ny.gov/hearings/30927.html> [hereinafter EES Ruling].

11. N.Y. COMP. CODES R. & REGS. tit. 6, § 360-1.15.

12. *See generally* EES Ruling, *supra* note 10.

13. *See id.*

14. These fees are commonly referred to as "tipping fees." Tipping fees are "fee[s] charged for the unloading or dumping of material at a landfill, transfer station, recycling center, or waste-to-energy facility, usually stated in dollars per ton." 2 U.S. ENVTL. PROT. AGENCY, DECISION-MAKERS' GUIDE TO SOLID WASTE MANAGEMENT A-7 (1995); *see also* Chaz Miller, Editorial, *Trash Taxes*, WASTE AGE, Apr. 2003, at 122 (describing and criticizing tipping fee taxes). Such tipping fee taxes can be highly lucrative for states. *See Landfill Surcharge Increased \$4 to \$7.25/Ton*, BIOCYCLE, Aug. 2002, at 18 (announcing that Pennsylvania had raised its tipping fee surcharge to finance environmental programs and close a \$1.3 billion budget gap).

15. EES Ruling, *supra* note 10.

action will commence.<sup>16</sup> Such an enforcement action may be triggered despite all other technical requirements<sup>17</sup> for the reuse of materials being satisfied.<sup>18</sup> Consequently, under the Ruling, a generator may be found liable for violations of the solid waste regulations and sanctioned under the ECL simply because a financial exchange has occurred—either with or without the generator’s knowledge. This transaction-based trigger creates an incredibly low threshold for environmental liability and has the potential to frustrate use of the BUD program by generators.

This Note discusses the background of the BUD program, an analysis of NYSDEC’s recent declaratory ruling, and the implications of using a fee exchange to trigger environmental liability under the ECL. Part II addresses the statutory authority for the BUD program, the mechanics of its operation, the distinctions between generic and case-specific BUDs, as well as NYSDEC and the courts’ interpretations of the BUD program. Part III discusses the sound environmental policy that underlies the BUD program, the incentives that are provided to generators of solid wastes to reuse solid wastes, and, generally, the liabilities that may be imposed for BUD violations. Part III provides an analysis of NYSDEC’s recent declaratory ruling, including identification of its internal inconsistencies. Part III also addresses the implications of the fee prohibition announced in the ruling, and ultimately concludes that the ruling, though poorly supported, furthers NYSDEC’s mandate to promote reuse of materials as opposed to conventional disposal. Part IV discusses the implications of using a fee exchange as a trigger for environmental liability, the theoretical limits of the fee prohibition, and proposes some protective measures that generators of solid waste might use to eliminate exposure to liability for violating the fee prohibition. The Note concludes with an assessment of the likelihood of criminal and civil actions being brought against a generator of solid waste for violation of the fee prohibition, and explains the sanctions that may be imposed as a result of such actions.

## II. BACKGROUND OF THE BUD PROGRAM

### A. *Statutory Authority for the BUD Program*

The Department of Environmental Conservation . . . implements article 27 of the [Environmental Conservation Law]

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16. *Id.*

17. For the purposes of this Note, the term “technical requirements” means requirements other than the fee restrictions, including engineering, monitoring, technical specifications, or other materials management protocols.

18. EES Ruling, *supra* note 10.

which, in part, covers the handling, transportation and disposal of solid waste. . . . During 1988, the Legislature enacted section 27-0106(1) of the Environmental Conservation Law which sets the State solid waste management priorities, and directs that reuse or recycling of waste is to take precedence over incineration or land filling. . . . [NYS]DEC implemented [its] legislative mandate by creating the . . . [BUD] program set forth in [Part 360].<sup>19</sup>

Other states, such as New Jersey, have implemented similar BUD programs for the same purposes.<sup>20</sup> “Under the BUD Program, waste materials which would otherwise be disposed of can be utilized in a cost-efficient manner, in many instances saving [a] State’s natural resources.”<sup>21</sup> The policy behind the BUD program is to remove reusable materials from the waste stream and provide sufficient incentives to encourage such reuse. Reuse of such materials conserves landfill capacity by reducing the volume of materials that require disposal, thereby satisfying NYSDEC’s legislative mandate to encourage reuse or recycling over incineration or landfilling.

### *B. Mechanics of the BUD Program*

When materials are beneficially reused in accordance with the BUD regulations, they “are not considered solid waste for the purposes of . . . Part [360].”<sup>22</sup> As such, “[t]he BUD program exempts [these] materials [when beneficially reused] . . . from the broad definition of solid waste.”<sup>23</sup> “This exemption allows the users of BUD materials to escape the comprehensive regulatory requirements of . . . Part 360.”<sup>24</sup> However, solid waste that is destined for beneficial reuse remains a solid waste, and is therefore subject to Part 360

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19. *Lehigh Portland Cement Co. v. N.Y. State Dep’t of Env’tl. Conservation*, 614 N.Y.S.2d 674, 675 (Sup. Ct. 1994).

20. *See, e.g.*, N.J. ADMIN. CODE §§ 7:26-1.1(a)1, -1.7(g) (2006); BUREAU OF SOLID AND HAZARDOUS WASTE MGMT., N.J. DEP’T OF ENVTL. PROT., GUIDANCE DOCUMENT FOR THE BENEFICIAL USE PROJECT (BUD) APPROVAL PROCESS (2003), <http://www.state.nj.us/dep/dshw/rtrtp/bud.htm>. There are many other examples of exemptions—or attempted exemptions—from the definitions of regulated materials, in an effort to save money for generators and reduce the demand on disposal facilities. In many cases, both the proposals and the outcomes are driven more by politics than by science.

21. N.Y. State Dep’t of Env’tl. Conservation, Solid Waste Program, <http://www.dec.ny.gov/chemical/8498.html> (last visited Mar. 24, 2008).

22. N.Y. COMP. CODES R. & REGS. tit. 6, § 360-1.15(b) (2003).

23. *Lehigh*, 614 N.Y.S.2d at 675.

24. *Id.*

regulations until the precise point of exemption is reached.<sup>25</sup> This point of exemption is determined by NYSDEC.<sup>26</sup>

### C. *Types of BUDs That Have Been Granted*

Pursuant to its statutory authority,<sup>27</sup> NYSDEC has granted numerous beneficial use determinations.<sup>28</sup> The BUD regulations include several predetermined reuses for specified solid wastes—generic BUDs—as well as procedures for petitioning NYSDEC for approval of “case-specific BUDs” not expressly included in the regulations.<sup>29</sup>

A BUD can be granted to any entity regardless of whether that entity is a generator, recycler, facility, or transporter.<sup>30</sup> However, to grant a BUD, NYSDEC must determine, among other things, that “the essential nature of the proposed use of the material constitutes a reuse rather than disposal.”<sup>31</sup> As part of this calculus, the material proposed for reuse must not have any unnecessary attributes or “contaminants.”<sup>32</sup> For example, if the materials proposed for reuse “did, in fact, require treatment prior to being acceptable for [beneficial reuse] . . . the material would continue to be regulated as a solid waste until such point that the material met the technical requirements or specifications for use as a product or material listed under the beneficial use provisions.”<sup>33</sup>

#### 1. Generic BUDs

Generic BUDs are predetermined uses of solid waste that are expressly included in the BUD regulations.<sup>34</sup> Materials that would

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25. See, e.g., Henner Ruling, *supra* note 6 (noting that transportation permits for ash are not required because BUD materials are exempt from Part 360 requirements and are not considered a solid waste).

