



Testimony

Submitted on behalf of the
Pennsylvania Chamber of Business and Industry

Pennsylvania's Clean Fill and Regulated Fill Standards

Before the:
Senate Majority Policy Committee

Presented by:
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Good morning Chairman Argall, Senator Scavello and members of this committee,

My name is Kevin Sunday, director of government affairs for the Pennsylvania Chamber of Business and Industry. The PA Chamber is the largest, broad-based business advocacy organization in the Commonwealth. Our nearly 10,000 members cut across all industrial and commercial categories, and range in size from sole proprietorships to Fortune 50 companies.

It is an honor to testify before you today regarding the state's approach to the use of fill material and the potential regulation of such use under the Pennsylvania Solid Waste Management Act ("SWMA"), 35 P.S. §§ 6018.101 – 6018.1003. We appreciate the opportunity to provide the business community's perspective on this issue. The PA Chamber has been active for decades in working with the legislature and the Department of Environmental Protection ("DEP") on issues related to waste management and the beneficial use and recycling of various types of materials. While other speakers this morning will discuss specific local projects, I would like to take a step back and frame this issue from a statewide perspective and give the committee an understanding of how the state's approach to facilitating the use and reuse of fill material can and does relate to economic development in the Commonwealth.

Our goal is to ensure that wastes are handled, processed, treated, stored and disposed of in a manner that protects the public health and our natural resources, but in such a way that does not impede economic development. At the same time, we strongly support approaches that enable materials to be beneficially used and recycled in ways that conserve resources and avoid unnecessarily exhausting limited landfill capacity. The state's approach to defining when materials are and are not considered regulated under the SWMA has continued to take shape over the years and under multiple administrations. It is vital that the committee understand that, when contemplating any changes to how the state defines regulated material, a thoughtful approach is needed. Establishing stringent numerical limits for what constitutes fill material regulated under the SWMA will make it very difficult for new development to occur in this state – and to build and repair roads, bridges, water lines, sewer lines, and other types of infrastructure. Indeed, virtually any project involving earth disturbance activities will involve the generation or use of fill materials. And when we talk about fill materials, we are not talking about construction and demolition debris, but soils, rock, concrete, brick, used asphalt and other materials essential to infrastructure projects.

If the numerical limits for certain constituents in materials suitable for reuse are set at reasonable levels, then these materials can be moved from one location to another where they can be used to shape the contours of a property or to provide structural support for new development. If those limits are set unreasonably low – such as below background or historical levels – then many, many cubic yards of these materials will no longer be able to be reused but instead will need to be managed as a waste. Practically speaking, this means that soil and other materials which for many years had been present at a site with no threat to public health or the environment might not be able to be moved except to a landfill. This would greatly increase the cost of building new roads and bridges in the state and of building or maintaining many existing commercial, industrial and residential sites. We have and will continue to applaud you, Senators Argall and Scavello, for your votes on Act 89 of 2013 – the comprehensive transportation funding bill, which set the path to build and repair our state's infrastructure. Simply put, should we adopt too conservative approach on clean fill, it will be much more expensive to build and rebuild infrastructure, and would, by necessity, lead to the need to take soils from greenfield or pristine spaces.

Thus it is our aim, and hopefully this committee's as well, to ensure that DEP's administration of policies relating to the delineation of fill material (be it as an unregulated "clean fill" or as fill material that must be managed as a waste under the SWMA) continues to proceed in a balanced manner. The PA Chamber appreciates the time and efforts of this committee and its staff in exploring this issue and listening to our perspective.

While the status of fill material is not specifically discussed in the SWMA, DEP has consistently advanced the position that the reach of the SWMA is sufficiently extensive to cover the management of certain classes of fill material. At the same time, DEP has taken the position that the use of “clean fill” should not be regulated under the SWMA. Establishing the line of demarcation between fill material that is regulated under the SWMA and that which is not has, at various times, proven to be a challenging and controversial process. Given the broad array of projects and activities that take place within the Commonwealth on a daily basis which involve excavating, moving, placing, or otherwise handling soils and other types of fill material, clearly defining this line of demarcation is of critical importance in determining which projects and activities are subject to the SWMA and which are not.

In 2004, DEP issued the initial version of the Management of Fill Policy and thereafter made minor modifications to the document in 2010. The Management of Fill Policy replaced a technical guidance document issued eight years earlier which was referred to as the 1996 Clean Fill Policy. The 1996 Clean Fill Policy attempted to define “uncontaminated” fill material or “clean fill” using extraordinarily conservative numeric standards which proved to be largely unworkable. The Management of Fill Policy represented a marked improvement and rested on three key cornerstone concepts. First, DEP embraced the position that fill material that has not been affected by a spill or release of regulated substances (as determined through appropriate due diligence), it qualifies as clean fill.¹ Second, DEP embraced the position that if fill material has been affected by a spill or release, it can nevertheless qualify as “clean fill” provided that the fill material is analyzed and found to contain regulated substances at concentrations below certain numeric thresholds (generally referred to as clean fill limits or clean fill standards). Third, in setting clean fill standards, DEP endorsed the use, at least to a degree, of environmentally protective numeric standards developed as part of establishing cleanup standards for soils at residential properties overlying used aquifers pursuant to the statewide health standard under the Pennsylvania Land Recycling and Environmental Remediation Standards Act (“Act 2”), 35 P.S. §§ 6026.101 – 6026.908. Specifically, DEP used the lower of residential direct contact numeric values and residential generic soil-to-groundwater numeric values set forth in 25 Pa. Code Chapter 250, Appendix A, Tables 3 and 4 as the clean fill standards. However, DEP rejected using other alternatives available under Act 2 for addressing the soil-to-groundwater pathway. While supportive of the first two cornerstone concepts, the PA Chamber recommended that DEP utilize the full “tool box” available under Act 2 for setting clean fill standards.

