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MassDEP's Interim Policy on Re-Use of Soil and the Metaphysics of Dirt

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MassDEP's interim policy for using soil to reclaim quarries, gravel pits and sand pits is out. You can read the new interim policy HERE. After two public meetings, a few drafts, and a lot of conceptual thinking, MassDEP's policy is pretty simple: MassDEP will issue site-specific approvals, in the form of Administrative Consent Orders, to ensure that the reuse of large volumes of soil for the reclamation of sand pits, gravel pits and quarries poses no significant risk of harm to health, safety, public welfare or the environment, and will not create new releases or threats of releases of oil or hazardous materials.

Is this so new? Not really. It is what MassDEP was doing for large projects before the issue of what to do with mildly contaminated soils came up a few years ago and before MassDEP was directed by Section 277 of Chapter 165 of the Acts of 2014 to come up with regulations, guidelines, standards or procedures for determining the suitability of soil used as fill material for reclamation projects.

While the legislative directive of Section 277 is clear and specific, the underlying statutory authority for regulating reclamation soils is less so. Chapter 21E, which addresses releases of oil and hazardous material to soil, gives MassDEP authority to regulate soil that has been contaminated by spills or releases of oil and hazardous material and sites were releases of oil and hazardous material might occur. And MassDEP's solid waste regulations and policies have been used to guide what types of materials may be brought to solid waste facilities. But do these laws apply to the fill material to be used for reclamation projects? Perhaps.

This is where the metaphysics comes in.

Let's say I am putting in a new building on my property that needs a deep foundation. Because there is no room for the displaced soil on my property, it must go off site. The material to be removed from the ground has been tested and found to be free of any oil or hazardous material release. It is just naturally-occurring rock, and soil. My goal is to get rid

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of this material; it is a "waste" to me. But hang on. From MassDEP's perspective, if the material I generate is a waste, is it a solid waste which must be disposed of at a location that has solid waste site facility approval? Some at MassDEP have said so. But that would be a problem. MassDEP in no way would want to call the location to which reclamation soils are being shipped – sand pits, gravel pits and quarries – a solid waste facility requiring site assignment. If, however, that same material is re-purposed or re-used for something we all consider a better use, such as to fill a quarry so that it may become a ball field, golf course, or housing – a reclamation project – then, from MassDEP's perspective, we can avoid calling it a waste and subject to facility siting requirements. The metaphysics of dirt. Dirt is defined by how you use it, right?

But wait. The Policy says: "*Fill projects that accept any amount of soil (whether pursuant to this Interim Policy or otherwise) must ensure that the filling does not create new, reportable releases of oil or hazardous materials to the environment pursuant to M.G.L. c. 21E and 310 CMR 40.0000, or will not violate M.G.L. c. 111, section 150A, 310 CMR 16.00, or 310 CMR 19.000*" (the solid waste regulations). Thus, reclamation soils can't contain oil or hazardous materials that, when "re-purposed," would create a new c. 21E site, or solid waste that would require solid waste permitting (i.e. site assignment). So, if c. 21E and solid waste regulations *prohibit* the disposal or re-use of certain soils, what *authorizes* MassDEP to say reclamation soils can go to quarries, sand pits and gravel pits?

Section 277 of Chapter 165 of the Acts of 2014 itself does not provide that authority. It merely directs MassDEP to "establish regulations, guidelines, standards or procedures for *determining the suitability of soil* used as fill material for the reclamation of quarries, sand pits and gravel pits." Nothing is said about the material that MassDEP is to determine suitably. "Soil" is not defined. And, according to the Policy, the underlying authority to regulate reclamation soils is in Chapter 21E and the laws and regulations governing solid waste. But as described above, those laws really don't apply to natural soils, free of anthropogenic sources – dirt. Thus, where the "stuff" that would be used as fill is not c. 21E oil or hazardous material that would create a new c. 21E site or solid waste (because it is being re-purposed), but natural soils, free of anthropogenic sources – dirt – is it subject to regulation by MassDEP? The Legislature may have asked MassDEP to do something it simply can't do.

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