26. *Id.*

27. N.Y. COMP. CODES R. & REGS. tit. 6, § 360-1.15.

28. See generally BUREAU OF SOLID WASTE, REDUCTION, AND RECYCLING, N.Y. STATE DEPT OF ENVTL. CONSERVATION, GRANTED BENEFICIAL USE DETERMINATIONS SORTED BY BENEFICIAL USE, available at [http://www.dec.ny.gov/docs/materials\\_minerals\\_pdf/buduse.pdf](http://www.dec.ny.gov/docs/materials_minerals_pdf/buduse.pdf) [hereinafter GRANTED BUDS REPORT].

29. Compare N.Y. COMP. CODES R. & REGS. tit. 6, § 360-1.15(b)(1)-(16) (generic BUDs), with *id.* § 360-1.15(d) (case-specific BUDs).

30. See generally GRANTED BUDS REPORT, *supra* note 28. See also N.Y. COMP. CODES R. & REGS. tit. 6, § 360-1.15(d)(1) (“The generator or proposed user of a solid waste may petition the department . . .”).

31. N.Y. COMP. CODES R. & REGS. tit. 6, § 360-1.15(d)(2)(i).

32. *Lehigh Portland Cement Co. v. N.Y. State Dep’t of Env’tl. Conservation*, 614 N.Y.S.2d 674, 675 (Sup. Ct. 1994) (noting that NYSDEC may refuse a BUD due to the presence of contaminants).

33. Henner Ruling, *supra* note 6, at 4 n.1.

34. N.Y. COMP. CODES R. & REGS. tit. 6, § 360-1.15(b)(1)-(16) (generic BUDs).

otherwise be considered solid waste are no longer considered to be solid waste when such materials are used in accordance with a generic BUD.<sup>35</sup> For example, the regulations expressly permit the beneficial reuse of “recognizable, uncontaminated concrete and concrete products, asphalt pavement, brick, glass, soil and rock placed in commerce for service as a substitute for conventional aggregate.”<sup>36</sup> Importantly, if reuse of materials is being conducted pursuant to a generic BUD, “the petitioner [does] no[t] . . . need to apply to the department for a beneficial use determination.”<sup>37</sup> Notably, in some cases “the user will not even be required to notify the department that such use will be occurring.”<sup>38</sup> However, NYSDEC has cautioned “that some of these [BUDs] are not self-implementing and may require a [solid waste] permit or demonstration testing and Department authorization.”<sup>39</sup> NYSDEC has not developed a list of self-implementing versus non-self-implementing generic BUDs. Moreover, in enforcement proceedings, *ex post facto* claims that prohibited activities were conducted in accordance with a generic BUD have not been accepted by the courts.<sup>40</sup> Consequently, activities conducted pursuant to a generic BUD, without prior notification to NYSDEC, can carry considerable risks.

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35. *Id.*

36. *Id.* § 360-1.15(b)(11). *Compare id.* § 360-1.15(b)(11) (approving uses for C&D materials), *with id.* § 360-1.2(b)(38) (defining C&D to include “bricks, concrete and other masonry materials, soil, rock”). Note that a recent decision explained that this generic BUD is restricted to highway construction; however, the regulations make no such indication. *See People v. Adinolfi*, 823 N.Y.S.2d 662, 667 (Sup. Ct. 2006). “Placed in commerce” means that “the solid waste material has, where necessary, been cleaned, processed, or otherwise managed in such a fashion that the material meets the technical requirements or specifications for the intended use identified by the particular beneficial use determinations set forth in subdivision 1.15(b).” *Henner Ruling*, *supra* note 6, at 3.

37. 15 N.Y. Reg. 17 (Aug. 25, 1993).

38. *Id.*

39. N.Y. State Dep’t of Env’tl. Conservation, Beneficial Use Determinations (BUDs), <http://www.dec.ny.gov/chemical/8821.html> (last visited Mar. 24, 2008) (“Please note, however, that some of these are not self-implementing and may require a 360 permit or demonstration testing and Department authorization.”).

40. *See State v. Della Villa*, 717 N.Y.S.2d 831, 838 (Sup. Ct. 2000) (noting that although “certain of the C & D materials at issue here might fall within the list of materials eligible for a beneficial use determination by DEC there is absolutely no proof in this record that Defendants ever petitioned DEC for such determination or that such a determination was granted”).

## 2. Case-Specific BUDs

Case-specific BUDs provide a flexible alternative to the generic BUDs.<sup>41</sup> To obtain a case-specific BUD, the entity seeking the BUD must petition NYSDEC for approval to reuse a particular solid waste as a substitute for a commercially available product.<sup>42</sup> The petitioner must demonstrate that, among other things, the proposed reuse will not adversely impact the environment.<sup>43</sup>

The enormous benefit derived from case-specific BUDs can be seen in those BUDs that NYSDEC has granted to date.<sup>44</sup> With case-specific BUDs, generators and users of solid waste are only limited by technical impracticability of reuse or their own innovation in developing novel reuses for solid wastes. By demonstrating a willingness to grant case-specific BUDs pursuant to their regulatory authority, NYSDEC has encouraged development of reuse methods by the private sector, thereby satisfying its legislative mandate to promote reuse and recycling as opposed to land disposal.

With respect to C&D materials, NYSDEC has granted BUDs for remedial cap construction during remediation and redevelopment, for use in landfill closures and as an alternate day cover, for use as a road subbase in highway construction, and for use as a general aggregate.<sup>45</sup> Some of the granted case-specific BUDs have permitted massive volumes of C&D materials to be beneficially reused,

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41. See N.Y. COMP. CODES R. & REGS. tit. 6, § 360-1.15(d).

42. *Id.* § 360-1.15(d)(1)(iii).

43. *Id.* § 360-1.15(d)(1). This section of Part 360 reads:

The generator or proposed user of a solid waste may petition the department, in writing, for a determination that the solid waste under review in the petition may be beneficially used in a manufacturing process to make a product or as an effective substitute for a commercial product. Unless otherwise directed by the department, the department may not consider any such petition unless it provides . . . (i) a description of the solid waste under review and its proposed use; (ii) chemical and physical characteristics of the solid waste under review and of each type of proposed product; (iii) a demonstration that there is a known or reasonably probable market for the intended use of the solid waste under review and of all proposed products . . . ; (iv) a demonstration that the management of the solid waste under review will not adversely affect human health and safety, the environment, and natural resources . . .

*Id.*

44. See generally GRANTED BUDs REPORT, *supra* note 28.

45. See generally *id.* For the purposes of this Note, the validity of BUDs issued by NYSDEC is presumed. However, it is worth noting that some BUDs that permit land application of C&D may be suspect under the federal Resource Conservation and Recovery Act (RCRA). See generally Jeffrey M. Gaba, *Solid Waste and Recycled Materials under RCRA: Separating Chaff from Wheat*, 16 *ECOLOGY L.Q.* 623, 639 (1989) (noting that recyclable materials remain "solid wastes if they are applied to land").

particularly as a substitute for commercial fill material during remedial cap construction and redevelopment of large contaminated properties.<sup>46</sup>

*D. Incentives for Using the BUD Program*

The benefits derived from these BUDs for C&D materials are self-evident. The holder of a BUD is able to obtain materials that it would otherwise be required to purchase.<sup>47</sup> Also, as a result of the recent declaratory ruling, generators now have a free alternative to costly disposal of C&D materials in a landfill.<sup>48</sup> In addition, entities engaged in large-scale fill operations can streamline their regulatory review process by opting to use a BUD. Generally, acquisition of appropriate permits for fill operations can be a time-consuming and costly endeavor.<sup>49</sup> Importantly, “[s]ince BUDs involve determinations over the jurisdiction of the solid waste permit program . . . compliance with 6 NYCRR Part 617 State Environmental Quality Review (‘SEQRA’) and 6 NYCRR Part 621 Uniform Procedures do not apply to the BUD review process.”<sup>50</sup> Consequently, an entity that requires a large volume of fill material to complete a project can avoid costs and delays associated with obtaining a Part 360 permit by obtaining a BUD, and at the same time avoid the notorious delays

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46. See, e.g., COMM. ON SANITATION AND SOLID WASTE MGMT., COUNCIL OF THE CITY OF N.Y., REPORT OF THE INFRASTRUCTURE DIVISION (Nov. 14, 2006), available at <http://webdocs.nycouncil.info/attachments/75219.htm?CFID=1130642&CFTOKEN=73990801> (BUD “permit” granted for 1 million cubic yards of materials to be used for remedial cap construction, and 3.8 million cubic yards total for redevelopment purposes).

