



282 South Church Street | Hazleton, PA 18201
570-501-5050

December 4, 2018

VIA ELECTRONIC MAIL & U.S. MAIL

Chris Solloway, Group Manager
Permits Section, Division of Municipal and Residual Waste
Bureau of Waste Management
Pennsylvania Department of Environmental Protection
P.O. Box 69170
Harrisburg, PA 17106-9170
ra-epbenuseall@pa.gov

Re: Comments on the Proposed Permit Modifications and Renewal of Residual Waste General Permit No. WMGR096

Dear Mr. Solloway:

Following are the comments of Hazleton Creek Properties, LLC ("HCP") on the Department of Environmental Protection's ("the Department's" or "DEP's") Proposed Permit Modifications and Renewal of Residual Waste General Permit No. WMGR096 ("the proposed General Permit") as published in the Pennsylvania Bulletin on October 6, 2018, PA Bulletin, Doc. No. 18-1561a. The Department announced a 60-day comment deadline on the proposed General Permit, which is December 5, 2018. As a result, HCP's comments are timely filed. HCP appreciates the Department's consideration of these comments and respectfully requests a meeting with the Department to discuss these issues further.

I. Background Regarding HCP and Summary Overview of Comments

For nearly thirteen years, HCP has been voluntarily recycling land for redevelopment and community revitalization pursuant to Pennsylvania Act 2 at the Hazleton Mine Reclamation Project, a 277-acre abandoned mine lands property in the City of Hazleton, Luzerne County, Pennsylvania ("the HCP Site"). The HCP Site is a Special Industrial Area ("SIA") Site under Act 2 pursuant to the December 6, 2005 Consent Order and Agreement entered into between the Department, HCP and the Hazleton Redevelopment Authority ("the SIA Agreement"). Further details regarding the HCP Site, the SIA Agreement, prior General Permits and Determinations of Applicability issued to HCP by the Department, and the status of ongoing construction and remedial activities for redevelopment at the HCP Site are contained in the public record, including the Application for Permit Renewal under Determination of Applicability WMGR096NE001 Regulated Fill General Permit submitted on June 14, 2018 by Evergreen Environmental, Inc. on behalf of HCP.

HCP has been conducting its ongoing land recycling efforts pursuant to the terms of the SIA Agreement in conjunction with authorizations in General Permit WMGR096 (issued December 23, 2013 and expires December 23, 2018) and guidance in the Department's Management of Fill Policy (version effective August 7, 2010)¹. However, the Department's recently proposed revisions to its General Permit could frustrate achievement of HCP's reclamation, restoration and construction objectives and obligations and may stall cost effective remedial action at the HCP Site. Economic redevelopment in the Hazleton community could likewise be thwarted.

Review of the Department's revisions to the proposed General Permit suggests the intent to vastly intensify the regulation of beneficial use of regulated fill sites operating under General Permit WMGR096. It appears that the Department intends to restrict responsible permittees' flexibility to sample, analyze, manage and handle regulated fill destined for beneficial use sites and instead prescribe rigid tasks and requirements that are unnecessary to protect the environmental health and safety interests of the Commonwealth and the public. Many of the changes in the proposed General Permit will degrade a successful environmentally beneficial program to the detriment of the Commonwealth and stakeholders.

Further the proposed changes impose significant new administrative, engineering, financial, recordkeeping, reporting and permit renewal obligations on General Permittees which will result in increased costs as well. One of the most significant impositions on General Permittees will be the requirement to secure affirmative written approval of all regulated fill destined for permitted sites. This places General Permittees in an impossible business management position, whereby they cannot control the flow of material to their construction projects and beneficial use sites in a way that allows their projects to be executed cost effectively. It also places the Department in the position to negatively affect site management and environmental progress and protection through bureaucratic inaction. Furthermore PADEP's and US EPA Region III's responses to fill materials containing PCBs have caused significant chilling of the market for regulated fill and has prevented placement of environmentally-safe materials into the HCP Site. Rather than requiring US EPA review and written approval of sources of material that contain PCBs greater than 2 ppm, the proposed General Permit should simply state that permittees are responsible for compliance with all applicable federal PCB regulations.

