

A New Year's Surprise - Management of Fill Policy Changes

By Jeff Walentosky, P.G.

As an owner of an environmental consulting firm, I'm usually not one for surprises for either my company or for my clients. However, if you're not an environmental attorney or an environmental consultant, I might be "surprising" some of you with the information in this article.

On January 1st, 2020, some significant changes to a long-standing policy utilized by the Pennsylvania Department of Environmental Protection (PA DEP) came into effect, which has the capability of impacting site developers, contractors and/or property owners that want and need to import or export fill materials at a project site.

This policy, known as the "Clean Fill Policy" was established by the PA DEP's Bureau of Waste Management in 1996. "The Management of Fill Policy" replaced the Clean Fill Policy in 2004, and some minor modifications were made in 2010. The framework of the Management of Fill Policy remained relatively static until the 2020 version of the Technical Guidance Document (TGD) was issued in November 2019.

Over the past 20 plus years, I have noticed that representatives from several industry sectors were not aware that this policy even existed, which can potentially result in "surprises" in the form of unexpected costs and delays to a project. As such, it's important that the guidance within the policy be followed. Early project planning and communications with all parties (including regulatory representatives) are crucial when addressing any fill material management issues.

The original purpose of the Management of Fill Policy (2004) and the original Clean Fill Policy (1996) attempted to define "clean fill" or uncontaminated fill by utilizing very stringent standards that were much more conservative than the statewide health standards set forth in the Pennsylvania Land Recycling Act, or the Act 2 Program. In many cases, the clean fill standards set forth in the Clean Fill Policy were unachievable, even with sites that had a benign property use history.

In 2004, the Management of Fill Policy officially replaced the Clean Fill Policy, and much of the policy language and procedures carried over to the updated

version of the document in 2010. In this updated version, PA DEP made some improvements that provided two options for the determination of clean fill status:

1. If due diligence efforts illustrated that fill material has not been impacted by a spill or release of regulated substances, the material qualifies as "clean fill".
2. If fill material was documented to be impacted by a spill or release, the material could be sampled and analyzed by a certified laboratory for a comparison to regulated substances with established in the "clean fill" standards. These standards were derived from the more stringent of the direct contact or soil-to-groundwater medium specific concentrations (MSCs) found within the Act 2 statewide health standards.

Following these guidelines would help determine whether the proposed fill material could be classified as "clean fill" or "regulated fill".

The PA DEP started a full internal review and revamp of the Management of Fill Policy in 2014, and a draft document was published in the Pennsylvania Bulletin in November 2018 for a subsequent public comment period.

During the comment period, the Department received a significant volume of comments from the public, which were reviewed and addressed in the final version of the 2020 Management of Fill Policy. The policy was published in November 2019, and the associated TGD is the guidance document we will be utilizing going forward.

It is important that anyone involved in transporting fill material to or from a site within the Commonwealth is aware of the requirements and criteria set forth in the 2020 Management of Fill Policy. This particularly applies to site developers, contractors, utility companies, and the energy sector.

We'll go through some of the major highlights regarding the updated policy document. First, here are several activities where this policy does not apply:

1. Mining reclamation activities subject to a permit.
2. The movement or use of fill within a "project area" or right-of-way project.
3. Use of reclaimed asphalt pavement in accordance with PA DEP's co-product determination.
4. Management of land clearing, grubbing or excavation wastes that may include trees, brush, stumps or other vegetative material.
5. The use of clean or regulated fill that was determined prior to January 1, 2020, unless the fill is moved to another receiving site or project area after January 1, 2020.

As the previous version did, the 2020 Management of Fill policy provides narrative for the necessary procedures to follow for determining if a material can be classified as clean fill or regulated fill. It is important for the person utilizing or moving the fill material to determine the eligibility for management as fill material. In addition, environmental due diligence must be completed to ensure there is no evidence that the fill has been impacted by the release of a regulated substance. This includes review and documentation of property ownership and historic usage records.

If there is evidence in the due diligence investigation that suggest there may have been a historic release of regulated substances at or near the project site, numerous samples of the proposed fill material must be sampled and analyzed for a list of analytical parameters. In some instances, the sample collection requirements are extensive and may add significant costs or delays to the project.

