

January 2, 2013

Commissioner Kenneth L. Kimmell
Massachusetts Department of Environmental Protection
One Winter Street
Boston, Massachusetts 02108

Re: Management of Uncontaminated and Mildly Contaminated Soils

Dear Commissioner Kimmell:

We are writing you on behalf of the Licensed Site Professional Association (LSPA) to respectfully request that you and the Department's Waste Site Cleanup and Solid Waste staff work quickly and cooperatively to address the critical issue of the disposition of mildly contaminated and essentially uncontaminated soils (soils which the Department has determined, through MCP Method 1 risk characterization, to pose "No Significant Risk" of harm to human health or the environment). As you know, substantial volumes of these soils are generated through a variety of projects within the Commonwealth. Our concern is that current solid waste policies are problematic for LSPs who need to manage these soils in accordance with the requirements of 310 CMR 40.0032(5); the current policies limit non-landfill reuse, recycling and disposal options that would conserve scarce, designated solid waste landfill space for solid waste, while still being protective of human health and the environment.

We understand that this issue has a high priority within the Department, and are appreciative of the efforts currently underway to address it. The recommendations provided below suggest a path forward that is both workable and protective of public health. We offer the resources of the LSPA to assist the Department in refining and revising the proposed approach as needed to address the concerns of all stakeholders.

Problem Statement

Presently, energy, development, construction, utility, infrastructure, and waste site cleanup projects within the Commonwealth generate more excess soil than can be physically re-used at the project sites. Often these soils may contain contaminants at levels that are detectable, but well below concentrations that would qualify the soil as characteristic hazardous waste. Such soils also need not meet the definition of solid waste, as there are available reuse options within the Commonwealth. However, because of current solid waste policy (COMM-097-001) and the soil management procedures provided in the Massachusetts Contingency Plan (MCP) at 310 CMR 40.0032(3) (i.e., the "anti-degradation requirements"), and the lack of clarity as to what

level of characterization of both the excess soil and the in situ soil at the receiving location is required in order to demonstrate compliance with 310 CMR 40.0032(3), these excess soils often cannot readily be transported, disposed of, or re-used in a reasonable and cost-effective manner.

Contaminated Soil is defined in Section 3.0 of COMM 97-001:

“Contaminated Soil means soil that contains oil and/or hazardous materials as a result of a release to the environment. This includes anthropogenic contaminants, regardless of whether the contaminant levels exceed the applicable Reportable Concentration (RC) under section 310 CMR 40.1600 of the MCP. This definition of Contaminated Soil is broader than that in 310 CMR 40.0006 since it includes soil contaminated at less than the RCs.”

This very broad definition includes soil that the Department has determined poses No Significant Risk to human health and the environment. It is the disconnect between rigid regulatory requirements and the risk-based approach of the MCP that has led to the present quandary.

The shortage of capacity for “uncontaminated” (i.e., contaminant concentrations <RCS-1) and “mildly contaminated” (concentrations <RCS-2) soils at solid waste landfills within the Commonwealth is currently a significant deterrent to economic development, and it affects public and private sector projects both small and large. Furthermore, there are few new solid waste landfill sites under development, and using the existing solid waste landfill capacity as the only practicable and viable option for managing Contaminated Soil (as defined by COMM 97-001) is rapidly – and needlessly - using up this increasingly valuable resource. The LSP Association believes that it is better public policy to reserve capacity in solid waste landfills for municipal and industrial solid waste materials and to develop alternative reuse options for “Contaminated Soil” as broadly defined by Section 3.0 of COMM 97-001.

Short Term Approach

The LSPA recommends that MassDEP publish, and adopt as an interim measure, short-term guidance that revises the definition of Contaminated Soil in COMM-97-001 to be consistent with the MCP definition of Contaminated Soil at 310 CMR 40.0006:

“Contaminated Soil - means soil containing oil and/or hazardous material at concentrations equal to or greater than a release notification threshold established by 310 CMR40.0300 and 40.1600.”

This guidance should also provide a clear interpretation and explanation of the 310 CMR 40.0032(3) anti-degradation requirements which allows best management practices for uncontaminated and mildly-contaminated soil, including non-landfill reuse. The LSPA recommends that this interim short-term guidance might allow for, but not be limited to, the following:

- A duration for the guidance to be in effect (e.g., 18 to 36 months), during which time a more permanent solution could be developed.

- A provision for the reuse of soils that have oil and hazardous materials at <RCS-1 levels (i.e., uncontaminated soils by MCP definition) as fill at any location.
- A provision allowing soils that have levels of oil and hazardous materials >RCS-1 but <RCS-2 (i.e., mildly contaminated soils or potentially contaminated soils by MCP definition, depending upon location) to be reused in subsurface locations as permitted under the MCP, provided that the soil is either placed at a depth greater than 3 feet below ground surface in vegetated areas, or under concrete or bituminous concrete pavement (such as parking lots or roadways) or permanent structures, at a commercial- or industrially-zoned facility, or otherwise at a location at which the RCS-2 Reportable Concentrations would apply per 310 CMR 40.0361(1)(b).

In addition, MassDEP might consider a moratorium on Massachusetts landfills accepting out-of-state soils until more licensed in-state receiving facilities are available.

Long Term Resolution

The LSPA supports a long-term resolution of issues related to soil management for uncontaminated and mildly contaminated soils that both preserves landfill space for true solid waste and supports a cost-effective, risk-based management approach. The LSPA requests that MassDEP convene a Soil Management Workgroup to include participants from MassDEP BWSC, BWP, the LSPA and other stakeholders. This Workgroup should be tasked with considering, developing for public comment, and promulgating guidance, and if necessary regulatory changes, to address soil management issues. Strategies to be considered should include those listed above, as well as additional approaches which the Workgroup feels would provide a longer-term solution to these issues.

The LSPA remains available and willing to assist the Department in addressing this issue, both in the short and long term. Please feel free to contact either of us to discuss the path forward on these issues. Thank you for your consideration.

Sincerely,
The LSP Association



Cole E. Worthy, III, LSP
President



Wendy Rundle
Executive Director

cc:
Ben Ericson, Assistant Commissioner, BWSC
Nancy Seidman, Assistant Commissioner, BWP