

PAPA

Pennsylvania Asphalt Pavement Association

Ronald J. Cominsky, P.E.
Executive Director3540 North Progress Avenue • Suite 206
Harrisburg, Pennsylvania 17110-9637

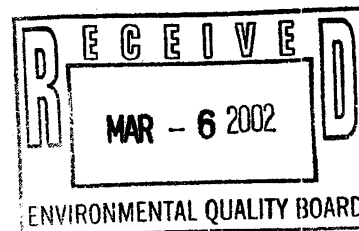
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February 25, 2002

Mr. William Pounds
Pennsylvania Department of Environmental Protection
Division of Municipal & Residential Waste
P.O. Box 8472
Harrisburg, PA 17105-8472

**RE: COMMENTS ON PROPOSED SAFE FILL REGULATIONS**

Dear Mr. Pounds:

On behalf of the Pennsylvania Asphalt Pavement Association, I am pleased to submit the following comments on the Safe Fill Regulations as proposed by the Department of Environmental Protection, and noticed in the *Pennsylvania Bulletin* on February 2, 2002. Our comments are as follows:

- **Investigating Shallow Impacted Soils** - Both under the Act 2 Land Recycling Program, and under these proposed regulations, there is little guidance on how to properly investigate soils, particularly when there is shallow contamination of soils. Delineation mistakes have already occurred at arsenic impacted sites (contaminated by the application of herbicides/pesticides) where environmental consultants took samples at intervals too great to accurately delineate the extent of the shallow impacted zone. This is very important under the Safe Fill Program, because soils impacted by urbanization (usually atmospheric particulate fallout) would be regulated for the first time. The Department could resolve this issue through a revision to the Act 2 Technical Assistance Guidance Manual, which we understand is currently in progress. This is important because if such soils are missed through sampling interval errors, Contractors could later be charged with improperly moving materials over the Safe Fill Numerical Limits.
- **Management of Questionable Materials** - It occurs very frequently that "pockets" of questionable materials are encountered in excavations, even when there has been due diligence and testing. Furthermore, in working along pipeline and other utility corridors or when building highways, railroads, or excavating on projects with long dimensional lengths, it is frequently impractical to pile questionable materials within the actual right-of-way. (In the case of construction, repairs, or utility work along highways, it is actually not advisable to attempt to store questionable materials in roadway edge or private property locations where storm water could cause material dispersal.) It is recommended that the regulations be revised to indicate that contractors can move materials to appropriate storage locations, so long as the materials are placed on a tarp and covered by a tarp while being characterized. Locations acceptable for removal include state, county, or municipal government property or the contractor's yard, as is appropriate for each project. As there is increasing recognition that questionable materials must be appropriately characterized and managed, it is important that the DEP be flexible with respect to local transport and storage, as materials are frequently encountered in locations where storage is simply not appropriate. By the Department acknowledging that local transport

is acceptable until it is determined what classification the materials are in, contractors can avoid being charged with hauling waste. As is present elsewhere in the regulations already, the maximum volume of questionable materials which could be hauled is 125 yards per excavation project (the same as the Historical Fill Limitation). *It should also be noted, however, that for many utility contractors, 125 CY is less than one day's work when installing sewers and water mains. Therefore, the limit for questionable materials and historical fill should be raised to 250 CY.*

- **Analysis of Asphalt** – The regulations indicate that Used Asphalt maintains its Safe Fill exemption so long as it is not "contaminated". As the Department is aware, based on previous submittals from the Association and as confirmed by testing in numerous other states, the only appropriate testing methodology for determining whether asphalt is or is not contaminated, is to test the sample using SPLP methodology (or TCLP methodology if the material is to go to landfill). Appropriate provisions need to be included in the regulations as to appropriate criteria to meet. It is recommended that no constituents in the leachate be higher than the used aquifer MSC, or, under the Permit By Rule, the non used aquifer MSC.
- **Recycled Asphalt Product (RAP)/Millings** – Since the advent of the 1992 Residual Waste Regulations, the Association has been urging (as also advised by the Department) that RAP go back to the plant as recycled material. As you're probably aware, asphalt is the most recycled material in the United States. Some government entities, however, currently require by Specification and Contract that RAP materials be delivered to a designated location, other than the asphalt plant. It is unknown at this time the degree to which the RAP materials delivered as required are appropriately managed. Uses which have been reported from the field include:
 - Sub-base
 - Shoulder material
 - Filling potholes
 - General fill material

Although asphalt, as a product, is clearly of little environmental concern, and because the petroleum fraction present in asphalt has few volatile organics and relatively low levels of PAHs, RAP is only of concern if particles flow from a stockpile or when RAP materials are placed, if they are not properly covered. The Association recommends that if uses other than recycling are allowed, such uses **only be under the terms of one or more General Permits**, to include such provisions as:

- Obtaining a facility-specific General Beneficial Use Permit where facilities proposed to crush product off-site from the original milled source (including to make cold asphalt as a driveway material).
- That other material placement uses only be permitted to occur in the highway right-of-way, or at commercial/industrial properties, and again, under the terms of a General Permit. The

General Permit should include specific placement restrictions, including the need for covering, erosion and sedimentation (E&S) control, and no dispersal by wind or water, as per the current regulations.

- In situations where stockpiling is to be conducted, stockpiles should be required to have erosion E&S controls, and/or covering of the stockpile as appropriate at sites where there are no E&S controls. Improper use of milled asphalt is not condoned by the Association, and maximum recycling of asphalt should be practiced whenever possible.
- **Demolition Materials** – While it would appear that properly separated construction concrete demolition waste can meet safe fill limits, there are many situations where the material cannot be practically separated, due to the way buildings are constructed. The impact of the regulations will be to send large volumes of materials, which are not now considered waste by many to landfills. The cost impact analysis in the regulations has no detail on this important cost impact of the regulations, at a time when the Commonwealth has imposed a landfill permitting ban. DEP must determine the impact of the regulations on the facilities it regulates, or the cost impact analysis section of the proposed regulations lacks credibility. *DEP should lift the landfill permitting ban in areas of the state where there is insufficient capacity to handle the additional waste materials.* Anecdotal information suggests that such a condition exists right now in the Commonwealth's largest city, Philadelphia, and there has been little effort to deal with the facility capacity shortfall.
- **Materials Placed Before February 2, 2002** – Materials placed below grade on commercial and industrial property (materials which are not otherwise municipal, residual, or hazardous waste) should be considered to qualify for the historical fill provisions of permit by rule, on request to the Department. This is important because DEP did not have usable regulations or guidance from the current earlier date up until February 2, 2002. Materials placed between 1988 and February 2, 2002 would have questionable status unless the transition date is changed.
- **Costs** – In the proposed regulations, DEP estimates compliance costs at approximately \$8 million per year. However, DEP also indicates that savings are approximately \$500 million per year, as contaminated materials can be managed under Permit by Rule provisions and not have to go to landfill. Permit by rule provisions, however, cannot be used until the regulations are final. The cost impact analysis is apparent faulty reasoning, because there is no evidence that DEP ever had enforceable standards requiring removal as waste such large volumes of materials to landfills, under its 1996 Clean Fill Guidance Document.

Nonetheless, it is probable that future Safe Fill compliance costs are higher than \$8 million per year, as follows:

- **Construction Delays** – Most excavation projects could be delayed due to the NEW NEED for preplanning & pretesting. The cost of such delays is not addressed in the DEP cost analysis. Sites with impacted soils or historical fill found this year will need to go into the Act 2 Land Recycling program, because the Permit by Rule is not yet available...this could delay many projects by several months.

