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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

May 3, 2002

Honorable David E. Hess, Chairman
Environmental Quality Board
Rachel Carson State Office Building
400 Market Street, 16th Floor
Harrisburg, PA 17101

Re: Regulation #7-372 (IRRC #2245)
Environmental Quality Board
Safe Fill

Dear Chairman Hess:

Enclosed are our Comments. They will soon be available on our website at www.irrc.state.pa.us.

Our Comments list objections and suggestions for consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.

If you would like to discuss these Comments, please contact my office at 783-5417.

Sincerely,

Robert E. Nyce
Executive Director
evp
Enclosure

cc: Honorable Arthur D. Hershey, Majority Chairman, House Environmental Resources and Energy Committee
Honorable Camille George, Democratic Chairman, House Environmental Resources and Energy Committee
Honorable Mary Jo White, Chairman, Senate Environmental Resources and Energy Committee
Honorable Raphael J. Musto, Minority Chairman, Senate Environmental Resources and Energy Committee

Comments of the Independent Regulatory Review Commission

on

Environmental Quality Board Regulation No. 7-372

Safe Fill

May 3, 2002

We submit for your consideration the following objections and recommendations regarding this regulation. Each objection or recommendation includes a reference to the criteria in the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) which have not been met. The Environmental Quality Board (EQB) must respond to these Comments when it submits the final-form regulation. If the final-form regulation is not delivered by April 5, 2004, the regulation will be deemed withdrawn.

1. General. - Protection of the public health; Fiscal impact; Reasonableness; Clarity.

Senate Environmental Resources and Energy Committee

A joint letter was submitted on behalf of the Senate Environmental Resources and Energy Committee (Senate Committee) on April 22, 2002, by Senator Mary Jo White, Chairman and Senator Raphael J. Musto, Democratic Chairman. The Senate Committee expressed three concerns:

- The complexity of the regulation may lead to confusion for those who use the materials. Specifically, the definition of "safe fill" exceeds two pages and the permit-by-rule provisions appear restrictive and cumbersome to the point where people may not want to bother using or receiving the material.
- It appears the regulation will place significant costs on the regulated community and even state agencies.
- Several commentators expressed the fear that the cost of sampling, analysis, record keeping and permitting will force contractors to send the material to a landfill because the disposal costs will be lower.

We share these concerns. We object to the complexity of the proposed regulation, the costs it will impose and the likelihood that valuable landfill space will be filled with materials that do not pose a threat to the public health or environment.

Scope and complexity of the regulation.

The proposed provisions are complex and, in many cases, unnecessarily restrictive. Furthermore, the scope of this regulation reaches virtually all excavations within the Commonwealth, ranging from excavations at large scale projects to small excavations by an individual contractor.

In regard to cost projections, the EQB states in the Preamble,

The proposed amendments will result in huge savings to the regulated community by avoiding disposal costs. Under the proposed safe fill regulations, the savings from disposal cost are estimated at \$500 million if it is assumed that approximately 50% or more of the estimated 20 million cubic yards of soil and other materials generated annually in this Commonwealth will qualify for use as safe fill or used under one or more of the five permits-by-rule.

The EQB's estimate presumes that this material is now being sent to landfills. Commentators have stated that this is not the case. Therefore, while it may not have been the EQB's intention, the proposed regulation may force large quantities of materials that are currently being used as fill to be disposed in landfills. Liability concerns all but negate the option in the regulation to presume there is no contamination. Hence, for the majority of projects the regulation presents a choice between the following:

- Make a safe fill determination which entails:
 - Extensive research of the excavation site and analysis of the material to determine what regulatory category the material falls under;
 - Depending on the result of the analysis, find a site that has the proper zoning to accept the material;
 - Assuming there is an appropriate site located within a reasonable distance, transport the material under appropriate regulatory requirements; and
 - File the proper paperwork with the Department and keep records; or
- Dispose of the material in a landfill under known guidelines and costs with virtually no liability.

The EQB has not demonstrated that the regulation is in the public interest. This regulation has the potential to decrease limited landfill capacity and increase the cost of virtually all projects that involve excavation.

The detailed comments that follow focus on the regulation as proposed. However, we believe that the EQB could better protect the public health and environment and reduce the fiscal impact of this rulemaking by focusing on fundamental objectives while eliminating extraneous requirements and restrictions. The fundamental question is whether the material is contaminated

to the point that it threatens the public health or environment. To focus on this question, the entire regulation should be revised as follows:

- Define “fill” as the materials in the proposed definition of safe fill without the extensive conditions or qualifiers.
- Redefine “safe fill” as any fill that does not contain materials that exceed the Land Recycling and Environmental Remediation Act of 1995 (Act 2) residential standards. Eliminate the extensive conditions or qualifiers from the proposed definition of safe fill.
- Develop substantive provisions within the body of the regulation, not the definition, that specify the criteria safe fill must meet. Further specify that safe fill is not waste and is not subject to any of the waste regulations. The regulation should also allow the option to determine whether or not “fill” is “safe fill” based on a due diligence review or testing.
- List in a separate section materials that are exempt, such as material moved in a right-of-way, small quantities of historic fill or blended agricultural soil that meets the Act 2 residential standards.
- Simplify and consolidate the permits-by-rule (PBRs) to the extent possible. Specifically, PBRs should apply to fill materials that meet the nonresidential Act 2 standards and should be limited to Act 2 nonresidential uses.

