

Comments on Behalf of Bethlehem Earth, L.P.
**Proposed General Permit Modifications and Renewal for Residual Waste General Permit
for Beneficial Use of Regulated Fill (WMGR096)**
December 5, 2018

These comments are submitted to the Pennsylvania Department of Environmental Protection (the “Department”) on behalf of Bethlehem Earth, L.P.¹ (“BE”) concerning the draft version of General Permit WMGR096 governing the use of regulated fill (the “Draft Renewal Permit”) posted on the Department’s public comment website. General Permit WMGR096 plays a critical role in Pennsylvania’s regulatory framework pursuant to the Solid Waste Management Act in that it provides a mechanism to beneficially use in a safe manner fill material that may not qualify as clean fill under the Management of Fill Policy but nevertheless has value and utility for construction and redevelopment purposes. Stated differently, regulated fill represents a resource that should be beneficially used rather than relegated to disposal in landfills that have limited capacity, and General Permit WMGR096 is designed to facilitate such an outcome. The Draft Renewal Permit is intended to replace the current version of General Permit WMGR096 which is set to expire (unless otherwise extended) on December 23, 2018. The Draft Renewal Permit contains numerous changes to the requirements that currently apply to those using regulated fill, such as BE, in conjunction with their projects.

While BE does not object to the majority of proposed modifications contained in the Draft Renewal Permit, BE strongly opposes several of the proposed modifications which, if read literally, might render it nearly impossible for BE and other current or prospective permittees of legitimate regulated fill sites to secure coverage under the Draft Renewal Permit in its current form where filling operations will extend over a multi-year period. If the Draft Renewal Permit is finalized without revising such provisions, the Draft Renewal Permit will potentially halt

¹ Bethlehem Earth, L.P. is a current permittee pursuant to Regulated Fill General Permit WMGR096-NE004 at its site located in the City of Bethlehem, Northampton County, Pennsylvania (the “Site”). BE has been conducting fill operations at the Site since securing coverage under the Regulated Fill General Permit for the Site in July 2014.

currently permitted ongoing operations and prevent such permittees from timely completing their redevelopment projects.

With respect to BE's redevelopment project, which is strongly supported by the City of Bethlehem, the inclusion of provisions in General Permit WMGR096 that would impede BE's ability to complete filling operations and to redevelop the Site into a commercial office/warehouse building project is an outcome that must be avoided. If the Draft Renewal Permit is finalized in a form that impairs fruition of the redevelopment of the Site, the City of Bethlehem, Northampton County and the Commonwealth will be deprived of the significant economic redevelopment benefits of the project, in the form of new tax revenues as well as increased commerce within the community, and the Site will remain burdened by its industrial legacy.

Below are BE's specific comments to the Draft Renewal Permit.

Comment No. 1: Section A.2. of the Draft Renewal Permit includes a newly proposed condition requiring that an eligible receiving site already be "approved for construction." This term is undefined in the Draft Renewal Policy, and is vague and ambiguous. To the extent this phrase is intended to require a site to already have an approved subdivision and land development plan in order to be eligible for coverage under the Draft Renewal Permit, then this requirement would effectively prevent currently permitted projects that do not have approved subdivision and land development plans from securing coverage under the Draft Renewal Permit. Further, for multi-year fill projects, even if such a project had an approved subdivision or land development approval, in light of the requirements and timing limitations contained in the Pennsylvania Municipalities Planning Code ("MPC") for the viability of an approved subdivision or land development plan, it is quite possible that any such approval would no longer be valid by the time filling operations are completed at such multi-year fill project sites.