- The cost of Due Diligence and Testing will likely total \$5-6 per CY, where the full testing for Table 3 parameters is needed at sites, under permit by rule. For large earthwork projects involving bulk soil movement, this would double the cost of earthwork for bridge approaches, overpasses, etc. The probable total cost of the regulations is more likely to be \$20-30 million dollars per year when fully implemented, because:
 - Some materials will need to be landfilled where they have constituents which exceed Ceiling Concentrations
 - Some materials will require special testing where used near streams or below the water table (due to the proposed low "Waters of the Commonwealth" limits).
 - Some Materials will need to be managed under Permit by Rule (probably several million CY per year).
 - Some sites will elect to go into the Act 2 land recycling program, so as to be able to obtain the liability release available under the statute.
 - Virtually all excavation project will experience cost increases because most areas of the state have shallow soils impacted by arsenic from historical coal burning. Almost all projects will require due diligence and testing. (See more discussion below):
 - **Due Diligence** – The cost of due diligence will likely be on the order of \$2,000-\$3,000 per site. Due diligence will typically consist of a Phase I Environmental Site Assessment, expanded to include review of background constituents, and particularly metals and other inorganics which may be known to be present in formations at particular sites where soils are excavated or where rock is mined.
 - **Testing** – The cost of testing will vary, depending on what contaminants are suspected at sites. DEP has, however, come up with a specific table (Table 3) which includes the key constituents which are expected to have to be tested at most sites. The average cost for each sample tested under this list is about \$400 per sample; including collection and reporting costs, the total will be about \$500 per sample. Given the typical sampling frequency as required by the regulations, the cost will translate to about \$4 per cubic yard. The total cost, including due diligence and running an on-going program to track materials, and provide test results, is expected to cost \$5 per cubic yard.
- Additional cost concerns include:
 - Ultraclean materials may need to be used where materials are near streams or will be beneath the water table. Higher material costs for these projects will likely result.
 - Some owners could begin to ask for "Safe Fill Material Certifications"; compliance could eventually become a condition of cash draw and job closeout payment.

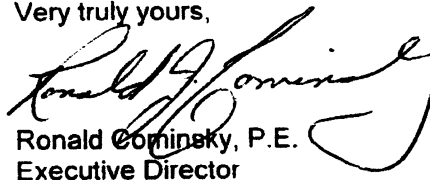
- Most sites will require between \$5,000 and \$10,000 worth of advance work to see if there are Safe Fill Numeric Limit Exceedences.
- Where materials are above the non-residential limits, they could need to be managed as residual waste at \$65-84/cy.
- **Implementation Schedule** – Finally, as it has taken a long time to get to this point in the promulgation of the Safe Fill Regulations, we trust that the Department will promptly respond to comments so that the final set of regulations can be placed into effect by midway through this construction season. The new SAFE FILL regulations were promised by DEP to be noticed sufficiently early to be commented on and in effect for the 2002 construction season. DEP missed promised deadlines to send the package to EQB in September and again in October, because of late revisions and apparently because the package, years in the making, still had no criteria for concrete and asphalt, which constitute 1/2 of the volume of materials moved.

Excavation of earth and demolition recycling everywhere in the Commonwealth will remain a very risky activity until this is resolved and the regulations are finalized. DEP has been working on this for five years, and detailed comments submitted by contractors associations to the Independent Regulatory Review Commission in 1998 have only recently been answered. We hope that this will receive prompt attention without further delays.

The Association appreciates the Department responding to comments and making the Safe Fill Regulatory Program workable, but many in the industry remain concerned about costs.

Now that a workable program is at hand, we hope that it can be implemented without delay, and we hope that DEP realizes the costs being imposed on excavation work are substantial. These costs, to a very large degree, will be taken from budgets for needed improvements to the Commonwealth's transportation and utility infrastructure. It is therefore important that DEP present a realistic cost impact evaluation without delay.

Very truly yours,



Ronald Cominsky, P.E.
Executive Director

RJC/ebb

cc: J. Sells, PACA
R. Latham, APC
S. Roth, PA Chamber of Business & Industry
B. Reigle, PUCA

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

* * * * *

PUBLIC HEARING

* * * * *

IN RE: PROVISIONS FOR THE MANAGEMENT
OF SAFE FILL AND CONTAMINATED
MATERIALS

BEFORE: MARGARET URBAN

HEARING: March 6, 2002

7:00 p.m.

LOCATION: Four Points Sheraton

Pittsburgh North

910 Sheraton Drive

Mars, PA

WITNESSES: NONE

ORIGINAL

Reporter: Rebecca R. Jost

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OPENING REMARKS

By Margaret Urban 5 - 13

TESTIMONY

By T.A. Ward 10 - 12

CERTIFICATE 14

E X H I B I T S

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NONE OFFERED

1 P R O C E E D I N G S

2 -----
3 MS. URBAN:4 I would like to welcome
5 you to this Environmental
6 Quality Board (EQB) public
7 hearing on proposed regulatory
8 provisions for the management
9 of safe fill and contaminated
10 materials.11 My name is Margaret
12 Urban. I am a Citizens
13 Advisory Council member of the
14 EQB. Also with me this evening
15 from the Department of
16 Environmental Protection, the
17 DEP are: William Pounds, Chief,
18 Division of Municipal and
19 Residual Waste, Bureau of Land
20 Recycling and Waste Management.
21 Khatija Satyaswaroop, Division
22 of Municipal and Residual
23 Waste, Bureau of Land Recycling
24 and Waste Management.
25 Michelle Moses, Assistant

1 Counsel, Bureau of Regulatory
2 Counsel. Leslie Sarvis,
3 Executive Policy Specialist,
4 Policy Office.

5 Notice of the proposed
6 amendments were printed in the
7 Pennsylvania Bulletin and in
8 nine major newspapers around
9 the state on February 2, 2002.
10 The proposal revises the
11 municipal and residual waste
12 regulations with respect to the
13 management of uncontaminated
14 and contaminated soil and other
15 materials. The proposal is the
16 result of public comments on
17 the DEP's efforts to update a
18 policy and numeric standards
19 for determining when fill is
20 safe enough to use in an
21 unrestricted manner. The
22 existing standards are based on
23 the land recycling regulations
24 proposed in 1996. Since that
25 time, the DEP has proposed

1 changes to its interim policy
2 on two occasions for
3 consistency with existing Act 2
4 standards, with opportunities
5 for public comment. The first
6 draft policy was established on
7 August 28, 1997. Comments on
8 this draft policy prompted a
9 second draft safe fill policy
10 package, which was published on
11 March 11, 2000.

12 The proposal adds a
13 definition for safe fill that
14 includes soils, dredge
15 material, used asphalt and
16 segregated brick, block and
17 concrete. Other major
18 provisions include adding five
19 permits-by-rule to allow for
20 the beneficial use of
21 contaminated materials with
22 certain conditions, as well as
23 materials that do not meet safe
24 fill standards. The proposal
25 also amends the definition of

1 construction/demolition waste
2 and adds new definitions for
3 historic fill, sediment, and
4 site undergoing remediation
5 activities.

6 In addition to the
7 management of uncontaminated
8 and contaminated materials, the
9 proposed regulations include
10 amendments to the permit-by-
11 rule in the municipal waste
12 regulations for mechanical
13 processing by enlarging the
14 tons per day of segregated
15 construction/demolition waste
16 that may be managed under the
17 permit.

18 To give everyone an
19 equal opportunity to comment on
20 this proposal, I would like to
21 establish the following ground
22 rules:

23 1. I will first call upon
24 the witnesses who have
25 preregistered to testify at

1 tonight's hearing as included
2 on the schedule of witnesses.
3 After hearing from these
4 witnesses, I will provide any
5 other interested parties with
6 the opportunity to testify as
7 time allows.

8 2. Oral testimony is
9 limited to ten minutes for each
10 witness.

11 3. Organizations are
12 requested to designate one
13 witness to present testimony on
14 its behalf.

15 4. Each witness is asked to
16 submit three written copies of
17 the testimony to aid in
18 transcribing the hearing.
19 Please hand me your copies
20 prior to your testimony.

21 5. Please state your name
22 and address for the record,
23 prior to giving your testimony.

24 6. We would also appreciate
25 your help in spelling names and

1 terms that may not be generally
2 familiar so that the transcript
3 can be as accurate as possible.

4 Interested persons may
5 submit comments in addition to
6 or in place of oral testimony
7 presented here, this evening.
8 All comments must be received
9 by the EQB by April 3, 2002.
10 Comments should be addressed to
11 the Environmental Quality
12 Board, P.O. Box 8477,
13 Harrisburg, PA 17105-8477.
14 Comments can also be e-mailed
15 to RegComments that is
16 R-E-G-C-O-M-M-E-N-T-S,
17 @state.pa.us. All comments
18 received at tonight's hearing
19 and in writing by April 3 will
20 be considered by the EQB and
21 become part of a
22 comment/response document
23 prepared for the EQB's review
24 prior to taking final action on
25 this regulation.

1 Anyone interested in a
2 transcript of this hearing may
3 contact the reporter here
4 tonight to arrange to purchase
5 a copy.

6 I will now call the
7 first witness.

8 As there are no
9 witnesses presently registered,
10 would anyone else like to offer
11 testimony? We can hold this
12 meeting open for another few
13 minutes, to see if anyone may
14 decide to give testimony.

