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New Pa. DEP Fill Material Policy Increases Project Complexity

By **Michael Meloy** (November 25, 2019, 4:09 PM EST)


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On Nov. 2, the Pennsylvania Department of Environmental Protection published a notice in the Pennsylvania Bulletin announcing that it has finalized its new management of fill policy.[1] The policy is the culmination of work that the DEP began in 2014, and represents a comprehensive overhaul of the existing version of the policy that has been in effect since 2004, with minor changes in 2010.

The new policy will take effect on Jan. 1, 2020, giving the regulated community a short time to prepare for its impacts. The policy is critically important, because it defines when and under what circumstances fill material can be moved and used without being regulated as a waste under Pennsylvania's Solid Waste Management Act. Activities and projects involving earth disturbance work, excavation work and demolition work — including brownfields projects, development projects, infrastructure projects and utility projects — fall within the scope of the policy.

The provisions of the policy will have broad impacts within the regulated community, affecting, among others, real estate developers, land owners, railroads, port operators, public utilities, municipalities, excavation contractors and environmental consultants who regularly support such entities.

While the DEP has largely retained the basic analytical structure for determining whether fill material can qualify as clean fill, there are numerous and important changes in the details of how such determinations are to be made. Fill material is now a defined term that is limited to soil, rock, stone, gravel, used asphalt, brick, block or concrete from construction and demolition activities, that is separate from other waste, and dredged material as defined in the municipal and residual waste regulations.

Analytical testing of fill material (except for historic fill) is not necessary, unless environmental due diligence indicates that the fill material may have been affected by a release of regulated substances. If analytical testing is performed, the results are to be compared to the clean fill concentration limits, which are numeric standards used by the DEP to determine whether fill material is deemed to be uncontaminated. Fill material that does not qualify as clean fill may still be beneficially used under a residual waste general permit if it qualifies as regulated fill.

As anticipated, the new policy eliminates the numeric standards defining “clean fill,” found in Tables FP-1a and FP-1b of the current policy. Those standards were developed in 2004, based on the residential

cleanup standards implementing the statewide health standard under the Pennsylvania Land Recycling and Environmental Remediation Standards Act, known as Act 2, then in effect.

Instead, under the new policy, the numeric clean fill standards incorporate by reference the lower of the current residential direct contact numeric values for soils and the residential generic soil-to-groundwater numeric values (based on protection of used aquifers) established under Act 2. This means that each time the cleanup standards under Act 2 change, the clean fill standards will change at the same time.

The new policy also provides that fill material containing polychlorinated biphenyls, or PCBs, at concentrations in excess of 2 milligrams/kilogram may only be used if prior written approval is obtained from the U.S. Environmental Protection Agency.

The immediate impact of incorporating by reference the numeric standards under Act 2 will be dramatic. The clean fill standards for various regulated substances are significantly lower under the new policy than under the current policy, including the standards for substances such as certain semi-volatile organic compounds and metals that are ubiquitous in urban and suburban environments.

The changes in the clean fill standards for benzo(a)pyrene and vanadium are particularly acute. The clean fill standard for benzo(a)pyrene is decreasing from 2.5 mg/kg to 0.58 mg/kg, which is below the background level of benzo(a)pyrene typically found in many developed areas in Pennsylvania. The clean fill standard for vanadium is decreasing from 1,500 mg/kg to 15 mg/kg, which is substantially less than typical naturally occurring background levels of vanadium in soils.

Complicating the situation further is the fact that proposed amendments to the cleanup standards under Act 2 were expected to be considered by the Pennsylvania Environmental Quality Board at its meeting on Nov. 19, as the first step in the process of making further changes to those standards. Accordingly, the clean fill standards will change again when the regulations under Act 2 are amended, likely in late 2020 or early 2021. These factors make the choice of analytical suites to which fill will be subjected critically important.

