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RE: Comments on WMGR096

Mr. Solloway,

Per the Department of Environmental Protection's proposed modifications to Residual Waste General Permit No. WMGR096, released October 6th 2018 please comments below.

Comment 1:

When proposing changes to General Permit WMGR096, PADEP should take an objective view of the program in general. What are the overall benefits to the state and what the overall problems created? In the past, PADEP has established limits for the safe use of construction materials in both residential and commercial/industrial settings. After 15 years of implementation there has not been one instance where those limits, used according to the existing policy, have damaged or compromised our environment or health. The proposed changes to General Permit WMGR096 include unreasonable application and testing thresholds which will severely curtail its use. Policy makers should evaluate these changes by reviewing the pros and cons of the program when initially adopted.

Pros:

- **Urban Revitalization, Reduced Landfill Use, Preservation of Existing Greenspace**

It is far more environmentally and logistically prudent to use and reuse existing urban and old industrial/commercial property than it is to build new ones on virgin land. That was the basis for the origination of General Permit WMGR096, which is regulated fill. Urban and old industrial/commercial properties have a higher degree of low-level concentrations due to the century's long presence of human and industrial/commercial activity respectively. If these areas are to be revitalized, buildings will be demolished or sites reshaped to have new redevelopment in their place. This redevelopment will require new excavation for foundations, below grade parking, utilities, etc. or reshaping to bring sites to a usable grade. Without programs designed to beneficially use and reuse these materials it will require virgin material to reshape old industrial/commercial property and excess material from urban and old industrial/commercial property will be

sent to a landfill for disposal. Therefore, the use of regulated fill benefits two properties; the redevelopment site with excess material and redevelopment site in need of material. Two properties benefiting with without taking up limited landfill space and saving two other virgin sites from being developed.

Cons:

- **Traffic**

Construction, be it development or redevelopment, creates truck traffic. The only difference is where the traffic occurs. If a project is in a city or town (typically redevelopment) the truck traffic will inconvenience the people living and working there. If material coming from that project can be beneficially used to redevelop a second site, the people living and working there will be inconvenienced. Likewise, if a project is located on virgin land/greenspace in a country (typically development) the truck traffic will inconvenience the people living and working there. However, because there are much fewer people in the country, less people are directly inconvenienced. If material coming from that project must go to a landfill, then the people living and working near the landfill will be inconvenienced by the additional truck traffic being sent to the landfill. The traffic created during construction, does not go away, it is merely moved someplace else.

The long-term downside of greenspace development, as opposed recycling existing sites, is that it exacerbates the problem of urban decay thereby accelerating more greenspace development. It's a vicious circle. The few people initially inconvenienced by the first development of greenspace are soon overwhelmed by even more development and the people in older neighborhoods wonder why they are not the places they once were.

Locations for development and redevelopment are largely economic. If governments enact policies that make urban and old industrial/commercial properties costlier to redevelop than virgin land/greenspace development will be the result. The opposite is also true. Remember some of signs you've seen while sitting in the traffic of a major construction project "Temporary inconvenience. Permanent improvement".

Comment 2:

Per DOCUMENT NUMBER 012-0900-001, titled Policy for Development and Publication of Technical Guidance, dated July 28, 2018, III. IV. Enhancing Transparency, Section C. Advisory Committee and Stakeholder Involvement states the following:

"...Program staff should involve Advisory Committees and other stakeholders as early in the development process as practicable when new TGDs, substantive revisions to TGDS, and Interim Final TGDs are being developed..."

Per DOCUMENT NUMBER: 012-0820-001, titled Policy for Development, Approval and Distribution of Regulations, II. Content of Regulations, bullet 8 states the following:

"Regulations shall be drafted and promulgated with early and meaningful input from the regulated community."

I believe “the regulated community” are also stakeholders and they were not given a chance to provide input into the extensive rewrite of General Permit WMGR096 in direct conflict with PADEP’s own policies as outlined above. The regulated community is now faced with the impossible task of adequately explaining, through comments, the myriad of problems, both technical and practical, that are created by the substantive changes being proposed. The regulated community did meet with representatives of DEP on two occasions during the Spring of 2018 in hopes of gaining some access and involvement into the process. The regulated community was not given the opportunity to participate in any discussions relative to the drafting of the document nor the opportunity to receive and comment on any of the proposed changes being considered before publishing a draft for general comment.