15 AUDIENCE MEMBER:

16 You made a comment about
17 submitting prior written
18 testimony. I certainly have no
19 prior written testimony.

20 OFF RECORD DISCUSSION

21 MR. WARD:

22 Ward, and what else do
23 you need? T-A, WARD. Is there
24 anything else that you need
25 from me? I don't have any

1 prior written testimony in
2 fact, I'm not very clear --- do
3 I need to come up here?

4 MS. URBAN:

5 Are you planning to
6 present comments?

7 MR. WARD:

8 No, I'm trying to ask a
9 question. I'm really not sure
10 what is going on. I came here
11 to learn, and I came here to
12 listen. Because I understand
13 there's some rules that are
14 going to be promulgated
15 regarding earthmoving. I am an
16 earthmoving contractor, it
17 affects me. And I am very
18 interested in what, what the
19 rules are all about. I do not
20 have any knowledge of them,
21 except from secondhand.

22 MS. URBAN:

23 We're going to have ---
24 we're going to take some time
25 and wait to see if anyone wants

1 to officially testify for the
2 record. As comments to the
3 rule making. When the rule
4 making and testimony is closed
5 then we will entertain
6 questions.

7 MR. WARD:

8 Very good, thank you.

9 MS. URBAN:

10 Go ahead.

11 MR. CARDEL:

12 I'm Jim Cardel from
13 Pittsburgh Commission and I
14 just want to commend the
15 department. I've known Gloria
16 Casper for many years and there
17 had been numerous hearings but
18 it appears that we have come up
19 with certain corporate rules of
20 dredging materials very
21 conclusive on this set. And the
22 whole process done and I just
23 commend the department.

24 MS. URBAN:

25 Thank you. As there is

1 --- no one seems to be
2 available to prevent testimony
3 --- to present testimony at
4 this time, we will officially
5 close this hearing at 7:20 and
6 open the floor to questions.

7 * * * * *

8 PUBLIC HEARING CONCLUDED AT 7:20 P.M.

9 * * * * *

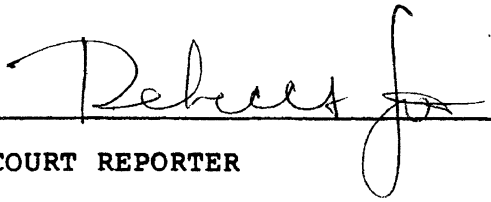
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C E R T I F I C A T E

I HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS
WERE REPORTED STENOGRAPHICALLY BY ME AND THEREAFTER
REDUCED TO TYPEWRITING AND THAT THIS TRANSCRIPT
IS A TRUE AND ACCURATE RECORD THEREOF.

SARGENT'S COURT REPORTING SERVICE, INC.



COURT REPORTER

WARD

ORIGINAL: 2245

T. A. WARD CONSTRUCTORS, INC.

1405 McLAUGHLIN RUN ROAD
PITTSBURGH, PA 15241
412-221-2222
FAX 412-221-2225

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RECEIVED
T. A. WARD CONSTRUCTORS, INC.

June 6, 2002

Dear *Mr. Nyce*

Here, are some proposed regulations that I'm concerned about. Could you please review to see if you have as much concern about them as I do?

If I can answer any questions you have I'll be glad to do so— or more than likely I can refer you to technical people who have a good grasp on what is being promulgated.

Sincerely,

T.A. WARD CONSTRUCTORS, INC.



T.A. Ward
President

encls.

F.Y.I. I have sent this letter to Chm. Mc Genley and to a number of representatives and Senators with whom I am acquainted.

Information Sheet

Pennsylvania's Proposed "Safe Fill" Regulations

Background

Pennsylvania's environmental laws impose strict regulatory requirements on the generation, processing, and disposal of "solid waste." Pennsylvania's definition of "solid waste" includes virtually all "discarded" materials, including solids, liquids, and contained gaseous materials. In many respects, these laws are identical or substantially similar to laws imposed by other states, including Pennsylvania's closest neighbors. However, the Department of Environmental Protection ("DEP" or the "Department") recently proposed regulations that will impose a number of new, considerably more stringent, requirements on the use of "fill" materials in the Commonwealth, in many cases subjecting fill materials to regulation as "solid waste," and in virtually all cases subjecting fill materials to onerous sampling and analysis requirements. These regulations go far beyond the requirements imposed by most states, and likely will have a "chilling" effect on construction and development activities in the Commonwealth.

The proposed regulations are commonly known as the "Safe Fill Regulations," and they were published in the Pennsylvania Bulletin on February 2, 2002. DEP held a series of public meetings on the proposed regulations and solicited public comment for 60 days. DEP representatives report that the Department intends to finalize the regulations, thereby making them the law of the Commonwealth, by the end of 2002.

The Regulations and Their Impact

The proposed regulations are very complex, and a complete outline of their provisions is far beyond the scope of this information sheet. In their simplest form, however, the regulations can be summarized as follows:

1. In the future, there will be two categories of "fill" materials: (a) "safe fill," which is not a "solid waste" and therefore not subject to regulation under the environmental laws; and (b) "waste" materials, which are subject to regulation under the environmental laws.
2. These categories appear to apply to all excavated materials, whether virgin soil/stone or previously placed "fill" material, and to demolition materials.
3. In order to demonstrate whether material is "safe fill" or "waste," individuals will be required to comply with comprehensive sampling and analytical requirements (or otherwise know the detailed chemical makeup of the fill material), and compare the results to a series of "safe fill numeric standards" that are based on conservative residential land use assumptions.

4. Most materials that exceed the numeric standards will be considered “wastes,” even if the exceedances are caused by natural background, atmospheric deposition, or “urbanization.”
5. Waste materials must be managed and placed in accordance with DEP-issued permits, including a series of cumbersome “permits-by-rule” included in the regulations.

DEP estimates that 20 million cubic yards of fill materials are managed in the Commonwealth each year. In many cases, facilities will choose to simply landfill excavated materials, rather than attempt to comply with the burdensome requirements of the regulations. In virtually all cases, the new regulations will impose significant costs on the excavation, management, and placement of these materials. These costs will be in addition to those that a project would incur if it were initiated in a neighboring state, thereby placing Pennsylvania at a competitive disadvantage when out-of-state companies are evaluating potential projects. In addition, the regulations likely will result in a substantial increase in the amount of material that is landfilled in the Commonwealth, further reducing the already limited landfill capacity in Pennsylvania.

The Solution

Interested parties should contact DEP, the Governor’s Office, or their State Legislators to express their concern about the proposed regulations. Among other things, parties should consider requesting that DEP revise the regulations to:

- A. Increase the amount of materials that will be considered “safe fill.”
- B. Reduce the sampling and analytical requirements necessary to demonstrate that the materials are “safe fill.”
- C. Reduce the requirements that apply to “waste” materials that are used as fill.

IRRC

ORIGINAL: 2245

From: Hess, Dave [dahess@state.pa.us]
Sent: Monday, June 03, 2002 3:44 PM
To: EP, LandRecycling
Subject: Pa Safe Fill Regulations

The Pennsylvania draft Safe Fill Regulations has generated a lot of interest, particularly to those regularly involved with remediation under the Land Recycling Program. The Land Recycling Program's Cleanup Standards Scientific Advisory Board has established a subcommittee to provide recommendations to the DEP in finalizing the Safe Fill Regulations. Their first meeting was May 20, 2002, and meeting minutes are available at:
http://www.dep.state.pa.us/dep/subject/advcoun/cleanup/2002/CSSAB_subcomm_notes_052002.pdf

The second meeting was held today, June 3rd. The agenda is available at:
http://www.dep.state.pa.us/dep/subject/advcoun/cleanup/2002/CSSAB_SubComm_Agenda.htm

Land Recycling Program
Dave Hess
Chief of the Voluntary Cleanup and Standards Section
717-783-9480
dahess@state.pa.us

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ATTORNEY
GENERAL'S
COMMISSION

CSSAB SUBCOMMITTEE MEETING ON SAFE FILL

MAY 20, 2002

Manko, Gold, Katcher & Fox, LLP

AGENDA

9:30 a.m. – 3:30 p.m.

