

Response to Comments
Solid Waste Regulation Reform
310 CMR 19.000
February 14, 2014

General Comments

Comment: Covanta supports the proposed permit streamlining and certification proposals for transfer stations, post-closure uses at landfills, and special wastes. We believe that special waste will continue to be properly managed under the proposal as written. (Covanta)

Response: MassDEP agrees with this comment and thanks the commenter for the support.

Comment: The Waste Bans, if properly enforced alongside information and assistance with compliance, could be a very effective tool to help the Commonwealth meet its waste reduction goals. The lack of enforcement of the bans has significantly limited their effectiveness and created an uneven playing field where diligent businesses that dedicate attention and resources to comply may be placed at a disadvantage compared to others who take no action. We believe that direct oversight and enforcement by DEP staff is the best solution and recommend investing in additional enforcement and inspection staff. If budget constraints make this impossible, the proposed third-party inspection system may provide valuable information about facility performance and waste ban compliance. We would urge DEP to implement the proposed changes in such a way that will enable meaningful and direct action on failed loads and other waste ban infractions. These changes should specifically allow for enforcement action by DEP based on violations observed by third-party inspections or other actions that meaningfully uphold the integrity of the waste ban system. (CET)

Response: MassDEP will be putting more resources behind enforcement of the Waste Bans, in addition to the inclusion of the third-party inspection program into the final regulations. MassDEP has hired additional staff to conduct waste ban inspections and follow-up on third-party waste ban inspections. MassDEP does not intend to take enforcement action based on deficiencies noted solely by a third-party inspector in most situations. Third-party inspections serve to notify the regulated entity of possible violations sooner or more frequently than if the regulated entity relied on MassDEP to conduct an inspection. In addition, MassDEP intends to use the third-party inspection reports to track compliance rates and to target MassDEP inspections. The third-party inspection also encourages the regulated entity to address potential violations. MassDEP will retain its authority to take enforcement based on a third-party inspection in appropriate situations.

Comment: I do not believe that the majority of the proposed changes are in the best interest of public health or the environment. (FCSWMD)

Response: Many of the proposed changes to the regulations were designed to help respond to budget cuts and to align MassDEP resources with its responsibilities. The intent was to streamline certain solid waste review and approval activities without compromising protection of public health, safety and the environment by building on streamlining actions MassDEP has taken, with good effect, in other programs, such as the Environmental Results Program (ERP).

Comment: This is billed as regulatory reform for whom? DEP maintains adoption of these proposed regulations will decrease demands on DEP staff and time to save money; they might, although we have our doubts, and they might increase DEP workloads. Their adoption will exponentially increase demands on private facility operators – the price for which will be borne by customers. Everything to be

inspected, the scope is not limited in any way. No MA industry is regulated like this, where is the evidence or basis calling for such a radical change from existing DEP protocols and frequency of inspections. Did DEP do a cost analysis of the imposition of this kind of program? (NSWMA)

Response: MassDEP is clarifying the existing third-party inspection requirements that are already in the regulations as well as a number of the proposed requirements based on public comments to narrow the focus or clarify some requirements. MassDEP is also standardizing the third-party inspection and reporting requirements so that MassDEP may focus its inspection and enforcement resources on serious violations that may pose a threat to the public or the environment. DEP considered the impacts of this proposal on small businesses in developing both the draft and final versions of these regulations.

Comment: [Regarding transfer station permit streamlining]...The proposed 5 year expiration of permits was identified as a potential problem for facility financing. Will the facility need to obtain an entirely new permit at the end of this period, and how can it have any certainty that it would be allowed to continue to operate, when it has made major investments in construction, equipment, etc. Would new local approvals be needed (and would this provide new opportunities for facility opponents to voice their opinions)? This proposal would limit the value of a permit. A longer timeframe was suggested. (NSWMA)

Response: If a certification for a transfer station has not been submitted within the previous 5 years, the facility will need to submit a new certification to MassDEP. No local permits would be needed prior to submitting such certification for an operating facility because the facility would already have an Authorization to Construct (ATC) permit and would have submitted a certification prior to starting operation. Transfer stations, in existence on the effective date of these regulations, are required within 120 days of the effective date of the regulation to submit a certification. Only a modification of the transfer station that is an expansion (see definition of Expansion at 310 CMR 19.006) would require a new ATC permit.

Comment: Based on Table 2 (page 7) of the Background document DEP has received applications for 383 solid waste facility permits in just less than 3.5 years. Of that number only 118 would be affected by the proposed streamlined permit process. That's an average of 34 per year. However, 50 of those 118 are for transfer station modifications which usually are minor changes to equipment or operations. Another 16 applications are for Special Waste approvals which I believe should be modified per the draft regulations. When those are removed from the calculation, it leaves an average of 15 actual facility permit applications that DEP has processed. It is conceivable that DEP would continue to process 15 new applications a year, although I believe that there are few new applications for permits for facility construction and operation. If each permit requires 40 hours of staff time that would equate to just under 30% of an FTE spread out over every region of the state. Even if the amount of time per application was doubled that is just over 0.5 FTE. The extreme severity of the proposed changes for facility permitting and for post-closure use do not begin to match the low economic savings that will result from these changes should they be promulgated. DEP is proposing changes that will negatively impact the environmental integrity of the permitting process for what appears to be a pittance in financial savings. This should not and cannot be allowed. (FCSWMD)

Response: MassDEP believes the savings on permitting time are larger than suggested by the commenter. The streamlining proposed in the regulations would affect many more permits than estimated in the comment. Approximately 90 of the 383 permits noted in Table 2, page 7 of the background document would be subject to either a certification (transfer stations), or either a presumptive approval or no permit for the special waste approvals. This represents significantly greater savings than estimated by the commenter. These savings allow MassDEP to better align existing staff with its workload and focus on other work, such as compliance and enforcement.