Question:

1. Does PADEP view existing permit holders as stakeholders?
2. What stakeholders were involved in developing the proposed revisions to General Permit WMGR096?
3. What was the reason PADEP did not seek early and meaningful input from the regulated community prior to publishing the draft document for general comment?
4. Who made the decision to not seek early and meaningful input from the regulated community prior to publishing the draft document for general comment?

Comment 3:

Sec. A. Description:

“The site is a real property where regulated substances have been released and remain present.”

This definition is a significant retreat from the initial implementation of the Management of Fill Policy (MOF) and WMGR096 in 2004 as a means for encouraging the reuse and redevelopment of the old industrial sites scattered throughout Pennsylvania. This revision to the policy rewards landowners who have **not** cleaned up releases or spills and penalizes those that have! The only sites that would qualify under this condition are those industrial sites that have been abandon and are bankrupt. If a viable company were to have a release or spill, they would be required by DEP to clean it up, therefore the spill or release would not remain present. This change eliminates thousands of industrial and commercial sites that have had a spill or release prior to the inception of PADEP in 1995. Many of the large industrial sites were in existence decades before the founding of PADEP. PADEP should assumed that old industrial and commercial sites have been impacted by a release or spill at some point and also assume the current owners are unaware of the spill or release. This proposed condition disincentivizes the redevelopment of industrial and commercial properties within the Commonwealth and places landowners in a difficult position when attempting to redeveloping their properties.

Questions:

1. Will Regulated Fill only be applicable to Act 2 sites?
 - a. If no, what are situation that would permit the use of Regulated Fill?

2. Will the placement of Regulated Fill be confined to the specific areas of the release or spill?
 - a. If No, will an existing DOA be able to expand the use of Regulated Fill at their site if the site, when initially approved, was NOT affected by a release or spill? To phrase the question another way, will the Regulated Fill placed on a site currently approved for Regulated Fill, without a prior release or spill, now be considered to have a release or spill as the result of bringing in Regulated Fill prior to this current proposed revision to General Permit WMGR096, thus conforming to this new requirement?
3. Will the condition be satisfied if a landowner performs testing that discovers analytical exceedances indicating a prior release or spill?
4. Will analytical exceedances alone satisfy the condition of a prior release or spill? If not, what would be required?
5. If a landowner performs testing that discovers analytical exceedances indicating a prior release or spill, will PADEP allow the material to remain on site thus satisfying the condition?

Comment 4:

Sec. B. Definitions:

Background reference area – *“The area identified for sampling that: will be used to establish background; is sampled and analyzed to determine the concentration of regulated substances found at or within a close proximity to the donor site, at a depth comparable to that of the area to be excavated at the donor site, in the same soil layer as the donor fill...”*

Regulated Fill comes principally from urban areas where there have been continual and repeated soil disturbances over the last century. For this reason, it is unreasonable to assume that widespread atmospheric disposition will be found at a depth comparable to that of the area to be excavated at the donor site and in the same soil layer as the donor fill. Construction activities as opposed to atmospheric disposition will be the primary causes of widespread low-level contamination. Secondly, it is unreasonable to assume any neighboring property owner will permit soil sampling on their property. The existing USGS statistical mapping or similar data is a far better methodology in determining background or as an alternative, a letter from a licensed environmental professional.

Question:

1. Will PADEP accept existing USGS statistical mapping or similar data if it is not practical to gain access to neighboring properties?
2. Will PADEP accept a Professional Environmental Engineers certification for background?

3. What the definition of “close proximity”?
4. What is considered a “comparable depth”?

Fill – ... *“does not include reclaimed asphalt pavement, naturally occurring asbestos, mine spoils or acid-producing rock.”*

Natural occurring materials should not be labeled or treated as waste and forced into landfills. Using Best Management Practices, these materials can be beneficially used. PADEP should utilize Best Management Practices such as “x” feet below surface. The inclusive of this definition will have a large detrimental impact on private and public construction projects.