Presumably, the Department proposed adding this provision to General Permit WMGR096 in an effort to prevent "sham" redevelopment projects, where coverage under a regulated fill general permit is only sought by a permittee as a mechanism to accept and place

regulated fill with no intention of using the regulated fill for redeveloping the receiving site for commercial purposes. In such circumstances, the receiving site is effectively serving the same function as a residual waste disposal facility (e.g., a landfill) but the permittee is seeking to avoid having to go through the more arduous process of securing an individual residual waste disposal permit. While BE fully supports the Department in its efforts to ferret out sham operators who are strategically attempting to avoid residual waste permitting requirements, the use of the phrase “approved for construction” has the real possibility of excluding from coverage under the Draft Renewal Permit genuine redevelopment projects that are currently permitted under the existing version of General Permit WMGR096, as well as proposed new redevelopment projects which require multi-year filling activities, but that are legitimate and should appropriately be able to secure coverage under the Regulated Fill General Permit. Stated differently, while BE supports the Department’s desire to separate legitimate redevelopment projects that require the use of regulated fill from projects that have no legitimacy from a redevelopment perspective, the tools that the Department is proposing to use to make that distinction are misplaced.

To address the concerns that it has raised in the above paragraphs, BE respectfully proposes that the Department revise the Draft Renewal Permit as follows:

- To the extent the Department desires to still include a requirement that a receiving site be “approved for construction,” then the Draft Renewal Permit should also include the following definition of the phrase “approved for construction”:
“approved for construction” – a site shall be approved for construction when the following conditions have been satisfied: (1) a valid permit has been issued by the municipality where the site is located demonstrating that the applicant is authorized to place regulated fill at the site or the municipality has issued a letter of no interest or similar documentation concerning the proposed fill site; or (2) an appropriate representative of the municipality where the site is located has issued one of the following for the site: (a) approval of a subdivision or land development plan for the nonresidential redevelopment of the site, which land development plan may consist of a tentative sketch plan or preliminary land development plan, and which municipal approval may contain conditions of approval, such as the need to secure other

necessary local and state permits and approvals (e.g., a permit under the National Pollutant Discharge Elimination System (“NPDES”) for managing stormwater during construction activities) for the construction project; (b) a zoning consistency letter, confirming that the applicant’s proposed nonresidential redevelopment is consistent with the municipality’s zoning code; or (c) a letter of support, indicating the municipality’s support for the applicant’s proposed nonresidential redevelopment project.

- To the extent the Department still wishes to include a requirement that a receiving site be “approved for construction,” then the Draft Renewal Permit should also include phase-in provisions for existing permittees, such as BE, to afford BE and other similarly situated permittees a reasonable period of time to satisfy these new requirements. BE believes an appropriate phase-in period to secure the approvals necessary to satisfy the above-proposed definition of “approved for construction” should be twenty-four (24) months from the date of finalization and issuance of the renewal permit; further provisions should also be included in the Draft Renewal Permit to allow for the Department to extend the period of time for at least an additional twelve (12) months if so requested by the permittee, along with an adequate rationale for the requested time extension.

It should also be noted that the newly proposed Section D.1.b. of the Draft Renewal Permit – which BE fully supports – contains new structural requirements for the regulated fill to ensure that the receiving sites will be buildable in the future. BE believes that these new requirements will assist in helping to thwart proposed sham operators from being able to benefit from the Draft Renewal Permit.

Comment No. 2: Section B.2. of the Draft Renewal Permit contains the new term “promptly,” which is defined as “construction that begins within one-year following the completion of fill placement of the receiving site.” This definition is then referenced in Section

D.1.e. of the Draft Renewal Permit, which requires that “[t]he permittee begin ... construction promptly after the completion of regulated fill placement at the receiving site.”

For the reasons discussed in **Comment No.1**, above, which BE incorporates herein by reference, a legitimate regulated fill redevelopment project may require multiple years to complete filling activities. Although the proposed nonresidential redevelopment at the site may comply with applicable zoning, and the project may be supported by the local municipality, it may not be practical -- or even possible -- for the permittee to secure necessary municipal land development approvals prior to the completion of filling activities at the site. And even if the permittee is able to secure local land use approvals, such approvals are only part of the myriad of local, state and regional approvals that many redevelopment projects must secure prior to the commencement of construction activities. For example, in order to be in a position to commence construction activities, a permittee would also need to obtain (among other permits and approvals): Act 537 Sewage Facilities Planning approval from the Department; a Chapter 102 NPDES stormwater construction permit from the Department or the county conservation district; if curb cuts onto state highways are required, a PennDOT Highway Occupancy Permit; and necessary local municipal building permits, including architectural, mechanical, electrical, plumbing and structural design and review comments from municipal professionals.

