



December 5, 2018

SUBMITTED VIA ECOMMENT SYSTEM

Department of Environmental Protection
Policy Office
Rachel Carson State Office Building
P.O. Box 2063
Harrisburg, PA 17105-2063

**RE: Comments on Draft General Permit WMGR096
Beneficial Use of Regulated Fill**

Dear Policy Office:

The Pennsylvania Waste Industries Association (PWIA) submits these comments regarding the Draft General Permit WMGR096, Beneficial Use of Regulated Fill (“Draft GP”) published in the October 6, 2018 Pennsylvania Bulletin and available through the Department’s eComment system. **PWIA opposes issuance of the Draft GP** as written, as the purpose and intent of the General Permit—use of residual waste as construction material to support legitimate redevelopment projects—has historically been circumvented by permittees, and the Draft GP will not be effective in preventing further abuses.

PWIA is a non-profit organization and is the Pennsylvania chapter of the National Waste & Recycling Association, and our mission is to promote efficient, environmentally safe management of recycling and solid waste and to advocate for sound public policy affecting the management of recycling and solid waste. PWIA members include both privately held and publicly traded companies, all of whom own and operate recycling and/or solid waste facilities within the Commonwealth, as well as provide solid waste and recyclable material collection and transport services throughout the Commonwealth. As a result, each of PWIA’s members has significant experience with the Department’s waste permitting programs. These comments are based on our collective experiences.

Comment #1: PWIA recommends that the Department abort issuance of the Draft GP because it is contrary to good public policy and has been improperly used by permittees.

PWIA opposes issuance of the Draft GP as actual use of the existing General Permit over the last five years has shown that the purpose and intent of the General Permit—use of residual waste as construction material to support legitimate redevelopment projects—has regularly been subverted and/or circumvented by some permittees. More specifically, a number of General Permittees have been operating large-scale waste disposal operations, charging a fee for each of

the millions of tons of residual waste that they have already received, under the fiction that the waste is being “used” for construction of a bona fide redevelopment project. Unlike regulated disposal facilities that are lined and equipped with extensive treatment and monitoring systems, these “redevelopment” sites are devoid of any of these protective measures. Rather this GP allows “redevelopment” sites to by-pass many of the environmental protection measures on the promise of a potential future use. In several instances, the so-called redevelopment projects are not even scheduled to begin construction until decades in the future—and only after receiving several million tons more of waste and tens or hundreds of millions of dollars in fees for disposing that waste—and without any approvals by local zoning or land development authorities, let alone the semblance of public review and comment.

Stripping away the false facade of redevelopment, many of the permittees currently operating under the existing General Permit are engaged in nothing other than large scale residual waste disposal operations. Under 25 Pa. Code § 287.611(e)(6), the Department is specifically forbidden from issuing a General Permit for land disposal of residual waste.¹ Moreover, this waste is being placed directly in the environment without proper controls to avoid or detect contamination, such as liners and monitoring wells. This is precisely the harm that the Solid Waste Management Act² and 25 Pa. Code Article IX. Residual Waste Management Chapter 287 are intended to prevent.

¹ We note that the application for renewal of the Draft GP is approximately 1,000 pages, and that the applicant avers that it has already received 2,725,000 cubic yards of material since filling started, with another 4,710,000 cubic yards required to complete the fill. The amount of materials already placed under this permit has a mass of approximately 4.1 million tons, and the applicant is looking to more than double that amount as “regulated fill” on what has now expanded to a 174-acre footprint “fill” operation. We further note that this applicant is just one of several large-scale operations utilizing the General Permit to allow for disposal of millions of tons of residual waste without proper environmental protections.

² See SWMA Act, Section 102. Legislative finding; declaration of policy. “The Legislature hereby determines, declares and finds that, since improper and inadequate solid waste practices create public health hazards, environmental pollution, and economic loss, and cause irreparable harm to the public health, safety and welfare, it is the purpose of this act to:

...