47. Some BUDs may take on characteristics of a conventional permit, hence the alleged benefits of such determinations become less apparent. Also, there are products and activities that, while not necessarily demonstrating a beneficial use in a commercial product, may be completely innocuous. Rather than fail the beneficial use test, they should still be considered for exemption from regulation. Despite these potential constraints, BUDs can offer strong motivation for recycling and reuse of solid wastes as well as regulatory relief.

48. See EES Ruling, *supra* note 10.

49. For example, if a construction operation will disturb or expose one or more acres of soil, the stormwater runoff from the site must be covered by a State Pollutant Discharge Elimination System (SPDES) permit for stormwater discharges from construction activity issued by NYSDEC. See generally N.Y. State Dep’t of Env’tl. Conservation, State Pollutant Discharge Elimination System, <http://www.dec.ny.gov/permits/6054.html> (last visited Mar. 24, 2008). Under the SPDES permit regulations, soil disturbance includes clearing vegetation, grubbing, filling, grading, excavation, demolition, and any current or proposed construction activity. See *id.* Parties are responsible for obtaining coverage under the SPDES permit prior to commencing construction activities and maintaining erosion and sediment control measures until the site has been stabilized. See *id.*

50. Beneficial Use Determinations (BUDs), *supra* note 39.

associated with the SEQRA review process.<sup>51</sup> Moreover, through beneficial reuse of C&D materials, New York can preserve its valuable landfill space by redirecting a solid waste that is capable of being reused in an environmentally sound manner. Certainly, concerns may be raised regarding the BUD program's circumvention of SEQRA.<sup>52</sup> However, the benefits of preserving landfill airspace and facilitating rapid remediation and redevelopment of large, environmentally impacted sites should properly outweigh such concerns.<sup>53</sup> As a result, the beneficial reuse of C&D materials has considerable benefits for both a BUD holder and the public as a whole. Additionally, the recent declaratory ruling establishes economic benefits for generators.<sup>54</sup> Consequently, beneficial reuse of C&D materials should continue to be promoted by NYSDEC.<sup>55</sup>

*E. Risks Associated with BUDs*

Despite these benefits, BUDs are likely to create liability concerns for generators of C&D materials. The penalties for violation of BUD regulations are substantial.<sup>56</sup> Imposition of these penalties generally stems from BUD materials losing their status as being exempt from the solid waste regulations. For example, "a beneficial use material can once again become a solid waste if discarded by its

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51. Patricia E. Salkin, Afterword, *SEQRA's Silver Anniversary: Reviewing the Past, Considering the Present, and Charting the Future*, 65 ALB. L. REV. 577 (2001). Salkin notes:

While academics and public sector proponents of the [SEQRA] implementing regulations argue that state-imposed time frames are reasonable, the practical reality is that these time frames are rarely adhered to; and delays abound while governments await modifications to proposals, additional requested information, and myriad details that cause a glitch in what, on paper, often seems quite reasonable.

*Id.* at 579-80.

52. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.1(c) (2000).

The basic purpose of SEQR is to incorporate the consideration of environmental factors into the existing planning, review and decisionmaking processes of state, regional and local government agencies at the earliest possible time. To accomplish this goal, SEQR requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an environmental impact statement.

*Id.*

53. See generally FEIS, *supra* note 1, at 5-8.

54. See *id.* at 7.

55. See U.S. Env'tl. Prot. Agency, Construction and Demolition (C&D) Materials, Deconstruction and Reuse, <http://www.epa.gov/epaoswer/non-hw/debris-new/reuse.htm> (last visited Mar. 24, 2008).

56. See N.Y. ENVTL. CONSERV. LAW § 71-2703 (McKinney 1997 & Supp. 2008).

manager or owner.”<sup>57</sup> In such circumstances, a violation of a BUD necessarily triggers a violation of the solid waste regulations for disposal of a solid waste at an unpermitted facility or, alternately, for the operation of a solid waste management facility without a permit. Cases have typically addressed the latter scenario,<sup>58</sup> and liability is not generally imposed on generators. However, under the solid waste regulations such liability clearly exists. Part 360 provides that “no person shall dispose of solid waste in this State except at: (1) a disposal facility exempt from the requirements of this Part; or (2) a disposal facility authorized to accept such waste for disposal pursuant to this Part or to a department-issued or court-issued order.”<sup>59</sup> The term “[p]erson means any individual, public or private corporation, political subdivision, government agency, authority, department or bureau of the State, municipality, industry, partnership, association, firm, trust, estate or any other legal entity whatsoever.”<sup>60</sup> Generators of C&D materials fall within this definition.<sup>61</sup> Therefore, if the exempt status of a generator’s BUD materials is eliminated, a generator can become liable for disposal at an unpermitted or nonexempt facility. Consequently, a generator must ensure that that a BUD is not violated to maintain the exempt status of its materials.

Both criminal and civil sanctions are imposed for violations of the solid waste regulations in the ECL.<sup>62</sup> The civil penalties generally increase with the volume of waste that is disposed of, as do the criminal sanctions, though the criminal sanctions require a culpable mental state.<sup>63</sup> Notably, the volume required to trigger the maximum civil violation—ten cubic yards—is less than one dump-truck load of materials.<sup>64</sup>

In addition to civil and criminal sanctions under the ECL, there are also potential indirect penalties for violation of BUD provisions. For example, in an enforcement action, NYSDEC might require

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57. Henner Ruling, *supra* note 6, at 4; *see also* N.Y. COMP. CODES R. & REGS. tit. 6, § 360-1.2(a) (2006).

58. *See generally* State v. Della Villa, 717 N.Y.S.2d 831 (Sup. Ct. 2000); People v. Adinolfi, 823 N.Y.S.2d 662 (Sup. Ct. 2006).

59. N.Y. COMP. CODES R. & REGS. tit. 6, § 360-1.5 (prohibited disposal).

60. *Id.* § 360-1.2(b)(117) (1995).

61. *Id.* § 360-1.2(b)(74) (2003) (“Generator means any person whose act or process produces a solid waste or whose act first causes solid waste to be subject to regulation under this Title.”).

62. *See* N.Y. ENVTL. CONSERV. LAW § 71-2703 (McKinney 1997 & Supp. 2008).

63. *Id.* § 71-2703(2). New York recognizes four culpable mental states: “intentionally,” “knowingly,” “recklessly,” and “criminal negligence.” *See* N.Y. PENAL LAW § 15.05 (McKinney 2004); *see also infra* note 136.