HCP requests that the Department issue another five year renewal of General Permit WMGR096 in its current form as existed on December 23, 2013. In the alternative, rather than impose a highly prescriptive General Permit like the one presently proposed, the Department could impose special conditions in DOAs on certain sites, where such special conditions are warranted to ensure viability of ongoing site remediation and construction activities while maintaining protection of human health, safety and welfare to the environment.

I. HCP'S SPECIFIC COMMENTS ON PROPOSED GENERAL PERMIT WMGR096

HCP's specific comments on certain terms and conditions in the proposed General Permit are set forth below along with HCP's recommended revisions to those terms and conditions.

¹ The Department recently released draft Management of Fill Policy published in the Pennsylvania Bulletin at 48 Penn. Bull. 7176 (Nov. 10, 2018) which is currently out for public comments. HCP will timely submit its comments on the draft Policy to the Department under separate cover.

A. The General Permit Should Not Change PADEP's Well-Established Review and Approval Process for New Sources of Fill.

Proposed Section E.5 in the General Permit [p. 19 of 23] requires separate, overt and formal approval for new sources of fill for receiving sites that are not otherwise addressed in the DOA application. The basis of General Permit WMGR096 is that regulated fill being placed at a receiving site is used as a construction material. Therefore, it follows that each receiving site is a construction project with defined construction requirements and schedules. Section E.5 has the ability to bring those construction projects to a screeching halt. This requirement strips the permittees of the ability to control their construction schedule and could have catastrophic effects on project viability.

Further, the current process (set forth in Section 28 of existing General Permit WMGR096) allows permittees to commence acceptance of new sources of fill 10 days after submitting required information to the Department unless the Department instructs otherwise. This has been the well-established process for many years for review and acceptance of new sources of regulated fill. Now, however, for unknown reasons, the Department has wholly removed Section 28 in the new proposed General Permit. The new requirements in proposed Section E.5 put the Department in the position to control or disrupt project schedules – either intentionally or through bureaucratic inaction. HCP believes that this requirement is unnecessary given all the technical safeguards in the General Permit and the Department's Management of Fill Policy.

Section 28 in the existing General Permit WMGR096 should be re-inserted in place of proposed Section E.5. Alternatively, proposed Section E.5 should be revised to state:

If new sources of regulated fill are to be used at an approved beneficial use location, the permittee shall notify the Department in writing by submitting (1) Names, addresses, and locations of known or potential sources of regulated fill and estimated weights or volumes of the regulated fill; and (2) Documentation including laboratory analytical results and a certification by the permittee that the regulated fill meets the conditions of this General Permit. A permittee may commence with beneficial use of the new source after 10 working days from the date the information is submitted to the Department, unless otherwise instructed by the Department.

B. The General Permit Should Not Require U.S. EPA Approval of Sources Containing PCB Material.

The proposed General Permit includes new conditions requiring proof that US EPA Region 3 must approve sources of material that contain PCBs greater than 2 ppm. Proposed Section E.3 and E.5.b.iii [p. 19 of 23] state:

“ . . . Proof that an EPA Region 3 PCB Coordinator has approved acceptance at the receiving site for PCB results over 2 ppm is required for authorization to beneficially use regulated fill. Applications that do not contain the EPA Region 3 approval for PCB results over 2 ppm will be deemed administratively incomplete.”

* * *

“Proof that EPA Region 3 PCB Coordinator has approved acceptance at the receiving site if there are PCB results over 2 ppm. New source submittals that do not contain the EPA Region 3 approval for PCB results over 2 ppm will be deemed administratively incomplete.”

