

The Management of Fill in Pa.: Environmental Considerations for Developers

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At an early stage of land development, fill is often transported to the construction site to bring an area to grade. The public becomes concerned when confronted with traffic and other disruptions from trucks carrying fill material such as soil, rock, stone and gravel, or certain construction and demolition debris such as brick, block and concrete. But for the developer and its lawyers, environmental considerations may loom larger.

At first blush, environmental requirements applicable to moving fill from one site to another would appear to depend on simple concepts. Persons relocating wastes must ordinarily comply with the requirements of the Pennsylvania Solid Waste Management Act and its federal counterpart which regulate wastes “from cradle to grave.” Yet uncontaminated fill, often termed “clean fill,” is not subject to waste management requirements.

It may be difficult to discern whether fill affected by a release of regulated substances but posing little or no risk to human health or the environment may be classified as clean fill. Similarly unclear is whether fill unaffected by a release but containing elevated background concentrations of regulated substances is clean fill or regulated fill.

The Pennsylvania Department of Environmental Protection (PADEP) has issued and periodically revised guidance documents to help distinguish “clean fill” that may be used without restriction from “regulated fill” that is subject to waste management requirements. PADEP’s current Management of Fill Policy, dated Aug. 7, 2010, was a major step forward. It outlines the environmental due diligence a donor or recipient of the fill should conduct to characterize the fill, and identifies the numeric standards to be used to determine whether the fill is clean or regulated. The policy also sets forth the sampling procedures to be followed when sampling is conducted as part of the environmental due diligence.

Based on the eight years of experience since the 2010 policy was adopted, on Nov. 10, PADEP published for public comment a revision to the policy. The comment period closes on Jan. 8, 2019.

PADEP’s proposal expands the due diligence necessary to determine whether the fill must be managed as clean fill or regulated fill. An initial focus of the investigation is assessing whether the fill was affected by a release of a regulated substance. Under the proposal, environmental due diligence must include, at a minimum, visual inspection of the donor property and a review of its ownership and historical use. Other investigative techniques commonly used to conduct due diligence for real estate acquisitions, such as electronic database searches, Sanborn maps, and environmental questionnaires, may also be employed.

Like the 2010 policy, the proposal requires analytical testing of the fill only if environmental due diligence reveals that an actual or suspected release occurred. As a result, many transactions involving the sale or other transfer of fill material occur without associated sampling of the fill.

When sampling is required or otherwise undertaken, the proposal provides detailed sampling protocols. To determine whether the fill is “clean,” the sampling results are compared with the values set forth in the list of medium specific concentrations (MSCs) in PADEP’s Chapter 250 regulations implementing the land recycling (Act 2) program.

Here it gets a bit technical. Under the proposal, the applicable Act 2 value is the lower of the generic soil to groundwater value and direct contact residential value. The proposal would provide the flexibility to calculate an alternate soil-to-groundwater value based on the ability of the fill to leach contaminants (the synthetic precipitation leaching procedure). Yet however the soil-to-groundwater value is calculated, the direct contact residential value may not be exceeded.

But imposing a residential standard in situations where the fill will be deposited at a commercial or industrial site is of questionable merit. Where a site will only be used for nonresidential purposes, regulated substances meeting a nonresidential standard would not cause harm.

Unlike the 2010 policy which contains a table of concentrations based on the Act 2 MSCs existing in 2010, the proposal would apply the Act 2 MSCs as they may be revised from time to time. Fill classified as “clean” based on the 2010 Policy and placed at the receiving site before the proposal’s effective date would not be subject to the proposal if kept in place. Presumably, each time the Act 2 standards are revised, fill already deposited at a site as clean fill would likewise be unaffected by the change in standards, but the proposal is silent on this point.

One uncertainty clouding application of the 2010 policy is whether background concentrations of regulated substances in proposed fill render it ineligible for use as clean fill. At times, fill may contain concentrations exceeding applicable Act 2 standards as a result of natural conditions or atmosphere deposition. The proposal classifies this fill as clean fill only if it passes a “background demonstration” and an “equivalent site evaluation.”

The background demonstration conducted at the donor site must show based upon the results of sampling using a statistically valid methodology that the concentration of the regulated substances at issue, ordinarily naturally occurring metals, lead and certain organics from widespread atmospheric deposition, are in fact background levels. Concentrations resulting from incidents at the donor site, runoff from upgradient sources or air deposition from specific sources are not considered to be background.

If the sampling shows that the fill contains only background concentrations, then background concentrations at the receiving site must be established through a similar sampling regime. Concentrations at the receiving site are then compared with those from the fill determination to show that no new regulated substance is introduced to the receiving site and that the fill will not cause concentrations already existing at the receiving site to increase.

By classifying some fill with elevated background concentrations as clean fill, the proposal would facilitate the movement of fill within areas affected by widespread impacts untraceable to specific sources. An area such as Philadelphia would benefit. But by excluding from “background” fill affected by widespread contamination from specific sources, the proposal unfortunately deviates from a risk-based approach. Protecting users of the receiving site should be the primary goal and implemented by focusing on the concentration of regulated substances in the fill, not the source of those regulated substances.

And where the receiving site already has concentrations of regulated substances that preclude its use for residential purposes, introducing a new contaminant with concentrations less than non-residential MSCs would not seem problematic. The proposal in part acknowledges this principle by allowing transfer of fill from one Act 2 site to another when three conditions are satisfied: the regulated substances contained in the fill are incorporated into the Act 2 notice of intent to remediate and the final report, the movement of fill is documented in the final reports for both the donor and receiving sites, and the placement of fill would not cause the receiving site to exceed the selected Act 2 standard. A consistent risk-based approach would not narrow the exception to only Act 2 donor sites and would similarly allow the transfer of fill with “background” concentrations to an Act 2 site consistent with the receiving site’s selected standard.

Aware that regulated fill may be appropriate to use at certain nonresidential receiving sites, PADEP issued general permit No. WMGR096. The permit authorizes the use of fill with concentrations of regulated substances below the thresholds in the tables included in the permit. If the thresholds are exceeded, the fill would be managed as any other municipal or residual waste, and likely disposed. But even for regulated fill subject to the general permit, conditions of the permit and prescriptive storage and transportation regulations apply that may deter use of the fill. So the distinction between clean fill and regulated fill remains important.

Additional provisions of the proposal, including certain of the eligibility requirements, are likely to be the subject of public comment. Fill is ineligible to be managed under the policy if regulated substances in the fill were “intentionally released” or the fill has been blended with the purpose of meeting the definition of “uncontaminated material.” It may be difficult for a purchaser of the fill to discover whether these circumstances exist, and they are unrelated to the risk the fill would pose at the receiving site. At a minimum, a person conducting reasonable due diligence should not be at risk if PADEP subsequently determines that the fill was ineligible as a result of one of these circumstances.

Because much is at stake, persons involved in fill activities should comment on the proposal during the public comment period.

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