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June 17, 2015

Paul W. Locke, Director - Response & Remediation
Massachusetts Department of Environmental Protection
1 Winter Street
Boston, Massachusetts 02108

**Re: DRAFT Interim Policy on the Re-Use of Soil for
Large Reclamation Projects Policy # COMM-15-01**

Dear Director Locke,

On behalf of Construction Industries of Massachusetts (CIM), we commend you and the staff of DEP for the open and cooperative process which began last fall as you prepared to develop this Interim Policy in response to Section 277 of the FY 2015 state budget (Chapter 165 of the Acts of 2014).

When this process began last fall, we submitted comments at that time (October 17, 2014) expressing our view that this Interim Policy, or whatever policy or regulation was to be developed, was unnecessary. We reiterate that position today. We continue to believe this Interim Policy is unnecessary as DEP is already engaged in a comprehensive regulatory process which addresses the requirements of Section 277, including protecting the health, safety, public welfare and environment. By adding a new permitting process/Administrative Consent Order (ACO), DEP will be adding unneeded layers to an already regulated area; will be prolonging projects; will be increasing the costs of doing business in the Commonwealth, including publicly bid projects; and will be impeding economic development at a time when the state should be doing all it can to be encouraging it. Section 277 doesn't call for a new permitting system. It calls for oversight of soil going into quarries, sand pits and gravel pits, which we believe can be achieved under current state regulations and processes. In addition to the state regulations, there is ample local, Home Rule oversight for quarries and pits that also provide much of the protections being sought. Again, the aim of Section 277 is the protection of the public's health, safety, public welfare and environment; those protections are in place with current law, regulation and established practices which can already be accessed and implemented.

As we have stated from the outset of the public process, it is important to make clear this policy only applies to quarries, gravel pits and sand pits. There was much discussion, and much confusion, throughout this process as to whether this policy would apply to large MassDOT projects, for example, where in excess of 100,000 cubic yards of soil are moved/removed, or whether it would apply to similar development projects where, again, in excess of 100,000 cubic yards of soil are moved/removed. We were assured this policy was NOT applicable to those projects, rather the policy would be clearly limited in scope consistent with the limited scope of Section 277 of Chapter 165 of the Acts of 2014. Specifically, we've been assured this policy only applies to the receiving quarries, sand pits and gravel pits. The language in the section titled "Applicability" has been rewritten a few times throughout the various drafts and our members are still unclear as to the scope of the policy.

MARCH

Applicability

This Interim Policy is applicable to any project that receives, or plans to receive greater than 100,000 cubic yards of soil in order to fill a quarry, gravel pit, or sand pit.

APRIL:

Applicability

This Interim Policy is applicable to any quarry, gravel pit, or sand pit that receives, or plans to receive greater than 100,000 cubic yards of soil for the reclamation/filling of said quarry, gravel pit or sand pit.

MAY:

Applicability

This Interim Policy is applicable to any project commenced or expanded after May 1, 2015 and which is anticipated to accept 100,000 cubic yards or more of soil for the reclamation/filling of a quarry, gravel pit, or sand pit.

Throughout the discussions it was always the receiving location that was discussed; it was never a specific project. We ask that you rewrite the language to very clearly state this. We've included our suggested language (along with the other suggested revisions below) in the attached marked up document.

In addition to the above comments, the following are additional issues, comments and questions our members have raised concerning the Interim Draft Policy.

- Delete the word "expanded" in the paragraph/sentence under "Applicability." Not sure what "expanded" means.

- What is considered *de minimis* as referred to on page 3: “To be eligible for MassDEP approval pursuant to this Interim Policy, the soil accepted by the quarry, gravel pit or sand pit can contain no more than **de minimis** quantities of Solid Waste (e.g. Municipal Solid Waste and/or Construction and Demolition Waste) as defined in 310 CMR 16.00 and 310 CMR 19.000.”
- On page 4, where it states “a summary of the steps taken to solicit meaningful input from local officials . . . :” insert the bolded language “a summary of the steps taken to solicit meaningful input from **those** local officials . . . :” so you are referring to the previously mentioned local officials to keep it consistent.
- On page 4, where it states “MassDEP will not finalize an Administrative Consent Order on the proposed quarry, gravel pit or sand pit reclamation project unless and until all comments on project impacts related to noise, dust, odor and/or trucks have been appropriately addressed by the proponent” add the bolded words “until all comments **from such local officials** on project impacts”. Again, this keeps it consistent.
- On page 4, where it states that a “Detailed Stormwater Management Plan to prevent impacts to sensitive receptors;” add the bolded language “Detailed Stormwater Management Plan, **if required under state or federal law**, to prevent impacts to sensitive receptors;”
- On page 4, where it states “Detailed Wetlands Impact provisions, . . . “ again add the bolded language “Detailed Wetlands Impact provisions **if required under state or federal law.**”
- Does DEP anticipate expanding the requirement for an Administrative Consent Order for locations receiving large volumes of soil that aren’t quarries, sand pits or gravel pits?
- Will DEP be specifying the total approved soil volume for a proposed reclamation site?
- When does DEP anticipate pursuing the regulations referred to as those that will “likely differ in scope and detail from this Interim Policy?”
- The Interim Policy does not provide details on what specific information DEP will require in order for a reclamation project proponent to apply for approval under an ACO. For example, in regard to data describing the OHM contained in the excavated soil, will DEP be developing and issuing any guidance on how soil proposed for reuse should be characterized? Such as: sample collection procedures, number and type of samples, soil characterization parameters, sample collection frequency etc. Will there be any standardized approach?
- Will DEP be developing and issuing any guidance identifying any prohibited contaminants and the intended limiting concentrations of these compounds (i.e. 1/10 of the MCP RCS-1 Reportable Concentration)?