Over the last decade, the Management of Fill Policy has played an important role in defining what fill material is a waste and subject to the SWMA versus what fill material qualifies as “clean fill” and that is not subject to the SWMA. Millions of yards of fill material have been classified, moved and used in reliance on the terms of the Management of Fill Policy. In December 2014, DEP proposed to revise the Management of Fill Policy (44 Pa. Bull. 7954 (Dec. 20, 2014)). The proposed revisions largely focused on two areas. First, DEP proposed to change many of the clean fill numeric standards. Second, DEP proposed to change the sampling

¹ The Management of Fill Policy defines “environmental due diligence” as “[i]nvestigative techniques, including, but not limited to, visual property inspections, electronic data base searches, review of ownership and use history of property, Sanborn maps, environmental questionnaires, transaction screens, analytical testing, environmental assessments or audits.” The due diligence step plays a crucial role in the implementation of the Management of Fill Policy. Those relying on due diligence to classify fill material need to have a high degree of confidence in the quality and conclusions of the process, particularly given the significant liabilities under the SWMA that can arise if fill material is improperly classified. In that regard, due diligence should generally be performed by qualified environmental professionals.

protocols, set forth in Appendix A of the Management of Fill Policy. The PA Chamber met with DEP staff and expressed a number of concerns related to both of these areas.²

The apparent impetus for the proposed changes to the Management of Fill Policy was described by DEP in discussions with the Solid Waste Advisory Committee ("SWAC") as the desire to update the clean fill standards to reflect changes to the cleanup standards under the statewide health standard of Act 2 that have occurred since 2004. Act 2 is the state's Land Recycling Act or brownfields clean-up law, which has been a national model for how to proceed with cleaning up sites of all types in a manner that protects public health and the environment. The PA Chamber urged DEP in our comment letter to address the challenge of tying clean fill standards to Act 2 standards on an on-going basis, as there are significant questions about how, should the standards change mid-course, DEP will treat fill material at an active site. This issue is of particular concern because DEP is committed to reviewing and changing as appropriate the cleanup standards under the statewide health standard of Act 2 every three years, meaning that if the clean fill standards are tethered to the standards under Act 2, the clean fill standards likewise will likely change every three years.

Further, the PA Chamber and other business groups noted that establishing clean fill standards at levels below background for key regulated substances will hamper economic development in this state. Regulatory policy must recognize that human activity for centuries now has resulted in the deposition of certain substances onto soils, and that that background deposition (or naturally occurring levels) is different than accumulation of a substance due to a spill or release.

For approximately 65 regulated substances, the newly proposed 2014 clean fill standards were lower than the current clean fill standards. Almost all of these regulated substances are organic compounds. However, PADEP also proposed to reduce the clean fill standards for certain metals and in some cases, those changes were more than an order of magnitude lower than the current clean fill standards. Metals are naturally found in soils.

Any decreases in the clean fill numeric standards will have the effect of restricting the amount of fill material that can qualify as "clean fill" and be productively used in development activities where fill material is needed. At the same time, any decreases in the clean fill numeric standards will increase the amount of fill material that will be labeled as a waste and subjected to regulation under the SWMA. The line of demarcation represented by the clean fill standards is extremely important. Fill materials that are subject to regulation under the SWMA generally may not be used without satisfying storage, transportation and permitting requirements pursuant to the SWMA. In many instances, such fill materials will need to be disposed of in landfills and other permitted waste disposal facilities. Moreover, even if fill materials subject to regulation under the SWMA can be beneficially used instead of being disposed of, the complications, time delays, costs and regulatory "red tape" associated with beneficial use is often sufficient to deter such use. This will not only compliance and delay the completion of certain projects, including construction and infrastructure, but could require the development of new soil borrow areas to import soil from - thus impacting even more properties across the state.

We have expressed our concerns to DEP and appreciate DEP's openness in understanding our positions. We understand that DEP plans to issue a revised version of the Management of Fill Policy later this year for public comment. We will again encourage DEP, once there is an opportunity to comment publicly again on

² Comments of the PA Chamber of Business and Industry re: Proposed Technical Guidance – Revisions to Management of Fill Policy (Document Number 258-21820773). Feb. 17, 2015.
https://pachamber.org/advocacy/legislative_agenda/communications/PA_Chamber_Clean_Fill_FINAL_021715.pdf

this policy, to move forward with an approach that balances economic development and environmental protection.

Thank you for the opportunity to bring our perspective on this important matter, and I look forward to answering any questions you may have.