(3) require permits for the operation of municipal and residual waste processing and disposal systems, licenses for the transportation of hazardous waste and permits for hazardous waste storage, treatment, and disposal;

(4) protect the public health, safety and welfare from the short and long term dangers of transportation, processing, treatment, storage, and disposal of all wastes;

...

35 P.S. § 6018.102(3), and (4).

These large scale sites are simply not the types of operations that should be permitted through the General Permit process.³ Although the Department specifically reserves the right to require an individual permit if the proposed activity is deemed unable to prevent harm or the threat of harm to the health, safety or welfare of the public or the environment, many current large-scale disposal operations were unfortunately allowed to proceed under this GP in the past despite such resulting harms.

While use of residual waste as a construction material may be appropriate on a limited basis (i.e., where the fill activity is of proper scale and the property's redevelopment is certain and defined), the history and use of the General Permit by permittees has been in direct contravention with the basis and purpose of the General Permit. Having a bona fide development project, reviewed and approved by the proper local authorities and the public, prior to receipt of waste, is an important safeguard to preventing improper land disposal of residual waste, as well as to ensuring that any elevated risks of using waste for construction purposes are understood and addressed by the Department in advance.

Comment #2: If the Department issues the Draft GP, the proposed changes are a small but insufficient step in the right direction.

To the extent that the Department chooses to issue the Draft GP, PWIA is generally supportive of the measures now being proposed by the Department because these changes are directionally appropriate; i.e., the changes are more protective of the environment and public health than what is in the current General Permit. Essentially, the Draft GP intends to treat those permittees functioning as disposal businesses while masquerading as project developers in a manner more similar to individually permitted disposal facilities. While PWIA believes that the newly proposed requirements do not go far enough relative to those large scale operations, the changes do offer some additional protections not found in the current General Permit. Specific changes are discussed in Comments #3 through #12.

Comment #3: If the Department issues the Draft GP, PWIA recommends that the Department finalize the proposed language relating to "Prompt" initiation of construction after placement of fill as an important safeguard to ensure that the integrity of the regulatory program is maintained.

The Draft GP requires that permittees begin actual construction of the project within one (1) year of completion of filling activities. This is accomplished through the new definition of

³ PWIA notes the absurd and inexplicable position wherein the Department allows large-scale disposal of residual waste at "redevelopment" sites throughout the state under the GP process absent the extensive environmental protective measures employed at residual waste disposal sites, while simultaneously prohibiting use of the same material for actual construction or operational uses at the highly regulated, monitored and protective individually permitted disposal facilities. If the Department issues the Draft GP, PWIA strongly recommends that the Department revise the existing waste regulations to ensure that individually permitted residual waste disposal facilities are not unfairly disadvantaged in terms of permitting requirements when it comes to the use of regulated fill for operational and construction activities at the disposal facility.

“Promptly” set forth in Section B. Definitions on page 3 of the Draft GP and used in Condition 1.e. of Section D. Operating Conditions on page 6 of the Draft GP:

D. Operating Conditions:

1. Regulated fill may be beneficially used provided all the following criteria are met:

...

e. The permittee begins construction promptly after the completion of regulated fill placement at the receiving site.

and

B. Definitions

...

Promptly (regarding the timeframe by which construction activities must occur on a receiving site where regulated fill is placed) – Construction that begins within one-year following the completion of fill placement at the receiving site.

Requiring permittees to begin physical construction within one year of completion will help avoid sham permitting by permittees functioning in the waste disposal business but claiming to be project developers. While this condition is helpful, PWIA believes that it is insufficient on its own to chill the continued operation of sham operations, as discussed in Comment #4.

Comment #4: If the Department issues the Draft GP, it is important that an effective enforcement remedy for failure of permittees to begin construction promptly after completion of filling operations be included.

Although permittees are required to begin physical construction within one year of completion of filling operations, the lack of a credible enforcement mechanism will render this requirement toothless. The Draft GP does not set forth the ramifications of a permittee’s failure to commence construction in a timely manner, and given the nature of the permitted activities, the Department’s existing enforcement authority will not be sufficient to compel compliance with this requirement. The fact that whether a permittee will comply with this requirement will not be known for a full year after completion of filling magnifies both the likelihood and harm of non-compliance with this requirement.