Questions:

1. Can natural occurring materials, such as naturally occurring asbestos, mine spoils or acid-producing rock be used as a Construction Material as defined?
2. Can reclaimed asphalt pavement be used as a Construction Material?

Receiving site – *“The area to which fill is proposed to be relocated. A receiving site is separate from a donor site and not part of a project area or right of way.”*

This definition does not adequately define the area that should be considered the “receiving site”. Large regulated fill sites can take numerous years to complete and municipal planning codes limit plan approvals to five (5) years. These local restrictions force redevelopers to subdivide their projects into smaller increments to stay within municipal limitations. Therefore, a new subdivided section of larger property can meet the municipal timeline and conform PADEP’s requirement of having an approved plan, but will DEP now require an entirely new regulated fill application for the remaining portions of the property or will it just be an expansion on the original regulated fill permit? As areas are brought to grade development activities can commence. The receiving site should be defined as the original site prior to any subdivision that is undertaken in order to fulfill either PADEP or municipal guidelines.

Questions:

1. If a landowner subdivides land in order to meet the local requirements in order to receive an approved plan, will that subdivision preclude the landowner from expanding the existing regulated fill permit outside the subdivided area?

Comment 5:

Sec. C. Determination of Applicability Requirements:

10. *Names, addresses, and locations of known or potential donor sites of regulated fill and estimates of the weights or volumes of regulated fill at the donor sites.*

Comments:

It does not make sense to provide proposed donor site information during the application process. Most proposed donor sites have already moved their material by the time a permit is issued.

Question:

1. What is the point in providing donor site information prior to receiving a permit?

Comment 6:

12. b. *The engineering properties required for the construction project and the plan to ensure that, with the placement of fill, these properties are met;*

All approved construction projects have plans and specifications prepared and approved by Professional Engineers. The permit requirement of an approved plan negates the need for DEP to become involved with construction standards already accounted for by the municipal plan approval process. Having two agencies overseeing the same project, with possibly different standards is not necessary or warranted. The beneficial use of Regulated Fill as opposed to Clean fill does not alter plans and specifications already approved for the project. There is no similar requirement if using any other type of fill. This requirement is outside the scope of DEP in determining the viability and applicability of a beneficially used material and discriminates against those wishing to utilize regulated fill. It is a complete reversal from the original intent of WMGR096 adopted in 2004 and discourages the redevelopment of old abandoned properties and adds another layer of bureaucracy by implementing conditions that are already a part of a standard construction approval process.

Questions:

1. Does the Department consider the infrastructure work for developing a property a construction project?
2. What technical guidance is PADEP using to establish this requirement?
3. What specific data is PADEP looking for to satisfy this requirement?
4. Has PADEP mandated this requirement in any other general permit?
5. Has PADEP mandated this requirement for any other beneficial use?
6. Has PADEP mandated this requirement for any PADEP Co-Product approval?

7. What department at PADEP will be responsible for reviewing and approving the data provided?
8. Will a letter from a PA Licensed PE stating material suitability satisfy this requirement?
9. How is this a PADEP requirement for the use regulated fill when it is not required for the use of any other product?
10. Does DEP see the use of regulated fill any different from using Clean Fill?

Comment 7:

12. d. *A copy of an approved Subdivision and Land Development plan in accordance with a Subdivision and Land Development Ordinance for the county or municipality within which the receiving site resides.*

In Pennsylvania, infrastructure construction can begin with Preliminary Plan Approval. Because of the timing issues discussed above in “Receiving Site”, it is recommended that a Preliminary Plan Approval be deemed an approval by the Department in for this permit. All NPDES plans should be approved by PADEP utilizing the term “PADEP Approved Materials”.