64. *See* N.Y. ENVTL. CONSERV. LAW § 71-2703(1)(b)(i). A standard tri-axle dump truck has an approximate capacity of twenty-four cubic yards.

materials accepted pursuant to a BUD to be removed from the reuse location and disposed of at a Part 360-permitted facility.<sup>65</sup> Costs associated with such remedial action may be considerable.<sup>66</sup>

*F. The "Contaminated" Loophole*

Under the generic BUD program, C&D materials must be uncontaminated in order to be acceptable for beneficial reuse.<sup>67</sup> Materials are "contaminated" if they satisfy a legal definition that has no relation to whether compounds that are commonly considered contaminants are actually present in the materials.<sup>68</sup> By the New York definition, uncontaminated materials include those materials that are:

[N]ot mixed or commingled with other solid waste at the point of generation, processing or disposal, and that is not contaminated with spills of a petroleum product, hazardous waste or industrial waste. Contamination from spills of a petroleum product does not include asphalt or concrete pavement that has come into contact with petroleum products through normal vehicle use of the roadway.<sup>69</sup>

Consequently, the definition requires particular activities to occur in order for the materials to be considered contaminated. If none of these activities occur, then the materials are not regulated as contaminated, and a generator may justifiably reuse them under a generic BUD or send them to an exempt facility without any testing or analyses. Exempt facilities may accept these materials, process them as uncontaminated without collecting any samples, and sell or reuse them, thereby passing on materials that potentially contain contaminants.

The absence of reference in the legal definition of uncontaminated materials to specific analytical limits for individual contaminant compounds creates a loophole where, if no mixing or commingling with other solid waste occurred and no spill is evident, the materials are legally considered uncontaminated despite the possible presence of contaminants. NYSDEC's adherence to this legal definition was reiterated in the declaratory ruling.<sup>70</sup>

C&D materials have a high likelihood of containing contaminants, despite not having been commingled with other solid waste and having no spill or release associated with the

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65. See *State v. Della Villa*, 717 N.Y.S.2d 831, 836-38 (Sup. Ct. 2000).

66. See *id.*

67. EES Ruling, *supra* note 10.

68. See *id.*

69. N.Y. COMP. CODES R. & REGS. tit. 6, § 360-7.1(c)(4) (1995).

70. EES Ruling, *supra* note 10.

contamination. Anthropogenic fill material in urban areas (commonly referred to as “urban fill” materials) typically contains high levels of organic and inorganic contaminants, and is an excellent illustration of how a material might meet the legal definition of uncontaminated, while containing high levels of individual contaminants.<sup>71</sup> Notably, these materials often have contaminants above applicable state or federal regulatory limits, which are generally based on human health risks.<sup>72</sup> As previously explained, soils removed from construction sites fall within the definition of C&D and are suitable for reuse under a generic BUD, provided they meet the legal definition of uncontaminated. However, these materials may have had no spill or commingling associated with them.

Consequently, if the materials are legally considered uncontaminated, despite containing contaminants above regulatory limits, they could theoretically meet the definition of C&D materials in the generic BUD regulations and would therefore be exempt from Part 360 regulations. As previously discussed, there are conflicting statements by NYSDEC as to whether notification to NYSDEC is required for reuse of materials. Relying on one set of statements, reuse of such materials may be wholly exempted from NYSDEC oversight.<sup>73</sup> Thus, materials that contain high levels of contaminants could be reused in inappropriate ways without any notification to NYSDEC whatsoever. However, it is worth noting that NYSDEC has apparently discovered this loophole, and has proposed to address this issue by giving urban fill its own category under the proposed revisions to Part 360, which would require testing and analysis of urban fill materials prior to removal from a source location.<sup>74</sup> Until such time that these regulations are adopted, risk of abuses of the loophole, and potential risks to human health and the environment, will remain.

In sum, BUDs for C&D materials provide considerable benefits. The most important benefits are preserving landfill airspace, providing a free substitute product to the BUD holder, and,

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71. Urban fill consists of anthropogenic fill materials—fill materials that were not placed by natural processes. *See* N.Y.C. OFF. ENVTL. COORD., NEW STAPLETON WATERFRONT DEVELOPMENT PLAN: FINAL ENVTL. IMPACT STATEMENT 12-12 to 12-17 (2006) [http://www.nyc.gov/html/oec/downloads/pdf/Stapl\\_FEIS/15-CHAPT\\_12\\_HAZ\\_MAT.pdf](http://www.nyc.gov/html/oec/downloads/pdf/Stapl_FEIS/15-CHAPT_12_HAZ_MAT.pdf).

72. N.Y.C. OFF. ENVTL. COORD., GATEWAY CENTER AT BRONX TERMINAL MARKET: FINAL ENVIRONMENTAL IMPACT STATEMENT 11-4 TO 11-5 (2005), [http://www.nyc.gov/html/oec/downloads/pdf/BTM\\_11\\_Haz\\_Mat.pdf](http://www.nyc.gov/html/oec/downloads/pdf/BTM_11_Haz_Mat.pdf) (noting that exceedances of New York State regulatory criteria are “typical of fill found in urban environments”).

73. 15 N.Y. Reg. 17 (Aug. 25, 1993).

74. N.Y. State Dep’t of Env’tl. Conservation, Comprehensive Revisions and Enhancements to Title 6 NYCRR Part 360 Regulations, <http://www.dec.ny.gov/regulations/8753.html> (last visited Mar. 24, 2008) (preproposal draft).

subsequent to the declaratory ruling, providing a free alternative to landfill disposal for generators. However, there are also inherent risks in BUDs. In particular, generators may be liable when a BUD is violated. NYSDEC's ruling clarified that the assessment of a fee for accepting materials that are reused pursuant to a BUD is, by itself, enough to trigger an enforcement action.<sup>75</sup> With this low threshold for triggering liability, generators of C&D materials who wish to use BUDs as a free alternative to disposal must understand the scope of the fee prohibition.

### III. ANALYSIS: THE SCOPE OF THE FEE PROHIBITION

#### A. *NYSDEC's Restricted Authority to Exempt C&D Reuse: Resolving Conflicting Statutory Mandates*

In 1988, during the same term that the New York legislature set forth the solid waste management priorities, the legislature enacted ECL section 27-0707(2-a),<sup>76</sup> which "require[s] that a permit be obtained in all instances prior to the establishment of a solid waste management facility to be used for the disposition of commercially generated nonputrescible construction and demolition debris when such facility will accept materials from an off-site source and charge a fee for the privilege of using such facility."<sup>77</sup> As noted previously, nearly all wastes generated during construction activities are considered C&D.

The effect of subdivision 2-a was to eliminate NYSDEC's ability to exempt certain C&D disposal facilities from Part 360 permitting requirements.<sup>78</sup> Specifically, subdivision 2-a was passed to directly address concerns regarding a particular C&D landfill that had enjoyed exempt status under an older version of the Part 360 regulations and created considerable public concern due to noxious odors emanating from the site.<sup>79</sup> Due to the narrow scope of the legislation, the legislature does not appear to have contemplated what effect, if any, subdivision 2-a might have on the BUD regulations.<sup>80</sup> Further, the BUD regulations were not put into effect until several years after the passage of subdivision 2-a.<sup>81</sup> However, because exemption from permitting requirements is the effect of the

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75. EES Ruling, *supra* note 10, para. 7.

76. N.Y. ENVTL. CONSERV. LAW § 27-0707(2-a) (McKinney 2007).

77. Memorandum in Support of Assembly Bill No. 8747-A and Senate Bill No. 6666-A from Senator Eugene Levy, bill sponsor, and Assemblyman Maurice D. Hinchey, Chairman of the Environmental Conservation Committee (1988).