19.006 Definitions

Construction and Demolition (C&D) Waste Transfer Station – The proposed new definition of C&D transfer station is a transfer station permitted to accept 50 tons/day or more of C&D. These facilities would not be subject to the proposed permit streamlining provisions. The Technical Support Document (TSD) states that this is because these facilities “...usually process the material they take in to remove asphalt, brick, concrete, wood...before transferring residuals to a landfill for disposal...” and that DEP wants to continue traditional permit procedures in order to seek opportunities to promote recycling. The existing Covanta transfer station in Holliston takes more than 50 tpd of C&D material but simply consolidates it for transfer to C&D recovery operations. This basic transfer of C&D with no processing should be allowed to be handled under the new proposed streamlined procedures. The definition could be changed to “a transfer station permitted by the Department to accept and process 50 tons per day or more...” (Covanta)

Response: Because C&D material management continues to be a high priority issue, MassDEP has intentionally excluded any type of C&D handling (including just transfer) that is more than 50 tpd from the TS certification process. Therefore “process” will not be added to the definition of C&D Transfer Station since doing so would allow them to be subject to the TS certification process.

Expansion – The regulation defines how an “expansion” would be triggered based on an increase in tonnage. Is it the Department’s opinion that if the tonnage limitations hit a particular threshold, then should an ATC be sought rather than a Modification of a Large and/or Small Handling Facility permit application? Secondly, it appears that a policy statement may be needed that states that even though a threshold is hit that it does not trigger a “Major Modifications of Site Assignment” based on a tonnage increase. We want to clarify that 16.22(3) still holds true for tonnage increases. (Green Seal)

Response: If an expansion threshold is reached under the definition in 310 CMR 19.000, then the facility will need to submit an application for an Authorization to Construct (ATC) as either a large (BWPSW05) or small handling facility (BWPSW19), as applicable. With regard to the second issue, this definition of “expansion” only applies to 310 CMR 19.000 and does not impact or apply to 310 CMR 16.22(3) of the Site Assignment Regulations, which independent of 19.000, establishes how expansions are to be handled by a BOH for purposes of modifying a site assignment. Under the site assignment regulations, an expansion will need to be addressed as either a major modification or a minor modification and, in either case will require a public hearing. The site assignment modification will need to be accomplished before MassDEP can issue a permit for the expansion under 310 CMR 19.000.

Expansion – The definition should apply to any increase in the tonnage acceptance limits in the current permit, not only to increases that are larger than 25% of those limits. As proposed, the changed definition will allow all existing transfer stations to increase their throughput by 25% without any DEP oversight or review. Our experience tells us that throughput increases at larger transfer stations are more likely to have greater impacts than other possible changes, and we believe the current standard of review and oversight is appropriate. (WMI)

Response: As discussed in the Response to Comments for Section 19.035, these regulations authorize expansions less than 25% to proceed using a certification process and larger expansions to proceed only after review by MassDEP as an expansion. Any expansion of a transfer station will first need to go through a site assignment modification process, either as a major modification or, more likely, as a minor modification (see previous response). The site assignment process requires review by the BOH and a public hearing in either case, and MassDEP review for a major modification. MassDEP believes that this level of review will be adequate and will allow MassDEP to focus on detailed review of the expansions that meet the revised definition.

Expansion – An increase in the tonnage acceptance limits of more than twenty-five percent beyond the limits approved in the permit is too high. Any increase should be considered an expansion for a facility that accepts 50 tpd or more. The definition of a transfer station expansion should be “an increase in the tonnage acceptance limits beyond the limits approved in the permit, determined on a cumulative basis since the last new or expanding transfer station permit was issued to the facility.” (ACE)

Response: See previous response.

Expansion – Current procedures for such expansions are best left in place. If these standards are relaxed we, as an industry, will likely find the siting and maintenance and expansion of our facilities will be more problematic in the future. (NSWMA)

Response: See above response. MassDEP believes that there will be sufficient public review and oversight of the smaller expansions for handling facilities.

Responsible Official – The proposed regulation is unclear and inconsistent with other DEP signatory provisions, and will require separate authorization procedures in many cases, thereby unnecessarily increasing regulatory burdens with no apparent gain in environmental protection. The definition in 19.000 should track the language used to define the same term in 7.00. (WMI)

If DEP wishes to add a provision for LLC signatures, it should not provide that the Responsible Official must have the authority to bind the company and all members. The members are not the LLC. Under MGL c.156C, s24, if an LLC has a manager, that person is authorized by law to execute documents and act for the LLC, unless otherwise provided in the operating agreement. Where there is a manager, no member is authorized to execute documents or act for the LLC. Where there is no manager, under law, any member can act for the LLC unless otherwise provided in the operating agreement. (WMI)

Response: DEP has revised the definition of Responsible Official so that the entity and the Responsible Official must determine whether the signatory has the proper authority to sign a document being submitted to DEP.

Responsible Official – This proposed change regarding the responsible official for a partnership/LLC is unworkable and not consistent with other state regulations regarding them. DEP should only require that an appropriately designated person signs on behalf of the partnership/LLC. (NSWMA)

Response: See response above.

Responsible Official – The proposed definition would require that a non-officer representative be authorized pursuant to a “corporate vote”, instead of the current authorization by “corporate procedures.” It is unclear what level of “corporate vote” would be required under the proposal. Is this a vote of shareholders, the Board of Directors, the corporate Executive Committee, or regional management? Covanta believes that authorizing a responsible official be consistent with current practices in some existing permits, where a corporate officer may authorize a representative in writing. The regulations should allow corporate policy to designate the signatory responsibility through individual job descriptions. Each facility would be responsible for informing DEP of the designee’s official title, and would be responsible for informing DEP of personnel changes. (Covanta)

Response: See response above.

Special Waste – We do not believe the reference to the hazardous waste regulations should be removed from the definition. We believe that this language is an important component of any special waste management program and should remain in the definition. Eliminating this language reduces the clarity of this important foundational point. (WMI)

Response: The language that had been proposed for elimination referring to hazardous waste and the hazardous waste regulations has been restored to the definition as suggested.