Advanced Notice of Final Rulemaking

This proposed rulemaking has received extensive comment, including suggested language changes. As noted above, it affects virtually all excavation within the Commonwealth. In order to allow full consideration of amendments to this regulation, the EQB should issue an advanced notice of final rulemaking. This would allow interested parties and the EQB the opportunity to resolve as many concerns as possible prior to the submittal of the final-form regulation.

2. Responsible party. - Clarity; Reasonableness.

The regulation places responsibilities on many parties for testing and placing a material. However, commentators expressed confusion over who is responsible under different circumstances. For example, the commentators questioned who is the responsible party if fill is properly placed, but subsequently removed. It would appear that the person who takes possession of the fill would be the party who has control over future use of the fill and responsibility for any possible harmful effects from the fill. The regulation should clearly state who is responsible for the material from excavation to placement, including who has ultimate responsibility for the fill after it is placed.

CHAPTER 271. MUNICIPAL WASTE MANAGEMENT - GENERAL PROVISIONS

3. Section 271.1. Definitions. - Need; Clarity.

Historic fill

The term “historic fill” is used once in the municipal waste (Chapter 271) regulations. The term is used in Section 271.2(c)(7) to designate historic fill is subject to regulation as residual waste instead of municipal waste. This definition is not needed in the municipal waste regulations. In its place, a cross reference to the residual waste definition of historic fill in Section 287.1 should be added to Section 271.2(c)(7).

Surface waters

This term is used several times in Section 271.103(i). For clarity, it should be defined.

4. Section 271.101. Permit requirement. – Reasonableness.

Subsection (b)(3)(ii) is being deleted. This subsection allows waste from land clearings to be managed without a permit if it is separated from other waste. The proposed regulation does not contain similar provisions. The final-form regulation should retain this provision.

5. Section 271.103. Permit-by-rule for municipal waste processing facilities other than for infectious or chemotherapeutic waste; qualifying facilities; general requirements. – Need; Reasonableness; Clarity.

Subsection (g) Mechanical processing facility.

The first sentence of this subsection contains several requirements. For clarity, the final-form regulation should list each condition as a separate sentence.

Paragraph (1) imposes a 350 ton limit on the amount of material that may be received in a day by a mechanical processing facility. Commentators have noted that this limitation would extend the duration and increase the cost of many highway construction projects. In the final-form regulation, the EQB should consider increasing the daily limit of material received or allowing different limits for material received from highway construction projects.

Paragraph (2) begins with the following phrase, “The facility shall *and* maintain...” (Emphasis added.) The final-form regulation should correct this typographical error.

Paragraphs (3) and (4) require incoming waste to be processed within 30 days and processed waste to be removed within 60 days. Commentators have noted that construction work is seasonal and the proposed time periods are not practical. In the final-form regulation, the EQB should allow more flexible time periods to accommodate the seasonal nature of some construction projects and allow different time periods for material received from highway construction projects. In addition, the EQB should consider allowing longer time periods for processing and removing waste for facilities that are not near populated areas.

Subsection (i) Brick, block or concrete.

The phrase, “segregated brick, block or concrete” is not clear. The regulation does not explain what “segregated” means. Is the brick, block or concrete to be segregated from each other or other materials? If the term “segregated” is needed, the regulation should clearly explain what segregation is required.

This subsection only applies to contaminated segregated brick, block or concrete from commercial or residential sites. The segregated brick, block or concrete from industrial sites should also be included in this PBR if it meets the additional criteria.

Paragraph (1) addresses numeric criteria that must be met. Paragraph (5) addresses acceptable placement of material. We have concerns with these paragraphs, which are addressed under our **Comment 11, Permit-by-rule provisions.**

Paragraph (3) states that “waste material shall be sampled and analyzed in accordance with § 287.11(b) and (c) or (d) (relating to safe fill numeric standards).” To be consistent with the other PBR provisions, this statement should be changed to, “waste material shall be sampled and analyzed in accordance with § 287.11(b) and *either* (c) or (d).” (Emphasis added.)

Paragraph (4)(i) states that waste material “...may not exceed 10% of the numeric standards calculated in paragraphs (1) and (2).” Paragraph (4)(ii)(A) states, “The waste material received shall meet 10% of the numeric standards calculated in paragraphs (1) and (2).” Is the requirement in Paragraph (4)(ii)(A) a maximum or minimum requirement? These requirements should be made clear and consistent in the final-form regulation.

CHAPTER 287. RESIDUAL WASTE MANAGEMENT - GENERAL PROVISIONS

6. Section 287.1. Definitions. - Fiscal impact; Protection of the public health; Reasonableness; Need; Feasibility; Clarity.

Historic fill

There are six concerns with this definition.

