

# Material Solution Services, Inc.

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RE: Comments on WMGR096

Dear Mr. Solloway;

On October 6, 2018 the Department published in the Pennsylvania Bulletin draft modifications to the renewal of the WMGR096 Residual Waste General Permit for the beneficial use of Regulated Fill. We applaud the Department's intent to clarify the permit; however, the additional language has raised more confusion. We are providing comment based on practical knowledge of the industry and procedures followed under this and similar permits.

1. The current WMGR096 permit expires December 23, 2018 where renewal applications were due by June 26, 2018 (180 days in advance). The draft permit language was not issued for public comment until October 6, 2018 with public comments due by December 5, 2018. The comment period ends just 18 days before the permit is due to expire. The draft Management of Fill Policy is open for comment until January 8, 2019 and is the underlying policy for the draft permit with important language that is referenced. These timing issues cause significant complications with renewing the WMGR096 permit. All permits and policies must have ample opportunity for public and shareholder comment and the Departments thorough review of impacts from these changes before the permit can be modified. In the interim of these permits and policies becoming final, the department should issue extensions of the current WMGR096 permit for a period of at least one year for these issues to be resolved. The rushed nature of this modification serves no one's interest and should take ample time to properly modify the permit and policy.
2. In the Draft permit the Department has removed the allowance for a receiving site to be a "non-residential greenfield". The remaining language in Section A requires a receiving site to be contain regulated substances, be approved for construction, and zoned and used exclusively for commercial and industrial uses. Is it the Department's new position that any site to be permitted under WMGR096 must strictly be contaminated?
3. The Department includes the definition of background reference area. This is the same language as included in the draft Management of Fill Policy and refers only to the donor site. Background determinations are very infrequent for donor sites in relation to Regulated Fill as the limits account for a spill or release. We believe this

definition should be removed. For already contaminated site requesting an increased background limit by the department should be addressed in this permit. References to the MOF policy language for background at contaminated sites would not be applicable.

4. The new definition of "Fill" lists some exclusionary materials some of which have specific policies for this use. Materials such as acid-producing rock and naturally asbestos rock are naturally occurring materials that would require some additional controls to be safely used. Under the right conditions, such as depth from direct contact, the placement of these materials at large scale permitted Regulated Fill sites would be the safest and most cost-effective option. A condition could dictate the placement conditions and approval. These sites are required to be non-residential and often have the depth to place beyond direct contact. Currently these materials are handled in a number of ways from landfilling to Right of Way disposal.
5. Thank you for updating the definition of "Promptly" to include the state within one-year of completion of fill placement. This issue has been addressed in case law and this definition matches the determination.
6. The definition of "Receiving site" is confusing with the language of "not part of a project area or right of way". Neither of these terms are listed in the draft permit. A receiving site can be a project area for the project but not in relation to a donor site. We suggest deleting the reference to project area in this definition.
7. Dredged material has been specifically defined as Regulated Fill in this draft permit. Historically dredged material was determined to be Clean or Regulated Fill based on the due diligence and testing process. This narrow definition will now require all dredged material to be Regulated Fill even if the analytical testing proves dredge material meets the limits of Clean Fill. This change will have an immense financial impact to the Pennsylvania economy. All sand and aggregate product dredged material will now be Regulated fill instead of a product. All Pennsylvania waterways that are dredged for any reason will now be waste. Even local small ponds, wetlands, and streams will require dredged material be disposed as waste.
8. By defining Dredged Material as Regulated Fill all dredge dewatering impoundments would be required to obtain a WMGR096 permit. As these sites are located immediately adjacent to the waterway the distance limitations would be problematic. The inclusion of Regulated Fill in only the Regulated Fill definition will cause significant impact to the United States Army Corps of Engineers. Has the USACE specifically been made aware of this change for comment?
9. It was stated by the Department that dredge material is no longer included in the definition of clean fill based on regulations. However, we believe this is a misinterpretation of those regulations. The Regulations define Dredge as "material dredged or excavated from waters..." and the Regulations also define Waste specifically as "...contaminated dredge material." Thus, if dredge material is not contaminated it does not fall under the Regulation's definition of a waste and therefore should be permitted to be handled as Clean Fill. The citation of 25 PA Code 287.2 only references that if dredge material is a waste that it must be managed as Residual Waste as opposed to a Municipal Waste. Nowhere does it state all dredge is a waste. We believe the Regulations clearly states that contaminated dredge should be handled as a residual waste. We recommend the handling of dredge be

determined by its analytical makeup. To that end the Department should change the definition of Clean Fill in the proposed revisions to the MOF by removing “or dredge material” from the sentence “The term does not include materials placed in or on the waters of the Commonwealth or dredged material.”; and add dredge to the definition of Fill.