19.007 Access Rights of the Department

Comment: We have no problem with DEP reserving for itself the access rights to properties that are provided under applicable statutes, or where owner consent is obtained. We do, however, believe that the proposed access language oversteps its authority in 19.007(1) and (4), where it seems to state that DEP can grant itself access rights by issuing “any order or other enforcement document.” We would ask that DEP remove this language. (WMI)

Response: It is customary for MassDEP to include access provisions in an ACO and ACOP and enforcement documents to which the owner or operator has consented. Typically, if DEP is unable to gain access through consent, MassDEP seeks a warrant, which is a more appropriate mechanism than an appealable unilateral order. MassDEP has revised this section of the regulations to clarify that the enforcement documents granting access are consented to by the owner or operator.

Comment: DEP is proposing to expand its inspectional rights by fiat and not by law or regulation; to penalize operators for exercising constitutional rights or to penalize operators for asserting such rights; and, the proposal seems likely to be advancing a new protocol that is inconsistent with existing state law for executing warrants for information or access in Massachusetts. This section needs a major rewrite. (NSWMA)

Response: MassDEP is exercising its broad regulatory authority pursuant to MGL c. 111 s. 150A by promulgating these access provisions. Please note these regulations only grant access to solid waste activities. Requiring MassDEP to obtain a warrant if access is denied guarantees operators the ability to exercise their constitutional rights consistent with existing state law. MassDEP has revised the regulations to indicate access must be authorized through approval or consent unless a warrant has been issued.

19.011 Certification

Comment: 19.011(1) – DEP’s proposed general certification language for anyone submitting certain documents to DEP is unclear and overly stringent and should be revised as follows:

- The proposed language would impose stringent certification requirements on any “determination, certification, report and any other document submitted to the Department pursuant to 310 CMR 19.000”. This is extraordinarily broad and will certainly inhibit the flow of information to DEP. Read literally, DEP is proposing to require that nearly every communication sent to DEP relating to the solid waste program must be signed by a high level official (meeting the definition of “responsible official”) and certified to be true, accurate and complete, at the risk of criminal perjury charges. We are certain this is not DEP’s intent. This should be limited to applications (including requests for modifications) for solid waste permits, ATCs and ATOs. (WMI)
- The proposed language creates an undue burden on submitters of information. There are different types of certifications that agencies require for submittal of application materials, and they vary in the stringency. In order to prepare for a certification, many companies conduct a due diligence inquiry to support the certification. The more stringent the certification language, the more time consuming and expensive the due diligence process. It is not appropriate for an agency to default to the most stringent certification for every submittal. DEP’s many different certification procedures are clear evidence that DEP has not adopted such an approach. In our view, DEP’s certification language for waste site cleanup submittals under the MCP strikes the appropriate balance for submittals under 19.000. While the language in the MCP has some similarities to DEP’s proposal

here, it is tempered as follows: (i) it provides that the certification applies to “the *material information* contained in this submittal:” (ii) it qualifies the certification “to the best of my knowledge and belief;” and (iii) it clarifies that the certifier is subject to criminal penalties “for willfully submitting” false information. These same qualifiers should be added to the certification in 19.011(1). (WMI)

Response: The current regulations already require that any paper required to be submitted to MassDEP pursuant 310 CMR 19.000 or any order must be accompanied by the same certification. MassDEP does not believe this clarification about who submits the document is overly burdensome. MassDEP does not expect there to be a change in day-to-day or casual communications (e.g. via email). On the other hand, MassDEP has modified the language to make 19.011 and 19.035 consistent. MassDEP believes that the revised language strikes the proper balance between the burden on the facility and MassDEP’s need to rely on the information provided. Here, nearly all of the information submitted would be material and is based on the signatory’s inquiry (similar to the knowledge component suggested by the comment) of the individual’s responsible for obtaining the information.

19.018 - Third Party Inspections

General Comments

Comment: Proposed changes such as increasing the third-party inspections make environmental and economic sense. Relying on professional assessments of facility operations ensures that facilities are properly managed and it frees up DEP staff to work on other projects. These types of changes are more in line with what I believe can address DEP’s limited financial resources while preserving (if not improving) the integrity of protecting the Commonwealth’s environment. (FCSWMD)

Response: MassDEP appreciates this comment. By standardizing and expanding the use of third-party inspections. MassDEP aims to maintain and improve facility compliance with permits and regulations such as the waste bans.

Comment: Third parties have been used, in an adjunct role and as a tool by the DEP in its current exercise of oversight and regulation of the industry. This has been acceptable and viewed as appropriate by all stakeholders. The current use of third parties is reasonable since these individuals support the broader and well-functioning DEP inspection program of our industry and facilities. The proposed change, especially the degree to which it shifts virtually the entirety of this core governmental regulation responsibility onto private third parties, is what we believe is unreasonable and not supported by statute, existing regulation and precedent. The language concerns us greatly as it:

1. Grants unlimited authority to DEP to use third party inspectors for any purpose it so directs;
2. Opens access to all records and denies us even reasonable grounds to not comply;
3. Requires all inspections be unannounced;
4. Gives third party inspectors authority to assess compliance for things not limited to core solid waste activities;
5. Creates the third party inspector’s responsibility to “examine and evaluate all” standards which is simply not possible for each inspection conducted;
6. Creates the third party inspector’s authority to demand “specific corrective actions”;
7. Creates overly burdensome frequency of inspections;
8. Proposes to change how DEP currently regulates C&D and other handling facilities together;
9. Increases waste ban inspections at facilities; and
10. Proposes to require operators to certify reports of third party inspectors. (NSWMA)

Response: Please see the responses below to address specific issues concerning access to the facility by third-party inspectors, the burdens of third-party inspections, corrective action, frequency, unannounced inspections, and other specific issues.