First, why is there a presumption that the material is contaminated? Also, why is there a need to check for visible staining and odor? Commentators who have raised these questions suggest historic fill should be tested to determine whether it is contaminated. We agree. The regulation should allow a material to be tested to determine its health and environmental impacts.

Second, this definition contains substantive provisions. Definitions describe terms, but are not enforceable. The substantive portions of the definition should be moved to the body of the regulation.

Third, the limit of “125 cubic yards per excavation location” is vague. It is unclear whether this limit applies to each individual excavation at a construction site, or to an entire construction site. The regulation should be clearer on this point.

Fourth, the 125 cubic yard limit is not practical. Commentators have suggested raising the limit to 250 cubic yards or more. The EQB should consider these recommendations when drafting the final-form regulation.

Fifth, Subparagraph (ii)(B) allows an exemption when “there is no visible staining, odor *or other sensory nuisance* associated with the material.” (Emphasis added.) Aside from sight and odor, what “other sensory nuisance” would a person use to qualify the material for exemption? We also question the need for and clarity of sight and odor restrictions other than odors that would constitute a public nuisance.

Finally, a commentator suggests revising the 1988 cutoff date to the date the final regulation becomes effective. The Department should make this amendment or explain the basis and need for the 1988 cutoff date.

Safe fill

We object to this definition because it contains numerous substantive provisions. Definitions describe terms, but are not enforceable. The definitions of the proposed regulation include lengthy substantive provisions. These requirements should be in the body of the regulation.

We also object to the length of this definition. The definition contains more than 900 words in more than 25 paragraphs. The removal of substantive provisions will significantly shorten the definition, making it easier to comprehend.

“Appropriate level of due diligence”

Several provisions within this definition require an “appropriate level of due diligence.” We have three concerns with this phrase.

First, use of the phrase “appropriate level of” is subjective. How can a person know when they have achieved this standard? This phrase should be deleted.

Second, the EQB should define the term “due diligence” and clearly establish within the body of the regulation what legal standard must be met to achieve “due diligence.”

Finally, assuming the regulation is amended to provide a clear due diligence standard, will the person who demonstrates due diligence be immune from liability for the material? The regulation should clearly state what benefits are gained by meeting the due diligence standard.

Subparagraph (i)

“Uncontaminated”

This subparagraph repeatedly uses the term “uncontaminated.” We object to its use for the following reasons.

First, this requirement is vague because the term “uncontaminated” is not defined or set forth in the body of the regulation.

Second, it is unclear why the term is needed. The definition states, "Material that is uncontaminated soil...and that meets one of the following requirements:" Therefore, the material must be "uncontaminated" and, in addition, meet another requirement, such as the numeric standards. The additional qualifier "uncontaminated" is unnecessary.

Finally, we question why a material that meets the numeric standards, would not qualify as safe fill. As stated above, if a material meets the Act 2 residential standards, it should be considered safe. The term "uncontaminated" should be deleted from the regulation.

"Uncontaminated used asphalt"

Commentators question whether any used asphalt would qualify as safe fill since used asphalt is likely to contain oil and other contaminants from the asphalt mix itself and from vehicles. This would be a major change from current practice. They suggest allowing more reasonable standards for constituents inherent in an asphalt mix and de minimus quantities of oil. We agree that the standards for used asphalt should be reviewed so that the material can be reused or used as fill, rather than placed in a landfill. In addition, if the asphalt material meets the Act 2 residential standards, it should be considered safe.

"Segregated brick, block or concrete"

Subparagraph (i) uses the phrase "*segregated brick, block and concrete.*" (Emphasis added.) We have two concerns.

First, the regulation does not explain what "segregated" means. Are the brick, block or concrete to be segregated from each other or from other materials? If the term "segregated" is needed, the regulation should clearly explain what segregation is required.

Second, consistent with our comment on other materials, if the material meets Act 2 residential standards, it should be considered safe.

"Resulting from construction or demolition activities from residential and commercial properties"

Commentators believe the classification scheme is overly restrictive and does not account for the high degree of variability in many circumstances. For example, they believe brick, block and concrete from any property should be allowed to qualify as safe fill if the materials can meet other conditions for safe fill. As stated above, if material from an industrial property meets the Act 2 residential standards, why is it in the public interest to exclude this material from being safe fill?

Subparagraph (i), Clause (A)

Under Clause (A), a material could meet the numeric standards, but fail under Subclause (I) because it was subject to a release in the past, or Subclause (II) because it is stained or smells. A persistent odor from a material could present a public nuisance. However, we question why the other parameters are reasonable. If a material is demonstrated to meet the numeric standards for

safe fill, why should it be disqualified based on past history of a spill, staining or an odor that dissipates soon after excavation?

Clause (A) requires a material to meet the numeric standards, but does not specify whether sampling and analysis are required. Whereas, Clause (C) specifically states the material could meet the numeric standards without sampling and analysis. If sampling and analysis is required under Clause (A), the regulation should specifically state this requirement.

Subparagraph (i), Clause (A), Subclause (I)

Subclause (I) uses the term “release.” We have two concerns.