Questions:

1. Does Municipal Preliminary Approval constitute approval in the context of this permit?

Comment 8:

16. *Proof that a traffic study has been conducted. As part of the traffic study, the applicant shall consult with neighboring municipalities (including municipalities along approach route(s) from limited access highways) regarding appropriate transportation routes.*

The beneficial use of regulated fill is a direct substitution of clean fill. The traffic impact of using regulated fill is no different from the traffic impact of using any other construction material. This requirement should be removed. There is no similar PADEP requirement for other construction projects. If a construction project opted to use another product to complete the same task, no traffic study would be required. This requirement is outside the scope of DEP in determining the viability and applicability of a beneficially used material. It discriminates against those wishing to utilize regulated fill and will reduce the beneficial use of this material. It is a complete reversal from the original intent of WMGR096 by placing unrelated obstacles to its use. Instead of encouraging the redevelopment of old abandon properties and promoting the recycling of this material, this condition discourages those activities. This requirement is more onerous than required for landfills which are required to provide a traffic assessment and not a traffic study.

Questions:

1. What is DEP’s definition of a traffic study?
2. Was the intent of this provision to require a traffic assessment as opposed to a traffic study?

3. How will the department use the information generated by a traffic study?
4. Will the Traffic study impact the issuance of a permit?
5. Will the department require street improvements or contributions as a result of the traffic study?
6. How is this a requirement for using regulated fill as opposed to some other product?
7. Does DEP see a greater impact to traffic by using regulated fill as opposed some other product?
8. Has PADEP mandated this requirement in any other general permit?
9. Has PADEP mandated this requirement for any other beneficial use?
10. Has PADEP mandated this requirement for any PADEP Co-Product approval?

Comment 9:

Sec. D. Operating Conditions:

1. b. *“For construction projects, the structural load requirements of the project shall be satisfied. The regulated fill shall satisfy the engineering requirements and the specifications for the construction project. At a minimum, the permittee shall document the final engineering design of the project and the calculations of the maximum bearing capacity for the regulated fill material. Where regulated fill material is used under a project contract, the contract must specify the engineering qualities and characteristics of the regulated fill that must be met for completion of the job or project.”*

This requirement adds another layer of bureaucracy by implementing conditions that are already a part of a standard construction approval process. All approved construction projects have plans and specifications prepared and approved by Professional Engineers. The existing permit requirement of an approved plan negates the need for DEP to become involved with construction standards already accounted for by the municipal plan approval process. Having two agencies overseeing the same project, with possibly different standards is not necessary or warranted. The beneficial use of Regulated Fill as opposed to Clean fill does not alter plans and specifications already approved for the project. There are no such PADEP requirements placed on the use of any other fill material. This requirement is outside the scope of DEP in determining the viability and applicability of a beneficially used material. It is unnecessary, bias against the use of Regulated Fill and a reversal of the policy’s original intent and should be eliminated.

Questions:

1. Does PADEP want to place themselves in a position of approving fill to meet specific construction requirements?
2. What technical guidance is PADEP using to establish this requirement?

3. If Dep has established that regulated fill is an equivalent to clean fill and may be beneficially used as such under this permit, why are requirements being set with regards to its physical properties?
4. What specific data is PADEP looking for to satisfy this requirement?
5. Has PADEP mandated this requirement in any other general permit?
6. Has PADEP mandated this requirement for any other beneficial use?
7. Has PADEP mandated this requirement for any PADEP Co-Product approval?
8. What department at PADEP will be responsible for reviewing and approving the data provided?
9. Will a letter from a PA Licensed PE stating material suitability satisfy this requirement?

Comment 10:

1. d. *“Upon completion of regulated fill placement at the receiving site, the permittee shall immediately notify the Department of the date that regulated fill placement was completed, and provide the Department with a copy of the approved plan or construction permit issued by the applicable state, county or municipal authority that has jurisdiction for the property that shows that the property is approved for construction.”*

This condition appears to be a duplication of section C. 12. d. There may not be another construction approval immediately upon completion of the initial construction project. Site improvements for the construction of an industrial/commercial business park do not require any additional municipal approvals.

Questions:

1. If an approved plan is a condition of receiving this permit, what additional plan is the Department looking for?
2. How does this requirement differ from the requirement in section C. 12. d.?
3. Do site improvement approvals for industrial/commercial business park satisfy this condition?

