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January 8, 2019

VIA ELECTRONIC MAIL AND HAND-DELIVRY

Ms. Jessica Shirley
Director
Office of Policy
Pennsylvania Department of Environmental Protection
Rachel Carson State Office Building
400 Market Street
Harrisburg, PA 17105-2063

Re: **Proposed Technical Guidance --
Revisions to Management of Fill Policy (Document Number 258-2182-773)
Comments on behalf of the Pennsylvania Chamber of Business and Industry**

Dear Ms. Shirley:

On November 10, 2018, the Pennsylvania Department of Environmental Protection (“PADEP”) published in the Pennsylvania Bulletin a notice announcing the availability for public comment of substantive revisions to a technical guidance document entitled *Management of Fill Policy* (Document Number 258-2182-773. *See* 48 Pa. Bull. 7176 (Nov. 10, 2018). This technical guidance document is commonly referred to as the “Management of Fill Policy” or the “Clean Fill Policy.” The notice in the Pennsylvania Bulletin invited the public and the regulated community to provide comments to PADEP regarding the proposed revisions to the Management of Fill Policy. PADEP has established a deadline of January 8, 2019, for submission of such comments.

The Pennsylvania Chamber of Business and Industry (“PA Chamber”), the largest, broad-based business advocacy group in the Commonwealth, appreciates the opportunity to comment on the proposed revisions to the Management of Fill Policy. In drafting these comments, the PA Chamber has drawn from a variety of views and resources from its diverse membership, which consists of a broad spectrum of Pennsylvania industrial entities, businesses, and commercial enterprises, many of which will be affected by the proposed revisions to the Management of Fill Policy. Historically, the PA Chamber has worked with PADEP in an effort to craft policies that allow for economic development and environmental protection to occur together. It is our aim that PADEP’s administration of policies relating to the delineation of fill material that can be used as unregulated “clean fill” and fill material that instead must be managed as a waste under the Pennsylvania Solid Waste Management Act (“SWMA”), 35 P.S. §§ 6018.101 – 6018.1003, continues to proceed in such a balanced manner. The PA Chamber appreciates the time and

efforts of PADEP staff in reviewing these comments and considering our suggestions and recommendations.

Regulatory Background and Context for Proposed Changes to Management of Fill Policy

The PA Chamber has a long history of working together with PADEP in an effort to address issues relating to potential regulation of fill material under the SWMA. While the status of fill material is not specifically discussed in the SWMA, PADEP 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, PADEP 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, proved 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, defining the line of demarcation is of critical importance in determining which projects and activities are subject to the SWMA and which are not.

In 2004, PADEP 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 that 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, PADEP embraced the position that if fill material 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, PADEP embraced the position that if fill material has been affected by a spill or release, it can nevertheless qualify as “clean fill” if 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, PADEP endorsed the use, at least to a degree, of numeric values 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, PADEP 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,

¹ 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.

Tables 3 and 4 as the clean fill standards.² However, PADEP 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 PADEP utilize the full “tool box” available under Act 2 for setting clean fill standards.

Over the last fifteen years, 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 can be used outside the scope of 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. PADEP is now proposing to substantially revise the Management of Fill Policy, a process that began more than four years ago.

On December 20, 2014, PADEP issued proposed revisions to the Management of Fill Policy. Those revisions largely encompassed two areas. First, PADEP proposed to change many of the clean fill standards. Second, PADEP proposed to change the sampling protocols set forth in Appendix A of the Management of Fill Policy. These proposed changes were significant in their own right but also had far reaching ramifications that were not addressed in the proposed changes to the Management of Fill Policy.

The apparent impetus for the proposed changes to the Management of Fill Policy was described by PADEP 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. While perhaps perceived by PADEP as a routine “housekeeping” step, the proposed changes to the Management of Fill Policy were extremely significant and had the potential for causing dramatic and adverse consequences for the regulated community. The PA Chamber therefore recommended that consideration of the proposed changes to the Management of Fill Policy be suspended until PADEP had an opportunity to work with interested stakeholders to identify and address the issues engendered by the proposed changes. In addition, the PA Chamber recommended that PADEP involve the Cleanup Standards Scientific Advisory Board (“CSSAB”) in this process. The CSSAB commented extensively on the proposals that ultimately culminated in the Management of Fill Policy in 2004. The PA Chamber also noted that further changes to the cleanup standards under Act 2 were then pending. Those changes were subsequently finalized and went into effect on August 27, 2016. *See* 46 Pa. Bull. 5655 (Aug. 27, 2016).

