

ADVANCE NOTICE OF FINAL RULEMAKING
DEPARTMENT OF ENVIRONMENTAL PROTECTION

(25 PA Code Chapter 271 and 287)

Draft Final Regulations for the Management of Safe Fill

Executive Summary

The Department of Environmental Protection (DEP) is publishing an Advance Notice of Final Rulemaking (ANFR) for regulations that were proposed for the management of safe fill (at 32 Pa.B. 564 on February 2, 2002) in order to solicit comment on changes made to the proposed rulemaking. 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). A 45-day public comment period will be provided on the recommended changes to the proposed rulemaking, which are detailed below.

A. Contact Persons 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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Bureau of Land Recycling and Waste Management
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14th Floor
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E-mail: wpounds@state.pa.us

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 AT&T Relay Service by calling 1-800-654-5984 (TDD users) or 1-800-654-5988 (voice users) and request that the call be relayed to DEP.

B. 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 the following areas:

CHAPTERS 271 and 287

§§271.1 and 287.1 – Definitions

Safe fill: The definition of safe fill is revised for clarification and shortened by moving the proposed substantive provisions related to 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 would qualify 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. Also, safe fill is not regulated as waste.

Historic fill: 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).

§§271.103(i) – Permit-by-rule for brick, block or concrete

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 contaminated 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 permit-by-rule (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.

§287.2 – Scope

Subparagraph (3) is added to subsection (e) to exclude excavation of noncoal minerals from noncoal surface mining activities as defined in §77.1, since the practice is already regulated under Chapter 77. Also, a new subsection (l) is added to exclude commercial dredging operations involved mainly in dredging of sand and gravel as these activities are already regulated under Chapter 105 of the Clean Streams Law, including the regulations promulgated under the Federal Coastal Zone Management Act of 1972 (16 USC Section 1456), as amended.

§287.11 – Due diligence and safe fill numeric standards

The due diligence standard is moved to §287.11(a) and, as a result, the title of the section is changed as shown above. The due diligence standard 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).

The proposed residential Statewide health standards (SHS) in §287.11(a) are now in §287.11(b) and are retained as the numeric standards for safe fill. Safe fill must meet the lower of the residential direct contact or residential generic value for used aquifer scenarios for any regulated substance. Practical Quantitation Limitation (PQL) is added to the numeric standards determination in §287.11(b)(1)(iii) to demonstrate compliance with the safe fill numeric standards. Proposed subsection (b), (c), and (d) are changed to subsections (c), (d) and (e), respectively. Statistical analysis requirements are added at §287.11(f), in addition to the proposed discrete and composite sampling and analysis procedures.

§287.12 – Determination that a material is safe fill

The exceptions to the definition of safe fill are completely revised and moved to new §287.12. This section clarifies when and where a material that may or may not be affected by a spill or release can be used as safe fill, if the material exceeds safe fill numeric standards but does not exceed the *nonresidential SHS cap*. The use of the material, if not affected by a spill or release, is restricted to within a right-of-way, within a property or offsite of a residential property. If affected by a spill or release, the use of the material is restricted to within a right-of-way and within a property except for historic fill, which can be moved offsite up to a volume not to exceed 500 cubic yards per excavation location, instead of the proposed 125 cubic yards.

Additional requirements for the determination of safe fill include: the use of an appropriate level of due diligence (if not affected by a spill or release) or mandatory sampling and analysis (if affected by a spill or release) to show the material is below the nonresidential SHS cap; maintenance of documentation to support determination; and requirements to submit a notice of determination and proof of recorded deed notice to the Department. Deed notice is not required if the material was not subject to a release or, in the case of a release, the numeric standards in the material are below the background levels at the property.

§287.13 – Relationship of safe fill to surface waters

Provisions for the placement of safe fill into waters of the Commonwealth are moved from the proposed safe fill definition to new §287.13. The proposed requirement, which requires that safe fill placed into or along surface waters must meet 10% of the safe fill numeric standards, has been deleted. For this placement, the discharge from the material may not violate the requirements of Chapters 16, 93 and 105 and the material may not exceed residential groundwater Medium Specific Concentrations (MSC) by SPLP analysis. No change is made to the proposed requirements applying to placement of material into the waters as part of an active or abandoned mine or abandoned quarry reclamation. Safe fill in that case must meet 10% of the safe fill numeric standards; for metals, an SPLP analysis of a leachate from the material showing that it does not exceed residential groundwater MSC may suffice in locations where groundwater monitoring is ongoing. The proposed regulation for the placement of safe fill into or along surface waters, which includes approval under Chapter 105 and the requirement that material may not exceed water quality standards in Chapters 16 and 93, is retained in the draft final regulations. The option of placement into or along waters is not provided to a material used as safe fill under §287.12 (relating to determination that a material is safe fill).

§287.102(j), (k), and (l) – Permits-by-Rule

Three of the four proposed 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 to 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.

§287.102(k) – Permit-by-rule

The proposed PBR that addresses the placement of contaminated soil at a site undergoing remediation activities in §287.102(m) is retained without change, except that the provision is now in subsection (k).

Appendix A

The following two changes are made to Appendix A:

1. Table 3 (Safe Fill Numeric Standards for Organic Regulated Substances) is deleted as it is not required under the two options for due diligence in the draft final regulations instead of the proposed three options. Safe fill numeric values in Tables 1 and 2 are updated to reflect the changes to those regulated substances in the SHS that occurred when the amended Act 2 regulations were published as final in November 24, 2001 (31 Pa.B. 6395).
2. As the three PBRs (j, k and l) proposed in §287.102 are now consolidated into one PBR (j), Tables 4, 5 and 6 are no longer needed and are therefore deleted. The new Tables 3 and 4 list numeric standards for organic regulated substances and metals, respectively, for materials that will be beneficially used under the PBR provisions in §271.103(i) and §287.102(j).

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