78. *Id.*

79. *Id.*

80. See EES Ruling, *supra* note 10.

81. 15 N.Y. Reg. 17 (Aug. 25, 1993).

BUD program—and exemption is precisely the activity that the legislature prohibited NYSDEC from engaging in with its passage of subdivision 2-a—if subdivision 2-a applies, a BUD cannot be granted by NYSDEC.<sup>82</sup> Subdivision 2-a provides that:

No exemption from the permit requirements imposed by this title shall be allowed for the establishment of a new solid waste management facility for the disposal of nonputrescible construction and demolition debris when such facility will be used for the deposition of construction and demolition debris from an offsite source when a fee or any other form of consideration is required for the privilege of using the facility for the disposal of construction and demolition debris.<sup>83</sup>

*B. Applicability of Subdivision 2-a*

Where all of the elements of subdivision 2-a are satisfied, no exemption from the permit requirements, including an exemption through the grant of a BUD, is allowed.<sup>84</sup> However, if one of the elements in subdivision 2-a is not satisfied, the section should not apply.<sup>85</sup> For example, if materials being disposed of at a facility are not C&D materials, or the C&D materials being disposed of do not originate from an off-site source, subdivision 2-a is inapplicable. Similarly, if a “fee or any other form of consideration is [not] required for the privilege of using the facility for the disposal of [C&D],”<sup>86</sup> subdivision 2-a should not apply. Subdivision 2-a was narrowly tailored to address a very specific legislative concern.<sup>87</sup> Consequently, a narrow interpretation of subdivision 2-a is likely consistent with the legislature’s purpose.

*C. The Fee Prohibition and Internal Inconsistencies in the Ruling*

In the recent declaratory ruling, NYSDEC explained that BUD holders may not assess a fee for accepting C&D materials at their facilities. “If the Department discovers that a fee is being charged for

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82. Where the legislature has spoken directly to the issue, NYSDEC lacks the authority to overrule. *See, e.g., Poretta v. Costantino*, 507 N.Y.S.2d 136, 138 (Sup. Ct. 1986) (“The power which may be granted [to an agency] is not the power to legislate, but the power to administer the law *as enacted by the Legislature*.”).

83. N.Y. ENVTL. CONSERV. LAW § 27-0707(2-a) (McKinney 2007).

84. EES Ruling, *supra* note 10.

85. Such statutory provisions are sometimes referred to as “conjunctive.” *See, e.g., Watchtower Bible & Tract Soc’y of N.Y. v. Lewisohn*, 315 N.E.2d 801, 803 (N.Y. 1974).

86. N.Y. ENVTL. CONSERV. LAW § 27-0707(2-a).

87. *See* Memorandum from Langdon Marsh, Executive Deputy Comm’r, N.Y. State Dep’t of Env’tl. Conservation, to Evan Davis, Counsel to the Governor of the State of N.Y. (July 11, 1988).

the use of C&D debris under a BUD, a Part 360 permit will be required and appropriate enforcement action will be taken.”<sup>88</sup> Similar language was reiterated in three other locations within the ruling.<sup>89</sup> This language is consistent with the elements necessary to trigger subdivision 2-a. The BUD regulations themselves contain no provisions whatsoever asserting that a fee cannot be charged for the reuse of BUD materials.<sup>90</sup> Consequently, the fee prohibition in the ruling appears to have originated from the restrictions provided in subdivision 2-a. NYSDEC seems to conclude that it lacks the authority to exempt facilities that beneficially reuse C&D materials from permitting requirements, because subdivision 2-a prohibits such an exemption.<sup>91</sup>

However, NYSDEC’s ruling is internally inconsistent with this conclusion. As discussed previously, subdivision 2-a presents a conjunctive test;<sup>92</sup> therefore, all elements must be present in order for subdivision 2-a to apply.<sup>93</sup> One of the requirements is that the facility be used “for the *disposal* of [C&D] debris.”<sup>94</sup> Subdivision 2-a might also be read to merely require “deposition” of C&D debris to trigger its requirements.<sup>95</sup> However, if neither deposition nor disposal is present, subdivision 2-a should not apply.

In the ruling, NYSDEC explained that “[u]nder the BUD Program . . . construction and demolition material is properly being reused and is not being disposed of.”<sup>96</sup> In addition, if “a BUD has been granted for the placement of the material,” it is not considered disposal.<sup>97</sup> If the basis of the fee prohibition resides in subdivision 2-a, these statements create a paradox.<sup>98</sup> If the materials are “not being disposed of,”<sup>99</sup> then subdivision 2-a, which requires disposal of C&D debris as an element,<sup>100</sup> should not apply. If subdivision 2-a is inapplicable, then it is unclear where the fee prohibition originated. Unfortunately, NYSDEC failed to cite support for its fee prohibition

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88. EES Ruling, *supra* note 10.

89. *See id.*

90. *See generally* N.Y. COMP. CODES R. & REGS. tit. 6, § 360-1.15 (2003).

91. *See infra* text accompanying note 98.

92. *See supra* text accompanying notes 85-87.

93. *See id.*

94. N.Y. ENVTL. CONSERV. LAW § 27-0707(2-a) (McKinney 2007) (emphasis added).

95. *See id.*

96. EES Ruling, *supra* note 10.

97. *Id.*

98. Notably, the ruling cited no support explaining the origin of the fee prohibition. *See id.*

99. *Id.*

100. N.Y. ENVTL. CONSERV. LAW § 27-0707(2-a) (McKinney 2007).

conclusions in the ruling. If subdivision 2-a is not the source of the fee prohibition, it must have originated elsewhere.

*D. Possible Support for NYSDEC's Conclusions*

Several statements in the *Final Environmental Impact Statement*<sup>101</sup> (FEIS), which was developed prior to the adoption of the BUD regulations, suggest that a fee prohibition may have been presumed for all BUDs. For example, the FEIS noted that “[BUD] determinations will save the regulated community the costs for disposal of [solid waste] materials. The avoided disposal fees will vary throughout the State.”<sup>102</sup> Also, when discussing the financial impacts of new closure requirements for municipal landfills, NYSDEC noted that “there are . . . many areas where the [closure] action allows less costly procedures and practices: for example, when specific waste materials can be beneficially used to replace materials which would otherwise have to be purchased.”<sup>103</sup> If NYSDEC believed a municipality could actually profit from accepting beneficial use materials by assessing a fee, thereby offsetting the costs of compliance with the new regulations even further, it likely would have emphasized that point. Such profit-making benefits were not suggested in the FEIS. Consequently, the statements in the FEIS support a conclusion that although NYSDEC did not expressly include a fee prohibition in the BUD regulations, it presumed that one would be imposed.

*E. Policy Reasons for a Fee Prohibition*

NYSDEC could reasonably conclude that imposition of a fee prohibition constitutes sound environmental policy. In the absence of a fee prohibition, beneficial reuse of materials becomes less attractive to generators than if they were permitted to rid themselves of the materials for free. When deciding between legally sufficient reuse or disposal options, economics will likely determine which option is ultimately selected. Absent a fee prohibition, a savvy BUD holder is likely to charge a similar rate for reuse of materials that a landfill can charge for disposal. This is because disposal and reuse services are perfectly elastic market substitutes with respect to the generator's needs—i.e., removal of materials from a site and placement at an appropriate facility.<sup>104</sup> Under such circumstances, generators would have no greater economic incentive to reuse

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101. FEIS, *supra* note 1.

102. *Id.* app. A, at RIS-3.

103. *Id.* app. A, at RIS-5.