First, what if a release occurred, but is no longer discernable because the release biodegraded or was remediated? Once again, the Act 2 residential standards should be the determining factor on whether the material is considered safe. This would have already been done under Clause A. Therefore, Subclause (I) should be deleted.

Second, if Subclause (I) is retained, what constitutes a “release” is unclear because the term is not defined. The regulation should define or cross reference the definition of “release.”

Subparagraph (i), Clause (A), Subclause (II)

We have two concerns with Subclause (II) which allows an exemption when “There is no visible staining, odor or other sensory nuisance associated with the material.”

First, since the regulation uses numeric standards, there is no need for “visible staining” or “odor” criteria. Two commentators stated roadway materials could not meet these requirements. We further question at what point these criteria would not be met. While we agree that an odor can present a public nuisance, the EQB should limit this provision to this possibility and delete the rest of these criteria. If these criteria are retained, the EQB should explain the need for them, why it is in the public interest to exclude roadway materials, and how a person can evaluate “visible staining” and “odor” consistently.

Second, aside from sight and odor, what “other sensory nuisance” would a person use to qualify the material for the exemption?

Subparagraph (i), Clause (B)

This clause requires a material to meet the numeric standards, but does not specify whether sampling and analysis are required. However, Clause (C) specifically states a material can meet the numeric standards without sampling and analysis. If sampling and analysis are required under Clause (B), the regulation should specifically state the requirements.

Clause (B) ends with the phrase “and meets the requirements of clause (A).” If all of Clause (A) is required to be met, we have two concerns.

First, the requirement to meet Table 1 is duplicative because this is already specified in Clause (B). Second, why would this circumstance require a material to meet both Tables 2 and 3

whereas other provisions only require a material to meet Table 2 or 3? If the intent is to only require a material to meet Clauses (A)(I) and (II), similar to the requirement in Subparagraph (ii), the language should be amended accordingly.

Subparagraph (i), Clause (C)

This clause states, “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 and meets the requirements of Clause (A).” We have two concerns.

First, assuming there is liability associated with this determination, we question whether this provision can be used as a practical standard. How could a person guarantee a material meets safe fill numeric standards without testing it? Even if the fill was safe when it left the property, how could that person defend their safe fill determination if the fill was subsequently suspected to be the source of contamination? The EQB should explain how this provision can be met and how the person can be protected from liability after the fill has been placed elsewhere.

Second, this requirement states the material meets “the safe fill numeric standards,” but does not specify which standards. Clause (A) specifically requires the material to meet “the numeric standards referenced in § 287.11...and listed in Appendix A, Tables 1 and 2....” Clause (C) should specifically state the standards the safe fill is presumed to meet.

Subparagraph (ii)

The opening phrase is not clear for four reasons.

First, in addition to our concern with substantive provisions within definitions, this subparagraph does not define safe fill, but rather provides exceptions to what is a waste. Further, this subparagraph duplicates the permit-by-rule in Subsection 287.102(1). Subparagraph (ii) should be moved from this definition and placed within the body of the regulation.

Second, it presents several conditions by reference. It may be clearer to just state the requirements rather than refer to provisions in Subparagraph (i).

Third, Subparagraph (ii) is inconsistent with Subparagraph (i). Subparagraph (ii) includes materials “that exceed the numeric limits in Appendix A, Table 1 or either Table 2 or 3.” Subparagraphs (i)(A) and (B) provide specific circumstances and relate those circumstances to the applicable tables of numeric standards. To be consistent, Subparagraph (ii) should also relate the listed circumstances to the appropriate tables.

Finally, Subparagraph (ii) should include a reference to the requirements that must also be met under Subparagraph (viii).

Subparagraph (ii), Clause (A)

This provision limits material movement to the area within a right-of-way. We have two concerns with this clause.

First, this provision should allow temporary storage of materials off-site so that a contractor can work with material efficiently.

Second, a right-of-way could cover miles if it involves a roadway or utility transmission line. Will the EQB allow this?

Subparagraph (ii), Clause (B)

Clause (B) is unclear for three reasons.

First, Clause (B) only states “the material is moved offsite....” Since the material exceeds numeric standards of one of the Tables pursuant to Subparagraph (ii), Clause (B) should specify where this material can be used.

Second, the phrase “and never used for nonresidential purposes” is unclear. Is the intent that the property was never used for nonresidential purposes?

Finally, the terms “residential” and “nonresidential” should be defined by cross-referencing the Act 2 definitions.

Subparagraph (iii)

This subparagraph states, “The term includes soil moved from a fruit orchard under development where pesticides were used in an authorized manner in conjunction with standard horticultural practices. If the soil exceeds the numeric limits in Appendix A, Table 1 or either Table 2 or 3, and meets one of the following requirements, it is considered ‘safe fill’:....” We have three concerns.

First, the phrase “a fruit orchard under development” is vague. The crux of this provision appears to be soil removed from land where pesticides may have been used. Is it relevant whether development is involved? If so, what specifically constitutes “development”?