Comment: We appreciate DEP's initiative for regulatory reform; however it seems that the amount of time, effort and cost to the permittee to bear for this effort may be better spent by asking the permittee to fund an inspection program for DEP to conduct inspections and forego the detailed requirements outlined in this draft regulation. (Casella)

Response: This suggestion for a different model for third-party inspections would require legislative authority to establish a fund that would allow MassDEP to hire and pay inspectors for conducting third-party inspections. Without such a dedicated fund, all monies received by MassDEP would have to go into the General Fund. MassDEP believes it is not feasible to accomplish what the commenter suggests quickly.

Comment: We generally do not support the DEP's proposal to privatize enforcement activities or to increase the frequency and scope of third party inspections with the primary objective of seeking out non-compliance. We do not oppose inspection requirements or reporting requirements but we do oppose the structure the DEP is establishing where it requires an elaborate licensing process for undefined third parties who then conduct various activities traditionally reserved for governmental functions, including, in the words of DEP's proposal, "any other third-party inspection as directed by the Department." (WMI)

The proposed program has the effect of empowering third-party service providers to act in a governmental function, under the direction of DEP, but at the increased additional expense of a private business owner. We believe this is an improper delegation of a governmental function. Our overriding concern is that the proposal will lead to greatly increased costs for private companies and for the communities they serve, an uneven playing field for industry participants, and a reduction in direct government oversight. (WMI)

Response: The goals of the third-party inspection program are to improve compliance with the regulations and their permit and not "seeking out non-compliance." The process for listing third-party inspectors is a registration process. The requirements for third-party inspectors build upon those already required in the existing regulations and include having experience and knowledge of solid waste management laws and regulations, being either a professional engineer or sanitarian or an LSP, or having a bachelor's degree and several years of relevant experience. While MassDEP agrees that facilities may bear some increased costs to hire third-party inspectors, those costs should not be significant compared with the existing requirements. This program is not a delegation of governmental function, but rather it is an enhancement of MassDEP's efforts to ensure compliance at facilities.

Comment: The design of the third party program will create severe inefficiencies and will provide limitless work for third party inspectors and require all facility operators to pay the inspector's fees. These fees will be passed on to customers and be a cost-of-service driver. (NSWMA)

Response: The current regulations require third-party inspections at solid waste facilities. Inspection fees are therefore already paid by the facility being inspected. The comment is not clear. Other than the number of inspections per year, what is viewed as significant cost drivers over the current regulations?

Comment: Facilities rely on MassDEP inspections to reassure their host communities and the public that they are operating properly. If DEP cuts back on facility inspections, the agency won't have first-hand

knowledge of how a facility is really operating, it will be disconnected from operations, which could create a perception issue for the public. (NSWMA)

Response: MassDEP believes the third-party inspection reports can be relied upon by the public and host communities for the same purpose. Many of the proposed changes to the regulations were designed to respond to budget cuts and to align MassDEP resources with its responsibilities. The intent was to continue oversight at facilities without compromising protection of public health, safety and the environment by building on the existing third-party inspection requirements.

Specific Comments

Comment: 19.018(3)(c) – If DEP proceeds with the third party inspection program, we believe DEP cannot provide that it can require “any other third-party inspection as directed by the Department.” This language suggests that DEP is seeking authorization, without issuing an order or permit or other document subject to administrative or judicial review, to direct a company to conduct any type of third-party inspection it chooses, without any technical or cost parameters. (WMI)

Response: MassDEP will act to require a different type or frequency of third-party inspection either through a modification to a permit or an order. Either of these agency actions is subject to administrative and judicial review pursuant to M.G.L. c. 30A, unless the action is issued with the consent of the party and waiver of such rights to review.

Comment: 19.018(4)(b) - Third-party inspectors should not be paid directly by landfill operators as this poses a conflict of interest. All perceived and actual conflicts of interest should be prohibited. We appreciate DEP’s development of a conflict of interest policy in the proposed regulations. Below are suggestions to strengthen the conflict of interest regulations:

1. In 19.018(4)(b)1, change the language to prohibit an inspector who received payment by the owner or operator for any service with the past three years. It should read: “a person with daily on-site responsibility for the operations or management of the facility to be inspected or received payment by the owner or operator for any service within the past three years;”
2. Add a section to 19.018(4)(b) that requires a third-party inspector to sign a statement certifying that they are not subject to the influence of an owner or operator or any employee of a solid waste facility subject to regulation under 19.000.
3. To avoid the potential influence of landfill operators on the outcome of inspection reports, inspectors should be compensated directly by DEP, even though the funds will originate from landfill operators. (ACE)

Response: MassDEP disagrees with the suggestion for a prohibition on all persons with a financial relationship with a facility within the last 3 years to conduct third party inspections. Facilities already may have established relationships with third party inspectors who have been performing satisfactorily in that role, and there is no reason to conclude that such inspectors could not continue to perform satisfactorily. In fact, with clearer standards for third party inspectors and clearer rules on conflict of interest issues, existing third party inspectors should be able to conduct more effective inspections.

MassDEP agrees with the second issue in this comment and has added language requiring the third-party inspector to certify that he/she has not been unduly influenced by the facility owner and operator or any employee of the solid waste facility.