104. For a discussion regarding elasticity between different products, see generally *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

materials than to simply dispose of them. As noted previously, NYSDEC's mandate is to promote reuse of materials more than disposal.<sup>105</sup> By imposing a fee restriction, NYSDEC furthered this mandate by giving an enormous economic incentive for generators to seek out BUD holders and reuse materials, as opposed to paying for disposal at landfills.<sup>106</sup>

While it may make good policy sense, NYSDEC's ruling may yet be subject to attack as arbitrary, capricious, and unreasonable. As noted previously, subdivision 2-a is a mandate from the legislature that, when certain conditions are satisfied, NYSDEC cannot exempt facilities.<sup>107</sup> Because it is a mandate, under New York law, NYSDEC's statutory interpretation would not be entitled to much deference.<sup>108</sup> However, if the ruling were viewed as merely an interpretation of Part 360 regulations, such an interpretation would be subject to considerable deference.<sup>109</sup> Consequently, even if the fee prohibition is not derived from subdivision 2-a, a NYSDEC determination that a fee prohibition can be attached as a condition to exemptions may ultimately be an interpretation of Part 360 regulations—and such an interpretation would stand in the face of judicial scrutiny.<sup>110</sup> Regardless of whether deference is ultimately given, NYSDEC's failure to cite support for the fee prohibition, and failure to recognize that subdivision 2-a consists of a conjunctive test,

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105. See N.Y. ENVTL. CONSERV. LAW § 27-0106 (McKinney 2007) (state solid waste management policy).

106. The economic impact of a fee prohibition on BUD holders might also be considered. NYSDEC has essentially decided to burden the BUD holders and benefit generators. It is noteworthy that the BUD holder still retains the benefit from obtaining materials that would otherwise need to be purchased. However, under the ruling, profits derived from accepting BUD materials are completely eliminated. EES Ruling, *supra* note 10, para. 6. Under such circumstances, a BUD holder may have a viable claim for a regulatory taking. Examination of this and other legal remedies that may be available to a BUD holder as a result of the fee prohibition is not within the scope of this paper.

107. See *supra* Part III.A.

108. See *Indus. Liaison Comm. of Niagara Falls Area Chamber of Commerce v. Williams*, 527 N.E.2d 274, 277 (N.Y. 1988).

109. “[T]itles in Article 27 state that reuse is a preferred alternative to disposal, [and] the Department has authority to approve certain reuses of material when done in accordance with applicable statutes and regulations.” EES Ruling, *supra* note 10, para. 3.

110. “[NYSDEC], as a State agency, has broad powers to construe the statutes and regulations it administers and should be upheld unless such construction is unreasonable or irrational.” *N.Y. Pub. Interest Research Group v. Williams*, 511 N.Y.S.2d 864, 866 (App. Div. 1987). The rule, however, “has no application unless the statute being construed lies within the realm of the agency’s expertise.” *Thomas v. Bethlehem Steel Corp.*, 466 N.Y.S.2d 808, 811 (App. Div. 1983), *aff’d*, 470 N.E.2d 831 (N.Y. 1984).

may be sufficiently unreasonable to convince a court to overturn the fee prohibition.

In sum, despite the BUD regulations being silent regarding fee restrictions and the tenuous applicability of subdivision 2-a, the fee prohibition furthers NYSDEC's mandate to promote reuse of C&D materials instead of disposal. NYSDEC's interpretation is likely to be heavily scrutinized by the courts if it is ever examined in detail. Until such time, in order to benefit from the economic windfall that was created by the ruling, and simultaneously avoid liability under the ECL, generators must ensure that the fee prohibition is observed. Moreover, it is critical to understand the sanctions that will be imposed if a violation is found.

#### IV. EVALUATION: FEE EXCHANGE AS A TRIGGER FOR LIABILITY

Fees cannot be charged when a BUD has been granted.<sup>111</sup> "The owner or operator should not be charging or accepting a fee for disposal. In addition, the generator or an entity seeking to dispose of the material should not be paying a fee for the disposal of such waste."<sup>112</sup> Consequently, the fee restriction is applied to both the generator and the BUD holder.

Importantly, if NYSDEC "discovers that a fee is being charged for the use of C&D debris under a BUD, a Part 360 permit will be required and appropriate enforcement action will be taken."<sup>113</sup> However, when asked "[w]hat financial monitoring and reporting is necessary to demonstrate that no fee or other consideration has been charged,"<sup>114</sup> NYSDEC responded that "[i]n most cases, there is no financial monitoring or reporting required. However, if it is discovered that a fee is being charged or received, the Department will take appropriate enforcement action and penalties will be assessed for non-compliance with the law."<sup>115</sup> Presumably, if a generator is unable to demonstrate that a fee was not exchanged, penalties can be assessed for noncompliance. Therefore, the ruling places the burden of assuring that a fee exchange has not occurred squarely on the generator.

##### A. *Identifying the Prohibited Transaction and Insuring That a Prohibited Exchange Does Not Occur*

There are several hurdles that generators may encounter in order to ensure that a fee exchange does not occur. First, it is difficult

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111. EES Ruling, *supra* note 10, para. 9.

112. *Id.* para. 6.

113. *Id.* para. 9.

114. *Id.* para. 7.

115. *Id.*

to determine from the ruling precisely what transactions are prohibited. For example, it is unclear whether a generator is prohibited from paying an intermediary, such as a transportation contractor, a fee for transportation and removal of C&D material from a generator's site if a fee is not also paid to the BUD holder for ultimate reuse of the materials. Arguably, in such a circumstance the generator has paid a fee for "disposal" of the materials, thereby violating the fee prohibition.<sup>116</sup> Also, the transportation contractor has accepted a fee for removal of the materials. However, the transportation contractor has not paid a prohibited disposal fee to the BUD holder.

Next, it is unclear whether the ruling is retrospective; i.e., whether it applies to prohibited fee exchanges associated with reuse of C&D materials that occurred in the past. If the ruling is retrospective and NYSDEC discovers a fee exchange has occurred—even long after the materials are reused in accordance with the technical requirements of a BUD—the materials will again become solid waste.<sup>117</sup> This creates practical monitoring difficulties for generators of C&D materials and their solid waste disposal contractors. For example, a generator may be required by NYSDEC to demonstrate that no fee or other consideration was assessed by its subcontractors in any way to a BUD holder. The difficulty in identifying such transactions is apparent. The section below discusses some potential limitations to the fee prohibition.

#### 1. Conceptual Reach of the Fee Prohibition

As noted previously, BUDs include a determination of the precise point at which the materials cease to be a solid waste.<sup>118</sup> Prior to this point, the materials remain a solid waste, and the BUD is inapplicable.<sup>119</sup> Arguably, any restrictions associated with the BUD terminate coextensively with its applicability. Consequently, transactions that occur prior to the point of solid waste cessation, or the point at which the BUD's fee prohibition becomes applicable, are not restricted. If this interpretation is correct, a generator may pay and an intermediary may charge fees for disposal of C&D materials, so long as the transaction occurs prior to the point of solid waste cessation.

Conceptually, a termination of the fee prohibition coextensive with the applicability of the BUD regulations makes sense. Such an

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116. *Id.* paras. 6 & 9.

117. *See id.* para. 5.