To the extent PCBs need to be addressed by the General Permit, they should only be addressed technically via specifications of PCB sampling techniques and via tables GP1-a and GP1-b as existed in the prior General Permit WMGR096. These have been the applicable regulatory requirements in place for many years and HCP is unaware of factual changes with respect to risks posed by the presence of PCBs in regulated fill that support the proposed changes now being sought by the Department.

PCB regulation in Pennsylvania is governed by the federal Toxic Substances Control Act (“TSCA”) and US EPA’s PCB regulations. The federal PCB regulations are self-executing, meaning that unless otherwise specified, US EPA approval before regulated entities take action under those rules is neither contemplated nor even authorized by TSCA. By requiring approval of a Region 3 “PCB Coordinator” before placement of regulated fill can be authorized, this provision in the General Permit essentially requires that General Permittees secure an action by Region 3 that is not authorized by federal law. These provisions are in effect a legal bar to taking any PCB material greater than 2 ppm. In fact, by these provisions in the General Permit, US EPA can prevent, simply by taking no action, the lawful placement of PCB material as authorized by TSCA and Pennsylvania’s Act 2. HCP believes that US EPA Region 3’s interpretation of the federal PCB regulations as now set forth in the proposed General Permit is contrary to law.

The better approach would be for proposed Sections E.3 and E.5 to simply state that placement of regulated fill containing PCBs at beneficial use sites must comply with TSCA. Proposed Sections E.3 and E.5.b.iii should be revised to state:

PCB samples shall be collected in accordance with EPA’s “Standard Operating Procedure for Sampling Porous Surfaces for Polychlorinated Biphenyls (PCBs)”. Compliance with the PCB levels set forth in this general permit do not assure compliance with the federal PCB requirements of the Toxic Substances and Control Act, 15 U.S.C. Section 2601 et seq. and 40 C.F.R. Part 761. Permittees are responsible for compliance with all applicable federal PCB regulations.

The foregoing language would achieve the Department’s objectives of federal EPA oversight over PCB materials but not unreasonably prevent the placement of such materials if they comply with federal law.

C. The General Permit Should Not Change the Sampling and Analytical Requirements that Sites Have Been Operating Under for Years.

Proposed Section E.2 [p. 9 of 23] regarding Sampling and Analysis requires samples to be collected and analyzed in accordance with Appendix A of the Department’s Management of Fill Policy Document No. 258-2182-773. Although HCP will submit, under separate cover, its comments on the Department’s recently proposed draft Management of Fill Policy, some general comments are included here.

HCP objects to the minimum number of samples required for fill material characterization as set forth in the Department's proposed draft Management of Fill Policy. HCP believes the imposition of a minimum number of samples removes flexibility to design scientifically credible sampling plans in accordance with the applicable US EPA publication that are also cost effective. Prescribing rigid sampling protocols can impose unnecessary expense with no concurrent environmental benefit. The Management of Fill Policy should act as a guideline (as that is what policies are intended to do) for developing scientifically credible sampling plans. If a sampling plan is scientifically credible, it should be authorized regardless of the number and type of samples (discrete or composite). The Department has expressly stated that the Management of Fill Policy is not a regulation; however, directing General Permittees to comply with the terms of that Policy (as proposed Section E.2 directive does), transforms the Policy into a regulation. If the Management of Fill Policy is a regulation, then the Department must treat it as such and proceed through formal rulemaking. The sampling and analysis requirements of the Management of Fill Policy should remain unchanged from the version currently in effect except a provision should be added to allow for alternative, scientifically credible sampling plans prepared by a Pennsylvania Licensed Professional Engineer or Geologist for review and approval on a case by case basis by the Department.