² The direct contact numeric value for a regulated substance corresponds to the concentration of a regulated substance in soil that will not pose unacceptable risks to a human receptor through direct contact with the soil. The generic soil-to-groundwater numeric value for a regulated substance is based on a highly conservative modeled prediction of the total concentration of that regulated substance in a soil matrix that can be present without leaching into percolating pore water at a rate that would cause the concentration of the regulated substance in the water to exceed the corresponding groundwater standard.

In response to the comments submitted by the PA Chamber and others, PADEP decided not to proceed with the changes to the Management of Fill Policy proposed in 2014. Instead, PADEP has undertaken a full-fledged review of the Management of Fill Policy. The proposed version of the Management of Fill Policy issued for public comment this past November represents a wholesale overhaul of the Management of Fill Policy designed to clarify the terms of the document and to facilitate its use. As with the prior proposed changes to the Management of Fill Policy, PADEP is proposing to modify the clean fill standards and the sampling protocols. The proposed changes extend well beyond just those two sets of issues, however.

By the same token, PADEP has retained the basic structure of the Management of Fill Policy that PADEP embraced in 2004 – namely, that fill material can qualify as clean fill if either: (1) it is unaffected by a spill or release of a regulated substance or (2) it has been affected by a spill or release of a regulated substance but the concentrations of the regulated substance meet the clean fill standards as set forth in the Management of Fill Policy. The PA Chamber is fully supportive of this framework. With that said, the PA Chamber has a variety of concerns with respect to many of the changes that PADEP is proposing to make within the basic architecture of the Management of Fill Policy. These concerns are generally described below. As in the past, the PA Chamber remains committed to working with PADEP as part of a stakeholder process and to explore in detail the concerns associated with the proposed changes to the Management of Fill Policy.

Discussion

1. PADEP is Proposing to Narrow the Universe of Materials that Can Qualify as Clean Fill without a Sound Supporting Basis

Under the proposed version of the Management of Fill Policy, PADEP is proposing to narrow the universe of materials that potentially can qualify as clean fill. Of paramount importance, PADEP has inexplicably eliminated dredged material as an entire category of material that can qualify as clean fill. This represents an abrupt departure from the manner in which dredged material has been consistently treated under the Management of Fill Policy. By fiat, PADEP is proposing to classify all dredged material as a waste under the SWMA thereby eliminating a resource that has been safely and effectively used, while creating a waste stream that would not otherwise exist. Under the proposed version of the Management of Fill Policy, dredged material will only be able to be used pursuant to the requirements of General Permit WMGR096 (relating to the beneficial use of regulated fill). There appears to be no justification for the position that PADEP is advancing. The PA Chamber believes that it is imperative to restore the ability to use dredged material as clean fill.

PADEP has also imposed restrictions on the use of used asphalt as clean fill. Used asphalt has long been a type of material that can qualify as clean fill. In the proposed definition of used asphalt, used asphalt only includes chunks of asphalt greater than one inch in size. While the PA Chamber understands that PADEP wishes to distinguish reclaimed asphalt pavement (which is

separately defined) from used asphalt, the sizing requirement is a wholly impractical method for achieving this result. It is sufficient simply to exclude reclaimed asphalt pavement from the definition of used asphalt given the specific methods (such as milling road surfaces) that generate reclaimed asphalt pavement.

Finally, PADEP is proposing to clarify the status of historic fill. Under PADEP's proposal, historic fill must be sampled and can qualify as clean fill if it meets the clean fill numeric standards and is a conglomeration only of soil, rock, stone, gravel, used asphalt, and brick, block or concrete from construction and demolition activities that is separate from other waste and recognizable as such. The second prong of the proposed test advanced by PADEP injects a level of needless subjectivity (an "eye test") into the evaluation that has very little to do with whether historic fill can be used safely. The sampling results obtained from historic fill are a far more objective way of determining whether the material is "uncontaminated" and therefore should qualify as clean fill. As with other forms of fill material, if historic fill is tested and meets the clean fill standards, it should qualify as clean fill.