- Will sludge treated material (paper pulp) be allowed?
- In regard to data describing the relevant characteristics of the location proposed to receive this soil, will DEP be developing and issuing any guidance defining what DEP thinks the potential relevant characteristics of a proposed fill/reclamation site are?
- Will DEP be providing guidance on the minimum content of a proposed Soil Management Plan?
- Has DEP accepted any submittals to date and approved any ACOs for sand pits, gravel pits, and/or quarries that can be used as a guide for a proposed fill site?
- Can DEP provide an indication of the amount of review time needed to obtain the final ACO?
- In regard to the need to demonstrate that the relevant local officials are aware of the project, the Interim Policy provides reasonable detail on how to make this demonstration. The question is the timing. Would DEP undertake a review of a proposed soil fill/reclamation project prior to the local process being initiated? The local process would be more productive if some level of preceding DEP review was already underway, even given that a DEP ACO approval would not be granted until the local process was complete.
- The Draft Interim Policy does not provide details on how the ACO process is to be administered. Who should be contacted at DEP? Does it vary by region?

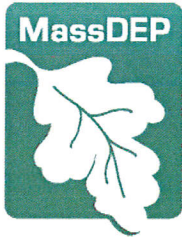
We appreciated the opportunity to meet with you and other officials at DEP during this process and we appreciate the opportunity to provide these comments today. Please let us know if you have any questions or would like us to supply additional information relative to any of the issues we have raised or the suggestions we have made. Again, we thank you for the open and cooperative process which you have conducted and we look forward to the continued collaboration on this and other issues of mutual interest and importance that we will undoubtedly continue to work on in the future.

Sincerely,



John M. Pourbaix, Jr.
Executive Director

Attachment



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DRAFT

Interim Policy on the Re-Use of Soil for Large Reclamation Projects Policy # COMM-15-01

Policy Statement

This Interim Policy provides notice of MassDEP's intent to issue site-specific approvals, in the form of an Administrative Consent Order, to ensure the reuse of large volumes of soil for the reclamation of sand pits, gravel pits and quarries poses no significant risk of harm to health, safety, public welfare or the environment and would not create new releases or threats of releases of oil or hazardous materials.

Effective Date

This Interim Policy is effective immediately. This Interim Policy will remain in effect until it is specifically rescinded or superseded by MassDEP regulations governing soil fill projects promulgated pursuant to Section 277 of Chapter 165 of the Acts of 2014, M.G.L. c. 21E, Section 6, and M.G.L. c. 111, Section 150A. While such regulation will likely differ in scope and detail from this Interim Policy, it is anticipated that the final approach will specifically recognize and accommodate projects commenced under an Administrative Consent Order issued pursuant to this Interim Policy.

Authority

This Interim Policy is implemented pursuant to Section 277 of Chapter 165 of the Acts of 2014¹, M.G.L. c. 21E, § 6² and 310 CMR 40.0000, and M.G.L. c. 111, § 150A³ and 310 CMR 16.00 and 19.000.

Section 277 of Chapter 165 of the Acts of 2014 directs the Department to “*establish regulations, guidelines, standards or procedures for determining the suitability of soil used as fill material for the reclamation of quarries, sand pits and gravel pits. The regulations, standards or procedures shall ensure the reuse of soil poses no significant risk of harm to health, safety, public welfare or the environment considering the transport, filling operations and the foreseeable future use of the filled land.*”

M.G.L. c. 21E, § 6 establishes the Department’s authority to “*specify reasonable requirements, applicable to sites and vessels where releases of hazardous material or oil might occur and to activities which might cause, contribute to, or exacerbate a release of hazardous material or oil, to prevent and control, and to counter the effects of, such releases. Such requirements may be prescribed... by order under section nine⁴ for specific sites and vessels which the department has determined to... be conducting an activity which poses a threat of release of hazardous material or oil.*”

The placement, dumping, disposing or reuse of soil containing oil and/or hazardous material (OHM) into the environment is a “release” as that term is defined in M.G.L. c. 21E § 2⁵. Depending upon site-specific conditions and the nature of the OHM present in the soil, such releases may have significant adverse human health and environmental effects. Examples of such effects include:

- contamination of the underlying aquifer through leaching of the OHM;
- human exposure through direct contact with the soil or inhalation of vapors or particulates emanating from the soil;
- degradation of wildlife habitats;
- degradation of neighboring properties, wetlands, and waterways through stormwater runoff; and
- exacerbation of localized flooding.