Second, how could it be verified “pesticides were used in an authorized manner in conjunction with standard horticultural practices”?

Third, Subparagraph (iii) is inconsistent with Subparagraph (i). Subparagraph (iii) includes materials “that exceed the numeric limits in Appendix A, Table 1 or either Table 2 or 3.” Subparagraphs (i)(A) and (B) provide specific circumstances and relate those circumstances to the applicable tables of numeric standards. To be consistent, Subparagraph (iii) should also relate the specific circumstances to the appropriate tables.

Subparagraph (iii), Clause (A)

The EQB should explain the basis for the presumption that these soils are “safe fill” for commercial or industrial purposes when they exceed numeric standards?

Also, Clause (A) should cross reference the additional requirements in Subparagraph (viii).

Subparagraph (iii), Clause (B)

This clause allows soil to be blended with other soil to meet the limits. Is the soil required to be retested to verify the blending was successful?

Subparagraph (iv)

To be consistent with other subparagraphs, the second sentence should state "...Table 1 *or* either Table 2 or 3..." However, we reiterate our concern with inconsistent language as stated in our comment on Subparagraphs (ii) and (iii).

Subparagraph (iv), Clause (B)

As explained in our comment on Subparagraph (iii)(B), is the soil required to be retested to verify the blending was successful?

Subparagraph (v)

This subparagraph is inconsistent with the parallel provisions in the definition of "historic fill." Subparagraphs (ii)(A) and (B) of the definition of "historic fill" differ from Subparagraphs (i)(A)(I) and (II) in the definition of "safe fill," in regard to due diligence, the determination of a release and chemical contaminants. The EQB should revise these provisions to make them consistent.

Subparagraph (vi)

Commentators have questioned the meaning of the phrase "along surface waters." The EQB should define or clarify this phrase to better describe the applicable areas.

This subparagraph also addresses circumstances similar to dredging operations. For clarity, this subparagraph should be more clearly distinguished from dredging operations.

Clause (A) states "...and placement of the material does not cause an exceedance of the water quality standards in Chapters 16 and 93 (relating to water quality toxics management strategy - statement of policy; and water quality standards)." The EQB should explain the legal basis for requiring universal compliance with a statement of policy.

Clauses (A) and (B)(I) are unclear. Clause (A) states "may not exceed 10%" and Clause (B)(I) states "shall meet 10%." Why do these differ?

Clause (B)(I) states, "The material received meets 10% of the numeric standards..." Why is the word "received" used? To be consistent with Clause (B), this should state, "the material placed..."

Subparagraph (vii)

This subparagraph states, "The person using the material has the burden of proof to demonstrate that the material is safe fill." We have three concerns.

First, the proposed shift in the burden of proof is inconsistent with rules and regulations of the Environmental Hearing Board found at 25 Pa Code Section 1021.101(b). The EQB should justify shifting the burden of proof in this instance.

Second, as stated above, this is a substantive provision that should be moved to the body of the regulation.

Third, it is not clear who the person “using” the material is. The regulation should specifically state who the user is.

Subparagraph (viii)

There are two concerns.

First, this provision is substantive and should be moved to the body of the regulation.

Second, this subparagraph begins with the phrase “If, based on a determination made under subparagraph (i), the material exceeds the numeric standards under subparagraphs (ii), (iii) or (iv)....” Subparagraphs (ii), (iii) and (iv) do not contain the numeric standards. Subparagraph (viii) would be clearer by stating, “exceeds the numeric standards *referenced in* subparagraphs (ii), (iii) or (iv)....”

Subparagraph (ix)

This is a substantive provision that should be moved to the body of the regulation. In addition, this subparagraph states the material will not be regulated as waste “when used as fill.” We have four concerns.

First, this subparagraph is unnecessarily restrictive by limiting use to fill. Commentators believe these materials could be used for construction, bedding for pipelines or other purposes. If the material is uncontaminated or meets the residential numeric standards, what is the basis for regulating the material as a waste and why would its final use matter? The phrase “when used as fill” should be deleted unless the EQB can justify its need.

Second, why are the handling, transportation and storage of a material also going to be regulated? The EQB should explain the basis for and need to regulate a material after it is demonstrated the material meets the safe fill standards.

Third, who is responsible for identifying a material as a waste? Commentators have suggested that the person responsible should be the generator, not the transporter. We agree that if a person only transported the material and was not given any indication the material is a waste, the generator, not the transporter, should be responsible for any violations. Otherwise, this would place an unreasonable, costly and time consuming burden on transporters to independently determine whether the material is a waste before transporting the material. The regulation should establish the generator as the responsible party for determining whether or not the material is a waste.

Finally, the term “fill” is not directly defined.

Sediment

This definition includes “materials deposited or overlain by water...” A commentator believes this definition is overly broad and suggests changing the word “or” to “and.” We agree that this definition is too broad and should be revised as suggested.

Site undergoing remediation activities

A commentator suggested expanding this definition to include other remediation activities such as hazardous site cleanup. Why is the definition limited to remediation activities to be conducted under the Land Recycling and Environmental Remediation Standards Act?