1. Welcome/Introductions
2. PADEP Thoughts
3. Safe Fill: Issues
4. Lunch
5. Safe Fill: Issues (cont'd)
6. Assignments
7. Path Forward

Attendees: J. Snyder, W. Pounds, K. Satyaswaroop, R. Rausch, J. Hines, T. Rae, T. Yohe, K. Reinert, R. Buchanan, M. Meloy, C. Robertson, A. Holmstrom.

Action Points:

1. W. Pounds will provide the sub-committee (electronically) with the comment summary extracted from all 33 commentators in approximately one week.
2. M. Mummert and S. Fang are charged with developing the language for alternate statistical procedures to deal with the issues of large volume and in-situ characterization.

Meeting Minutes:

Jim Snyder set the stage for the session by asking everyone to remain focused on the issues. Because some sub-committee members were also commentators, Jim reminded everyone that the entire scope of issues, not just those submitted by the commentators present, needed full consideration. He suggested a goal of trying to get through a list of all the issues in the first meeting which demanded not getting "hung-up" on any single issue.

Bill Pounds offered to summarize what he felt were the key issues based on his reading of the 33 comment submissions. These issues (normal text), labeled A. through F. are listed in the following tables under section II.

The sub-committee was then solicited for additional issues. Al Holmstrom introduced a list of issues raised by IRRC. The list of issues raised from this exercise are recorded in the following tables under Section III.

The committee then consolidated the issues by relating issues to the section II list of Mr. Pounds. The number of the section III list issue is indicated on the section II list in italics. Three issues did not find a logical association to the Pounds list; they were,

- land clearing and grubbing exemption
- the need for the 1988 cut off date
- the list of IRRC recommended definitions.

These items are indicated with an asterisk in the section III list. Finally, it was noted that item "D" on Bill's section II list could be included under "B".

Discussion on the issues started with item "B" based on Bill's desire to have technical recommendations on these issues. The CSSAB members readily concluded that there were statistical means of reducing the sampling for large volume sampling and that some discussion of alternate methods had been included in the Land Recycling Regulations. It was suggested that Mark Mummert (a member of the sub-committee on Safe Fill) be asked to work with Sam Fang on developing appropriate text to describe the use of alternate methods. (Mark subsequently agreed to the assignment.)

On the matter of due diligence and screening, Bill Pounds re-stated that the current version of the Safe Fill Regulations do not prohibit the use of screening sampling and that he had no objection minimum levels of assurance sampling being performed as part of due diligence. Mike Meloy raised the question of whether there was an incentive for a person to do detailed sampling, such a

providing "safe harbor" if later there were found to be a problem. Jim and Bill agreed that in the real world the Department could not provide such an incentive – they would have to enforce on all parties. It was generally acknowledged that a range due diligence was needed to suit the specific circumstances. However, it was recognized to really define what level of due diligence is needed, you need to have some idea of what "safe fill" is.

An extensive discussion covering the current policy and regulatory framework, the existing definitions of "waste" and "contaminant" in the regulations, the disincentive of excluding Act 2 site soils from "safe fill" eligibility and the policy related to the spill and release exclusion. The Department was interested in knowing how conservative the Act 2 residential standards were. The CSSAB members confirmed that the standards were quite conservative as they were developed to be acceptable anywhere in the Commonwealth.

A Department concern was raising the contaminant levels at neighboring properties. The CSSAB members agreed that could happen, however, it was still universally safe. Mike Meloy also suggested that having a firm standard in place may even reduce the ambiguity of what is OK to place next door.

At the end of the discussion Jim Snyder summarized a policy position he was willing to support which included the following concepts:

- applicable to all soils whether or not impacted by a spill or release;
- decisions made on a degree of due diligence proper for the situation, for example, no action needed for virgin soil but release impacted soil due diligence would be equivalent to Act 2 characterization;
- soils determined to have contaminants below the Land Recycling statewide residential MSCs would be "safe fill" and not be waste;
- soils qualifying for "safe fill" status could be used for all applications.

On the subject of C/D materials, Jim and Bill stated they agreed with commentators that certainly some buildings on industrial properties would be no more contaminated than residential or commercial properties and therefore probably not appropriate to exclude all industrial C & D materials for reuse. The question became one of determining where to draw the line or what due diligence is needed. After the committee made the analogy to soil, i.e., if the material meets objective "safe fill" standards it is safe for general use, there was acceptance of the concept of including industrial C/D material applicability.

Bill Pounds noted that some screening guidance would have to be set up for industrial C/D specifically to make sure hazardous items are removed from the fill. Hazardous items include asbestos, mercury switches and devices, PCB capacitors and florescent lights.

For historic fill, Jim Snyder stated that he did not feel the Department could bring historic fill into the safe fill category because there is so much ash and slag in historic fill which is classified as waste. Even though the technical logic was present to make the case, the historical definition of ash and slag in his opinion control. Jim was willing to allow returning historic fill to a trench or excavation, to moving it on-site, movement of diminmish quantities.

Jim Snyder stated he could not support moving historic fill outside of a property outside of the waste stream. He could support using the material under a PBR.

The meeting concluded with Chairman Buchanan reviewing the considerable progress for the days meeting.

The CSSAB Sub-committee on Safe Fill agreed to the following meeting schedule to accommodate the Department's needs:

June 3, 9:30 a.m., Harrisburg, 14th floor of Rachael Carson Office Building

July 1, 9:30 a.m., Harrisburg

July 12, 9:30 a.m., Harrisburg.

CSSAB SUBCOMMITTEE ON SAFE FILL

MAY 20, 2002 MEETING

I. Potential Issues

- 271.1 Definitions
- 271.103 PBR Municipal Waste
Proc. Facil. (rock, stone, brick, block, concrete)
- 287.1 Definitions
- 287.11 Safe Fill Numeric Standards
- 287.101 General Permits
- 287.102 PBR (soil, dredge material, asphalt, historic fill)

II. PADEP – BILL POUNDS

- A. Definition of Safe Fill (See IRRC comments)
(1, 2, 6, 8, 9, 12, 19, 20 and "D")
- B. Issues for dealing with sampling
(15, 16 - For next meeting)
 - Large Volume Protocols
 - Screening
 - Due Diligence
 - In Situ Sampling
 - Statistical Tools
- C. PBRs
(2, 3, 5, 10, 11, 12, 13, 14, 15, 17, 18)

- Streamline/clarify
 - Consistency between standards and property use
 - Flexibility
- D. Sampling – How Many Samples (*Consolidate with “B”*)
- E. Numeric Standards vs. Impacted by Spill or Release
- F. Public Nuisance vs. Spill or Release
- G. C & D Material – Industrial vs. Residential and commercial facilities
(Level of due diligence; sampling; “SIC” codes)
- H. Residual Waste Definition of Waste -- Contaminated Soil vs. Safe Fill
(19, 20) (*Put in definition of Safe Fill clarification of non-contaminated*)

III. ADDITIONAL ISSUES

1. Policy Issues
 - When is something a waste?
 - Act 2 Interface
2. Who is responsible party? (safe harbors?)
3. Who is responsible for records?
- *4. Clearing and grubbing waste
5. Requirements for PBR (mechanical processing facilities)
6. Volumes for exemptions
- *7. 1988 cut-off date for historic fill
8. ROW exemption
9. Regulation of storage and transportation of safe fill & PRB materials
10. Applicability at CERCLA/RCRA sites
11. Mechanics of PBR process
12. Set-backs from waters of PA – What does “along” mean?

13. Background at unzoned properties
14. Process for placing PBR material
15. SPLP & PQL
16. "Sediment" sampling procedures
17. Emergency use of materials for fire suppression
- *18. Definitions
 - Release
 - Fill
 - Surface waters
 - Sediments
 - Composite, grab and discrete samples
 - Residential vs. non-residential property
19. Off ramps
 - Waste vs. Safe
 - Virgin soil
20. Act 2/Safe Fill interface
21. Waste classification – PBR material placed and later picked up

**Search
Subjects**

PENNSYLVANIA
Department of Environmental Protection



AGENDA
CSSAB Safe Fill Subcommittee Meeting
on Safe Fill Proposed Regulations
June 3, 2002
Rachel Carson State Office Building
400 Market Street
Harrisburg, Pennsylvania
9:30 A.M. - 4:00 P.M.

Monday, June 3, 2002 - 14th Floor Conference Room

Welcome/Introductions: Buchanan

Objectives: To continue to identify issues and issue resolution regarding PaDep's proposed "Safe Fill Regulations"

Recap of May 20 Meeting: Buchanan, All

Continue Safe Fill Proposed Regulations/Issues: All

Lunch (provided for subcommittee members/PaDEP staff)

Continue Safe Fill Proposed Regulations/Issues: All

Assignments: Buchanan/Subcommittee

Path Forward: Buchanan

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Contact Webmaster

Last Modified on 05/31/2002 09:36:45.

