



DIRT IS DIRT, **Right?**

This article discusses some of the issues facing modern development with respect to dirt movement.

As the ground thaws, construction season comes.

Backhoes, excavators, graders, and shovels will turn up and redistribute dirt throughout the country. In some places, development will be smooth; in others, it may take longer and be more costly than anticipated.

Dirt moving often has a significant cost. However, when soil is contaminated, marginally contaminated, impacted, or simply an “environmental concern,” the costs for lawfully addressing this dirt as part of a development can increase substantially. When those costs are anticipated in the beginning of the project, the project usually continues without issue. However, when the assumption is made that dirt is just dirt—when in fact it is not—costs may rise and schedules may halt. The excavation, movement, reuse, and disposal of dirt may be regulated by different agencies.

Relevant Regulatory Criteria

One concern is whether the soil at a site may be a “waste,” as that term is used in environmental regulation. In certain circumstances, dirt can be regulated under the Resource Conservation and Recovery Act (RCRA) as hazardous waste, it can be regulated under state law as solid waste, it can be regulated by state law in some other manner (e.g., as “historic fill”), or it may be completely unregulated.

RCRA

At the federal level, dirt will constitute hazardous waste when it is generated if the dirt contains a listed hazardous waste or

if the dirt is characteristically hazardous. To determine whether the dirt contains a listed waste, one must carefully analyze the facts surrounding the contaminated media within the dirt to understand whether it contains a listed waste. Where a waste generator makes a good faith effort to determine the source of contamination, but the necessary records are unavailable or the analysis is inconclusive, one may assume that the source of the contamination is not from a process that would make the dirt a listed waste.¹ However, in other cases where the generator knows the source of contamination, and that source is listed waste, the dirt itself must be treated as a listed hazardous waste using RCRA’s so-called “contained-in” policy.²

To be characteristically hazardous, dirt must meet one of the four characteristics under RCRA, 40 CFR §§ 261.20-261.24. These characteristics include corrosivity, toxicity, ignitability, and reactivity. When dirt is characteristically hazardous, it is often due to the presence of heavy metals or solvents (i.e., the soil is toxic), or to significant residual petroleum product contamination (i.e., the soil is ignitable).

Under RCRA rules, and many solid waste rules, waste dirt is usually “generated” when it is excavated, except in some atypical circumstances, such as when the soil is within a RCRA-designated Area of Concern. At most sites, in order to determine whether the dirt itself is hazardous, it is the developer’s obligation to characterize the dirt to ensure that it is treated and handled appropriately under federal law when it

**Power Plant Pollutant and Effluent Control MEGA Symposium: Best Practices and Future Trends**

August 20-23, 2018 • Baltimore Marriott Waterfront, Baltimore, MD

The MEGA Symposium is back in 2018 and better than ever with a focus on industry responses to new operational and environmental challenges for power plants, as well as policy and regulatory perspectives.

Be a part of this leading conference and share your knowledge as a presenter! Abstracts due March 9.

Building on the 20-year history as the power plant industry’s leading technical conference for SO_x, NO_x, particulate and mercury control, the 2018 MEGA Symposium will provide latest developments, policy changes, and operational experience to reliably manage compliance with air quality, solid waste, and discharge water quality requirements for fossil-fired power plants.

Share your knowledge and be a presenter!

The technical program will emphasize cycling operations while balancing emission constraints at the stack and effluent discharges, and byproduct quality. Topics include:

- Air Pollution for Coal-Fired and Gas-Fired Generation
- Effluent and Byproduct Management
- Managing Variable Load
- Carbon Management and CO₂ Control for Fossil Plants

Gain exposure at MEGA and turn connections into clients

- Premium and standard double and single booths available
- Networking and receptions in exhibit hall
- Technical registrations included with exhibits and sponsors
- Multiple sponsor levels to meet your budget
- Maximum exposure with exclusive options available

View the prospectus online and contact Jschurman@awma.org.

The MEGA Symposium is brought to you through the efforts of four key industry players: the Air & Waste Management Association (A&WMA), Institute of Clean Air Companies (ICAC), US Environmental Protection Agency (EPA), and US Department of Energy (DOE).

Find out more at www.awma.org/MEGA and make your plans to be there!

is excavated. For states that administer RCRA on behalf of the U.S. Environmental Protection Agency (EPA), there may be additional requirements that apply.

Solid Waste

If the dirt is not hazardous waste, but is moderately contaminated above background impact levels, it may be considered a regulated solid waste. Solid waste thresholds are typically based on analytical analysis, and can vary from state to state. Usually, as in RCRA, the determination of whether dirt is considered to be a solid waste is made at the time the soil is excavated.

Other Categories of Moderately Contaminated Soils

Some states have other classes of moderately contaminated soils. For example, before environmental regulations were prevalent, development in many communities consisted of



filling and grading the land with whatever materials were available. In some areas, these fill materials could have included slag, coal ash, riprap, foundry sand, clinkers, cinders, concrete, sediments, solid waste, and construction/demolition debris. Some areas specifically regulate the historic fill, which is generally identified due to the presence of man-made heterogeneous materials scattered throughout an area.

In areas where it is relatively common, some communities have specific requirements when historic fill is uncovered. These programs can take the form of specific reports approved by the local agencies, or by specific construction and handling requirements set forth in regulation or guidance. Where regulated, the state programs vary in administration, but usually allow for moderately impacted fill to remain on site, subject to conditions.