Additional definitions

As mentioned within other comments, the terms and phrases “along surface waters,” “nonresidential property,” “residential property” and “surface waters” are used but not defined. The EQB should define these terms. We suggest cross referencing the Act 2 definitions of “nonresidential property” and “residential property.”

Additionally, the term “surface waters” is used in the permit-by-rule requirements. Commentators expressed the need for a precise definition so that they can comply with the restriction against placing materials within 100 feet of surface waters. For clarity, this term should be defined.

7. Section 287.2. Scope. - Need; Reasonableness; Duplication; Clarity.

A commentator questioned the applicability of the safe fill regulations to remediation sites under the federal Resource Conservation and Recovery Act (RCRA). The commentator states the management of excavated materials within a RCRA site should comply with federal permit requirements whereas management for offsite relocation of materials should be done under the Solid Waste Management Act. The commentator suggests that the management of excavated materials under RCRA should be exempted from compliance with the safe fill requirements. The EQB should clarify whether the safe fill regulations apply to RCRA sites. If the safe fill regulations do apply to RCRA sites, the EQB should explain the need to include RCRA sites and how the safe fill regulations can be reasonably coordinated with federal permits.

8. Section 287.11. Safe fill numeric standards. – Clarity; Reasonableness; Conflict with existing regulations.

Detection of contaminants.

Commentators have provided examples where many of the numeric standards contained in the regulation are below the detection levels of currently available analytical techniques. They state many of the standards listed are not measurable using generally accepted Environmental Protection Agency (EPA) testing methodology. This would exclude material from being categorized as safe fill due to limitations of instrumentation and methodology. In the final-form regulation, the EQB should insure that all of the proposed numeric standards can be accurately measured by current laboratory methodology.

The regulation prescribes specific tests and specific sampling techniques. Commentators have requested various alternatives to the sampling and analysis procedures, such as including the Synthetic Precipitation Leaching Procedure in the regulation. To the extent possible, flexibility should be added to these procedures. In addition, the EQB should consider adding a process whereby a request for use of an alternate procedure could be made if the process is appropriate for the material being tested.

In situ sampling.

Commentators have noted that the proposed regulation requires sampling and analysis after material has been excavated. They note that this is impractical and would create significant delays for construction projects. In the final-form regulation, the EQB should allow *in-situ* sampling of materials.

Subsection (a)

The first sentence should read, "When conducting sampling and analysis, safe fill numeric standards *for regulated substances* listed in Appendix A, Tables 1, 2 and 3 shall be calculated as follows." The final form regulation should incorporate this change.

Paragraph (1) is not clear. Commentators have noted that virtually all soils and soil-like material contain copper and zinc at varying concentrations. Thus, the sampling and analysis requirement would not be applicable to most material. For clarity, the final-form regulation should delete the qualifier "containing substances other than copper and zinc."

Paragraph (3) refers to calculating numeric standards under Paragraph (1). For clarity, the requirements of Paragraph (3) should be included under Paragraph (1).

Subsection (b)

Paragraph (1)(i) through (iii) and Paragraph (2)(iii) describe required sampling and analysis procedures. We have three concerns.

First, why is field screening required to determine where to take additional samples in Paragraph (1)(i)(B) and (C)?

Second, volumes of material less than 125 cubic yards require eight samples. Volumes of material greater than 125 and less than or equal to 3,000 cubic yards require 12 samples. Volumes of material greater than 3,000 would require an additional 12 samples. Thus, 3,001 cubic yards of material would require 24 samples. Commentators have noted that these requirements are overly intensive, especially for large projects. They recommend a tiered testing approach for large volumes of material that are likely to show common constituent characteristics. The final-form regulation should provide a more flexible testing scheme that adequately protects the public health and reduces costs for the regulated community.

Third, does the EPA manual adequately address how to perform every sampling technique required in this subsection?

Subsections (b), (c) and (d)

Sampling forms the basis of determining whether a material meets the safe fill numeric standards. The terms “composite sample,” “grab sample” and “discrete sample” are used throughout these subsections. For clarity, these terms should be defined.

Subsection (c)

In Paragraph (1), the measured numeric value for a substance from a composite sample must be equal to or less than half the safe fill numeric standard as listed in Appendix A, Tables 1, 2 and 3. The regulated community has questioned the science behind this determination and also the reasonableness of it. The final-form regulation should explain the basis for using this standard.

Subsection (d)

Commentators have noted that there is an inconsistency between this subsection and existing regulations found at § 250.707. Subsection (d) specifies that 75% of the discrete samples of the material shall be equal to or less than the safe fill numeric standard for each substance with no single sample exceeding more than twice the safe fill standard for a substance. This is commonly referred to as the “75%/2X test.” Section 250.707 uses what is known as the “75%/10X test.” We question the need for this higher standard in this regulation.

Subsection (e)

This subsection states that for sediments “sampling and analyses shall be conducted in accordance with guidance developed by the Department.” We have three concerns.

First, if these requirements are not in the regulation, they could be changed without the opportunity for comment. The EQB should explain why these requirements are not in the regulation.