The manner in which historic fill is treated under the new policy is very much a mixed bag. Historic fill is defined as material used to bring an area to grade prior to 1988 that consists of a conglomeration of soil and residuals such as ash, slag, dredged material and construction and demolition waste. Historic fill is prevalent in many urban areas in Pennsylvania, reflecting more than two centuries of industrial activities.

Unlike the proposed version of the policy, the final version of the new policy provides that only historic fill that is comprised primarily of residuals (ash and slag) cannot qualify as clean fill. Accordingly, the mere presence of some amounts of ash and slag in historic fill does not mean that the historic fill must be managed as residual waste.

However, sampling of historic fill is now mandatory, and the DEP has included a list of target parameters that must be used as part of such sampling. This target list includes a broad array of metals (including vanadium), pesticides, PCBs, semi-volatile organic compounds and volatile organic compounds.

The new Policy contains much more detail regarding the manner in which due diligence must be performed and how sampling is to be undertaken. These requirements will increase the level of effort and the amount of time necessary to determine whether fill material qualifies as clean fill. In contrast to

the proposed version of the Policy, the final version allows for use of composite samples to characterize fill material both in stockpiles and on an in situ basis. However, there are limitations on when composite samples can be used for in situ fill material.

Once a determination has been made that fill material at the "donor" site (i.e., the point of generation) qualifies as clean fill, Form FP-001 (Certification of Clean Fill) must be filed electronically with the DEP (for informational purposes, but not approval) before the fill material is transported to the receiving site. There are no exceptions to this requirement, so it presumably will cover any transfers of fill material, ranging from fill material moved as part of large infrastructure projects to homeowners obtaining topsoil for a garden or lawn restoration project.

Moreover, if sampling of the fill material is necessary, Form FP-001 must be accompanied by copies of the sampling plan, all laboratory reports, data and documentation of any background determination, and any written approval from the EPA to use fill material containing PCBs at concentrations of greater than 2 mg/kg.

Several changes in the new policy will be helpful to the regulated community. First, the new policy expressly states that the excavation, movement or reuse of fill material within a project area or right-of-way of a project is not an activity that requires a permit under the SWMA. The DEP has included a broad definition of "project area," making it clear that the new policy is focused predominantly on the transfer of fill material between sites.

Second, the DEP has authorized the use of the synthetic precipitation leaching procedure, or SPLP, to evaluate fill material, in lieu of being tied to the residential generic soil-to-groundwater numeric values under Act 2. Approximately 80% of the numeric clean fill standards are based on the residential generic soil-to-groundwater numeric values under Act 2, so the potential for using SPLP will introduce important flexibility for encountered regulated substances that have residential direct contact numeric values that are higher than the residential generic soil-to-groundwater numeric values under Act 2.

Third, the DEP has expressly clarified in the new policy that, to the extent that sampling is required, only those regulated substances that are suspected to be present due to a release need to be evaluated. Finally, the DEP has included procedures to demonstrate that regulated substances present in fill material at a donor site are attributable to background conditions, and to allow that fill material to be moved to a receiving site, provided that the regulated substances in the fill material subject to the background determination are also present at the receiving site at comparable concentrations. Because the procedures for invoking background levels are complex, they are unlikely to be used under typical circumstances.

The new policy makes clear that its terms do not apply to fill material that has already been used, unless and until that fill material is moved to another site. It also appears that similar grandfathering protections apply to fill material that has been determined to be clean fill prior to the effective date of the policy, "unless the fill is moved to a new receiving site or off the project area or project right-of-way after the effective date of this policy."

Accordingly, fill material that has been determined to be clean fill under the current policy, and has been stockpiled for use at a particular receiving site, is likely to avoid needing to meet the requirements of the new policy. For pending projects, this is a critically important feature of the new policy. Similar protections will apply as the clean fill standards continue to change with revisions to the regulations implementing Act 2.

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[1] The new Management of Fill Policy and the associated Comment/Response Document can be accessed at the following link: http://www.depgreenport.state.pa.us/elibrary/GetFolder?FolderID=4647.