

May 15, 2014

Massachusetts Department of Environment Protection
Bureau of Waste Site Cleanup, 6th Floor
One Winter Street
Boston, Massachusetts 02108

Attn: Ms. Elizabeth Callahan

Subject: Comments on the Public Hearing
Draft Proposed Amendments to the
Massachusetts Contingency Plan, 310 CMR 40.0000

Dear Ms. Callahan:

Thank you for considering the following comments to the Department's proposed amendments to the Massachusetts Contingency Plan (the "MCP").

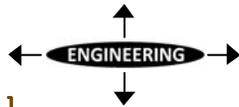
310 CMR 40.0006(12) Historic Fill

It is not clear to me what the archetypal, over-regulated Site the definition is intended to address. If historic fill is to be hauled away, the cost for MCP paperwork is relatively insignificant relative to costs associated for transportation and disposal and permitted facilities. If soil is to be managed on site, placement of cover materials and implementation of an AUL does not significantly alter the cost of redevelopment projects.

The "Note to Reviewers" understates the public health risks of the proposed changes by suggesting the chances are matters of nuance and clarification. As an LSP with a public health "Hold Paramount" clause in my license, I do not support the broad exemption being proposed and recommend it be reconsidered or at least be modified for clarity and public health reasons. The following comments are suggestions to limit possible unintended consequences of the definition and its lack of clarity.

1) The adjective historic is unclear to me as to whether it implies "old". Is there fill that is not historic? Is fill placed yesterday historic, or is MassDEP trying only to exempt traditional old urban fills? If the former, I suggest you delete the word historic and the word fill is sufficient and clear. If the later, I suggest providing a date. I recall earlier discussion draft versions that limited the exemption to fill placed pre-21E (pre-1983). See my comment (8) below.

I suggest the term "**Historic Contaminated Fill**". It would make clearer that the defined material is contaminated and the term historic would indicate the fill was contaminated prior to placement at the site.



2) The phrase "**deposited to raise the topographic elevation of the site**" is vague and may imply fill placed to bring depressions to grade is not covered. I doubt this was the intent. If its fill, no context is needed and word is clear to the user. Otherwise one is left to wonder if there is fill deposition not covered by the definition.

3) Consider adding to the definition an additional criteria **(f) Does not represent an imminent or substantial hazard to public health, safety welfare or the environment**

If not added, the regulation changes would seem to allow Imminent and Substantial Hazard conditions to be maintained at a "historic fill" Site. I doubt this was the intent. The existing notification exemptions under 40.0317 (i.e., coal ash, lead paint, etc.) require actions under 40.0370 to address non-reportable releases that pose IH or SH risk. However, because historic fill is not a notification exempt condition, 40.0370 does not apply and MassDEP would appear to have no authority to require actions for fill sites which would otherwise pose significant existing risks or imminent hazards. Again, I would be surprised if this was the intent.

Another approach to address this issue would be to add a clause similar to 40.0370 in 40.1020 to mandate actions at historic fill Sites to address substantial or imminent hazards.

It is not clear to me where and if historic fill conditions supersede IH regulations.

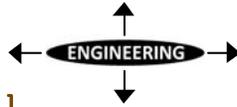
4) Under clause (a) of the definition, I initially read the phrase "**May contain metals and/or semi-volatile compounds.....**", as exempting metals and SVOCs, but not limiting the exemption to these compounds other than the specifically noted PCBs. Hearing Paul Locke talk in Springfield, it seems it is not MassDEP's intent to broaden the exemption for other compounds such as asbestos, VOCs and petroleum hydrocarbons, pesticides, etc. However, use of the word "may" seems to open the exemption in a very broad and perhaps unintended way. The definition should state that it only applies to fill contaminated by metals and SVOCs. The terms metals and SVOCs should be added to the MCP definitions, just as VOCs are defined in 40.0006.

5) Under clause (a) there is no limit to the percent solid waste that may be in the "non-indigenous material", which could include up to 100 percent construction debris. Essentially this covers solid waste landfills, pre-and post 1971. Was this the intent? Since the exemption applies to "material", it is broad and would seem to go well beyond exempting traditional "soil" fill.

6) Under clause (a), the adjective "weathered" is ambiguous and adds to the ambiguity of the word "historic" noted above in comment (1). It is ambiguous and implies fill that has been in the ground for some unspecified amount of time being degraded in some non-specific, time related, and non-measurable way. I would change (a) to read:

(a) Contains metals and/or SVOCs (excluding PCBs above reportable concentrations), including but not limited to constituents of construction and demolition debris, dredge spoils, incinerator ash, fly ash, coal ash, wood ash or other non-hazardous solid waste material.

7) Under clause (b) the phrase "was contaminated prior to placement" places a RAPs burden on the LSP to serve as a historian. It is troubling to see the MCP moving away



from a scientific risk based approach, to one where the source and date of the release is more relevant to response actions than contaminant levels and the risks posed. This is more like TSCA and RCRA than the traditional MCP risk based approach. Consider revising (b) to **“Available information indicates was likely contaminated prior to emplacement.”**

8) Under clause (e), I suggest it best not to refer to legal opinions in the regulations. Would DEP agree that it was “illegal” to place contaminated soil on otherwise clean sites since at least 1983 (date of 21E)? If so, I suggest that DEP assign 1983 as the date defining “legal” placement of contaminated fill on a property. Similarly, could the implementation date (1971) of current solid waste regulations serve as the date of defining “legal” placement of placement of solid waste materials. I therefore suggest changing (e) to read:

(e) Was not the result of contaminated soil placed after to the effective date of MGL Chapter 21E or of solid waste constituents placed after 1971, unless such materials were placed in accordance with MGL Chapter 21E and solid waste regulations in effect at the time of emplacement.

In summary, I appreciate MassDEP’s desire to reduce unnecessary regulatory burdens on parties complying with the MCP with regard to historic fill. But reducing regulatory burdens should not come at the expense of public health in those cases where historic fill actually poses an Imminent or Substantial Hazard. Clarifying the definition of Historic Fill, and/or providing regulatory mechanism(s) similar to that which are provided in 310 CMR 40.0370 for releases that are not reportable, would be sound public policy that would both serve to reduce regulatory burdens and protect public health.

Once again, I would like to sincerely thank the Department for considering these comments and for the significant outreach work the Department has done to solicit comments from the public.

Sincerely,
O'Reilly, Talbot & Okun Associates, Inc.

Kevin J. O'Reilly, LSP
Principal