As noted in a previous response, the suggestion for a different model for third-party inspections where MassDEP would pay for third party inspectors would require legislative authority to establish a fund out of which inspectors could be paid for conducting third-party inspections. Without such a dedicated fund

all monies received by MassDEP would go into the General Fund and could not necessarily be available to fund inspections

19.018(4)(b)

Comment: Regarding municipal employees performing third-party inspections for other municipal departments, it may be very difficult or impossible for such a town employee to serve as an independent inspector. In addition, state ethics rules may possibly prohibit such activities. (MR)

Response: MassDEP consulted with staff of the State Ethics Commission inquiring whether municipal employees could perform such third-party inspections. The State Ethics Commission advised MassDEP that if the third-party inspection duties were set up as a separate paid position within the municipality, then it would be a violation of M.G.L. c. 268A, § 20, which prohibits the holding of more than one paid position. However, MassDEP understands that a municipality could ask an employee as part of his or her existing position to take on new duties to act as a third-party inspector. Since concerns were expressed during stakeholder input meetings by municipalities as to the costs of hiring an outside party as a third-party inspector and since another municipal employee would perform inspection duties in the context of a greater municipal duty to protect its citizens, public health and the environment, MassDEP will go forward with the regulation as proposed. MassDEP does advise municipalities to consult with the State Ethics Commission on how to properly structure inspection duties consistent with the ethics laws.

Comment: 19.018(4)(b)5. - Proposes to authorize a municipality to retain an inspector who works for a municipal department separate from that which owns or operates the facility. The language is unclear on whether private entities that are part of larger corporate structures can similarly use employees of different entities which may have a common parent company. DEP should clarify that a private entity may use as a third-party inspector a person who works for an affiliate or parent company of the entity that owns or operates the facility, provided that person otherwise meets the criteria for a third-party inspector. (WMI)

Response: MassDEP will not allow a private entity to utilize its own employees as third-party inspectors. Unlike private entities, municipalities have legal duties to protect citizens, public health and the environment as part of their governmental mission. Municipalities also already have expertise in structuring inspector positions so that such inspectors can inspect other municipal departmental operations effectively. For example, it is not uncommon for the local public health agent to have to inspect food service operations at local schools or for the conservation commission agent to inspect construction by the local public works department. Therefore, MassDEP will require private entities to hire a third-party inspector from a separate legal or corporate entity, but will allow municipalities to maintain the ability to utilize municipal employees as third-party inspectors with the advice of the State Ethics Commission.

Comment: 19.018(4)(c) – The regulation proposes to give unrestricted third party access to a facility and its records and directly prohibits any restrictions or delay. This language is far too harsh and does not address legitimate needs to prohibit the dissemination of lawfully protected material. Access language must be far more tailored. We suggest: “The owner and operator shall allow the third-party inspector with reasonable access to the facility to the extent necessary to review information within the legitimate scope of the inspection. Such access shall not include the right to view confidential business information, information that is protected by laws governing privacy rights, or any information subject to the attorney/client privilege or attorney work product protection.” (WMI)

Response: The regulations have been narrowed to address records that are related to the solid waste activities carried out at the facility. In addition, the third-party inspector will not have access to proprietary or confidential business information.

Comment: 19.018(4)(c) – Granting a third party “full access” should be limited to public information and does not include proprietary business information. (NSWMA)

Response: MassDEP agrees with the comment and has modified the regulation to ensure protection of proprietary trade secrets and confidential business information.

Comment: 19.018(4)(d) and 19.018(6)(a)5 - The District does not support unannounced inspections. For facilities that will require six inspections per year it might be useful to require at least two unannounced inspections. However, for any other inspection frequency it is completely impractical to require an unannounced inspection. I urge DEP to adjust this language. (FCSWMD)

Response: MassDEP regularly conducts with its own staff unannounced inspections of all types of solid waste facilities. Those inspections and the proposed third party inspections are intended to capture a snapshot in time of the compliance of the facility under normal operating conditions. Giving advance notice of inspections may result in activities at the facility that are not representative of typical operation. While, at times, there can be some time lost to locating particular records or personnel with the knowledge needed to complete such inspections, third-party inspectors can always follow up at another time to obtain and review records or interview particular personnel, if they are not at the facility at the time of an inspection.

Comment: 19.018(4)(d) – The regulation proposes to require the postponement of any inspection which is not conducted as a surprise visit. We think this is entirely misdirected and unnecessary. It is essential for facility personnel to know in advance of an inspection so that appropriate personnel or records can be made available, appropriate access can be granted, and proper safety procedures are followed. Preventing advance notice will do nothing other than to guarantee the inspection process is inefficient and costly. Should be removed, or at minimum a 48-hour notice. (WMI)

Response: See above response. This requirement has not been changed.

Comment: 19.018(5)(a)8. – The regulation proposes to require third party inspectors to “provide any information regarding third-party inspections to the Department upon request.” We believe this provision inappropriately seeks to place on inspectors the obligation to conduct follow up activities that are not clarified by the regulations, and therefore are not subject to public notice and comment. Owners and operators will be paying for third-party inspectors, and if DEP insists on using them, it is essential that their activities are clearly and narrowly scoped in the rule. Expansive language that suggests DEP can seek to use these inspectors for additional activities, even if related to the original inspections, is not appropriate and we therefore request that this provision be removed. (WMI)

Response: The commenter has misread the regulation. 19.018(5)(a)8. requires the third-party inspector to provide information regarding inspections the inspector has submitted to MassDEP upon request, not to conduct follow-up inspections.

Comment: 19.018(5)(c) Inspector Qualifications – It does not seem necessary to specify the type of college major because this is irrelevant. It may be important to have a college degree but if one has the required experience in solid waste management as listed then it does not matter what type of degree one has. Strike the list of degree types. (FCSWMD)

Response: MassDEP agrees that the type of college degree is less important than the level and type of experience the inspector has and that there should be more flexibility. The regulation has been modified to stress the need for appropriate experience.

Comment: 19.018(5)(c)3 - Regarding the proposal that personnel qualified to perform third-party inspections at solid waste facilities shall include Licensed Site Professionals along with Professional Engineers and Registered Sanitarians, this proposal appears to be at odds with the existing statute and regulations, and with general historic practices of the solid waste regulatory community.

Management of solid waste, as an extension of the fields of civil engineering and public health, has been the province of civil engineers and sanitarians since the mid-19th century. There is a logical and statutory justification for authorizing Registered Sanitarians to conduct such inspections.