D. *The General Permit Should Not Require a Mandatory Deadline or Schedule for Project Completion.*

Proposed Section C.12.c – Schedule for Completion [page 5 of 23] requires submittal of a schedule for the completion of placement of regulated fill at a site to be included in an application for a DOA of General Permit WMGR096. Due to the complexities of construction projects, the availability of fill for placement at receiving sites and the lack of project control that site construction parties will hold due to the proposed term of this new General Permit, all such project schedules are necessarily contingent. The Department must recognize this fact in the General Permit. The Department can always request specific project information on an as-needed basis if specific projects require specialized attention. Proposed Section C.12.C should be revised to include the word “estimated”:
An estimated scheduled for the completion of placement of regulated fill at the site;

E. *The General Permit Includes Other Administrative Conditions Not Required to Protect the Environment, Health and Safety (Particularly for Act 2 Sites with Approved Remediation Plans) and Could Thwart Site Remediation or Construction as No Longer Being Cost-Effective.*

The December 6, 2005 SIA Agreement between the Department and HCP outlines the remediation obligations to achieve the Act 2 non-residential statewide health standards and site specific standards. In addition, the Act 2 program includes procedural requirements such as community involvement, recordkeeping and deed notices that do not need to be addressed once again through the General Permit WMGR096 process in circumstances where General Permits are required. HCP recommends that the administrative conditions contained in the proposed General Permit be specified for sites not otherwise operating in accordance with an approved and permitted operation plan such as those implementing an approved remediation plan under Act 2.

The administrative requirements in proposed Sections C.15 and C.16, D.7, F, G.1, G.4, G.5, H would impose obligations on General Permittees that appear to be unjustified for protection of environmental, health and safety of the Commonwealth. These new obligations will

impose costly obligations on permittees frankly only to provide information and convenience to the regulators. Rather than impose these types of obligations on all permittees regardless of circumstances, should particular concerns exist at specific sites, the Department can take appropriate individualized action. All General Permittees should not be required to incur cost where such costs are not necessary to protect the environment or public stakeholders.

Proposed Sections C.15 and C.16, D.7, F, G.1, G.4, G.5, and H should be revised as follows:

C. Determination of Applicability Requirements:

15. [DELETE].
16. Proof that the applicant has consulted with municipalities where the site is located regarding appropriate transportation routes.

D. Operating Conditions:

7. If the placement of additional regulated fill will be expanded beyond the permitted area, the permittee shall notify the Department in writing by submitting information in accordance with this General Permit. If additional regulated fill volumes are needed for the approved construction activities within the existing permitted area, the permittee shall submit a letter notifying the appropriate Department regional office. The letter shall include a description of the proposed changes and identify the additional volumes necessary.

F. Recordkeeping:

1. Records of all analytical evaluations conducted on the regulated fill material under this permit, daily records of the weight or volume of regulated fill received, the donor sites where the regulated fill originated, the placement locations, and approved construction plans, locations of known regulated fill donor sites, and estimated weights or volumes of regulated fill at the donor sites shall be retained by the permittee for a minimum of five (5) years, onsite and at the permittee's place of business. These records shall be made available to the Department upon request.
2. [DELETE] The permittee shall maintain records of all physical and analytical evaluations conducted in accordance with Section E of this general permit to demonstrate that the regulated fill material meets the beneficial use and the concentration limits of this general permit. Records of physical and analytical evaluations must include, at a minimum, the following for each sample:
 - a. The dates of sampling and testing.
 - b. Sampling procedures utilized.
 - c. The name of the individual who collected the sample.

- d. ~~The volume or weight of the sample.~~
 - e. ~~Each parameter tested.~~
 - f. ~~The analytical results.~~
 - g. ~~The name of the analytical laboratory used.~~
 - h. ~~The analytical methodologies employed.~~
3. For each destination of outgoing shipments of regulated fill material, the permittee shall maintain records that contain the following:
- a. The name, address and telephone number of the person that is supplied the regulated fill material for beneficial use.
 - b. The location where the regulated fill material was beneficially used.
 - c. The date and weight in tons of the regulated fill material received.
4. ~~[DELETE] The permittee shall also maintain records of all spills of one (1) ton or greater and releases that include, at a minimum, the following: the location, date, time, identification and quantity of spilled or released material, and a description of how the material was cleaned up. These records shall be retained by the permittee, for a minimum of five (5) years, onsite and at the permittee's place of business and shall be made available to the Department upon request.~~