2. PADEP Should Use the Full Tool Box Under Act 2 to Establish Clean Fill Standards

As discussed above, the current clean fill standards reflect only partial use of the regulatory toolbox available under Act 2. The proposed changes to the Management of Fill Policy will perpetuate this approach. While PADEP is proposing to endorse the use of the Synthetic Precipitation Leaching Procedure ("SPLP") as an option to evaluate the propensity of regulated substances to leach from fill material (a step that the PA Chamber strongly supports), PADEP is proposing to continue to use only the generic soil-to-groundwater numeric values under the statewide health standard of Act 2 in setting the clean fill standards. The PA Chamber has long advocated use of the full tool box under Act 2 in setting clean fill standards which includes selecting soil-to-ground numeric values based on the higher of the generic soil-to-groundwater numeric values and numeric values based on 100 times the relevant groundwater standards. The PA Chamber reiterates its position here.

Other than the clean fill standards for polycyclic aromatic hydrocarbons ("PAHs") and polychlorinated biphenyls ("PCBs"), almost all of the clean fill numeric standards for organic compounds are based on the generic soil-to-groundwater numeric values. Where these numeric values are overly conservative, the clean fill standards are likewise overly conservative. In contrast to the methods employed by PADEP to determine clean fill standards, the approach under Act 2 allows either the generic soil-to-groundwater numeric values or the numeric values that are 100 times the relevant groundwater standards to be selected as representative of numeric values that are protective of groundwater quality. The impact of using the more limited method embraced by PADEP to establish clean fill standards is significant. Over 50% of the organic regulated substances listed on Table FP-1a of the current Management of Fill Policy would have less stringent clean fill limits if PADEP simply used the higher of the generic soil-to-groundwater numeric values and the 100 times groundwater standards (consistent with Act 2) to

determine the appropriate soil-to-groundwater numeric values for purposes of calculating clean fill standards. The consequences of such conservatism are that significant amounts of fill material that could be safely used as clean fill instead are classified as wastes under the SWMA.

3. PADEP Should Enhance Grandfathering Protections for Fill Material

In its prior comments, the PA Chamber underscored the fact that changes to the clean fill standards to make those standards more restrictive have tremendous potential for unintended consequences.³ Over the past 15 years, large amounts of fill material have been moved and placed within Pennsylvania in reliance on the current clean fill standards. More restrictive clean fill standards put the status of such fill material in question. In an apparent attempt to address this particular issue, the proposed version of the Management of Fill Policy provides that it does not apply to fill materials that have been placed prior to the effective date of the changes to the Management of Fill Policy unless that fill material is subsequently moved. While such a provision is useful, it does not go nearly far enough.

In the proposed version of the Management of Fill Policy, PADEP is proposing to incorporate by reference certain numeric values under the statewide health standard of Act 2 to establish clean fill standards. This approach ensures that every time the medium specific concentrations (“MSCs”) under Act 2 are modified, the clean fill standards will be modified at the same time. PADEP is required to update the MSCs on a periodic basis (typically on cycles of three to four years). The incorporation-by-reference approach means that the regulated community will be confronting ongoing shifts in clean fill standards. The implications of these changes cannot be underestimated and highlight the need for a robust “grandfathering” process in conjunction with any changes to the Management of Fill Policy (including the periodic changes to the clean fill standards that are envisioned).

From a practical perspective, it is critical that PADEP address the problems created by a system that can render material that qualifies as clean fill one day a waste subject to full regulation under the SWMA the next. This dynamic is present with respect to virtually any project that is pending or in process but not yet complete at the time that the MSCs are revised. The problem is particularly acute for large development projects that may proceed in stages and be designed

³ It is important to note that 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.

around the current clean fill standards. Contracts, real estate agreements and various other types of commercial documents may be tied to the existing clean fill standards. Fill material may have been acquired and stockpiled in anticipation of upcoming construction activities. Bids for projects may be based on the availability of clean fill using the existing clean fill standards. Publicly funded infrastructure projects may be premised on managing fill material in accordance with the current clean fill standards. The additional costs associated with modifying the clean standards to be more restrictive may cause such projects to be deferred or abandoned altogether, particularly where state and local governments are already facing tremendous budgetary limitations.