The LSP credential was created by the legislature for a very specific role - to assess, remedy, and certify the closure of hazardous waste sites under the MCP, an area of professional practice which is entirely different from solid waste facility. The LSP program's enabling regulations and code of conduct limit the license's applicability to "professional services" defined as "rendering of waste site cleanup activity opinions, and service associated with the rendering of such opinions." There is no provision for the application of the LSP license to solid waste facility compliance and the standard LSP body of knowledge does not include this area of practice. The LSP credential in and of itself does not bear on this area of practice and should not be held to qualify individuals for the proposed site. (TS)

Response: MassDEP believes that a LSP in good standing represents a type of qualified environmental professional that meets the professional or academic requirement for a solid waste third party inspector. However, before a LSP can qualify as a TPI they must also have the required solid waste management experience. The combination of these 2 requirements will ensure a LSP is qualified to be a third party inspector.

Comment: 19.018(5)(c)3. – We request that the language be changed to state the third party inspector maintain "one of the following". As it is currently written, it could be construed that the third party inspector must maintain the first three of the aforementioned credentials. (Green Seal)

Response: The suggested modification was made.

Comment: 19.018(5)(c)4. – The proposed regulation requires the third party inspector to have an Asbestos Inspector license and classroom certification, in addition to a minimum of 40 hours of on the job training in the identification of potential asbestos-containing material and ACM sampling protocols or 2 months of full time field experience, or equivalent, under the direct supervision of a certified Asbestos Inspector. These requirements are overly demanding for a licensed P.E. to complete the inspections. Recommend that DEP allow the Facility O&M inspectors the ability to sub-contract licensed asbestos inspector to conduct the ACM inspections at the same time the O&M inspection is completed. Massachusetts licensed P.E.'s experienced in solid waste engineering currently conduct third party inspections at solid waste facilities, and can complete the proposed O&M inspections and other new requirements that DEP is proposing. But to also require the inspectors to be ACM certified with on the job training will be a costly and time-demanding undertaking. (CEC)

Response: MassDEP agrees and modified the regulations to allow for sub-contracting to a certified asbestos contractor to conduct ACM inspections.

Comment: 19.018(6)(a) and (8)(b)1 – Performance Standards and Frequency – An inspection of this detailed nature (i.e. all operating equipment, etc.) could take days to inspect and would not likely change that significantly in a 2 month period as required in the inspection schedule proposed for an active landfill. The third party inspector should be allowed some reasonable discretion, or DEP should be more prescriptive on the specific areas of inspections.

The total number of inspections at various times throughout the year may not allow corrective actions, before the next inspection is conducted; thereby potentially creating a record of on-going repetitive issues.

Currently, our third party inspector is required to submit the report to DEP within 14 days of the date of the inspection. For inspections of this detailed nature, 14 days will be a very short timeframe to summarize an inspection and submit to DEP. Has DEP considered providing inspectors with a report form, where all inspectors are reviewing the facilities on the same baseline and could expedite the reporting process more efficiently? (WMI)

Response: The regulations were modified to clarify that an O&M inspection is focused on the relevant activities related to the solid waste functions of the facility. With regard to corrective actions, MassDEP understands that some corrective actions, depending on their nature, may take significant time to complete or put in place (for example, if something needs to be constructed) and may not be completed before the next inspection.

The draft regulations included a 30 day timeframe within which the owner or operator must submit inspection reports to DEP. MassDEP will develop a standardized report form.

Comment: 19.018(6)(a)1. and 2. – The regulation proposes that a third-party inspector should assess operation and maintenance practices to determine compliance with various requirements but the language as drafted is not specific to solid waste requirements. We believe DEP intends that this assessment be limited to solid waste requirements and we believe strongly that the scope must be limited to solid waste requirements. We therefore request that DEP clarify the language to ensure that the scope of the assessment is to address requirements under the solid waste rules, permits, orders, approvals, determinations and authorizations. (WMI)

Response: MassDEP agrees with the comment and modified the scope of TPIs to be limited to solid waste operations and compliance with solid waste regulations, permits, orders, determinations and authorizations.

Comment: 19.018(6)(a)3. – The regulation proposes that a third-party inspector should “examine and evaluate all of the facility’s solid waste activities, equipment, operations, practices, procedures, and records relevant to the inspection....” Inspection of equipment can be inferred to include heavy equipment, rolling stock, and other ancillary equipment including but not limited to solid waste processing equipment, weight scales, pumps and generators. We are certain that when DEP conducts inspections, particularly inspections at larger facilities of the type that we own, DEP does not examine and evaluate all of these items, because it is not physically possible to do so in a reasonable amount of time. We expect that this is not what is intended by DEP.

We suggest DEP make the following changes to its proposed language:

- Revise the inspection scheme by altering the review requirement to provide for the assessment of a reasonable sampling of available data based on a standardized inspection form; and
- Structure the inspection to evaluate the facility’s operations at a higher level and provide for a detailed review of documents and operational minutia only in identified areas of concern. This practice would be consistent with generally accepted auditing standards. (WMI)

Response: MassDEP narrowed the scope of the inspection as suggested and will develop a standardized inspection form.

Comment: 19.018(6)(a)4. – The regulation proposes that third-party inspectors should recommend corrective actions whenever they observe deviations. Third party inspectors will not necessarily have operational experience, and they certainly will not have intimate familiarity with the facility subject to the inspection. We strongly oppose having such personnel suggest corrective actions, as these will create expectations that may be entirely inappropriate when reports are submitted. DEP doesn’t suggest corrective actions when it identifies non-compliance, neither should inspectors. (WMI)

Response: The requirement was not modified. The third-party inspectors are directed to recommend corrective actions. As such, they are recommendations and, as detailed at 19.018(8)(b)2., the owner or operator shall document either the completion of the corrective action, explain why the corrective action is not needed, or submit a plan and schedule for completing the corrective action. Furthermore, the owner or operator can correct a deviation in a manner that is different than what was recommended so long as the facility returns to compliance. Finally, the requirement that the third-party inspector recommend corrective action is not a new requirement. Existing regulations at 19.130(35) and 19.207 require a report from the third-party inspector that requires a description of “any actions taken to correct such deviations, as required by the Department or recommended by the inspecting engineer, and schedules to correct identified problems.”