Second, this guidance is not described in the Preamble. It is not clear what guidance the Department will provide. Does the EPA have procedures for sampling and analysis that could be referenced? The EQB should explain what sampling and analysis will be required.

Finally, given the detailed requirements for sampling and analysis in Subsections (b), (c) and (d), why does sampling and analysis of sediment differ?

9. Section 287.101. General requirements for permit. - Clarity.

Existing Subsection (b) specifically states the use of clean fill does not require a permit. Under the amendment to Subsection (b), the term clean fill is being deleted. However, safe fill was not added. Safe fill should be added to this list to clearly reinforce that a permit is not required for safe fill.

10. Section 287.102. Permit-by-rule. - Clarity; Reasonableness.

Classes of facilities that are subject to permit-by-rule.

As noted in Subsection (a) of the existing regulation, this section sets forth classes of facilities that are subject to permit-by-rule. The four subsections being added through this rulemaking apply to material, not facilities. This inconsistency should be corrected in the final form regulation.

Subsection (j) Contaminated soil resulting from agricultural practices.

Paragraph (1) states that, "...soil may be analyzed for pesticides..." The final-form regulation should state that the soil "shall" be analyzed for pesticides.

Subsection (l) Contaminated soil, dredged material or used asphalt impacted by a release or contaminated soil, dredged material or used asphalt that exceeds safe fill numeric standards as the result of urbanization.

As published in the *Pennsylvania Bulletin*, this subsection is mislabeled as (l). The final-form regulation should change this subsection to (k).

The title of this subsection is long and redundant. This title is used in the body of the regulation and describes a certain type of material that can be placed through the use of a PBR. For clarity, this title should be shortened in the final-form regulation.

Commentators have noted that the phrase, "as a result of urbanization" is vague. The final-form regulation should define urbanization and explain how it is relevant to this PBR, or delete it.

Subsection (m) Contaminated soil placed at a receiving site undergoing remediation activities.

Paragraph (14) requires areas to be "...promptly vegetated to minimize and control erosion or capped to minimize infiltration." The phrase "promptly vegetated" is vague. The final-form regulation should specify how soon an area must be vegetated, with consideration given to the winter season when ground may be frozen. In addition, how would one know whether to vegetate or cap an area?

11. Permit-by-rule provisions. – Clarity; Protection of public health; Reasonableness.

Section 271.103(i) adds a permit-by-rule provision for material classified as brick, block or concrete. Section 287.102 adds permit-by-rule provisions for four types of material. They are:

- Contaminated soil resulting from agricultural practices (agriculture);
- Contaminated soil, dredged material or used asphalt impacted by a release or contaminated soil, dredged material or used asphalt that exceed safe fill numeric standards as the result of urbanization (soil, dredged material and asphalt);
- Historic fill; and

- Contaminated soil placed at a receiving site undergoing remediation activities (remediation).

We have several concerns about common requirements which appear in all of the PBR subsections.

Streamlining of PBRs.

Each of the PBR subsections contains numerous requirements, several of which are identical. Commentators have suggested that the PBR provisions be consolidated into one permit-by-rule provision. In the final-form regulation, the EQB should consider streamlining the five PBR subsections into two or three PBRs or consolidating the common PBR paragraphs into one subsection.

Numeric criteria.

Commentators have noted that PBR material can only be placed at commercial and/or industrial sites; yet, the PBR material to be placed must meet the *residential* medium specific concentrations (MSCs) under Act 2. They have suggested that the numeric standards be based on the nonresidential MSCs under Act 2. We agree. In the final-form regulation, the EQB should adopt the numeric standards of nonresidential MSCs under Act 2.

Deemed to have a waste permit.

The five PBRs begin with sentences that are not grammatically correct. As a result, it is unclear who the holder of the various PBRs would be. The beginning of all five sentences can be paraphrased as follows: The placement of PBR material from known areas of contamination shall be deemed to have a residual/municipal waste permit when used... Commentators have noted their confusion as to who the responsible party is when placing PBR material. For clarity, the final-form regulation should change the subject of the sentences from the word "placement" to the entity responsible for the material.

Use of various PBR material.

In order for material to be placed under a PBR, it can only be used for specific purposes at commercial and industrial properties. For example, for material to be placed under the agriculture PBR, it must be used for one of the following purposes: to bring an area to grade; as construction material; for control of fire and subsidence events or in reclamation of mines, if the reclamation work is approved by the Department or if performed under contract with the Department. Conversely, historic fill can only be used for construction material. This requirement is restrictive. If the material meets the nonresidential Act 2 standards, it should be allowed to be used at any nonresidential property.

The agriculture and contaminated soil, dredged material and asphalt PBR allow the respective material to be used for the control of fire and subsidence events. We have two concerns.

First, fire and subsidence events could pose an immediate danger to public safety and must be dealt with in an expeditious manner. Would the record-keeping requirements still apply? Is it

reasonable to exclude the use of this material for controlling fires and subsidence events in residential zones? Is it reasonable to require testing of material before it is used to control fires or in subsidence events? If it is not feasible to perform the required tests before the material is used, this provision should be removed from the final-form regulation.