Comment 11:

12. *“...as well as for any approvals or permits sought from municipalities.”*

This requirement seems out of place in “Operating Conditions” and appears to be a last-minute inclusion. This condition is not required for any other recycled or beneficially use product in

Pennsylvania. By adding this condition, the Department is placing a “bull’s-eye” on its use and will make it a political weapon for NIMBYs, thus sacrificing its benefits to the greater good of the State. Giving local governing bodies the ability to impose their own set of conditions on what the state has determined is a product (“not a waste”) when utilized under this permit, is a very slippery slope and is considerably outside local expertise and established oversight. If Regulated Fill is a product, then it should be treated as such. Instead of embracing the recycling of older abandoned properties, this requirement unfairly discriminates against those living in urban areas and puts material that can be beneficially reused into landfills, thus unfairly discriminating against those living near landfills.

Questions:

1. Has PADEP mandated this requirement in any other general permit?
2. Has PADEP mandated this requirement for any other beneficial use?
3. Has PADEP mandated this requirement for any PADEP Co-Product approval?

Comment 12:

20. *“...The Department may:*

b. “Suspend or revoke authorization to provide regulated fill material to any person whose authorization to beneficially use the fill material for reclamation of a mine site has been suspended or revoked.”

The meaning of this section is unclear as to the word “provide”.

Question:

1. Should the word “receive” replace the word “provide”?

Comment 13:

E. Sampling and Analysis:

2. *“...Samples shall be collected and analyzed in accordance with Appendix A of the Department’s Management of Fill Policy, Document No. 258-2182-773.”*

Appendix A is far too restrictive. Most projects have an environmental assessment done at the initial stages of development. These assessments are done by licensed environmental professionals and are consistent with standard accepted procedures. Environmental assessments are expensive and a serious undertaking as the liability for all parties involved with disposal is extremely high. Creating specific procedures that do not allow for the discretion of those professionals is too restrictive. Developers needing to utilize Clean or Regulated Fill for their projects will be restricted from utilizing materials that do not exactly match this policy condition even if the assessment is conducted by environmental professionals using other accepted protocol. This will have a negative economic impact on Pennsylvania redevelopment projects utilizing Clean and Regulated Fill. In PADEP policy documents quoted below you will

also see that *“performance standards are generally preferred to engineering or design standards”*. In keeping with that comment, I believe it would be better to keep the existing testing requirements and adding groundwater monitoring for any project needing in excess of 50,000 tons (or 33,333 cy) of material. Per DOCUMENT NUMBER: 012-0820-001, titled Policy for Development, Approval and Distribution of Regulations, II. Content of Regulations, 3) Economic Impacts,

a) *“Regulations should be proposed only when the need for and economic consequences of any proposal are evaluated. Regulatory strategies should be designed to achieve the desired goal at the lowest possible cost. The costs of the regulation shall not outweigh the benefits.”*

b) *“Regulations should be drafted in a manner which does not diminish Pennsylvania’s competitive economic advantage while still achieving their objectives. Furthermore, performance standards are generally to be preferred to engineering or design standards because performance standards provide the regulated parties the flexibility to achieve the regulatory objective in a more cost-effective way.”*

Questions:

1. What guidance documents are being used to establish this condition?
2. Has PADEP mandated this requirement in any other general permit?
3. Has PADEP mandated this requirement for any other beneficial use?
4. Has PADEP mandated this requirement for any PADEP Co-Product approval?

Comment 14:

3. *“...Contact the EPA Region 3 PCB Coordinator at R3_PCB_Coor@epa.gov to determine the allowable PCB level for your site and situation prior to acceptance of material with sample results over 2ppm. Proof that an EPA Region 3 PCB Coordinator has approved acceptance at the receiving site for PCB results over 2ppm is required for authorization to beneficially use regulated fill. Applications that do not contain the EPA Region 3 approval for PCB results over 2ppm will be deemed administratively incomplete.”*

This condition is not achievable as EPA Region 3 is not required to provide written authorization for the acceptance or use of PCB contaminated material. The EPA regulations state how and when PCB contaminated soil can be handled. Imposing this condition establishes a regulation more stringent than Federal requirements and is contrary to PADEP policy as follows: Per DOCUMENT NUMBER: 012-0820-001, titled Policy for Development, Approval and Distribution of Regulations, II. Content of Regulations, 2) No More Stringent than Federal Requirements a) *“As a general rule, DEP will not promulgate regulations which contain standards, procedures, or other requirements more stringent than imposed by federal law unless authorized by state law and determined to be needed to address a problem of state concern.”*

Comment 15:

F. Recordkeeping:

2. "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..."