WARD

T. A. WARD CONSTRUCTORS, INC.

1405 McLAUGHLIN RUN ROAD
PITTSBURGH, PA 15241
412-221-2222
FAX 412-221-2225

2002 JUN 11 AM 9:18

REVIEW COMMISSION

June 6, 2002

Dear

Jack

Here, ~~are~~ some proposed regulations that I'm concerned about. Could you please review to see if you have as much concern about them as I do?

If I can answer any questions you have I'll be glad to do so— or more than likely I can refer you to technical people who have a good grasp on what is being promulgated.

Sincerely,

T.A. WARD CONSTRUCTORS, INC.

T.A. Ward

T.A. Ward
President

encls.

*Here is an ex. summary
of those pending rego.
T.A.*

Information Sheet

Pennsylvania's Proposed "Safe Fill" Regulations

2002 JUN 11 AM 9:18
REVIEW COMMISSION

Background

Pennsylvania's environmental laws impose strict regulatory requirements on the generation, processing, and disposal of "solid waste." Pennsylvania's definition of "solid waste" includes virtually all "discarded" materials, including solids, liquids, and contained gaseous materials. In many respects, these laws are identical or substantially similar to laws imposed by other states, including Pennsylvania's closest neighbors. However, the Department of Environmental Protection ("DEP" or the "Department") recently proposed regulations that will impose a number of new, considerably more stringent, requirements on the use of "fill" materials in the Commonwealth, in many cases subjecting fill materials to regulation as "solid waste," and in virtually all cases subjecting fill materials to onerous sampling and analysis requirements. These regulations go far beyond the requirements imposed by most states, and likely will have a "chilling" effect on construction and development activities in the Commonwealth.

The proposed regulations are commonly known as the "Safe Fill Regulations," and they were published in the Pennsylvania Bulletin on February 2, 2002. DEP held a series of public meetings on the proposed regulations and solicited public comment for 60 days. DEP representatives report that the Department intends to finalize the regulations, thereby making them the law of the Commonwealth, by the end of 2002.

The Regulations and Their Impact

The proposed regulations are very complex, and a complete outline of their provisions is far beyond the scope of this information sheet. In their simplest form, however, the regulations can be summarized as follows:

1. In the future, there will be two categories of "fill" materials: (a) "safe fill," which is not a "solid waste" and therefore not subject to regulation under the environmental laws; and (b) "waste" materials, which are subject to regulation under the environmental laws.
2. These categories appear to apply to all excavated materials, whether virgin soil/stone or previously placed "fill" material, and to demolition materials.
3. In order to demonstrate whether material is "safe fill" or "waste," individuals will be required to comply with comprehensive sampling and analytical requirements (or otherwise know the detailed chemical makeup of the fill material), and compare the results to a series of "safe fill numeric standards" that are based on conservative residential land use assumptions.

4. Most materials that exceed the numeric standards will be considered “wastes,” even if the exceedances are caused by natural background, atmospheric deposition, or “urbanization.”
5. Waste materials must be managed and placed in accordance with DEP-issued permits, including a series of cumbersome “permits-by-rule” included in the regulations.

DEP estimates that 20 million cubic yards of fill materials are managed in the Commonwealth each year. In many cases, facilities will choose to simply landfill excavated materials, rather than attempt to comply with the burdensome requirements of the regulations. In virtually all cases, the new regulations will impose significant costs on the excavation, management, and placement of these materials. These costs will be in addition to those that a project would incur if it were initiated in a neighboring state, thereby placing Pennsylvania at a competitive disadvantage when out-of-state companies are evaluating potential projects. In addition, the regulations likely will result in a substantial increase in the amount of material that is landfilled in the Commonwealth, further reducing the already limited landfill capacity in Pennsylvania.

The Solution

Interested parties should contact DEP, the Governor’s Office, or their State Legislators to express their concern about the proposed regulations. Among other things, parties should consider requesting that DEP revise the regulations to:

- A. Increase the amount of materials that will be considered “safe fill.”
- B. Reduce the sampling and analytical requirements necessary to demonstrate that the materials are “safe fill.”
- C. Reduce the requirements that apply to “waste” materials that are used as fill.

ORIGINAL: 2245

Pennsylvania Utility Contractors Association

Strawberry Arcade
223A Walnut Street
Harrisburg, PA 17101
Phone: 717-234-8055
Fax: 717-234-7955

Rick Zoelle, President
Brenda Reigle, Executive Director

April 30, 2002

Re: Comments on Proposed Safe Fill Regulations on
Behalf of the Pennsylvania Utility Contractors Association

Independent Regulatory Review Commission
14th Floor, Harristown Two
333 Market Street
Harrisburg, PA 17101

Dear Commission Members:

On behalf of the Pennsylvania Utility Contractors Association, I am hopeful that you will give our association's comments serious consideration concerning the Safe Fill Regulations (25 PA CODE CHS. 271 and 287) as proposed by the Environmental Quality Board (the "Board") to the Department of Environmental Protection (the "Department"), and noticed in the *Pennsylvania Bulletin* on February 2, 2002.

First, we would like to call to the attention of the Commission the fact that our Association represents over 200 contractors, subcontractors and suppliers throughout the Commonwealth of Pennsylvania. These members of the Pennsylvania Utility Contractors Association (PUCA) perform most of the water and sewer line utility and plant work for authorities and municipalities throughout the Commonwealth. As such, they are dedicated to keeping a healthy, safe and pollution-free environment through the treatment and transmission of potable water and sewage in a manner which is consistent with not only the letter, but the spirit of environmental needs of Pennsylvania.

However, many of the contractors who perform this environmentally valuable work are admittedly small to medium-size competing companies. They are concerned with the costs and difficulties posed if the obligations and duties of the new proposed Regulations are imposed upon them, as opposed to the owners of the utility line rights-of-way, and the designers of utility line projects. These are the local governmental authorities and municipalities who own, design and contract out the work. Some of our comments reflect these concerns and we respectfully ask that the Board and Department take these concerns into consideration.

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INDEPENDENT REGULATORY
REVIEW COMMISSION

Our specific comments on the Regulations are as follows:

First, the proposed Regulations should be amended to reflect that in cases of utility and right-of-way work, "The person using the material... " (vii) and "A person who receives and uses" (I)(12) material which does not meet the standard of Safe Fill, is the right-of-way owner or controller that lets any contract which results in excavation of material which comes under the definitions set forth in the proposed Regulations. The Regulations should reflect that this responsibility is a non-waivable responsibility and, to the extent possible, any burdens for determining whether Safe Fill standards and applications are met should be made at the design stage of any utility line or plant project involving movement of material within a right-of-way or movement of material within a property or offsite from a right-of-way or property. Similarly, any unforeseen or unanticipated site conditions involving the applicability of the Safe Fill Regulations and costs which result must be borne by the owner or controller of the right-of-way, which in some cases is a municipality or authority and branch of local government. Similarly, the burden and cost of testing, handling and any remediation or disposing of excavated material required by the Safe Fill Regulations must be borne by the owner of the right-of-way or local governmental body or authority which contracts for such subterranean work on the right-of-way.

In this respect, it should be pointed out that contractors who perform such excavation and utility line and plant work do not participate in the design stage of the project, nor do they usually have access to the site for a determination of subterranean conditions. By the same token, most municipalities and authorities contracting for utility line work within rights-of-way they control do not utilize in their contracts the type of Hidden or Unforeseen Site Condition clause found in the AIA contracts and in the Federal Acquisition Regulations. Similarly, the authority has access to the records involved in the exercise of due diligence in its locality, and would be able to better determine knowledge of past activity which would indicate that the material has been subject to a release.

This change in the Regulations would help contain costs of the performance of the work and the costs reflected in the bids submitted by the contractors for this environmentally vital work. Consequently, the responsibilities and costs in connection with the application of the Safe Fill Regulations should be borne by the owners and controllers of the rights-of-way and work sites for water and sewer utility lines and plants rather than the contractor who merely performs the work pursuant to the plans and specifications given to it.