10. The DOA application requires the inclusion of “engineering properties required for the construction project” in Section C.12.b. What is meant by engineering properties? The subdivision and land development process often does not require any soil engineering properties. The normal construction process is to bring in soils and spread them around and mixing various soil types to meet a specification as established in the construction plan. These soils are worked and compacted in place. The use of regulated fill as a beneficial use as a construction material (soil) does not change the engineering specifications.
11. The purpose of WMGR096 is to promote the beneficial use of regulated fill. The condition of limiting traffic solely for regulated fill would be an impediment to the reuse of this material. If this project was clean fill the same volume of fill would be moved through the same streets with no study or limiting factors. Therefore, the material used in constructing the project has no bearing on the traffic caused by construction and should not be limited solely because of beneficial use.
12. Condition D.1.d requires the permittee to provide a copy of the approved plan or construction permit upon completion. The submission of an approved construction plan is required in the beginning of the permit and it does not make sense to submit it upon completion of the project. Local, county and state agencies do not issue completion letters. If it is the Department's intent for condition D.1.d to cover the construction required after placement then this condition needs to be rewritten to reduce confusion?
13. Condition D.1.e requires that construction begin promptly after completion of regulated fill. Not all approved construction plans utilizing regulated fill require additional construction or approvals. This condition should be rewritten to allow those circumstances.
14. Condition D.3 only allows for regulated fill containing metals to be moved under certain conditions. The previous approvals and the draft MOF Policy allow for parameters other than just metals. This condition should be expanded to include any parameter that has proven to be background.
15. All previous versions of the WMGR096 permit required regulated fill to not be hazardous waste. Those versions allowed for generator knowledge as is allowed in 40 CFR 262.11. Condition D.5 now requires TCLP analysis on any parameter that is 20 times the corresponding hazardous waste limit. This condition should be revised to utilize generator knowledge when applicable.
16. Regulated fill is not allowed to be placed into the waters of the commonwealth. In some previous permits and NPDES applications the Department has directed that regulated fill cannot be placed in areas where infiltration will take place.
17. Draft permit Condition D.12 requires “applicants must disclose intended use of regulated fill when submitting an erosion and sedimentation control plan”. This has been occurring and modifications have been made for sites with pre-existing permits.

The erosion and sedimentation control plans or NPDES permits are applied for simultaneously with the WMGR096 permit.

18. Condition D.20.b is confusing. The condition says “provide regulated fill” which seems misleading since Reclamation of a mine site is not allowed to use regulated fill.
19. The inclusion of tables GP-1a & GP-1b establish a “static” limit for Regulated fill. These values will not be updated when the Statewide Health Standards are update on a three-year basis. This varies from the Management of Fill Policy that requires the limit for clean fill to be based directly on the Statewide Health Standards as they change. This removes the consistency the Department indicated as a goal in these changes.
20. The draft permit does not reference the use of due diligence to determine what parameters must be tested. Condition E.2 references the MOF policy which is undergoing significant revision and is in draft version. Appendix A of the existing MOF policy states due diligence must be applied to determine what potential contaminants must be sampled.
21. Tables GP-1a & GP-1b parameters have changed. The tables add 38 parameters and remove 2 parameters compared to the previous version.
22. In draft permit Tables GP-1a & GP-1b, the following parameters seem to have limits that vary from the decision factor from the MSCs. They are the following:

Parameter	Proposed limit	Correct limit
Benzo(k)fluoranthene	76	26
Benzoic Acid	9,000	180
Chlorobenzilate	620	20
Dichlorobenzidine 3,3-	43	42
Copper	120,000	43,000