118. This point of exemption is determined exclusively by NYSDEC. *See Henner Ruling, supra* note 6, at 2.

119. *See id.*

application would, at a minimum, provide a bright-line rule that generators of solid waste could implement to avoid liability for violation of the fee prohibition. Moreover, such an interpretation would avoid impacting up-stream economic exchanges that are beyond the legitimate concern of NYSDEC. For example, it is unlikely that NYSDEC wishes to eliminate the ability of solid-waste transportation contractors to assess a fee for their services involving the transportation of BUD materials. Such a restriction would likely be met with heavy opposition in the trucking and construction industries. Consequently, it is doubtful that NYSDEC—without expressly addressing such transactions in the ruling—intended to prohibit them. As such, a coextensive terminus of the fee prohibition at the point of solid waste cessation is appropriate.

## 2. Geographical Reach of the Fee Prohibitions: Interstate Commerce

The field of solid waste management has been thoroughly examined through the courts' Commerce Clause jurisprudence. Where BUD materials are transported across state lines, important Dormant Commerce Clause limitations are likely to apply to the ruling's fee prohibitions. As has been explained repeatedly, "[t]he Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside the State's borders, whether or not the commerce has effects within the State."<sup>120</sup> Regulations and declaratory rulings are subject to the same constitutional limitations.<sup>121</sup> Consequently, if the ruling is meant to apply to out-of-state transactions such as a fee assessment, the constitutional limitations on such restrictions must be examined.

Conflicting regulatory frameworks between states that implement BUD programs set the stage for conventional Dormant Commerce Clause analysis by the courts. Such multistate regulatory paradigms become particularly confusing when one state requires independent BUD approval for materials that are ultimately beneficially reused in another state. For example, in New Jersey, a BUD is required even where materials are being transported out of the state for beneficial reuse.<sup>122</sup> This is because the materials are

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120. *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982).

121. See DANIEL A. FARBER ET AL., *CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY* 878-79 (2d ed. 1998).

122. Any proposal to beneficially use or transport nonhazardous petroleum-contaminated soils outside of the state of New Jersey requires an approval from the Bureau of Resource Recovery and Technical Programs. See N.J. ADMIN. CODE §§ 7:26-1.1(a)1, -1.7(g) (2002). However, soils destined for recycling or beneficial use are not considered solid waste and, thus, do not require registered transporters. See *Henner Ruling*, *supra* note 6, at 2.

exempt from the requirements of New Jersey solid-waste regulations, including requirements for valid transportation permits, even when the ultimate beneficial reuse of the materials is at an out-of-state location.<sup>123</sup> Consequently, a generator in New Jersey that wishes to beneficially reuse materials in New York may be subject to regulatory structures in both states simultaneously. As noted previously, NYSDEC has granted BUDs for materials originating outside New York,<sup>124</sup> but has not addressed whether BUDs are required for materials that are ultimately reused at out-of-state locations.<sup>125</sup> In such circumstances, the question that arises is whether NYSDEC has the authority to enforce the fee prohibition announced in the ruling to transactions that occur in other states such as New Jersey.

Courts considering Commerce Clause challenges are more tolerant of state laws that are not designed to achieve economic benefits, but rather to advance social welfare, safety, or other noneconomic goals.<sup>126</sup> When there is a reasonable basis for regulations to protect the social—as distinguished from the economic—welfare of a community, courts will not deny the local exercise of the sovereign power of the state.<sup>127</sup> As discussed previously, NYSDEC could reasonably conclude that the imposition of a fee prohibition constitutes sound environmental policy.<sup>128</sup> In the absence of a fee prohibition, beneficial reuse of materials becomes less attractive to generators than if they are permitted to rid themselves of solid waste for free. If beneficial reuse is less attractive, more materials are likely to be disposed of in conventional landfills. The benefits of such a policy are clear. While this policy has certain economic incentives, the ultimate purpose is to encourage

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123. See *supra* Part IV.A.1. This is a conceptual conclusion based on exemptions granted from BUD use. The cessation causes the exemption, as discussed in the previous sections.

124. See *supra* note 28 and accompanying text.

125. See GRANTED BUDS REPORT, *supra* note 28.

126. See generally Stephen Loffredo, "If You Ain't Got the Do, Re, Mi:" *The Commerce Clause and State Residence Restrictions on Welfare*, 11 YALE L. & POL'Y REV. 147, 150-54 (1993) (discussing the history of the Commerce Clause and its power to protect individual freedoms).

127. The first question the court must answer in conducting a Dormant Commerce Clause analysis is whether the state regulation at issue discriminates against interstate commerce either on its face or in practical effect. If so, heightened scrutiny applies. On the other hand, if the state regulation does not discriminate against interstate commerce, but "regulates even-handedly" and is merely incidentally burdensome, the regulation will be upheld unless the burden is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

128. See *supra* Part III.E.

recycling of materials that are suitable for beneficial reuse. Consequently, such a purpose is likely to be considered constitutionally valid by the courts under a Commerce Clause analysis. However, ironically, if the fee prohibition that NYSDEC seeks to enforce is found to be constitutionally valid as applied to out-of-state transactions, New York has the potential to become an incredibly attractive dumping ground to out-of-state generators of reusable solid waste. For example, a New Jersey generator could avoid tipping fees altogether by delivering its BUD materials to New York, rather than being assessed a tipping fee for beneficial reuse or disposal in New Jersey. Consequently, although NYSDEC may have intended to preserve landfill airspace, it has created another capacity problem altogether. Specifically, it is unclear how NYSDEC will handle the large volumes of BUD materials that can be expected as a result of the fee prohibition. It is also unclear whether NYSDEC anticipated this potential problem as a result of its ruling.

*B. Policy Implications of NYSDEC's Fee Prohibition*

If NYSDEC's ruling is indeed based on a policy decision to provide economic incentives to generators to reuse C&D, permitting the interception of fees by an intermediary would frustrate that policy. Effectively, the intermediary would intercept the economic benefit that was due to the generator for electing reuse, rather than disposal, of materials. Unfortunately, as noted previously, NYSDEC failed to indicate whether this policy might be the basis for the fee prohibition. Therefore, it is uncertain whether NYSDEC would view such transactions unfavorably. Absent further clarification, difficulties in identifying what transactions are prohibited are likely to remain.<sup>129</sup>

*C. Protections That are Needed for Generators Using BUDs*

Even if the prohibited fees could be identified, the incorporation of such prohibitions into conventional waste disposal contracts may prove problematic. Generators often contract for waste disposal services in a manner that includes both transportation and disposal

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129. Note that the resolution of these ambiguities may be ripe for judicial intervention. In New York, very little deference is given to NYSDEC's interpretations where, as here, the interpretation provided is associated with a legislative mandate or purely legal question that requires little technical expertise to resolve. Where "the legislative direction to [an] agenc[y] is compliance, not implementation . . . [and] specialized knowledge is not necessarily implicated, the courts use their own competence to decide issues of law raised, since those questions are of ordinary statutory reading and analysis." *Indus. Liaison Comm. of Niagara Falls Area Chamber of Commerce v. Williams*, 527 N.E.2d 274, 277 (N.Y. 1988).

(T&D) of the waste for a combined price.<sup>130</sup> In such contracts, it is not determinable what portion of the T&D is actually reserved for disposal of the waste.<sup>131</sup> Moreover, it is unlikely that a generator will be privy to the waste disposal contractor's financial arrangements with a disposal or reuse facility. The ruling requires a generator to insert itself into the contractual relations of its waste disposal contractors and their disposal or reuse facilities to ensure the fee prohibition is properly observed.<sup>132</sup> Such an imposition is unlikely to be well received.