Second, the definition in respect to "historic fill" does not take into consideration the realities of sewer and water line utility work. In this respect, the term "safe fill" in the Regulations include historic fill in quantities of less than or equal to 125 cubic yards per excavation location, if the conditions of Subparagraph (i)(A)(I) and (II) are met. Sewer and water line contractors may excavate and cover three or four times that amount in one particular day. This is especially true in instances where there is a time element involved

because of the critical nature of the condition of the water or sewer line. The Regulations should be clarified to indicate that the term Safe Fill includes historic fill in quantities of less than or equal to 350 cubic yards per excavation location per day on line work. Again, this would be subject to the conditions of Subparagraph (i)(A)(I) and (II) being met.

Third, for projects involving sewer and water line work, the condition that material moved within a right-of-way must be no greater than the lower of the non-residential direct contact numeric values and other numeric values stated in (viii) should be eliminated. Again, we ask that the Board and the Department take into consideration the nature of water and sewer line work within a right-of-way owned by a municipality or authority. The rights-of-way are very narrow and the excavation, laying of pipe and backfilling is very limited and on a rigid time schedule. If the material being excavated meets the standards of (I) and (II), and taking into consideration that it is the most part in the nature of historic fill, which is being put back into place in the trench from which it came, the requirement of applying the numerical limits in (viii) imposes a testing and time limitation which could prove to be costly both in terms of time and expense and is unnecessary.

Fourth, there should be modification to the Regulations taking into consideration the narrow nature of rights-of-way and utility corridors when excavating water and sewer line projects with long dimensional lines. In such cases, it is frequently impractical to pile questionable material excavated within the right-of-way. In fact, in the case of utility work along a highway, it is actually not advisable to attempt to store questionable material on right-of-way edge locations where storm water could cause material dispersal. Therefore, the Regulation should be changed and revised to indicate that contractors can move materials which are excavated on such site to appropriate storage locations, as long as the materials are placed on a tarp and covered by a tarp while being characterized and dealt with. Again, the responsibility for such location should be that of the owner of the right-of-way, which is the local authority or municipal government which owns the utility right-of-way and has let the contract for the excavation. Similarly, such local authority or government should have responsibility for the costs of transporting such materials so they could be properly classified. This position on the Regulations would be an acknowledgement that local transport of such excavated materials is acceptable until it is determined what classification the materials are and, therefore, the municipality or authority can avoid being charged with hauling waste. Again, it should be pointed out that the raising of the historic fill limitation to 350 cubic yards per excavation per day would help to alleviate the potential for problems arising out of this issue.

Fifth, while we do not wish to be repetitive, we would like to recommend that in case the recommendation set forth in the **First** item above is not adopted in totality, the Regulations should be changed so that the cost of due diligence and testing are borne by the owner of any right-of-way involved in utility water and sewer work, which as stated, is generally the local government or authority. This should be a non-waivable provision.

Sixth, consistent with the position taken in item **First**, our Association recommends that the Regulations provide that it is the owner of the right-of-way, which is the local authority or municipality in utility water and sewer line projects, that has total responsibility for the material in the excavation and the classifications of fill of the material excavated. However, in case that position is not totally adopted by the Board and the Department, it is our recommendation that the owner of the right-of-way in utility line projects be responsible for the requirements of (i)(A)(I) and (II) of the recommended Regulations. It is the owner who performs the engineering and lets the contract. In respect to the appropriate level of due diligence, the owner of the right-of-way, as stated above, is in a much better position to determine past activity which would indicate that material had been subject to a release. Similarly, such owner of the right-of-way would be in a much better position to determine whether or not the numerical standards for (viii) would be met in respect to the excavation and is in a better position to satisfy the requirements in (vii) inasmuch as it would maintain the records and documentation in respect to the Safe Fill.

Seventh, we recommend that the definition of "historic fill" set forth in the recommended Regulations be modified by eliminating the requirement of (ii)(A). That is, an elimination of the requirement that there be no indication that such historic fill has been subject to a release of regulated substances. Again, this takes into consideration the nature of the narrow rights-of-way and long dimensions on sewer and water utility work. Inquiries of a Phase I nature for a 9-mile narrow right-of-way would be impractical and if undertaken, expensive. Basically, if the second part of the standard or requirement as to visible staining, odor or other sensory nuisances associated with material is present, that should eliminate the need for the added costs and difficulty of a long dimension Phase I.

Eighth, the visible staining, odor and other sensory nuisances standard or requirement for both historic fill and Safe Fill is too vague as to be meaningful. In this respect, the standard for historic fill in the definition section of the Regulations, or §287.1, should be changed to indicate that there be no "recurring or persistent" odor and that as in the Safe Fill definition, that the visible staining, recurring or persistent odor or other sensory nuisance be "resulting from chemical contaminants." By the same token, the definition of Safe Fill should be changed in (i)(II) to indicate that any odor must be recurring or persistent. This would eliminate a temporary or unexplained odor which is momentary in respect to the particular excavation.

Conclusion

The above constitute the comments of PUCA in respect to the proposed Regulations. As always, our Association supports a strong and healthy environment and commends the effort of both the Department of Environmental Protection and the Environmental Quality Board in attempting to reach that goal. As stated above, however, we have a genuine concern. Our work, which consists of multi-mile narrow right-of-way work designed by engineers employed by municipalities and authorities, is unique.

Page -5-
April 30, 2002

Our industry remains healthy because of the competition among the various contractors and the professionalism of all those who contribute towards building environmentally sound and durable water and sewer lines and treatment plants.

As you will note, many of our concerns are that the burden of meeting lengthy right-of-way excavation restrictions will be pushed off by the owner of the rights-of-way who are also the designers and engineers on the line projects, on to our contractors. The types of conditions which can be encountered are impossible to anticipate by the contractor, but are simpler for the owner of the right-of-way employing the engineer on the job to satisfy. In all due respect, we believe that if our recommendations are not followed, we can anticipate much higher bids for sewer and water line and plant work. Contractors faced with conditions which they can't possibly determine in advance may have no choice other than to build the costs of such compliance into their bids. We do not want this to happen. We do believe, however, that the goals of the proposed Regulations can be met, and at the same time, the costs of water and sewer line and plant work can be held down if our recommendations on responsibility for meeting the regulations, together with some of the other recommendations pertaining to rights-of-way, historic fill and the application of numerical standards are adopted.

Therefore, we respectfully submit these comments and recommendations for modification of the proposed Regulations.

If you have any questions at all, please do not hesitate to contact me.

Very truly yours,
Brenda V. Reigle
Brenda V. Reigle, Executive Director

cc: Board of Directors of PUCA
Allan L. Fluke, Esquire
Gary Brown, P.E., RTES, Inc.
Jen Hitz, of Senator Robert C. Jubelirer
Charles Crouse, of Senator J. Barry Stout

BVR/jlb/o/puca/lettercommentsonsafefillletter

IRRC

ORIGINAL: 2245

From: ed-puca [ed@puca.org]
Sent: Wednesday, May 01, 2002 11:42 AM
To: IRRC; FLUKE
Subject: Safe Fill Regulation Comments

Attached are comments from the Pennsylvania Utility Contractors Association concerning the final rulemaking on the Safe Fill Regulations.

Thank you for your attention to our concerns.

Brenda Reigle
Executive Director
PA Utility Contractors Assn.
Strawberry Arcade
223A Walnut Street
Harrisburg, PA 17101
717-234-8055

cc ALLAN Fluke; Esq. - PUCA Legal Counsel

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PA UTILITY CONTRACTORS ASSOCIATION

RT Environmental Services, Inc.