23. In Table GP-1b of the draft permit there is a new superscript notation #1 for Arsenic which states both total and SPLP analyses is required. What is the justification for this single metal to be required to have both total and SPLP analyses conducted? The choice of the SHS MSCs have already taken leachability into the established values.
24. In Table GP-1b of the draft permit there is a new superscript notation #2 for Arsenic which references the limit is based on 40 CFR 503 and PA Code 271.914. These references are to the land application of sewage sludge and not the beneficial use of fill as construction material. Also, the referenced limits published in 40 CFR 503 and PA Code 271.914 do not list a limit of 29 for Arsenic in any section.
25. In condition 6 of the current WMGR096 permit SPLP Chlorides is required only for dredged material from tidal streams. With the inclusion of SPLP Chlorides in Table GP-1b the limit would be applicable to all potential regulated fill. The incorporation will cause roadside excavations to be a potential problem due to salt use on roadways. This would cause significant impact to PennDOT and Municipal projects.
26. Condition D.3 references the EPA PCB limit of 2 ppm. This condition fails to state that the limit is the aggregate total of PCBs and not a single aroclor.
27. Condition D.5.b requires the permittee to “Submit a request to the Department” for all new sources of regulated fill. This condition gives no timeframe for Department

review, response, or approval. The current WMGR096 allows the department 10 working days to respond to the permittee before the permittee may commence with beneficial use. The lack of a timeframe penalizes the permittee as there is no reasonable timeframe for a permittee to move forward. We suggest a reasonable timeframe for Department response be included.

28. The department indicated that there is a work load issue in reviewing and responding to regulated fill new source reviews within the 10 working day limit in the current permit as the reason to remove that timeframe. As a permittee we have received new source reviews well within the 10-day timeframe. It is crucial that the department is required to conduct a timely review. Only regulated fill is required to be reviewed by the department.
29. Condition F.1 of the permit requires the permittee to retain records for 5 years. This requirement lists records must be kept onsite and at the permittees place of business. This seems like a redundant duplication of records. Typically, the department requires records be kept onsite so they are readily available. The types of records required for a permitted regulated fill site and sources is massive and an unnecessary burden to be kept in duplicate.
30. Condition F.2 is overly specific and unnecessary. Condition E.1 already requires a laboratory accredited under Pennsylvania Environmental Laboratory Accreditation Act of 2002. Data provided from such laboratories would be provided to contain all the information requested.
31. Condition F.3 requires the permittee to maintain records for “outgoing shipments”. Does this mean that WMGR096 permitted sites are allowed to ship regulated fill out to other sites? The current permit does not have any language about outgoing shipments.
32. Draft permit condition G.1 and G.3.c.viii has immensely increased the required information and frequency of the recorded deed notice. This condition would now require the all sampling and analysis of each accepted source and locations. This far exceeds deed restrictions or environmental covenant requirements for waste landfills and Act 2. Deed restrictions are not meant to contain all information about each source, but rather the horizontal and vertical extent of the area, the type of material used (regulated fill), and any restrictions to that properties use in the future. Annual updates should not be necessary as the permit area would be defined and once complete the deed record can be updated at that time with final means, bounds and elevations.
33. Rather than the department use an overly expansive unformatted deed notice, the draft permit should reference laws and regulations already in place such as the PA Act 68 Uniform Environmental Covenants Act (UECA). The UECA has formats for deed restrictions and also maintains a registry of sites where environmental covenants are in place. The registry would be helpful in allowing the public and future owners of parcels containing regulated fill to identify and track the deed restrictions.
34. Requiring the permittee to notify the department of a violation for a department issued permit is a bit redundant. The department tracks the compliance history of a permittee through the department’s eFACTS tracking system.