Second, is the public health adequately protected if pesticide laden soil or contaminated soil, dredged material and used asphalt are used to control fire? Could the application of heat to elements or chemicals found in the PBR material cause those elements or chemicals to become airborne?

Placement of material within 100 feet of surface water or within 300 feet of a water source.

Commentators have noted that the requirements that PBR material not be placed within 100 feet of surface waters or within 300 feet of a water source would severely limit their ability to place PBR material anywhere in the Commonwealth. In particular, this requirement would cause time delays and increased costs for road construction work. Since erosion and sedimentation plans are also required, we question the need for these provisions.

Direct contact pathways.

The agriculture and historic fill PBRs require that direct contact pathways be eliminated. To protect the health of citizens, should direct contact pathways be eliminated when any PBR material is placed?

Other engineering controls.

The agriculture and historic fill PBRs use the phrase "other engineering controls" in Paragraph (3) respectively. For clarity, the final-form regulation should explain what this phrase means. In addition, the historic fill PBR allows the use of uncontaminated dredged material to eliminate direct contact pathways and the agriculture PBR does not. We question the reason behind this difference.

Commercially/industrially zoned and unzoned properties.

The five PBRs contain provisions that state, "...material shall only be used under this permit on properties that are zoned exclusively for commercial and industrial uses." Commercial and industrial districts can be zoned for multiple uses. For example, private schools and day care centers could be allowed in a downtown commercial district. Each local government is responsible for establishing what types of uses are allowed in commercial and industrial districts and those uses can vary. Given this fact, is the public health adequately protected when PBR material is placed in commercial or industrial districts that allow a wide variety of uses? In order to adequately protect public health, we recommend deleting the requirement that the material can only be used on "commercial and industrial zoned properties" and replacing it with "nonresidential property" as defined in Act 2.

For unzoned properties, contaminated soil can only be used in an area where the background is equal to or greater than the concentration of contamination of soil being placed. This

requirement is too restrictive and is not needed. It should be deleted from the final-form regulation.

Written notice requirements for persons who receive and use material from known areas of contamination.

The five PBRs contain provisions that require persons receiving and using fill to submit written notice to the Department that includes certain information. We have two concerns.

First, it is unclear who “receives and uses” material and therefore is required to provide notice to the Department. The regulation should clearly designate who must provide notice. Additionally, if more than one person is required to provide this notice, the final-form regulation should clearly state this.

Second, the final-form regulation should specify to what address the written notice should be sent.

Record-keeping requirements for persons using and distributing material.

The five PBRs contain provisions that require persons using and distributing material to maintain records of analytical evaluation of the material. We have two concerns.

First, it is unclear who is “using and distributing” material and therefore must keep certain records. The regulation should clearly designate who must keep records. Additionally, if more than one person is required to keep the records, the final-form regulation should clearly state this.

Second, the regulation should specify how long records are to be kept.

Odor or other public nuisance.

The agriculture, soil, dredged material and asphalt, and remediation PBRs contain paragraphs that prohibit placed material from creating, “...odor or other public nuisance resulting from chemical contaminants in the soil.” The historic fill and brick, block and concrete PBRs contain paragraphs that prohibit placed material from creating “...odor or other public nuisance associated with...” the historic fill or brick, block and concrete. We have two concerns.

First, what standard would be used to determine if material has an odor or creates a public nuisance?

Second, three of the five PBRs contain the phrase “resulting from chemical contaminants in the soil.” We question the need for this phrase.

Material placed in accordance with this permit.

The five PBRs contain a paragraph that states the materials placed in accordance with the applicable permit shall “cease to be a waste” as long as the material “remains in place.” We have two concerns.

First, if it is a waste until it is placed, would all of the municipal or residual waste requirements apply prior to placement? Would those who transport the material be required to follow Department of Environmental Protection regulations pertaining to transporting of waste? If so, we question the reasonableness of the requirement.

Second, commentators have concerns with this paragraph as it relates to material moved after it has been placed. If placed material is subsequently moved, does it revert to its classification as waste? Would placed material have to be retested before it is moved again? For clarity, the final-form regulation should address how placed material that is subsequently moved should be treated.

12. Appendix A. – Clarity; Implementation procedures.

Table 2.

In the title, the word “regulated” is misspelled.

Referencing MCSs under Act 2.

Commentators have noted that the safe fill numeric standards are based on the MSCs for residential property under Act 2. They note that if the MSC standards under Act 2 were changed, the regulated community would be forced to comply with two separate sets of standards. We agree and suggest that a cross-reference to the Act 2 MSC standards be included in the final-form regulation.

13. Section 287.611. Authorization for general permit. – Clarity.

Subsection (g) states, “The Department may issue a general permit on a regional or Statewide basis for the use, as construction material, of soil and other materials that do not meet the *clean fill criteria*.” (Emphasis added.) This rulemaking deletes the definition and criteria for “clean fill” from other sections. The term “clean fill” needs to be replaced with the term “safe fill” in Subsection (g).