To address these concerns, PADEP needs to go beyond what it has proposed in terms of “grandfathering” protections. At a minimum, the revisions to the Management of Fill Policy should confirm that future modifications to the clean fill standards will have no effect on fill material that has already been determined to be clean fill under the requirements in effect at the time the determination is made. Stated differently, once fill material is determined to qualify as clean fill pursuant to the requirements in effect at the time the determination is made, that fill material should retain its classification as clean fill regardless of how the standards might change in the future. Otherwise, fill material that is acquired and moved in good faith reliance on existing standards might be rendered waste material simply by a change in the standards.⁴

4. PADEP Should Simplify the Approach for Establishing Background Levels of Regulated Substances

Based on the current MSCs under Act 2, it is apparent that PADEP’s proposal to incorporate by reference key numeric values in establishing clean fill standards will result in sharply lower clean fill standards for a significant number of regulated substances. Some of the new clean fill standards will fall below background levels. Background levels can be either the result of naturally occurring substances (such as metals) being present or the result of the diffuse effects of centuries of human activities in Pennsylvania.⁵

⁴ It is miscarriage of governmental function to establish a process whereby thousands of construction projects across the Commonwealth will be subject to the vicissitudes of when changes to the MSCs under Act 2 may be published in the Pennsylvania Bulletin.

⁵ We note that concerns regarding clean fill standards being set below background concentrations of regulated substances are not new but will certainly become more acute. Naturally occurring inorganic compounds such as arsenic may be present in fill materials at concentrations above the clean fill numeric standards even though the fill materials have not been affected by a spill or release. Under such circumstances, the fill material can qualify as clean fill. Given the broad definition of a “release” that is utilized in the Management of Fill Policy, however, the rationale is more difficult to apply in circumstances where the regulated substances at issue are not part of the geologic composition of the fill material. Moreover, it does not account for the presence of regulated substances (including inorganic compounds) that are the result of generalized anthropogenic activities as opposed to a particular event resulting in the release of regulated substances.

For example, PAHs are widely found across Pennsylvania, particularly in urban and suburban areas. While sources of PAHs can vary significantly, PAHs commonly result from the combustion of coal, petroleum-based fuels and wood. The activities of daily living over the past two centuries within the Commonwealth, including cooking food, heating dwelling places, operating furnaces and factories, and utilizing internal combustion engines for transportation for many decades have contributed to the ubiquitous presence of PAHs. Air-borne deposition of PAHs from both stationary sources and mobile sources has distributed low levels of PAHs throughout many if not virtually all of the developed regions of Pennsylvania. Rural areas are also not immune. In addition, PAHs are found in asphalt and combustion residues that are ubiquitous in developed areas, particularly where urban land units are present. Indeed, in many of Pennsylvania's major population centers, vast areas rest on fill material that was placed decades if not centuries ago. This is particularly true in areas adjacent to waterways such as the Delaware River, the Schuylkill River, the Susquehanna River, the Monongahela River, the Allegheny River and the Ohio River. While human activities are a key driver for the widespread presence of PAHs, naturally occurring events such as forest fires also contribute to the presence of PAHs.

Although the proposed version of the Management of Fill Policy introduces an additional mechanism for attempting to take background concentrations of regulated substances into account in making clean fill determinations, the approach that PADEP has set forth is so complicated and onerous that it will be unlikely to be used. It is critical that a simpler way to address background concentrations of regulated substances be developed.

One option is for PADEP to issue default background values for certain commonly occurring regulated substances for which clean fill standards will fall below background standards. For metals, anticipated clean fill standards for arsenic and vanadium are particularly problematic. For organic compounds, the anticipated clean fill standards for certain PAHs are particularly problematic, including, but not limited to, the anticipated clean fill standard for benzo(a) pyrene.

Regulatory agencies outside of Pennsylvania such as the Massachusetts Department of Environmental Protection ("MADEP") and the Illinois Environmental Protection Agency ("IEPA") have recognized the ubiquitous nature of PAHs in urban and suburban environments. Default background concentrations of PAHs have been established, even though PAHs are not naturally occurring like many inorganic compounds. Normal concentrations of benzo(a)pyrene in soils in developed areas can often exceed 2 mg/kg, simply from long term atmospheric deposition of combustion byproducts from burning of fossil fuels and wood. With respect to metals, regulatory agencies such as the New Jersey Department of Environmental Protection ("NJDEP") and the Maryland Department of the Environment ("MDE") have established naturally occurring background concentrations that are extremely helpful in providing a point of reference for metals that are frequently encountered in soils.

If PADEP moves forward with the proposed changes to the Management of Fill Policy without adequately addressing the background issue, the result may very well be that large amounts of

materials that are excavated in urban and suburban areas will need to be managed as wastes under the SWMA. Such an outcome that will have tremendous adverse consequences for the regulated community, state and local governmental entities, and the Commonwealth as a whole.

