

**DEPARTMENT OF ENVIRONMENTAL PROTECTION
ADVANCE NOTICE OF FINAL RULEMAKING**

**Provision for the Management of Safe Fill
Draft Final Regulations**

The Department of Environmental Protection (DEP) is publishing an Advance Notice of Final Rulemaking (ANFR) for the draft final regulations for the management of safe fill in order to solicit comment on changes made to the proposed rulemaking, which was published at 32 Pa.B. 564 on February 2, 2002. The changes recommended to the proposed rulemaking are based on comments received during the public comment period for the proposed rulemaking, which occurred from February 2, 2002 to April 3, 2002, as well as comments received from the Residual Waste Subcommittee of the Solid Waste Advisory Committee (SWAC) and the Cleanup Standards Scientific Advisory Board (CSSAB). While there is no legal requirement to provide an opportunity to comment upon the Department's recommendations for final rulemaking, the Department believes further discussion would serve the public interest in this instance. A 45-day public comment period will be provided on the recommended changes to the proposed rulemaking, which are detailed below.

Background and Summary

Guidelines for the management of safe fill were established by Departmental policy in technical guidance #258-2182-773: *Policy And Procedure Establishing Criteria For Use Of Uncontaminated Soils, Rock, Stone, Unused Brick And Block, Concrete And Used Asphalt As Clean Fill* (effective February 29, 1996). Subsequent revisions were proposed to the policy in March 2000, which were advertised for public comment and review. During the public comment period, several commentators recommended, and the Department concurred, that the Department regulate fill by regulation, rather than by policy. Additional recommendations were also received during the public comment period on the policy, which were considered and incorporated by the Department into a newly proposed safe fill regulatory package. The final regulatory package will amend the municipal waste and residual waste regulations.

Major changes made to the policy, which are contained in the proposed regulatory package, include the following: the definition of clean fill was deleted and replaced with a definition for safe fill, the definition of construction/demolition waste was amended, and new definitions were added for historic fill, sediment and site undergoing remediation activities. In addition to these changes, other significant changes included the addition of five permits-by-rule, including one to the municipal waste program and four to the residual waste program for the beneficial use of contaminated soil, contaminated dredged material, historic fill, contaminated used asphalt and segregated and contaminated brick, block and concrete and contaminated soil placed at a receiving site undergoing remediation activities. The proposed regulations for the management of safe fill were published for public comment at 32 Pa.B. 564 (February 2, 2002).

In response to comments received during the public comment period on the proposed regulatory package for safe fill, as well as the Department's review of other related information, the Department prepared a draft final regulatory package for public comment. The draft final regulation package contains significant changes in four major areas, including the following:

1. The safe fill definition is revised for clarification and shortened by moving the proposed substantive requirements of due diligence, safe fill exceptions and placement along waterways to the body of the draft final regulations. The distinction between brick, block and concrete from construction/demolition activities at residential and commercial properties versus industrial properties is eliminated from the safe fill definition. Material that qualifies as safe fill should not exhibit visible staining but an exception is made to visible staining resulting from normal vehicular use and dripping of vehicular lubricant. The subparagraphs in the historic fill definition are deleted as the requirements are already addressed in the new §287.12 (relating to determination that a material is safe fill). Safe fill is not regulated as waste.

2. Two new sections are created in Chapter 287, §287.12 (relating to a determination that a material is safe fill) for additional materials to qualify as safe fill that do not meet the safe fill definition, and §287.13 (relating to relationship of safe fill to surface waters), which establishes requirements for the placement of safe fill into waters of the Commonwealth.