Applicability

This Interim Policy ~~is applicable~~ applies to any ~~project commenced or expanded after May 1, 2015~~ quarry, sand pit or gravel pit that accepts or ~~and which~~ is anticipated to accept 100,000 cubic yards or more of soil for the reclamation/filling of a said quarry, gravel pit, or sand pit after May 1, 2015.

¹ <https://malegislature.gov/Budget/CurrentBudget>

² <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleII/Chapter21E/Section6>

³ <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXVI/Chapter111/Section150A>

⁴ <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleII/Chapter21E/Section9>

⁵ <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleII/Chapter21E/Section2>

To be eligible for MassDEP approval pursuant to this Interim Policy, the soil accepted by the quarry, gravel pit or sand pit can contain no more than de minimis quantities of Solid Waste (e.g. Municipal Solid Waste and/or Construction and Demolition Waste) as defined in 310 CMR 16.00 and 310 CMR 19.000.

Soil fill projects to which this policy applies and that are not managed in compliance with this policy may be subject to enforcement pursuant to Section 277 of Chapter 165 of the Acts of 2014⁶, M.G.L. c. 21E, § 6⁷ and 310 CMR 40.0000, and/or M.G.L. c. 111, § 150A⁸ and 310 CMR 16.00 and 19.000.

Fill projects that accept any amount of soil (whether pursuant to this Interim Policy or otherwise) must ensure that the filling does not create new, reportable releases of oil or hazardous materials to the environment pursuant to M.G.L. c. 21E and 310 CMR 40.0000, or will not violate M.G.L. c. 111, section 150A, 310 CMR 16.00, or 310 CMR 19.000.

Nothing in this Interim Policy eliminates, supersedes or otherwise modifies any local, state or federal requirements that apply to the management of soil, including any local, state or federal permits or approvals necessary before placing the soil at the receiving location, including, but not limited to, those related to placement of fill, noise, traffic, dust control, wetlands, groundwater or drinking water source protection.

Implementation

In determining whether to issue an Administrative Consent Order for a specific quarry, gravel pit or sand pit reclamation project, MassDEP will review data describing the OHM contained in the excavated soil proposed to be used for reclamation, data describing the relevant characteristics of the location proposed to receive this soil and the surrounding area, proposed soil management plans, and any other information necessary to ensure the proper handling of the fill material. In addition, MassDEP will review documentation submitted by proponents to demonstrate that the relevant local officials are aware of the project and have been afforded the opportunity for meaningful input. Examples of such documentation may include:

- a copy of any local permit or other approval specific to the use of large volumes of fill material that may be required (municipal approval of an up-to-date reclamation plan for the receiving location, and/or or a municipal permit under an “earth filling” ordinance, and/or any other approval required by a municipality for activities that involve the transportation of soil onto the receiving site); or
- where such local approvals are not required, a copy of any notification to the public in the area surrounding the fill project and the Chief Municipal Official (CMO) and the Chair of the Board of Health (BOH) of the city or town in which the fill project is located of the

⁶ <https://malegislature.gov/Budget/CurrentBudget>

⁷ <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleII/Chapter21E/Section6>

⁸ <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXVI/Chapter111/Section150A>

proposal to use the excavated soil (including a description of the oil and/or hazardous materials that it contains) and

- a summary of the steps taken to solicit meaningful input from those local officials, copies of comments received, and a description of the ways in which these comments have been (or will be) addressed.

MassDEP will not finalize an Administrative Consent Order on the proposed quarry, gravel pit or sand pit reclamation project unless and until all comments from such local officials on project impacts related to noise, dust, odor and/or trucks have been appropriately addressed by the proponent.

Administrative Consent Orders will include, at a minimum, requirements for:

- Implementation of a detailed Soil and Fill Management Plan that specifies how material will be sampled, documented, tracked, transported and managed as well as what materials are permitted and not permitted;
- Detailed Stormwater Management Plan, if required under state or federal law, to prevent impacts to sensitive receptors;
- Detailed Wetlands Impact provisions, if required under state or federal law, including, as applicable, a requirement to obtain an Order of Conditions, Determination of Applicability or other approval or permit to proceed with the project as designed;
- A plan for communicating with the public and involving interested parties at key points in the implementation of the reclamation project;
- Oversight by an LSP or other qualified environmental professional and/or Third Party Inspection program;
- Plans to comply with all applicable laws and regulations and to prevent nuisance conditions; and
- Stipulated penalties for noncompliance with the Administrative Consent Order.

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Date

Gary Moran
MassDEP Deputy Commissioner