



PENNSYLVANIA "CLEAN FILL" PROGRAM PROPOSED REVISIONS TAKE INDUSTRY BY SURPRISE

For nearly 15 years, the PA DEP Management of Fill Policy (also known as "Clean Fill" Policy) has been successfully implemented throughout the State and most recently, the Department has proposed changes which essentially are a re-write of the Policy. Well intentioned is the Department, with the goal of having a Policy which is consistent with standards used under the PA DEP Act 2 Land Recycling Program; however, the draft revisions proposed will hinder and make it more costly for the earthwork construction Industry's ability to successfully implement the program. The Department received comments through January 8, 2019 from various stakeholders, which included comments from the PA Asphalt and Pavement Association (PAPA).

PAPA's key comments included:

- The draft document includes within the definitions section "background reference area." How does the Department presume that one gains access to "other" properties to determine background levels? What are the liabilities or liability protections which may be afforded to an owner of a site which is to be used as a background reference? Does the department have a quantitative definition of, or can provide further explanation of, "close proximity"?
- A very important issue is that PA DEP is losing consistency amongst its fill programs. PA DEP does not have one set of reliable statewide numerical limits to managed materials properly. Limits for arsenic and benzo(a)pyrene are set too low and conducting more background studies at individual sites is a waste of time and money. Ohio and New Jersey have taken urban background numbers into account. It should not be the responsibility of individual property owners and contractors to test site all over the State because PA DEP has not set appropriate background numbers.
- Section B. Procedure for Performing a Fill Determination states that "Prior to the movement of fill to a receiving site, either the person proposing to provide fill from a donor site or the person proposing to receive the fill shall determine whether the fill is clean fill or regulated fill pursuant to this policy." Why would the responsibility to determine whether the fill is clean not squarely fall upon the responsibilities of the generator/donor site? The Department seeks fill determination information for projects with export required in the NPDES filings, which would undoubtedly be the responsibility of generator/design professional? This inconsistency will cause confusion amongst property owners, highway and earthwork contractors and environmental managers.
- Section B. 2. B. uses the term possible release, which is neither defined in the definitions nor is a term which is associated with the ASTM standard E-1527-13 referenced in the document. Is it the Department's intent that any "recognized environmental condition" per the ASTM standard E-1527-13 would then necessitate sampling and characterization of fill materials per Appendix A of the technical guidance document? PA DEP agreed to allow the private sector to determine what is appropriate due diligence and PA DEP should not go back on that agreement.
- The cost for testing materials to see if they are or are not Clean Fill could rise from five to sixteen fold, from about \$2 a ton to \$10 to \$42 per ton. In the proposed policy, PA DEP indicates that the minimum should be 10 samples from a receiving site and a minimum of 10 samples from a donor site to establish background conditions in addition to the samples required based on the volume of material to be classified. No technical or statistical basis is provided by PA DEP for what would be a 2 ½ time sample

frequency increase.

- PA DEP is already indicating that all or most Clean Fill materials should be tested for PCBs, and that there may be coordination needed with US EPA in many cases. There appears to be no Program set up jointly between the US EPA and PA DEP to provide timely answers when low level PCBs are found. Earthwork and building construction projects will likely be significantly delayed unless this is promptly addressed.
- The draft policy has removed "dredge material" from the Clean Fill definition and moved it the fill definition. PA DEP also did not include dredged material in the fill definition, instead only defining dredged material as regulated fill. This narrow definition will now require all dredged material to be Regulated Fill even if the analytical testing proves dredge material meets the limits of Clean Fill. This change will have an immense financial impact to the Pennsylvania economy. All sand and aggregate dredged material will now be Regulated fill instead of a product. All Pennsylvania waterways that are dredged for any reason will now be waste. Even local small ponds, wetlands, and streams will require dredged material be disposed as waste. We suggest that "dredged material" be placed in the fill definition and the material be evaluated based on the analytical as it currently is evaluated. Otherwise, PA DEP will need to issue a set of new regulations for dredged materials.

Overall, members of PAPA provided 127 technical comments to the proposed policy which affects the ability of the Policy to be implemented in a manner that can be used effectively to managed "Clean Fill". It is likely that once the Department has the opportunity to process the extensive technical comments they received on the current proposed Policy changes, there will need to be a new draft proposed revision document prepared and submitted for comment from Industry Stakeholders. Industry must have a "Clean Fill" Policy that is usable and can be implemented throughout the State, but PA DEP is making the workable program unnecessarily more complicated and costly. Taking steps backward will hurt Pennsylvania's residents and will be a burden to landowners who want to redevelop their properties.

We will continue to monitor developments and provided updates on the Management of Fill Policy. If you have questions on "Clean Fill" issues, you can contact RT Environmental Services, Inc.; Walter H. Hungarter, III whungarter@rtenv.com or Gary R. Brown, P.E., gbrown@rtenv.com.



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