If you're familiar with the fill determination processes required in previous versions of the Policy, you may be thinking, "this process doesn't sound like it changed very much". I would have to agree that the overall process for determining the status of proposed fill material has not changed much. However, the level of detail in the technical guidelines have significantly changed. Here are some key components of this policy that has changed:

- Necessary documentation of due-diligence efforts is much more extensive.
- The sampling requirements and the amount of sampling is much more prescriptive and extensive.
- A sampling plan is required for any sampling to be completed as part of a determination of fill status.
- There are more stringent health risk based standards for several key analytical parameters for fill determination.
- A section for the assessment of background conditions has been added. Because this process is somewhat complex, we anticipate issues and significant conversation with PA DEP if a project is looking to complete sampling for a background determination.
- Electronic submittal of Form FP-001 (Certification of Clean Fill) is being requested with all plans, reports and laboratory results attached. This can be a significant volume of required paperwork, and it must be retained by the donor and receiving site of the fill material for a period of 5 years. It is not known at this time how the PA DEP will manage and utilize this information.
- With on-going projects that have started prior to January 2020, there is concern that the changes in this policy could potentially impacting established schedules, project costs and associated contract obligations.

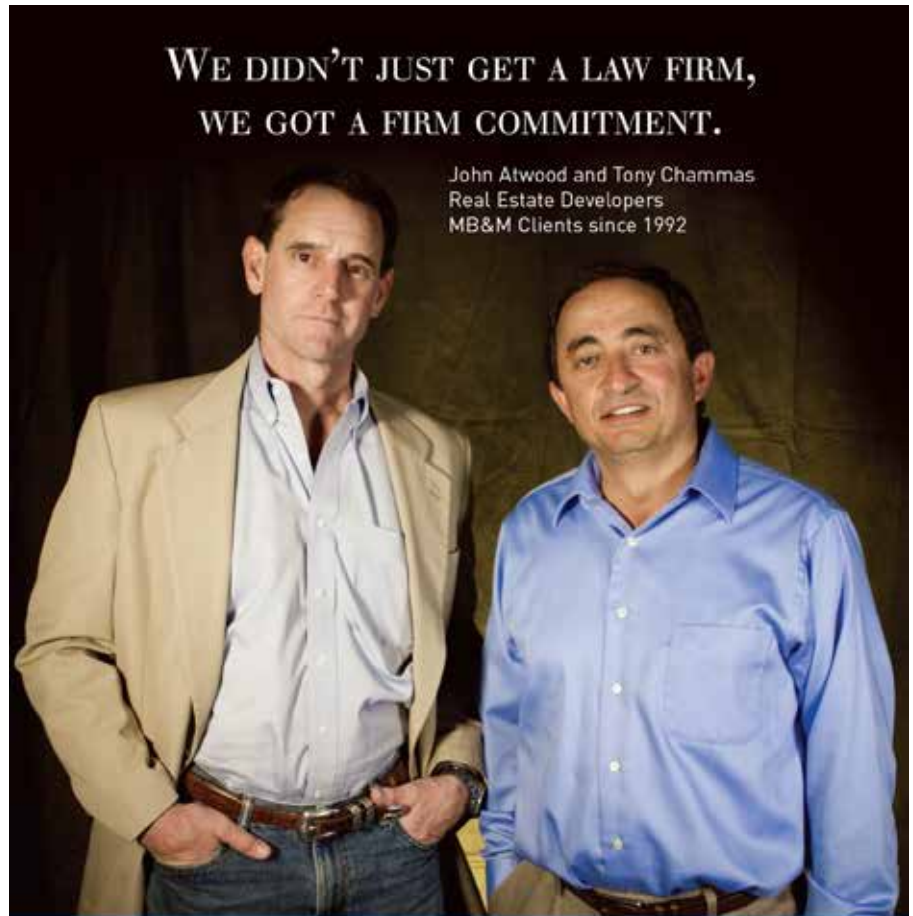
If the fill material is determined to be "clean fill", the material can be used in an unrestricted manner, as long as the material is not placed in the waters of the Commonwealth and abides by other appropriate PA DEP regulations.

If material is determined to be classified as "regulated fill", there are some options, but the procedures are much more prescriptive. The most common option is to treat "regulated fill" as a "waste", where following applicable municipal and residual waste regulations for disposal is the norm. This certainly would be an additional cost to any project. There are other potential options for regulated fill, however, these options will take significant coordination and discussion with PA DEP representatives.

I hope by reading this article, you've become more aware of this policy and how it applies to your business, project and potential opportunities. This policy should always be considered and followed when the movement of fill material is anticipated at your project site. In conclusion, it is important to avoid addressing last minute fill management issues due to the new guidelines in the 2020 policy. Planning and

communication between your project team and PA DEP representatives early in the process, are critical to ensure that these determinations are made as soon as possible for the sake of project timing, budgeting and to make sure there are no "surprises". **DP**

Jeff Walentosky is president of Moody & Associates, an environmental consulting firm in Houston, PA. He can be reached at JWalentosky@moody-s.com.



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