3. The due diligence standard, which is moved to §287.11(a), now provides for two options instead of the three options originally proposed to evaluate if a material was affected by a spill or release. As a result, Table 3 in Appendix A, which contained safe fill numeric standards for a short list of organic regulated substances, is deleted. Decision on parameters testing from Tables 1 and 2 will depend on the knowledge of the material (or site) and due diligence results. In addition, the use of field screening or laboratory screening methods as part of due diligence is added to this section. In a situation where an analytical method cannot determine the concentration of a regulated substance below its Practical Quantitation Limitation (PQL), the PQL can now be used to demonstrate compliance with the safe fill numeric standards and is added to the safe fill numeric standards determination in §287.11(b)(1)(iii). Similar language allowing demonstration of compliance with PQLs has been added to the new §287.12 and the PBRs. Other changes include provision for using statistical analysis procedures to demonstrate compliance of a material with the safe fill or permit-by-rule (PBR) numeric standards.

4(a). In the proposed permit-by-rule in §271.103(i) in the municipal waste regulations, the term “segregated” is deleted and language is added to clarify that brick, block or concrete may be separate or mixed together, but it should be separate from other waste materials from construction and demolition activities and also recognizable to qualify for use under this PBR. The numeric standards the material must meet are changed from the proposed residential Statewide health standards (SHS) to the nonresidential SHS. As a result of using higher numeric standards, several new requirements added to this PBR are: prohibition to placement of waste in waters of this Commonwealth (proposed §271.103(i)(4) has been deleted); documentation of longitude/latitude where material will be placed; elimination of direct contact pathways promptly and permanently through the use of engineering controls; and submission of records to the Department, including a copy of a recorded deed notice for the property.

4(b). Three of the four permits-by-rule (subsections (j), (k) and (l)) in the residual waste regulations in §287.102 are now consolidated into one permit-by-rule in §287.102(j), and nonresidential Statewide health standards (instead of the proposed residential SHS) are used as the numeric standards that designated waste materials must meet in order to be used beneficially under the consolidated PBR. As a result of using higher numeric standards, several new requirements added to the consolidated PBR are: prohibition on placement of waste in waters of

this Commonwealth, documentation of longitude/latitude where material will be placed, elimination of direct contact pathways promptly and permanently through the use of engineering controls, and submission of records to the Department including a copy of a recorded deed notice for the property.

During the 45-day comment period, the Department is also seeking comments on how to address areas where the natural background levels for Arsenic exceed the proposed safe fill generic number. Based on recent data submitted for our review, the Department has been advised that there may be areas in the Commonwealth that are not affected by a spill or release but have natural concentrations of Arsenic that exceed the Residential Statewide Health Standard. The Department is therefore interested in comments about whether the Standard needs to be revised, or other provisions made to accomplish this reality.

Finally, the Department is seeking comment on the “spill or release” provisions of this proposal. It is the intent of the Department that the safe fill program be a risk-based program, not an antidegradation program. It is also the intent of the Department that the safe fill regulations work in concert with Act 2. The Department is therefore soliciting input on whether the “spill or release” language in the proposal, or any other provisions of the proposal, could be better harmonized with Act 2.

Contact Persons, Availability of the Draft Final Regulations and Submission of Comments

DEP will accept written comments as well as comments transmitted via e-mail on the draft final regulations for the management of safe fill. Comments will not be accepted by facsimile or by telephone or voice mail. All comments sent via e-mail must include the following in the subject heading of the transmission: “Comments on Safe Fill ANFR”. All e-mail transmissions as well as all written comments must include the commentator’s name and address. Written comments must be received by DEP by August 5, 2003. Please direct comments to:

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To request a copy of the draft final regulations and a summary of the changes, please contact the Bureau of Land Recycling and Waste Management at (717) 787-7381. The draft final regulations are also available through DEP’s website at: <http://www.dep.state.pa.us> (select “Public Participation Center – Proposals Open for Comment – Regulations & Other Proposals”). Persons with a disability may use the Pennsylvania AT&T Relay Service at 1-800-654-5984 (TDD users) or 1-800-654-5988 (voice users) and request that the call be relayed to DEP.

Kathleen A. McGinty
Secretary