35. The new quarterly report requirement for the draft permit requires the reporting of “weight and volume” of material accepted in Condition G.3.a. The permitted site will be accepting the fill by either weight OR volume but not both. Primarily weights are utilized to accurately track accepted fill material. Volumes are highly inaccurate estimates and are used when no weight scale is available or by the load.
36. Condition G.3.b requires a summary of total volume received. Again, volumes are a highly inaccurate estimate and have primarily been provided after being converted from tonnage using an industry accepted generic conversion value. This conversion can continue but the realization that these inaccurate estimates will be problematic in relation to final approval volumes.
37. The annual report requirement of condition G.3.c.ii states a topographical survey map must be conducted annual at the end of year. Firstly, conducting this on an annual basis is unnecessary and should only be implemented towards the end of the project and final grades. Secondly the work of conducting a survey after the end of the year would make it impossible to provide updated topography survey maps by the 20<sup>th</sup> of January. A more reasonable timeframe of 2 to 3 months would have to be provided to conduct this work to the detail requested.
38. Condition G.3.c.iii requires the information of the “person that was supplied the regulated fill”. Again, is this meant to record offsite shipments of regulated fill from the permittee? Otherwise the language needs changed to “supplying”.
39. Condition G.3.c.iv & v require the recording of date generated and provided. What is the purpose of recording both the generation date and provided date. The permittee would only be responsible for the received date of regulated fill.
40. The condition for renewal of the DOA is rather slim in minimum requirements. Section C of the draft permit lists the requirements for a DOA application. It would be logical to reference this section for minimal renewal application requirements.
41. Since the first issuance, the underlying basis for the Management of Fill Policy and WMGR096 has been the Act 2 program. The draft MOF policy has replaced references to the Act 2 Technical Guidance Manual with references to Federal EPA Draft Guidance document. A reference to a final state guidance document should be preferred to a federal Draft. The Act 2 program and its interpretation has been fundamental to the WMGR096 permit.
42. Although the November 27, 2017 DEP letter to permittees stated the changes to WMGR096 would be minor modifications for streamlining the process; the draft permit has extensive changes and additions. A review of the compliance history of the permitted sites on eFACTS does not demonstrate any significant issues with the use of Regulated Fill. With the successful beneficial use of hundreds of thousands of tons per year as regulated fill at these sites it seems unnecessary for such drastic changes.
43. DEP Policies on writing regulation and guidance documents indicate that changes should not diminish PA’s competitive economic advantage. In fact, policies should provide flexibility for cost effective alternatives, drive growth, as so long as not compromise environment. There have been 15 years of successful beneficial use of regulated fill before the draft permit added burdensome requirements. These requirements will have extensive economic impact to Pennsylvania by removing

material that could have been used as regulated fill that will be disposed in landfills at extensively higher costs.

44. For internal reasons most WMGR096 permitted facilities have some form of groundwater monitoring. Including groundwater monitoring would give the department quantitative evidence that the beneficial use of regulated fill is not causing any contamination issues. We would suggest the inclusion of monitoring as a substitution to the inflexible conditions suggested in the draft permit.
45. Condition H.3 is helpful in establishing the procedure to be followed in the case that the Department is unable to reissue the general permit. The use of the verbiage “approved coverage” is confusing. Is this to mean the existing permit that exists prior to the expiration date?
46. Permittees requesting renewal of the permit have applied before June 26, 2018. The DEP regional offices have reviewed the applications for the WMGR096 renewal and have provided technical review letters referencing the requirements of the Draft permit and Draft Management of Fill Policy that have not accepted public comment and issued as final. These comment letters require response by dates after the expiration of the permit. The process taken by the department in the reissuance of the WMGR096 permit is wrought with legal issues. In the interim of these permits and policies becoming final, the department should issue extensions of the current WMGR096 permit for a minimum of one year for these issues to be resolved.

This rewrite of this WMGR096 permit seems overly restrictive. The compliance history of these facilities does not demonstrate the need for such significant increase in regulation. The departments conditions seem to attempt to regulated the beneficial use of construction material as permanent landfills with no future reuse. These sites are all construction activities to redevelop large non-residential properties into higher value properties.

The department also seems to be incorporating new interpretations that are drastically different from the intent of the permit. There has been remarkable variation in interpretations and reviews of sampling and operational procedures from within a single regional office. This pales in the disparity seen in how these sites and submissions are handled from region to region.

The impact of this draft permit language will lead to very limited beneficial use of benign material. The current WMGR096 sites handle over half a million tons per year. These changes will result in a significant increased financial burden for all development costs as the material will be diverted to landfills with diminishing capacity. These changes affect a small number of permittees, but the volume of material is significant.

These comments are only what could be summarized within a short review period. These comments do not extend in depth into the issues with the Management of Fill Policy draft revisions that determine what is regulated fill and the sampling requirement. The permit and policy are intensively intertwined that one is not complete without the other. The department should take extensive time to consider all the comments to both the permit and policy before issuing any final permit. Any rush to put out a final permit would lead to an

unworkable document. We would suggest further shareholder meetings to perfect the language.

Sincerely;

A handwritten signature in black ink, appearing to read "Shelley Gilbert". The signature is written in a cursive style with a large, stylized initial "S" and a distinct "A" at the end.

Shelley Gilbert  
Manager