April 25, 2002

ORIGINAL: 2245

Independent Regulatory Review Commission
14th Floor, Harrisstown Two
333 Market Street
Harrisburg, PA 17101

2002 APR 26 AM 9:32
INDEPENDENT REGULATORY
REVIEW COMMISSION

RE: PROPOSED SAFE FILL REGULATIONS

Dear Commission Members:

The Pennsylvania Asphalt Pavement Association, and its Environmental Committee have worked with the Pennsylvania Department of Environmental Protection to come up with a workable set of "Safe Fill" regulations. The proposed "Safe Fill" regulations are tied to statewide health standard under Act 2, which is a considerable improvement of previous regulatory proposals. However, a number of important issues remain to be resolved, which require attention, as follows:

- ▶ **Cost Analysis** - The cost analysis presented with the proposed regulations, which is required by state law, lacks credibility because it is not honest. The cost effectiveness analysis assumes that the 1996 "Clean Fill Guidance Document" has been uniformly enforced, which is not the case, because it set metals limits below background. Therefore, the regulations will in fact, not "save" hundreds of millions of dollars, instead, they will add costs to all highway and earthwork construction projects, at a time that highway budgets face considerable reductions, due to national security concerns. ***The DEP should be required to present accurate cost effectiveness analysis, so Members of the Legislature, as well as the regulated community can gain a proper understanding of the impact of the proposed regulations, as required by state law.***
- ▶ **State Specifications** - Millions of cubic yards of material have been placed on properties throughout the Commonwealth, in many instances, where the material has been specified as being "Clean Fill". Specifications continue to indicate that material which is unsuitable from a construction standpoint does not have to be managed as "waste", even during the current construction season. However, DEP only proposes to legitimize "Historic Fill", up until 1988. All Historic Fill, particularly fill received from state contracts, should be legitimized, up until the effective date of the Regulations. ***If this is not done, the state could face substantial claims in coming years, because the state itself did not follow the Clean Fill Guidance Document throughout the 1990's.***
- ▶ **Testing Protocols and Large Projects** - The proposed regulations are deficient, in that they do not tell the regulated community how to properly test materials *in situ*. In particular, shallow, area wide contamination, from atmospheric emissions, or historical use of arsenical based herbicides and pesticides on roadways, needs to be properly investigated, so that consultants can include in Plans and Specifications how the materials have to be managed. Further, for large projects, the testing iteration (8 to 12 samples per 3,000 cubic yards) is overly intensive, particularly where there are common constituent characteristics over large volumes. The Delaware River Port Authority has proposed a reasonable program for use in connection with materials that are likely to exhibit uniform characteristics, that is, to test at the required frequencies for the first 10,000 yards, then



to take one sample per 3,000 yards, unless there are exceedances, and in such instance, the more intensive sampling frequency would prevail for the balance of the project. ***This sampling frequency modification should be included in the final regulations.***

- ▶ **What do contractors have to do now?** - Many contractors are asking what they should be doing during this construction season, as the 1996 Clean Fill Document does not have usable numbers. The DEP has indicated in the preamble to the proposed regulations that the new Safe Fill Numerical Limits can be used along with the current 1996 Clean Fill Guidance Document. Contractors and consultants can not be expected to refer to preambles, proposed Safe Fill Numeric Limit tables, and a current Guidance Document, to find out what needs to be done this construction season. **DEP should modify and reissue the 1996 Clean Fill Guidance Document, immediately, so those in the field have a clear understanding of what limits apply now. This should be posted on DEP's website, without delay.**
- ▶ **Land Zoning** - With respect to use of the Permit-By-Rule, there is currently no statement as to what classification "agricultural" sites fall in, i.e. - are these "residential", or "nonresidential". ***A response on this issue is critical because much of the land through which new highways are constructed falls into the agricultural category.***
- ▶ **Construction and Demolition Waste** - Major changes are proposed in the proper management of construction and demolition waste in the Commonwealth. Construction and demolition recycling facilities and landfills may not be prepared to handle the volume of materials which will now have to be managed as "contaminated", and costs in some areas have risen significantly since announcement of the ban of future landfill permit capacity. The impact on projects such as Philadelphia Mayor Street's plan to demolish 14,000 row houses is very substantial, and a serious effort needs to be made to determine the true impact of the regulations, both on remaining air space, and tipping fees. **If County Solid Waste Management plans to not take these materials into account, plans should be modified in light of these proposed regulations, within the next 60 days. Otherwise, DEP does not really know the impact of these regulations on the Commonwealth's current Solid Waste Management System. (It should be noted that nearby states, for example New Jersey, have included construction and demolition waste in their Solid Waste Management Plans for more than a decade.)**
- ▶ **Owner Generator Responsibility** - The DEP, in the proposed regulations, has said very little about the responsibility of owners to determine the history of their sites, and to properly test and characterize materials before contracts are let. Placing the burden solely on "the person using the material", will lead to endless unnecessary litigation because the burden is inappropriately shifted away from the "waste generator". Utility contractors, for example, frequently do not have the ability or time available under let contracts to "pre-study" corridors, or, areas where water mains or gas mains will be replaced, particularly,

in urban areas. It is, in fact, up to the owners and the owners' engineers to specify how materials should be managed, and to place appropriate bid items in project specifications. It is a mistake for DEP to depart in these regulations from the long held environmental law and regulation principal that generators are responsible for their waste. **The responsibility for owners to properly test and characterize materials before letting out earthwork projects needs to be clearly stated in the regulations.**

The proposed regulations likely affect the excavation and movement of 20 to 30 million cubic yards of materials per year, one third to one half of which is under state contract. For sites where questionable materials are present, the cost will likely be about \$6 per cubic yard to test materials, essentially doubling the cost of larger earthwork projects. If the Regulations were more flexible, particularly as to "*in situ*" testing, the cost could drop by 50 to 75%, which is quite obviously, very important. If this is not done, Pennsylvania's highway construction budget as actually applied to new or repaired highways will undoubtedly be slashed much more than is needed, at a time when it is also being reduced due to federal expenditure reallocations due to security concerns.

It is extremely important that:

- ▶ The proper tools be included in the Regulations to test materials *in situ*.
- ▶ Owners be held responsible for properly characterizing their materials.
- ▶ That DEP present a reasonably accurate cost effectiveness impact analysis, and County Solid Waste Management plans be revised, so that "overload conditions" at facilities, at a time that DEP is restricting new landfill permit capacity, does not negatively impact public works projects unnecessarily.

The construction industry is generally in favor of any program which helps to draw distinctions between what is waste, and what is "Safe Fill". It is strongly recommended that a focused effort be made to appropriately finalize the regulations, make adjustments for major projects, and focus on the impacts as they will affect major projects without further delay, so that an appropriate set

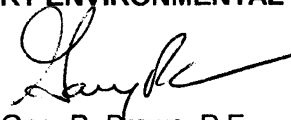
Independent Regulatory Review Commission
April 23, 2002
Page 4

of regulations can be in effect by this November, when Specifications are being finalized for the 2003 construction season.

Thank you for the opportunity to provide further comments.

Very truly yours,

RT ENVIRONMENTAL SERVICES, INC.

A handwritten signature in black ink, appearing to read "Gary R. Brown", written over a horizontal line.

Gary R. Brown, P.E.
President

GRB/jw

RT Projects\2157-07\21570723.wpd

cc: Ron Cominsky - PAPA,
Jim Sells - PACA,
Bob Latham - APC,
Mike Taylor - NADC,
Brenda Reigle - PUCA



Environmental Quality Board

RECEIVED
2002 APR 25 AM 8:55
p.o. box 8477
REGULATORY
REVIEW COMMISSION

harrisburg, pa. 17105-8477 (717)787-4526

April 23, 2002

Mr. Robert E. Nyce, Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown #2
333 Market Street
Harrisburg, PA 17120

Re: Proposed Rulemaking – Safe Fill Regulations (#7-372)

Dear Mr. Nyce:

Enclosed is a copy of the official verbatim transcripts for the public hearings the Environmental Quality Board recently held on the proposed safe fill regulations.

If you have any questions, please call me.

Sincerely,

A handwritten signature in black ink that reads 'S.F. Trostle'.

Sharon F. Trostle
Regulatory Coordinator

Enclosures



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REGULATORY
REVIEW COMMISSION

PENNSYLVANIA CHEMICAL INDUSTRY COUNCIL
200 N. Third Street, 10th Floor
Harrisburg, PA 17101
(717) 232-6681
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April 3, 2002

Honorable David E. Hess
Chairman
Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477



**Proposed Amendments to Pennsylvania Municipal
and Residual Waste Regulations – Safe Fill**

Dear Chairman Hess:

The members of the Pennsylvania Chemical Industry Council (PCIC) have reviewed the proposed amendments to the municipal and residual waste regulations commonly referred to as the Safe Fill Regulations and are submitting the enclosed comments.

Generally the members of PCIC have found the proposed regulations to be an improvement over the existing guidance document titled "Policy and Procedure Establishing Criteria for Use of Uncontaminated Soils, Rock, Stone, Brick and Block, Concrete, Gravel, Used Asphalt, Dredged Material and Waste from Land Clearing, Grubbing and Excavation as Fill." However, confusion and a lack of consistency with principals of Act 2 remain.

The enclosed comments will detail our concerns and make recommendations to clarify definitions and avoid conflict post-promulgation.