Contractual assurances may provide some protection against impermissible fee exchanges. For example, a generator might stipulate in a waste disposal contract that if the C&D material is to be beneficially reused, no fee may be exchanged. Such a stipulation would not eliminate a generator's exposure to an enforcement action if a fee is in fact exchanged for its materials. However, it would provide a remedy for breach of contract against a waste disposal contractor. In addition, such arrangements could demonstrate that the generator made a good faith effort to comply with the law, which is one of the equitable principles that must be considered during enforcement proceedings.<sup>133</sup> Consequently, modification of waste disposal contracts to better protect generators should be encouraged.

#### *D. Likelihood of Civil and Criminal Actions Against Generators*

These considerations aside, questions remain regarding liability when and if NYSDEC determines that a prohibited fee has been assessed. On one end of the spectrum, a generator who pays a fee

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130. See, e.g., City of New York Construction and Demolition Waste Management Standard Form Contract, Section 01505 (June 2003).

131. It is important to note that transportation costs are often determinative of whether a particular facility is economically viable for disposal, which should be considered in the calculus of whether disposal options are indeed elastic. Transportation costs are generally based on a per-ton basis that is a direct reflection of the number of rounds per day that a transporter can make from the point of generation to a given facility. These costs are charged in addition to any tipping fees that may be imposed. The trucker's costs are based on labor rates for drivers and equipment costs. Consequently, the closer the facility is to the generator, the lower cost per ton for transportation and the more efficient the disposal option. Landfills that are located in a particular geographical market will adjust their tipping fees based on costs to ship to their competitors. A well-located landfill could, therefore, dominate a market.

132. See EES Ruling, *supra* note 10, para. 7. Note that such cost-sharing may not be entirely detrimental to the market. "[U]nrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

133. See N.Y. ENVTL. CONSERV. LAW § 71-2703(5) (McKinney 1997 & Supp. 2008).

may be subject to criminal sanctions. The ruling makes clear that the payment of a fee is the proscribed behavior.<sup>134</sup> Criminal liability is imposed where “[a]ny person who, having *any of* the culpable mental states defined in section 15.05 of the penal law”<sup>135</sup> violates Article 27 of the ECL, including subdivision 2-a. The requisite mental states are familiar, with the lowest requisite mental state being criminal negligence.<sup>136</sup> Thus, if a generator failed “to perceive a substantial and unjustifiable risk” that a fee would be exchanged, the criminal sanctions of the ECL could be enforced. Moreover, if a generator intended that a fee be paid, the culpable mental state would certainly be established.<sup>137</sup>

Importantly, the New York Penal Law section 20.25 provides that “[a] person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or in behalf of a corporation to the same extent as if such conduct were performed in his own name or behalf.”<sup>138</sup> “Thus, while criminal liability generally cannot be vicarious where a person personally commits all the elements of a crime, he is criminally liable therefor notwithstanding that he performed the conduct in a corporate

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134. See EES Ruling, *supra* note 10, para. 6.

135. N.Y. ENVTL. CONSERV. LAW § 71-2703(5) (emphasis added).

136. N.Y. PENAL LAW § 15.05 (McKinney 2004). The definitions of culpable mental states provide:

1. “Intentionally.” A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.
2. “Knowingly.” A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists.
3. “Recklessly.” A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.
4. “Criminal negligence.” A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

*Id.* § 15.05(4).

137. See *id.* § 15.05(1).

138. *Id.* § 20.25.

capacity or on behalf of a corporation.”<sup>139</sup> In *People v. Adinolfi*, the president of a company was held to be criminally liable where he personally contracted with a fill supplier and personally oversaw the placement of C&D materials at a site.<sup>140</sup> Here, theoretically at least, the simple exchange of a fee is all that is required to trigger liability. Thus, intentional payment of a fee, whether personally or on behalf of a corporation, may be sufficient to impose criminal liability on an individual. Admittedly, this is a somewhat draconian result.

On the other end of the spectrum, the unintentional exchange of a fee for reuse of BUD materials is less likely to trigger an enforcement action, provided all other technical requirements of the BUD are satisfied. Although NYSDEC might technically have the ability to pursue an enforcement action to impose civil penalties, NYSDEC is unlikely to have sufficient incentive to pursue such an action.<sup>141</sup> Consistent with the ECL’s penalty assessment provisions,<sup>142</sup> NYSDEC and the courts must consider equitable factors when determining penalties. The relevant section provides:

In determining the amount of any fine, penalty or sentence imposed pursuant to this section, the commissioner or the court *shall* take into consideration any evidence introduced by a party regarding the economic impact of a penalty on a business, the compliance history of violator, good faith efforts of a violator to comply, any economic benefit obtained from noncompliance, the amount of risk or damage to public health or the environment caused by a violator, whether the violation was procedural in nature, or such other factors as justice may require.<sup>143</sup>

Consequently, if a fee were exchanged without the knowledge of the generator, the technical requirements of the BUD were satisfied so as to be protective of public health and the environment, and the generator otherwise made good faith efforts to comply, a court might reasonably conclude that little or no penalty should be imposed. Notably, it could hardly be argued in such circumstances that a generator who paid a fee received “any economic benefit . . . from noncompliance.”<sup>144</sup> NYSDEC’s action would be based on violations that were purely financial in nature and have caused no greater

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139. *People v. Adinolfi*, 823 N.Y.S.2d 662, 668 (Sup. Ct. 2006) (citing *People v. Byrne*, 570 N.E.2d 1066 (N.Y. 1991)).

140. *Id.* at 664. Notably, Adinolfi attempted to argue that the materials were being accepted pursuant to a generic BUD. *Id.* Adinolfi’s conviction was upheld. *Id.* at 670.

141. Concededly, this argument relies on a reasonable use of prosecutorial discretion.

142. N.Y. ENVTL. CONSERV. LAW § 71-2703(5) (McKinney 1997 & Supp. 2008).

143. *Id.* (emphasis added).

144. *Id.*

detriment to human health, safety, or the environment than if a fee exchange had not occurred.<sup>145</sup>

It remains, however, within prosecutorial discretion to bring an initial enforcement action. NYSDEC has declared that if a fee exchange is discovered, an enforcement action will follow.<sup>146</sup> As such, these equitable considerations provide little comfort to a generator named as a defendant.<sup>147</sup>

## V. CONCLUSION

Although the ruling was meant “to resolve uncertainties regarding subdivision 2-a . . . and the Beneficial Use Determination . . . program regulated under 6 NYCRR 360-1.15,”<sup>148</sup> several uncertainties remain. A fee prohibition for beneficial reuse of C&D materials makes good policy sense insofar as it provides considerable economic incentives for generators to reuse materials as opposed to disposing of them, thereby preserving landfill capacity. However, the underlying legal support for the fee prohibition remains unclear, and identification of the prohibited transactions may prove to be problematic. Consequently, it is uncertain how a fee prohibition will be enforced upon the regulated community and what sanctions will be imposed for violations. The fee prohibition theoretically provides a low-threshold trigger to both civil and criminal sanctions under the ECL. As such, generators who wish to capitalize on the windfall that the ruling has created should, at a minimum, adopt appropriate protective measures, including careful interaction with NYSDEC and implementation of contractual protections and restrictions when C&D is to be beneficially reused.

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145. It is interesting to consider whether the return of the fee to the generator might reinstate the exempt status of the materials under a BUD.

146. EES Ruling, *supra* note 10.

147. Notably, the court in *Adinolfi* held “that [a] defendant’s prior conviction for a violation is a sufficient predicate conviction under [the criminal provisions of the ECL].” *People v. Adinolfi*, 823 N.Y.S.2d 662, 667 (Sup. Ct. 2006). Consequently, a defendant may be charged with a felony, even where the previous conviction under the ECL was not a criminal one.

148. EES Ruling, *supra* note 10.