New York State Bar Association
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Comments of the Energy and Environmental Law Section of the New York State Bar Association on Proposed Food Donation and Food Scraps Recycling Regulations (6 NYCRR Part 350)

ENVIRONMENTAL AND ENERGY LAW SECTION

Environmental #1 April 27, 2021

BY EMAIL

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New York State Department of Environmental Conservation
Division of Materials Management
625 Broadway
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Re: Comments of the Energy and Environmental Law Section of the New York State Bar Association on Proposed Food Donation and Food Scraps Recycling Regulations (6 NYCRR Part 350)

To whom it may concern:

On behalf of the Energy and Environmental Law Section (EELS) of the New York State Bar Association, we applaud the Department's proposed regulations requiring recycling of food for certain regulated food scraps generators. The EELS solid waste committee has reviewed the regulations and offer the following comments that the section believes will clarify and strengthen this proposed regulatory scheme by striking the right balance between mandating recycling from large generators of food scraps while avoiding unreasonable financial burdens for facilities without reasonable access to organics recyclers.

Subpart 350-1

1. Section 350-1.3. We believe this section would benefit by including a definition of the term "animal feed" in the definitions section (350-1.4), to clarify for the regulated community what material is subject to the prohibitions contained in this section. In addition, a critical component of this legislative scheme is that the resultant product developed by the recycler "be used in a beneficial manner" as "determined by the Department." While the regulations include a parenthetical with certain examples, the regulations should provide greater clarity on what factors the Department will to use to

determine beneficial use. Will such determinations be ad hoc, or does the Department plan on issuing more detailed guidance? We believe that such detailed guidance would be a better approach for determining beneficial use of the end product.

2. Section 350-1.4. The regulations define "*Designated food scraps generator"* as **"**a person who generates at a single location an annual average of two tons per week or more of food scraps, on a wet weight basis." This definition needs to be clarified to make clear how that average is calculated. For example, is such average based on a rolling 12-month average, or based on the prior calendar year? We suggest a rolling 12-month basis be used for calculating the "annual average." We are concerned that aggregating what could be separate businesses at a single location, merely because the businesses all use the same transporter, could have the unintended consequence of incentivizing separate businesses co-located at a location under common ownership (*e.g.*, a shopping center) to use different transporters to avoid coverage under the regulations. The regulations should not incentivize the use of separate transporters to service separately-owned establishments that are co-located. In addition, the definition of "*on-site*" is difficult to follow, especially with regard to the intent of the reference to the crossroads intersection with entrance gained by crossing rather than moving along the right-of-way.

Subpart 350-2

3. 350-2.1. The title of this subsection, referencing "methodology," is inconsistent with the title in the table of contents, which uses the word "calculation."

4. 350-2.2. The Department should include a procedure in the event an organics recycler closes in the middle of the year. In certain locations the closure of a facility may significantly impact the available capacity, and thus the ability of a food scraps generator to reasonably comply with the regulations. The failure to address what occurs in the event of a major facility closure is a significant omission.

5. 350-2.3. We believe this provision, addressing food for donation, is not workable. While it is obviously prudent for generators to separate food going to recyclers versus donated food, the decision on whether and how much food should be donated should be left to the generator and such donation should not be mandated by these regulations as long as such waste is sent to a recycler.

6. 350-2.4. Subsection (a) should also include cost as well as available capacity to trigger compliance with the remaining requirements of this subpart. As written, a generator would be required to send its food waste to the facility even if its pricing is unreasonable or otherwise not consistent with pricing in other areas of the state. The Department should include cost as a factor in

order to prevent potential gouging by a recycler when it is the only available facility within a reasonable distance from the generator. Although cost can be used as a justification for a waiver, we believe that it should also be considered in the context of the initial applicability determination, thereby obviating the need for a generator to obtain a waiver (see below).

7. 350-2.6. The waiver provision in subsection (2) should allow submission after the November 1 deadline "for good cause shown," to provide an exception to the deadline where just and reasonable. We believe that it is misguided to not allow a generator to exempt itself from the regulatory scheme by donating food sufficient to bring it under the two ton regulatory threshold. The Department should encourage food donation and reuse and allowing donations to bring a generator under the regulatory threshold should be encouraged rather than discouraged. We agree with using the 10% increase in cost as an appropriate justification for a waiver, but believe the regulations should clarify when a recycling facility is deemed unavailable to the generator. If the Department intends to apply the twenty-five mile distance threshold to determine availability, the regulations should make that clear. We also believe that the list of necessary documentation to support a waiver request should allow the generator to submit the information or an explanation of why such information could not be provided. Adding the ability to explain why information was not provided addresses circumstances where a facility or transporter may be unwilling to provide the generator with the information required pursuant to this subsection.

Subpart 350-4

8. 350-4.2. The Department should reconsider applying subsection (b) to exempt solid waste management facilities, as these facilities have a reasonable expectation that a facility that is exempt under Part 360 not be subject to regulatory provisions requiring it to report on the amount and types of food scraps processed at the exempt facility, or the potential capacity for food scraps at such exempt facility.

9. 350-4.4. The requirement that incinerators and landfills take "reasonable precautions" to not accept food scraps from food scrap generators is unworkable. First, the Department provides no guidance on what constitutes reasonable precautions. Second, it is unclear how such facilities will know that its customer is a food scrap generator regulated under Part 350 or how it can determine at the time of disposal whether a commingled waste stream includes food scraps from a regulated facility. We suggest omitting this requirement, or at least detailing what would constitute "reasonable precautions."

We thank the Department for its consideration of these comments.