

NOBLE, WICKERSHAM & HEART LLP

DESIGN, CONSTRUCTION, ENVIRONMENTAL & LAND USE LAW

BARBARA K. LANDAU
DIRECT DIAL: 617-491-9822
BL@noblewickersham.com

June 17, 2015

Via Electronic Mail

Paul Locke, Director, Response and Remediation
MassDEP Waste Site Cleanup
One Winter Street
Boston, MA 02108

Re: Comments of the Massachusetts Bay Transportation Authority on Draft Interim Policy on the Re-Use of Soil for Large Reclamation Projects, Policy # COMM-15-01

Dear Mr. Locke:

On behalf of the Massachusetts Bay Transportation Authority (MBTA) I am submitting the following comments to the Massachusetts Department of Environmental Protection (MassDEP) on MassDEP's draft Interim Policy on the Re-Use of Soil for Large Reclamation Projects, Policy # COMM-15-01.

The MBTA appreciates the opportunity to review and comment on the draft policy. As you may be aware, the MBTA is currently undertaking some major capital projects, including the extension of the Green Line from Lechmere to Medford, MA. During the course of this and other capital projects the MBTA will be required to dispose of vast quantities of soil and, to a lesser extent, import fill material. However, the MBTA is reluctant to accept soil from third parties and dispose of soil at third party sites without appropriate guidance and standards for management of these soils. On the one hand, as a receiving party, the MBTA has concerns about how much sampling is sufficient to adequately characterize the soil, how it will be trucked to the project, and who will bear liability if unreported hazardous materials are later discovered in the fill material. On the other hand, the MBTA is also concerned with the reuse of its soil. Once the MBTA delivers the soil to site, it has no control over where it is placed, if it is later moved and reused at a subsequent location, or if the use of the receiving site changes (e.g., from RCS-2 to RCS-1) potentially resulting in an MCP reportable condition. Without a clear policy, developers and parties disposing of excavated soil can never be certain of proper reuse or disposal. The fear of potential liability remains a significant deterrent to the beneficial reuse of excavated soil; and if there are no sites to place excavated soil, projects cannot move forward.

We believe, subject to our specific comments on the draft policy set forth below, that the policy should not be limited to sand pits, gravel pits and quarries. It would be useful to

expand the applicability of the draft policy to all sites receiving large quantities. However, a more limited, modified process would be appropriate for smaller quantities of soil.

I. General Comments:

1. The policy should apply to any project that accepts large quantities of fill, not just sand pits, gravel pits and quarries. A policy will provide greater assurance to parties who are receiving and sending the fill material and will encourage beneficial reuse of this material.
2. A similar policy should also apply to smaller projects, to establish protocols for sampling, and determining appropriate locations for reuse of the soil. However, smaller projects with smaller quantities of fill material and fewer trucks and/or shorter duration, should not be required to enter into an Administrative Consent Order. An application or certification process should be sufficient. This submittal should include confirmation of local approval of the soil import activity and commitment for future use(s).

II. Comments on Requirements for Administrative Consent Orders (page 4):

Fourth Bullet: A plan for communicating with the public and involving interested parties at key points in the implementation of the reclamation project. The level of required community involvement should vary depending on the location of the reclamation project, number of truckloads and duration of the project. For example, a reclamation project that will require 50 trucks per day for five months driving through a residential neighborhood and past schools may require greater involvement than a project with fewer trucks, traveling solely on highways and through industrial parks. However, all projects should, at a minimum, be required to obtain local approval from the city or town (e.g., Board of Selectman, planning or engineering departments). Larger project should provide notice to the community and an opportunity for comment.

Sixth Bullet: Plans to comply with all applicable laws and regulations and to prevent nuisance. This requirement is unduly onerous and may deter applicants. Before an applicant knows if the project will be approved, the applicant is not only required to identify all applicable laws, but the applicant is also required to develop plans for compliance. For the purposes of the application, it should be sufficient to have the applicant identify the applicable laws and certify that it will comply. Once the ACO is approved and executed, the applicant can then devote the resources to developing the plans. In the event of noncompliance, MassDEP will have the applicant's certification, indicating that the applicant had knowledge of the applicable laws.

Last Bullet: Stipulated penalties for noncompliance with the Administrative Consent Order, The penalties should take into consideration the relative fault of the party that sent the fill to the reclamation project. The recipient should be able to reasonably rely on the sampling data provided by the party disposing of the fill material, provided that the sampling was completed by qualified individuals in accordance with appropriate protocols. In the event that the disposing party provided false information or conducted inadequate sampling, the recipient should not be

required to bear full responsibility for any resulting release of contamination. Potential liability is a key concern and a deterrent to accepting fill material. In a similar manner, the disposing party should not be held responsible for the recipient's mishandling of the fill material, if the disposing party has provided adequate sampling and analysis of the fill material. This is of particular concern to the MBTA. The MBTA has adopted stringent sampling and disposal protocols and it does not want to be held responsible for less stringent protocols of a recipient. The MBTA should not have liability for contaminated soil that is mixed with the MBTA's soil; or for improper placement of the MBTA soil in a Zone II or RCS-1 location; or for a subsequent change in use or excavation and reuse of the MBTA's soil.

If you have any questions about these comments, please feel free to contact me at (617) 491-9822 or Richard Quateman of Kleinfelder at (617) 498-4735.

Sincerely,



Barbara K. Landau

cc: *(via electronic mail)*

Janis Kearney / MBTA

Andrew Brennan / MBTA

Richard Quateman / Kleinfelder