In addition to the necessary approvals and authorizations, the economic reality is that most redevelopment projects are not constructed on a speculative basis, and instead construction does not commence until such time as a sufficient number of tenants have committed to the project in order to secure necessary construction financing for the project. Further, it is extremely difficult to predict the state of the commercial markets at the point in time when multi-year filling operations will be completed at a site, and as was evidenced during the global economic recession that commenced in 2008 – and which was particularly devastating for the U.S. real estate market. Such economic factors outside of the control of the permittee could render this proposed requirement to “promptly” commence construction activities after the completion of fill activities impossible to satisfy.

In light of the above, to the extent the Department wishes to include a time limitation for the commencement of construction activities in the Draft Renewal Permit, BE proposes that a more appropriate and realistic time period to require construction activities to commence would be within three (3) years following the completion of fill placement at the receiving site. Further, the Draft Renewal Permit should include a mechanism for the permittee to secure from the Department one or more extensions of time if the permittee provides the Department with an adequate rationale for the requested extension(s) of time (e.g., existence of a sewer moratorium or other developmental requirements and necessary approvals imposed by governmental agencies with jurisdiction over the project site that were not in place at the time filling activities commenced).

Comment No. 3: Section C.12. of the Draft Renewal Permit includes a requirement that the application contain a “detailed description of the proposed construction activity at the receiving site and the intended use of the site, including . . . (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 for which the receiving site resides.” For the reasons discussed in **Comment No. 1** above, which is incorporated herein by reference, while BE does not object to requiring an applicant to provide a detailed description of the proposed construction activity at the receiving site and the intended use of the site, BE strongly objects to the inclusion of the language contained in Subsection C.12.d. in the Draft Renewal Permit.

At a minimum, the Department should revise this proposed provision to only require the applicant to provide documentation demonstrating that the receiving site is “approved for construction.” As part of this revision, the Department should then also adopt BE’s proposed revisions for defining “approved for construction” as described in **Comment No. 1**, above.

Comment No. 4: BE supports Section D.10. of the Draft Renewal Permit, confirming that regulated fill that complies with the terms of the Draft Renewal Permit and does not exceed the concentration limits in Tables GP-1a and GP-1b shall cease to be a waste when placed at the receiving site. BE believes that Section D.10. should be expanded to clarify that, even if the concentration limits in Tables GP-1a and GP-1b should be lowered in the future, regulated fill

previously placed at a site in compliance with then applicable concentration limits still remains dewatered even if it contains concentrations of regulated substances above revised concentration limits contained in the revised versions of Tables GP-1a and GP-1b.

Comment No. 5: Unlike the existing Regulated Fill Permit, the Draft Renewal Permit does not contain a ten (10) Day Approval provision for new sources of regulated fill material; this provision also currently provides that if no response is received from the Department during the 10-day period of time, the fill source is deemed approved by the Department. BE strongly encourages the Department to revise the Draft Renewal Permit to include this important provision, which provides the regulated community with timing predictability concerning new sources of fill material. Without this timing predictability, BE and other permittees may face potentially disruptive and expensive delays to their fill operations which have the potential to impact the overall viability of the fill operations.

Comment No. 6: Section D.24 of the Draft Renewal Permit contains a requirement for the permittee to maintain in force and effect a general liability insurance policy in accordance with 25 Pa.Code, Chapter 287 to provide continuous coverage during operation of the facility. BE does not object to this provision. BE does, however, object to the language proposed by the Department requiring that the general liability insurance policy remain until the Department issues a “final closure certification.” The quoted phrase “final closure certification” is not defined in the Draft Renewal Permit, and BE believes that this requirement should be revised to require the general liability insurance policy to remain in place until the commencement of construction activities at the permitted site.