G. Reporting Requirements:

1. The permittee shall update the recorded deed notice to include, for each source of regulated fill, the exact location of the regulated fill placed on the receiving site, including longitude and latitude descriptions, and a description of the types of regulated fill identified by sampling and analysis. The location and description shall be made a part of the deed for all future conveyances or transfers of the subject property. This deed notice shall may be updated annually, when ownership of the project changes, ~~and provided as part of the fourth quarter report or at the end of the completed project.~~
3. ~~[DELETE] Permittees operating under the provisions of this general permit shall submit a quarterly report, by the 20th of the month following each quarter, to the appropriate Department Regional Office (see attached list) for the previous calendar quarter that includes the following:~~
- a. ~~A summary of the weight and volume of material received from each donor site during each month of the quarter.~~
 - b. ~~A summary of total volume of regulated fill received at the facility from the date of permit issuance through the end of the quarter being reported~~

as compared to the volume of regulated fill required to complete the construction project.

- ~~c. The fourth quarter report will serve as the annual report. In addition to the information identified in parts a and b of this condition, the annual report shall include the following:
 - ~~i. an annual administration fee of \$500.00 payable to the "Commonwealth of Pennsylvania";~~
 - ~~ii. a topographic survey map of the same scale, contour interval and grid system as the original site plans that show the contours at the beginning and the end of the year, the completed areas of the site, and areas partially filled but not active during the previous calendar year;~~
 - ~~iii. the name, address and telephone number of the person that provided and the person that was supplied the regulated fill material for beneficial use;~~
 - ~~vi. the date that the regulated fill was generated;~~
 - ~~v. the date that the regulated fill was provided;~~
 - ~~vi. the location where the regulated fill material was beneficially used;~~
 - ~~vii. the date and weight in dry tons of the regulated fill material received; and~~
 - ~~viii. proof of a recorded deed notice that includes, for each source of regulated fill, the exact location of the regulated fill placed on the property, including longitude and latitude descriptions, and a description of the types of regulated fill identified by sampling and analysis.~~~~
4. The permittee shall notify the Solid Waste Manager at the appropriate Department Regional Office (see attached list), within 72 hours of any evidence that the material does not meet the chemical standards or physical property requirements in Condition D.1 ~~or that there is a variability in the quality of the regulated fill material that has been indicated through visual observation or analytical testing during the production of the regulated fill material.~~
 5. [DELETE] The permittee shall immediately notify the Department's Emergency Hotline at (717) 787-4343 and the appropriate DEP Regional Office in the event of a discharge or spill of regulated fill material and shall take appropriate immediate action to protect the health and safety of the public and the environment. Spills of less than 1 ton of regulated fill material need not be reported.

H. Renewal:

1. A person or municipality that plans to continue the beneficial use of residual waste authorized under this general permit, after the expiration date indicated on the approval for coverage page, shall file a complete application for permit renewal at least 180 days before the expiration date of this general permit unless permission has been granted by the Department for submission at a later date. The renewal applications shall be submitted to the appropriate DEP Regional Office (see attached list) and include, at a minimum, the following:
 - a. General Information Form (Authorization Application for a Residual or Municipal Waste General Permit Application).
 - b. Form B (Professional Certification).
 - c. Form 20RF (Application for a Municipal or Residual Waste General Permit), which shall include information to show that the construction project is still on schedule.
 - d. Form 27R (Acceptance of General Permit Conditions).
 - e. DOA application fee in the amount identified in Section A (General Information) of the Form 20. A check shall be made payable to the "Commonwealth of Pennsylvania."
2. A copy of the renewal application shall also be sent to the Department's Bureau of Waste Management, Division of Municipal and Residual Waste, Rachel Carson State Office Building, 400 Market Street, P.O. Box 69170, Harrisburg, PA 17106-9170.
3. In the event that a timely and complete application for renewal for permit coverage has been submitted and the Department is unable, through no fault of the permittee, to reissue the general permit or approval for coverage before its current coverage expiration date, the terms and conditions of the approved coverage will automatically continue and will remain fully effective and enforceable pending the issuance or denial of the application for renewal for permit coverage, ~~provided the permittee is, and has been, operating in compliance with the terms and conditions of the general permit.~~