5. PADEP Should Further Evaluate the Increased Paperwork Requirements that are Proposed

In the proposed version of the Management of Fill Policy, PADEP has substantially expanded the paperwork requirements associated with the use of clean fill. For example, any transfer of clean fill must be accompanied by the submission to PADEP of Form FP-001 (*Certification of Clean Fill*, 2500-FM-BWM0008) by the owner of the receiving site. As part of the submission of Form FP-001, the owner of the receiving site must also include copies of various documents, including laboratory reports and other supporting documentation. Based on the proposed version of the Management of Fill Policy, it appears clear that the submission of such paperwork to PADEP is for informational purposes only. Such an approach begs the question of what PADEP intends to do with all of the paperwork that it will be receiving and whether it has adequate staff (and file space) to manage the paperwork. Before proceeding with the imposition of yet further paperwork requirements, PADEP should carefully consider whether those requirements will actually result in any meaningful benefits and whether it has the administrative resources to effectively manage the implementation of those requirements.

6. PADEP Should Revise the Proposed Sampling Procedures and Protocols

Appendix A of the proposed version of the Management of Fill Policy contains extensive new requirements relating to sampling procedures and protocols. It also incorporates various technical guidance documents issued by the United States Environmental Protection Agency (“EPA”). The rationale for certain of these requirements is missing and/or misplaced. For example, PADEP is proposing to prohibit the use of composite samples to evaluate in-situ fill material. Such a prohibition makes little technical sense and will quadruple the costs of sampling for in-situ fill material. In addition, PADEP has referenced certain technical guidance issued by EPA relating to sampling requirements for PCBs that are inapplicable to the evaluation of fill materials. PADEP has also relied on technical guidance issued by EPA relating to statistical evaluation of sampling results and random sampling protocols when those matters are addressed in the Land Recycling Technical Guidance Manual (“TGM”) issued by PADEP. At a minimum, it would seem appropriate to include the TGM as a relevant source of technical guidance regarding these matters.

7. PADEP Should Clarify Proposed Requirements Relating to Environmental Due Diligence

In the proposed version of the Management of Fill Policy, PADEP has expanded the definition of “environmental due diligence” and described in greater detail the role that environmental due diligence generally plays in determining whether fill material qualifies as clean fill. The PA

Chamber fully supports the use of environmental due diligence in making clean fill determinations. At the same time, the PA Chamber believes that several additional modifications to the Management of Fill Policy in this regard are necessary, as follows:

- Sufficient latitude for qualified environmental professionals to employ professional judgment must be provided in conducting environmental due diligence.
- Environmental due diligence should be treated as distinct from sampling and analysis activities (the proposed version of the Management of Fill Policy appears to treat sampling and analysis activities as a subset of environmental due diligence).
- The focal point of environmental due diligence must be on whether fill material from a donor site has been affected by a release of a regulated substances as opposed the donor site itself or areas in proximity to the donor site.
- While environmental due diligence is useful in many instances, sampling of fill material to determine whether the material qualifies as clean fill should be permissible in lieu of relying on environmental due diligence. For example, this approach may be selected for utility projects that involve hundreds of small properties where sampling is a more efficient mechanism to deploy than engaging in environmental due diligence at each of those properties.

8. PADEP Should Clarify Requirements for Utility Projects

The proposed modifications to the Management of Fill Policy include a new definition for the term “project area” which is generally quite helpful, particularly for projects involving excavation, movement or reuse of fill that occurs within a single parcel. It is unclear, however, how this definition may apply to linear projects such as utility line work that may involve large numbers of small properties. Such linear projects are very similar in characteristic to road construction projects and other types of activities that occur within delineated rights-of-way. The PA Chamber suggests that PADEP clarify that linear projects such as utility line work can be considered to involve activities within a “project right-of-way” for purposes of determining the applicability of the Management of Fill Policy to such projects. Such clarification would be useful not only for work within the footprint of linear projects but in terms of reconciling the concept of multiple donor sites in the context of utility line work. In addition, we note that because of the constraints often associated with utility line work (e.g., construction activities in city streets), it may be necessary to stage excavated materials in centralized locations outside of the immediate working zones until the status of the excavated materials can be determined. The Management of Fill Policy needs to provide sufficient flexibility for the implementation of utility line work in practicable ways.