The requirement of physical evaluations does not make sense as regulated fill is the same as clean fill with the only difference of having been affected by a release or spill as outlined in your definitions. Construction specifications, addressing the physical utilization of the construction materials, already exist in an approved construction project. It is not practical or warranted to have a second level of bureaucracy added as a requirement for this permit.

Questions:

1. Has PADEP mandated maintaining records of physical requirement in any other general permit?
2. Has PADEP mandated maintaining records of physical requirement for any other beneficial use?
3. Has PADEP mandated maintaining records of physical requirement for any other PADEP Co-Product approval?

Comment 16:

3. c. *"The date and weight in dry tons of the regulated fill material received."*

The term "dry tons" is not appropriate nor practical. Dry tons can only be achieved by specific soils testing typically done by sending samples to a soil testing lab. Tons or estimated cubic yards are the standard measurement. Both tons and estimated cubic yards are both inexact for determining the actual volume of real material (dirt) creating the fill. Tons are converted into cubic yards by using a standard conversion of 1.5 tons/CY. This conversion is typical for most soils in the northeast United States. This conversion is used by contractors and assumes the material is close to its optimal moisture content. Variables such as weather, how the material is stored and where the material came from can greatly affect moisture content. Materials received are typically too high in moisture to initially meet compaction requirement and will need to be dried by aeration (spread in thin layers under favorable weather conditions) to remove excess moisture. Therefore, one ton of received material will be less than that number once it is dried and compacted. Estimated cubic yards are typically measure from a stockpile or from the vehicle delivering the material. In both cases the material is not compacted. Compacted dirt can be 20-30 percent smaller in volume to uncompacted dirt. Only grade elevations should be used for determining the exact volume of material received.

Questions:

1. What guidance documents are being used to establish "dry tons" as an appropriate measurement?
2. Has PADEP mandated this requirement in any other general permit?
3. Has PADEP mandated this requirement for any other beneficial use?
4. Has PADEP mandated this requirement for any PADEP Co-Product approval?

Comment 17:

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 be updated annually and provided as part of the fourth quarter report.”*

This scope of this condition is impractical, unreasonable and will render Regulated Fill sites unmarketable for the following reasons:

1. You have **not** defined the term “exact location” but I assume your desire is to locate each Regulated Fill load much like a municipal landfill. If I am correct in this assumption, this condition is not possible when dealing with soils delivered to a construction site which will simultaneously be coming from multiple donor sites, all with varying moisture content, in all types of weather and that need to be compacted to meet construction specifications. Arriving materials will be blended with other material arriving from other donor sites. As material arrives it will be placed as close to their ultimate location as possible. However, drying the material, to meet proper compaction, takes favorable weather conditions which can take months. This situation requires a facility to spread out and aerate the accumulated material prior to placing it in its final location. The initial placement, drying procedure and final placement make it impossible to provide an exact location for any given load of material. The term “exact location” should be changed to “location” to match the condition set in F. 3. b. and should merely identify the location of the project.
2. This condition requires the deed recording to include *“types of regulated fill identified by sampling and analysis.”* Sampling and analysis documents from one donor site can exceed one thousand pages. Multiplying that times hundreds of projects will create a deed that will require its own filing cabinet.
3. The deed notification should only be made as a condition of the permit and made upon issuance.

Questions:

4. What guidance documents are being used to establish this condition?
5. Has PADEP mandated this requirement in any other general permit?
6. Has PADEP mandated this requirement for any other beneficial use?
7. Has PADEP mandated this requirement for any PADEP Co-Product approval?

PADEP should provide for a second comment period due to the volume and complexity of the changes proposed. Inclusion of the regulated community would streamline the process of developing meaningful changes that preserve the original intent of General Permit WMGR096.

Steven J. Kolbe
President

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