For those permittees that are essentially disposal operations and developing bona fide projects, the economic benefit of the operation essentially ends immediately upon completion of filling. In this instance, the Department’s enforcement ability to rescind the permit is ineffective, as the permittee will not suffer any economic downside to such a permit rescission and there is little-to-no benefit to the permittee to holding a permit once filling is complete. Similarly, unlike properly permitted waste disposal facilities, the bonding requirement under Condition 24 of Section D. Operating Conditions on page 9 of the Draft GP is limited to a “general liability

insurance policy.” As a result, the Department cannot use bond forfeiture as a means of motivating compliance.

Theoretically, the Department could order removal of all regulated fill placed by a permittee in the event the permittee fails to promptly commence construction. From a practical standpoint, it is highly unlikely that the Department would chose such a course of action for a variety of reasons, and it is even less likely that a permittee would have sufficient economic resources to perform such a removal.

Simply put, the requirement that permittees begin physical construction within one year of completion of filling requires a strong, clear and explicit enforcement mechanism to be meaningful. Failure to include such an enforcement mechanism undercuts the integrity of the regulatory program generally, and the core purpose of the Draft GP specifically.

Comment #5: If the Department renews the General Permit, PWIA recommends that the Department finalize the proposed language relating to submission of Subdivision and Land Development plans.

The Draft GP includes a requirement that all permittees submit a copy approved Subdivision and Land Development plan for the project. PWIA believes that this is an important step to ensure that sham disposal facilities do not operate under the Draft GP. However, it is only a step, and is insufficient in and of itself to effectively protect the integrity of the permitting program.

Subdivision and Land Development plans are reviewed by local governmental agencies and are required prior to construction. Requiring applications for the General Permit to submit an approved Subdivision and Land Development plan for the project helps ensure that the development project claimed by applicants as supporting issuance of their General Permit is legitimate.

PWIA notes that other land use and/or local governmental approvals may be required for project development and/or construction. PWIA strongly supports inclusion of the Subdivision and Land Development Plan to ensure that placement of regulated fill is appropriate; i.e. requirement to help ensure that permittees are meeting the intended purpose of the General Permit.

Comment #6: If the Department renews the General Permit, PWIA recommends that the Department add additional language to buttress the proposed requirement relating to submission of approved Subdivision and Land Development plans.

Many potential projects receive Subdivision and Land Development plan approval but are never constructed for a variety of reasons. The Department should consider inclusion of additional requirements to ensure that the claimed property development is realistic and will occur. For example, applicants should be required to submit evidence that all local government approvals for a project have been issued; evidence that financing for the property development is in place,

such as copies of letters of credit issued by banks or other financial institutions; and other indicia guaranteeing that the project is bona fide and will be constructed.

Comment #7: If the Department issues the Draft GP, PWIA recommends that they include the proposed language requiring Preparedness, Prevention and Contingency (PPC) Plans

The Draft GP includes a requirement that the “permittee shall develop and implement a Preparedness, Prevention and Contingency (PPC) Plan that is consistent with current Department guidelines.” PWIA believes that this is an important and common-sense requirement to help protect the environment during operation of the operations of these facilities, especially as they will be handling residual waste. This requirement is set forth in Condition 13 of Section D. Operating Conditions on page 8.

Comment #8: If the Department issues the Draft GP, PWIA recommends inclusion of the proposed language requiring submission of a Waste Transportation Safety Plan.

The Draft GP requires submission of “a Waste Transportation Safety Plan that includes, at a minimum, standard operating procedures designed to dis-incentivize overweight trucks and identify designated truck routes, and how such plans will be implemented.” PWIA notes that the material to be used as fill is classified under Pennsylvania law as residual waste until it meets a variety of conditions, including final placement (*See e.g.* Draft GP Condition 10 of Section D. Operating Conditions on page 7). PWIA believes that a Waste Transportation Safety Plan is an important and common-sense requirement to help protect the environment during transportation of residual waste. This requirement is set forth in Condition 15 of Section C. Determination of Applicability Requirements on page 5.