Clean Fill

Of course, some dirt really is just dirt. Usually, there are minimal restrictions on the reuse of existing dirt, especially when it is reused on-site. However, even natural soil may carry environmental issues—clean soil material may have seeds, larvae or micro-organisms that, when transported

distances, may cause environmental harm in the new location. To prevent this type of harm, the U.S. Department of Agriculture (USDA) has developed strict soil import limitations and domestic quarantine areas (see, e.g., 7 CFR Part 330; 7 CFR Part 301). Additionally, some states have additional limits on the use of imported soil materials.

How to Handle Your Dirt

Understanding the risks associated with the dirt at your development site usually requires learning about your dirt prior to excavation, as the regulatory waste criteria are typically triggered when the soil is excavated. So how do you know if your dirt is impacted?

In many transactions, a Phase I Environmental Site Assessment is performed to evaluate the risk of any past releases of hazardous substances or petroleum at the property. Additionally,

Failing to identify the risks and incorporate lawful handling and disposal requirements into a project can give rise to significant additional and unanticipated costs for development.

these Phase I reports should also identify when soil staining or other minor leaks or releases exist at the property. Even if not noted in the Phase I report, evidence of shallow soil contamination may be visible as discolored soil or distressed vegetation at the property.

Where impacted soil exists, laboratory analysis of soil is often helpful. Laboratory data can be used to justify either an offsite disposal or reuse strategy. In some development, it is often advisable or required to develop data to ensure the soil meets state standards for the proposed use. For example, planned residential developments usually require cleaner dirt than planned industrial developments. Soil testing data is often used to evaluate risks and costs for soil handling. (Note, however, that this kind of analysis does not always answer the question of whether the dirt is characteristically hazardous under RCRA-required test methods. See 40 CFR §§ 261.20-261.24.)

Using soil testing data, developers can plan for the ultimate use of the soil. Some soil must be disposed (as in a landfill), some soil can be reused without limits, and some soils may only be reused subject to conditions prescribed by applicable regulatory authorities. Developers should consult with their

environmental counsel on applicable restrictions in their jurisdiction. The earlier in the project that these issues are addressed, the fewer potential issues the dirt can cause.

Implications of Mishandling

Regulatory agencies typically have authority to bring enforcement actions against those who violate dirt-handling rules. Enforcement actions may come with a civil penalty or injunctive order requiring restoration or other earthwork to address real or perceived environmental harms caused by mishandling the dirt. EPA is authorized to issue fines over US\$71,000 each day of RCRA violations for mishandling soils that are hazardous waste (40 CFR §19.4), though most penalties are for less than that amount. Similarly, states can impose monetary penalties and/or injunctive orders for mishandling soils under applicable state laws.

Additionally, those who move dirt have been found to be liable parties under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). CERCLA is a strict liability statute with joint and several liability features that can result in one potentially responsible party paying for one hundred percent of all cleanup costs. For

example, a developer who moved contaminated soils from one area to another area has been held as liable under CERCLA as the owner at the time of disposal.³ Furthermore, developers may lose available CERCLA liability defenses by utilizing soil management practices that constitute “disposal” or otherwise exacerbate existing environmental conditions.

As a result, failing to identify the risks and incorporate lawful handling and disposal requirements into a project can give rise to significant additional and unanticipated costs for development.

Conclusion

Dirt is not always just dirt. Identifying and anticipating potential issues with dirt in a development project in advance is one strategy to minimize potential environmental liabilities and unanticipated delays. Because the regulatory structure varies across the states, it is important that the developer knows the dirt for the project site and also engages competent legal counsel to assist in developing a strategy to resolve environmental issues with the dirt in compliance with applicable laws. **em**

Tim Haley is with the Barnes & Thornburg, LLP, office in Indianapolis, IN; and **Tammy Helminski** is with the Barnes & Thornburg, LLP, office in Grand Rapids, MI. E-mail: Timothy.Haley@btlaw.com.

References

1. *Guidance: Managing Remediation Wastes under RCRA*; U.S. Environmental Protection Agency, October 14, 1998 at 5; available online at <https://www.epa.gov/enforcement/guidance-managing-remediation-wastes-under-rcra>.
2. *Id.* at 9.
3. See, for example, *United States v. Honeywell International, Inc.*, 542 F. Supp. 2nd 1188, 1198-99 (E. D. Cal. 2008).

Environmental education will drive the future

Recognize someone by nominating them for the A&WMA Exceptional Education Contributor Award. Nominations are due April 18.



If you know someone who has made a significant contribution to environmental education this year, nominate them for this prestigious award!

Nominations and self-nominations are encouraged for individuals from all backgrounds who have contributed to A&WMA's educational mission. **Criteria used to evaluate the nominations are:**

- A&WMA leadership positions with educational responsibilities (40%)
- Specific initiatives and/or contributions that have supported A&WMA's educational mission (60%)

The award recipient will be recognized and given a plaque at A&WMA's 2018 Annual Conference & Exhibition Student Awards Ceremony in Hartford, CT.

Please submit electronic nominations that include the candidate's contact information, professional background, and contributions pertaining to the two award criteria cited above. Self-nominations are also encouraged. The nomination should be no more than 4 pages long with 11 point font.

Nominations should be submitted to Robin Lebovitz, A&WMA Professional Development and Student Programs Manager at rlebovitz@awma.org by **Wednesday, April 18.**