Comment: 19.018(6)(a)4 - We question the competency of third party inspectors to make corrective action suggestions. DEP inspectors don’t do this and it is not reasonable to enforce. (WMI)

Response: This requirement is not new. The existing regulations at 19.130(35) and 19.207 require a report from the third-party inspector that requires a description of “any actions taken to correct such deviations, as required by the Department or recommended by the inspecting engineer, and schedules to correct identified problems.” The third party inspector’s recommendations are suggestions, as noted in the previous response, and they may not be the only way to address the issues raised. It is the owner/operation’s responsibility to decide how to respond to any issue identified by a TPI.”

Comment: 19.018(6)(a)5 - It is good to require that Department representatives will enter a facility without prior notice. This ensures that the Department will observe routine activity on a site that involves the storage, disposal, handling, processing, or transferring of solid waste, which is representative of typical procedures on site. (ACE)

Response: MassDEP agrees with this comment.

Comment: 19.018(6)(a)5. DEP should reconsider the mandate for unannounced inspections, or allow 24-hour notice. For example, if the person responsible for filing the groundwater monitoring reports is not available on the day of the unannounced inspection, it may reflect poorly on the facility when in fact the report was available, but could not be produced at the time of the inspection. (Casella)

Response: As noted previously, MassDEP regularly conducts unannounced inspections of all types of solid waste facilities with its own staff. While, at times, there can be some time lost to locating particular records or personnel with the knowledge needed to complete such inspections, MassDEP has found that such inspections can proceed smoothly and efficiently in the vast majority of cases. The inspections are intended to capture a snapshot in time of the compliance of the facility under normal operating conditions. Giving advance notice of inspections has resulted in diversion of waste shipments or other changes of activity during the date and hours of inspection, which defeats the purpose of the inspection. In addition, third-party inspectors can always follow up on another date to obtain and review records or interview particular personnel, if they are not at the particular facility at the time of an inspection. Any third party inspector should have sufficient expertise in safety issues to determine if an inspection needs to be postponed due to legitimate safety issues or emergency conditions.

Comment: 19.018(6)(a)5. – The regulation proposes that third party inspections should be unannounced. We strongly oppose this provision, as it mandates inefficiency and high costs and does not lead to any better outcome. The regulations should provide a minimum of 48 hour notice. (WMI)

Response: See response above.

Comment: 19.018(6)(a)5 - Unannounced inspections result in loss of productivity and are a driver of expense. They will intrude unnecessarily on confidential or proprietary information. Scope appears unlimited and assumes the worst. (NSWMA)

Response: See Response above as to unannounced inspections. MassDEP notes that the scope of the inspection is not unlimited but instead, will be focused on the compliance of the facility with the state's solid waste regulations and the facility permits. MassDEP has taken note of the concern by other commenters that protections are needed for proprietary trade secret and other confidential information, and MassDEP has revised the regulation to ensure protection of such materials.

Comment: 19.018(6)(a)5. Covanta understands the reasoning behind requiring O&M inspections to be unannounced and random, but requests some allowance for denying an inspection. A limited provision should be allowed for postponement if a facility cannot accommodate it. The proposed inspections are expanded in scope compared to current ones and include review of facility records and operations. There may be a few days when someone qualified to escort the inspector, satisfactorily answer his or her questions and provide the requested documentation in a complete and accurate manner is either not on site, can't arrive within a reasonable time or is legitimately occupied with a facility-critical issue. These would be rare. The provision would require notice to DEP by the inspector within one day that the postponement occurred with an explanation of the reason. Alternatively, the proposal should allow the inspector to call a facility contact on the morning of the inspection before they are en route, in order to confirm that an appropriate contact is present or can travel to the location. (Covanta)

Response: See responses above; MassDEP has not made any changes with respect to this comment.

Comment: 19.018(6)(b) – Some solid waste facilities already have permit conditions that provide for third party inspection, with significant success. At the permit holder's expense, the facility is required to be inspected by a qualified professional engineer experienced in solid waste management four times per year. We believe that quarterly inspections accurately quantify the current compliance status of the facility and are not overly burdensome for daily operations. For facilities that are municipally owned and privately operated, where there is local oversight by the BOH or a continuous on-site monitor we ask that DEP consider an option for the facility to reduce this inspection schedule to 4 times per year.

DEP could consider reduction to quarterly inspections based on 4 consecutive good inspections and no outstanding violations. If there are any violations, a facility would be subject to the increased inspection schedule until the facility has returned to compliance or for a period subject to DEP discretion. (Casella)

Response: MassDEP considered the idea of reducing the number of inspections based on 4 consecutive good inspections and determined that this concept did not meet one of the goals of regulation reform because it would likely increase MassDEP's time needed for tracking inspections, determining which facilities had consecutive good inspections, etc. Furthermore, a new set of criteria would need to be established to determine a "passing" inspection for purposes of reducing inspection frequency.

Comment: 19.018(6)(b) - The proposed third-party inspections will add an unknown, though likely significant cost to the cost of doing business. The cost will not only include payment of inspectors, but the corresponding time required of facility personnel to escort inspectors and provide them with requested information. Covanta requests a slight change to help mitigate this cost. Covanta requests that the frequency be reduced to once every quarter for MWCs. It is understandable that DEP would want an inspection every two months at a landfill because landfills are continually changing, whereas MWC facilities do not typically change over a three-month period.