Comment #9: If the Department issues the Draft GP, PWIA recommends inclusion of the proposed language requiring the applicant to perform a Traffic Study. PWIA further recommends that the proposed condition explicitly state that the Traffic Study be reviewed and approved by the Department as part of the application process.

The Draft GP requires “[p]roof 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.” PWIA notes that the material to be used as fill is classified under Pennsylvania law as waste at the time of transportation, and that the potential impact of transportation of millions of tons of waste to these facilities is worthy of evaluation. PWIA believes that all applicants should be required to have a traffic study performed, and that the traffic study should be reviewed by the Department as part of the application process. This is an important and common-sense requirement. This requirement is set forth in Condition 16 of Section C. Determination of Applicability Requirements on page 5.

Comment #10: If the Department issues the Draft GP, PWIA recommends inclusion of the proposed language requiring all independent contractors operating at the facility subject to Compliance History Form submission requirements.

The Draft GP requires that “[a]ny independent contractors or agents retained by the permittee in the completion of activities authorized under this general permit shall be subject to compliance history review by the Department prior to performance of any activities, as specified by the SWMA.” PWIA supports inclusion of this condition, which closes the loophole allowing permittees to avoid compliance history submissions for independent contractors, including closely related entities. This requirement is set forth in Condition 18 of Section D. Operating Requirements on page 8.

Comment #11: If the Department issues the Draft GP, PWIA recommends inclusion of the proposed language requiring all approval for all new sources of waste to be used as regulated fill. PWIA further recommends a small clarification in the language of the proposed condition.

The Draft GP requires that any new source of regulated fill (either from a new or existing donor site) must submit site and laboratory analytical results to the Department for approval prior to use of the waste as regulated fill. PWIA supports inclusion of this condition, as it closes a loophole in the current General Permit regarding sites not initially included in an application. PWIA recommends that the permit language more clearly indicate that Department approval must be received before any waste from the new source is moved or used. This requirement is set forth in Condition 5 of Section E. Sampling and Analysis on page 19.

Comment #12: If the Department issues the Draft GP, PWIA recommends significant strengthening of the proposed language explicitly requiring that permittees comply with federal law as it relates to disposal of Polychlorinated biphenyls (PCB).

The Draft GP very explicitly states that the permittee must comply with both Pennsylvania and federal requirements relating to placement of PCB contaminated waste/materials into the environment. The Pennsylvania requirement is contained in Table GP-1a (pages 10-18) and is considerably less stringent than the federal requirement. The federal requirement is correctly cited as 2 ppm in Condition 3 of Section E. Sampling and Analysis on page 19. There is no explicit requirement in the existing General Permit reminding permittees that compliance with the less stringent state requirement does not invalidate the more stringent federal requirement.

PWIA strongly supports the explicit permit condition reminding applicants that they must comply with federal law at all times, including facilities currently accepting residual waste for use as contaminated fill under the existing General Permit.

PWIA recommends that the Department lower its published allowable level of contamination of PCB to match the federal standard. This is particularly important given the lack of

environmental controls, such as liners and leachate collection systems, at these sites. Similarly, the fact that these sites are being developed (in theory) for human occupation through commercial and industrial purposes, increases the importance of protecting human health and the environment from PCB.

To the extent that permittees under the existing General Permit are not complying with the federal requirements by accepting PCB contaminated waste with concentrations exceeding the limits established under federal law, our expectation is that the Department would take appropriate action to remedy this situation. This would include any on-going disposal of such PCB contaminated wastes in abandoned mining pits, including former slate quarries.

Conclusion

PWIA **opposes issuance of the Draft GP** as the purpose and intent of the General Permit—use of residual waste as construction material to support legitimate redevelopment projects—has historically been circumvented by permittees, and the Draft GP will not be effective in preventing further abuses. We hope that the Department finds these comments helpful in understanding the issues and implications relating to the Draft GP.

Very truly yours,

/s/ Tim O'Donnell

Tim O'Donnell
President