9. PADEP Should Authorize Use of Clean Fill in Waters of the Commonwealth subject to Appropriate Authorization

The definition of “clean fill” in the current version of the Management of Fill Policy states that “[t]he term does not include materials placed in or on the waters of the Commonwealth unless otherwise authorized.” (Emphasis added). In the definition of “clean fill” in the proposed version of the Management of Fill Policy, the underscored language has been removed. This change is critically important because it precludes the use of clean fill for projects that involve activities in or on waters of the Commonwealth, even if such use has been authorized by an appropriate permit from PADEP. If clean fill is not authorized for such use, then what is? The change that PADEP has made would, for example, preclude the use of crushed stone or rip-rap to protect stream banks, and preclude the use of fill material to construct duly authorized stream encroachments under the Dam Safety and Encroachments Act (“DSEA”) and 25 Pa. Code Chapter 105. It is hard to fathom that PADEP intended to make such a dramatic change. It may be that PADEP intended to suggest that clean fill can be used in an unrestricted manner provided it is not placed in waters of the Commonwealth because placement of clean fill in waters of the Commonwealth would typically trigger permitting requirements under the DSEA and 25 Pa. Code Chapter 105 (i.e., it would not be unrestricted). However, the change to the definition of “clean fill” goes much further and results in an outright prohibition on use of clean fill in waters of the Commonwealth under any circumstances. It is imperative that the phrase “unless otherwise authorized” be restored in the portion of the definition of “clean fill” discussing “materials placed in or on the waters of the Commonwealth.”

10. PADEP Should Clarify the Scope of New Requirements Relating to Toxicity Determinations

The proposed version of the Management of Fill Policy requires that material that will be used as clean fill or regulated fill not exhibit a characteristic of toxicity as determined pursuant to 40 C.F.R. § 261.24 (relating to whether a material is a characteristic hazardous waste). To determine whether a material exhibits a characteristic of toxicity pursuant to 40 C.F.R. § 261.24, it is often necessary to sample the material using the Toxicity Characteristic Leaching Procedure (“TCLP”). Under the hazardous waste program, generator knowledge can also be used to make a hazardous waste determination. It is unclear how PADEP envisions the proposed requirements of the Management of Fill Policy in this regard to be implemented. Under the current version of the Management of Fill Policy, sampling of fill material that is performed typically focuses on obtaining total concentrations of regulated substances based on the premise that if the fill material qualifies as clean fill, the probabilities are remote that the fill material would at the same time qualify as hazardous waste. Because the numeric standards for regulated fill are in many instances higher than the clean fill standards, there is a somewhat greater chance that regulated fill might exhibit the characteristic of toxicity. If this is the crux of PADEP’s concern, the PA Chamber suggests that the issue be dealt with in the revisions that are under consideration to General Permit WMGR096 governing the beneficial use of regulated fill and that the working

presumption be left in place that fill material that qualifies as clean fill is not a characteristic hazardous waste.

11. PADEP Should Continue to Work with EPA to Harmonize Federal and State Requirements Relating to PCBs

In the proposed version of the Management of Fill Policy, PADEP has included provisions indicating that the total concentrations of PCBs in fill material may not exceed 50 parts per million (“ppm”) and that fill material containing total concentrations of PCBs exceeding 2 ppm may only be used if EPA has provided advance written authorization for such use. The PA Chamber recognizes that use of fill material containing PCBs has been a topic of discussion between PADEP and EPA. The PA Chamber encourages PADEP to continue to work toward a more practicable solution with EPA for addressing fill material containing PCBs than the approach that is currently proposed. From the perspective of the regulated community, it is incumbent on both EPA and PADEP to come up with a workable solution that does not leave the regulated community facing competing standards and requirements. We believe that the risk-based approach for addressing PCBs in fill material endorsed by PADEP is a much better approach than the brittle approach advanced by EPA. The PA Chamber is quite willing to be part of discussions with both EPA and PADEP to attempt to forge a better solution than the one that is proposed.

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The PA Chamber very much appreciates the opportunity to provide comments regarding the proposed changes to the Management of Fill Policy. The PA Chamber has serious concerns regarding certain of the proposed changes and the ramifications that flow from those changes. We would welcome the opportunity to meet with PADEP to discuss these concerns and to be part of any stakeholder group that PADEP may convene to evaluate further the need for and implications from the proposed changes to the Management of Fill Policy. We may be able to provide additional suggestions that would be of assistance to PADEP as part of this process.

Sincerely,



Kevin Sunday
Director, Government Affairs
Pennsylvania Chamber of Business and Industry

cc: Technical Guidance Coordinator
Ms. Ali Tarquino Morris
Michael M. Meloy, Esquire