F. Other Comments

Definitions. The Department has revised or added several new definitions in the proposed General Permit which are unclear or unnecessary. Of most importance are the new definitions of "Background," "Background reference area," and "Promptly." The definitions of Background and/or Background reference area should be expanded to provide for the use of generally accepted reference materials to demonstrate concentrations of metals and polynuclear aromatic hydrocarbons are likely a result of natural background conditions or from ubiquitous, widespread deposition of regulated substances. This can be particularly useful to both the Department and the regulated community where the ability to obtain representative background samples is limited, thereby also limiting the use of appropriate statistical methods.

Further, to the extent the receiving site is undergoing remediation under Act 2, the definitions of “background” and “background reference area” should be modified to include the concentration of constituents already existing and permitted to remain in place at the receiving site, as is the case in the current General Permit under Condition No. 7. Sites undergoing remediation through Act 2 have been extensively studied to determine the site’s geologic and hydrogeologic setting, the fate and transport of materials to remain on site, and the potential exposure pathways for in-place material that are being addressed under the approved remediation plan. As required under Act 2, there can be no remaining exposure pathways for exposure to onsite materials that pose an unacceptable risk to human health and the environment. Therefore, there is no benefit from excluding the consideration of the receiving site background concentrations for comparable material that has already been deemed acceptable to remain in place while there will be a great cost in the form of reduced material availability to complete Act 2 remediation projects at these sites. We therefore recommend the proposed General Permit retain the current WMGR 096 definition of “Background Concentration” (Condition No. 7 of the current General Permit) for Act 2 remediation sites where it “is defined as the concentration of a substance that is present at the site before beneficial use activities occur under this permit.”

Finally, considering the varying complexity of potential receiving sites, as well as the added variability related to the complexity of construction/redevelopment plans, the definition of “Promptly” should be modified to include “or another reasonable time frame approved by the Department.”

Stabilization of Area. Proposed Section D.11 will now require “stabilization” of area upon completion of earth disturbance by seeding, mulching etc. This will apply to “any stages or phases”. Proposed Section D.11 should be revised to make clear that seeding and mulching is acceptable until final site development is completed which would include permanent erosion and stabilization controls. Any site that operates with an approved erosion and stability control plan should be exempt from the requirements in Section D.11.

Annual Report Requirements. As described in the proposed revisions and deletions above, HCP objects to the onerous administrative requirements in proposed Section G.3.c that must be included in the annual report submitted to the Department, including the topographic survey map, date of regulated fill generated, provided, location, date and weight in tons and recorded deed notice requirements. These requirements are unreasonably burdensome and unnecessary for sites already operating within a regulatory approved framework. In addition, as a point of clarity, the applicable weight of material received should be referred to as scaled weight or simply weight in tons as dry weight implies the weight of material received does not include naturally occurring moisture.

Waste Transportation Safety Plans and Traffic Studies. HCP objects to proposed Section 15 requiring a waste transportation safety plan and proposed Section 16 requiring a traffic study. These requirements are unreasonably burdensome and have not been previously required as part of any of the prior General Permits issued by the Department.

II. CONCLUSION

Thank you for the opportunity to comment on the proposed Permit Modification & Renewal of General Permit No. WMGR096. Given the significance of these issues to HCP, we would appreciate a meeting with the Department to discuss these comments in further detail.

Very truly yours,

Matt Neely
Matt Neely */bsm*