Sincerely,

Pamela A. Witmer
President

Enclosure

**PENNSYLVANIA CHEMICAL INDUSTRY COUNCIL
COMMENTS ON
SAFE FILL REGULATIONS**

**Submitted
April 3, 2002**

Introduction

The Environmental Quality Board published in the *Pennsylvania Bulletin* proposed amendments to Pennsylvania's municipal and residual waste regulations on February 2, 2002. These proposed regulatory amendments are commonly known as the "Safe Fill" regulations. The proposed regulations are to replace a guidance document titled "Policy and Procedure Establishing Criteria for Use of Uncontaminated Soils, Rock, Stone, Brick and Block, Concrete, Gravel, Used Asphalt, Dredged Material and Waste from Land Clearing, Grubbing and Excavation as Fill" ("Clean Fill") which was issued by the Department of Environmental Protection on February 29, 1996.

The Pennsylvania Chemical Industry Council believes that the proposed "Safe Fill" regulations will provide a marked improvement over the existing guidance document. However, there are a number of points in the proposed "Safe Fill" regulations which continue to cause concern for the regulated community. The changes suggested in the following text will provide for additional clarification, avoid confusion, undue regulation of large amounts of material that could be beneficially re-used and consistency with the Land Recycling and Environmental Remediation Standards Act. (Act 2 of 1995.)

Background

The existing Clean Fill Policy was intended to provide for a streamlined process to identify materials that could be beneficially re-used. In absence of material being designated as "clean" it would have to be regulated as a waste and then be subject to the Solid Waste Management Act. The Clean Fill Policy impacts many in the regulated community due to the breadth of its reach. Virtually every construction and remediation project is subject to the Clean Fill Policy.

While the Clean Fill Policy was established as the "brite-line" to determine whether or not material is sufficiently contaminated to be regulated as a waste, it did so by including standards that are an order of magnitude less than the most restrictive of the Medium Specific Concentrations developed under Act 2. These standards have proven to be unworkable because they are below background concentrations of regulated substances found in soils and other materials.

The chemical industry was and is a vigorous supporter of Act 2 as a mechanism to provide a consistent approach to remediation and redevelopment based on sound science

and risk management. However, the proposed “Safe Fill” regulation will not provide this same sound science and risk based approach to the management of reusable material.

The Pennsylvania Chemical Industry Council’s comments address those areas where we believe revisions must be made in order to continue the same science and risk approach that has worked so well in the Act 2 program and which will avoid the un-necessary landfilling of re-usable material.

Recommended Changes

I. Definition of Safe Fill

Concern

The proposed definition of safe fill is overly complicated, overly restrictive and un-clear. Under 287.1(i) there is a failure to define how to classify a material as uncontaminated. Numeric values are available to determine if a material is suitable as a safe fill, however, requiring that a material be uncontaminated is subjective. For example, depending upon how broadly industrial property is defined, the proposed Safe Fill regulations could render brick, block and concrete from office buildings and other non-production areas at industrial sites as wastes even though the material may be absent impacts from the production portion of the facilities. These materials could exhibit the same characteristics as brick, block and concrete from residential or commercial properties.

Further, instances involving due diligence investigations of sites may determine general areas where suspected releases may have occurred. However, as proposed the material would be excluded from being deemed safe fill because it may have been subject to a spill. This will increase costs to prove a negative and eliminate the ability to beneficially re-use a material. Even for materials that have been impacted by a release, the extent of the release may have been in concentrations less than the applicable numerical standard(s) and which do not have any detectable odor, visual staining or other sensory nuisance condition.

Recommendation

Under 287.1(i), define uncontaminated to mean material which exhibits no detectable odors, visual staining or demonstrates no other sensory nuisance and/or which the numerical standards for re-use as an industrial, commercial or residential safe fill are achieved.

Revise 287.1(i)(B) – based on an appropriate level of due diligence and a review of historical data on the excavation site indicates that past activity may have had the potential to result in a release, but there is no knowledge of a release and the material meets the numeric standards reference in Section

287.11 and listed in Appendix A, Tables 1 and 3, and meets the requirements of subparagraph (a)(II).

Revise 287.1(i)(C) – based on an appropriate level of due diligence and knowledge of the site, the material meets the safe fill numeric standards without sampling and analysis, there is no knowledge of a release, and meets the requirements of subparagraph (a)(II).

The disqualification of a material which has been subject to a release, regardless of how minimal the release, from being deemed a safe fill is a complete disregard for philosophy of Act 2.

Concern

The definition of safe fill, 287.1(ii), is not sufficiently clear regarding materials that are excavated and replaced in the excavation or placed within a project area encompassing the excavation. As proposed, the regulations could impose a costly sampling and analysis burden at industrial sites where insignificant release may have occurred and excavations are routinely necessary for infrastructure repair or improvement. Unless the material is known to have been impacted by a release, the onsite management of the material should be left to the regulated entity.

Additionally, the evaluation of any contaminated media encountered and replaced should be consistent with Act 2 regulations and the RCRA regulations.

Recommendations

Revise 287.1(ii)(c) - Include in the regulation an exception for the unrestricted re-use of excavated material within a property, without any sampling or analysis requirements, in the following situations:

1. re-use of excavated material, regardless of quality, in the same excavation.
2. re-use of excavated material, regardless of quality, within a project area encompassing the excavation, but where soil may not be replaced to its original location.
3. re-use of excavated material managed within a property unless the material is known to have been impacted by a spill or release.
4. materials excavated and stored prior to the effective date of the regulation.

II. Safe Fill Numeric Standards

Concern

The materials that may qualify as safe fill are dissimilar and it is therefore critical to provide regulated entities the ability to demonstrate that a particular material meets the residential soil-to-groundwater protection standards by using the Synthetic Precipitation Leaching Procedure (SPLP) method of

analysis instead of only using the generic soil-to-groundwater pathway values. It is possible for regulated substances to be present in concrete, but be bound to its structural matrix so that they pose no threat to groundwater.

Recommendation

Revise 287.11(a)(1)(i) – residential soil-to-groundwater pathway numeric Value calculated either in accordance with the methodology in Section 250.308(a)(2)(i), (3), (4)(i) and (5) (relating to soil-to-groundwater pathway generic numeric values) or based on a concentration in the material that does not produce a leachate in excess of the residential medium specific concentrations for groundwater, in aquifers used or currently planned for use with naturally occurring background total dissolved solids concentrations less than or equal to 2,500 milligrams per liter, contained in Chapter 250, Appendix A, Tables 1 and 2, when subjected to the Synthetic Precipitation Leaching Procedure.

SPLP testing will provide a far more accurate measure of the likelihood of regulated substances to leach from a given material than will an evaluation of the total concentrations of regulated substances in a material.

Concern

As presently drafted the safe fill regulations tie the safe fill numeric standards to the medium specific concentrations for residential property under Act 2. Potential exists for the Act 2 standards to change with the safe fill numeric standards remaining the same, thus creating confusion and the discretion for the Department of Environmental Protection to implement two different standards.

Recommendation

Include in the safe fill regulations a provision that would automatically change the numeric standards in the safe fill regulations whenever there is a modification to the medium specific concentrations for residential property in the Act 2 regulations.

III. Safe Fill for other Purposes

Concern

Under the proposed definition of safe fill, materials that meet the definition of safe fill are not regulated as wastes when used as fill, however, it is unclear whether these materials may be used as construction material.

Recommendation

Revise clause (ix) – notwithstanding any other provision of Chapters 271 and 287, materials that meet the requirements under the definition of safe fill are not regulated as waste when used as fill or for other beneficial purposes.

IV. Sites Undergoing Remediation

Concern

While it is imperative that the hard work put forth by the regulated community under Act 2 not be disrupted by the proposed safe fill regulations, it is equally important that the Department of Environmental Protection through these proposed regulations provide clarity on the applicability of these regulations to activities at regulated sites undergoing remediation through the federal Resource Conservation and Recovery Act. (RCRA)

These sites have often undergone extensive investigations including hydrogeologic evaluations and human health and ecological risk assessments and may be subject to institutional controls such as deed restrictions. The management of excavated materials, regardless of quality, within a RCRA Corrective Action property should comply with the applicable federal permit Requirements, whereas the management of excavated materials for offsite relocation should be conducted under the Solid Waste Management Act.

Recommendation

Revise 287.2 – The management excavated materials within properties undergoing remediation under the requirements of the Resource Conservation and Recovery Act shall be exempted from compliance with this regulation.