Covanta believes that a reduction in the frequency of inspection is warranted for a facility that has had several consecutive inspections with no significant deviations. We request that inspection frequencies

be reduced by half for a facility that has had no deviations noted on inspections for one year. The normal frequency could be resumed if a deviation is noted in a subsequent inspection. (Covanta)

Response: The Department agrees with this comment and has revised the frequency of inspections for MWCs to quarterly, 4 times a year.

Comment: 19.018(6)(b)1. – This regulation proposes that an O&M inspection should be completed at every active landfill every two months. We are strongly opposed to the frequency, especially given the extremely burdensome provisions proposed for the conduct of these inspections. We believe that inspections should be no more frequent than every six months. Assuming DEP agrees that the scope of the inspections should be significantly changed, we propose that the frequency be changed to once every four months. In addition, we suggest that where a permit calls for an O&M inspection frequency different from that in the rule, that the less stringent of the two standards apply. (WMI)

Response: The current regulations and most landfill permits require a TPI every two months. The frequency of inspections has not been changed.

Comment: 19.018(6)(b)2 – This regulation proposes to require third party inspections of closed landfills every two years. We do not oppose the concept of such inspections but do not believe that it is necessary to use third party inspectors. DEP should allow inspections by any qualified parties as the number of requirements to assess at a closed landfill is dramatically lower and less complex than at an operating landfill. (WMI)

Response: The regulation was not modified as suggested. MassDEP wants to ensure that post-closure inspections are conducted by qualified inspectors. While such landfills are no longer active, there are a number of landfill specific issues such as landfill gas collection systems, odors and erosion, that require review by a qualified inspector.

Comment: 19.018(6)(e) & (f) – This regulation proposes different performance standards for inspection of handling facilities and C&D facilities. We do not believe that DEP should distinguish between handling facilities that manage C&D materials and those that do not. All handling facilities present the same types of regulatory issues and should be managed under one set of requirements. Change frequency to once every six months. (WMI)

Response: The proposed performance standards are not substantially different between handling facilities and C&D processors, with the exception of the requirements for asbestos inspection and management and so, no change was made. With respect to the difference in frequency between large handling facilities and C&D processors, transfer stations are primarily only transferring waste whereas C&D processors are conducting sorting and grinding operations in addition to monitoring for asbestos materials. The number of inspections for C&D processors has been established at quarterly intervals. These facilities should be inspected more often as a result of the greater potential for development of nuisance concerns.

Comment: 19.018(7) - The proposed waste ban inspections are potentially problematic as they focus on facilities that receive material that generators have already decided to dispose of. Relying on waste ban inspections as the primary enforcement tool for recycling gets only limited results and leaves little room for improvement. The proposed protocol may set a tone that DEP takes waste bans seriously but it may not drive recycling improvements in Massachusetts. The waste management industry needs to move material efficiently and safely. Work with haulers and generators may be more effective ways to improve recycling than more facility inspections. (NSWMA)

Response: MassDEP has been working with the generator and hauler sectors when facilities notify MassDEP, or MassDEP otherwise determines, that generators are not in compliance with waste ban

requirements. MassDEP has issued many enforcement actions against haulers and generators for violations of waste ban requirements. MassDEP will continue to enforce waste ban requirements at all levels of the waste management infrastructure.

Comment: 19.018(7) - The focus of waste ban inspections on incoming loads does not give the receiving facilities any flexibility to pull recyclables out after the load is tipped. Some facilities are changing their processes and procedures to remove recyclables when they arrive at the facility, but waste ban enforcement on incoming loads limits this flexibility. More letters to generators from facilities and haulers about failed loads are not likely to make a difference in recycling rates, and increase the burden of facility responsibilities. (NSWMA)

Response: Loads with excessive waste ban materials are required to be recorded as failed loads so that the hauler and generator can be notified of the waste ban compliance issue, and MassDEP will have the opportunity to take follow-up actions. However, facilities have the option to either: (1) separate and recycle the waste ban materials from those failed loads and dispose of the remaining waste; or (2) reload the failed load and return it to the generator.

Comment: 19.018(7) - Covanta continues to believe that waste ban effectiveness should be based upon a concentration on education of the public and inspection and enforcement on the waste generators. Covanta continues to encourage DEP to utilize the substantial waste ban records generated by waste disposal facilities to target enforcement on generators violating the regulations rather than on handling and disposal facilities that receive the waste and gather records. The purpose of the proposed third-party inspections appears to be ensuring the compliance of disposal facilities with the waste disposal restrictions. DEP should use the records generated by these inspections for subsequent inspections and enforcement of waste generators. (Covanta)

Response: MassDEP will utilize all data available to it to determine generator compliance with the waste bans.

Comment: 19.018(7) – Waste ban inspections are a clumsy tool to drive recycling and their effective use have reached their limits. More waste ban inspections at facilities will not drive improved recycling rates. Again, we urge DEP to shift its focus to generators and to move away from the inefficiencies and sunk costs increased waste ban inspections represent. Other proposals are active and in the DEP pipeline for adoption involving waste ban inspections. Now, combining increased third party waste ban inspections with new action levels for waste bans and the coming waste ban on organics and our ability to manage efficient and cost effective operations quickly becomes diminished.

Other waste ban thoughts: the state has banned the use of C&D wood in biomass facilities – without such end markets the ban’s effectiveness is highly in doubt. Glass as a banned item is also problematic, the state should incentivize the use of glass as backfill and sub-base in sewer, road work and other construction projects. (NSWMA)

Response: MassDEP believes waste ban inspections have been an effective tool that has increased recycling rates and will continue to use them as part of an integrated strategy to reduce the amount of waste disposed. The moratorium on combustion of C&D wood in biomass combustion facilities remains in place at this time, although C&D wood is not banned from disposal at MSW combustors. Regarding use of glass, MassDEP issued a general BUD in 1994 for the use of crushed glass in several types of engineering applications, such as drainage material and as backfill. MassDOT also adopted a specification for use of Processed Glass Aggregate in Standard Specifications for Highways and Bridges which allows use of crushed glass in certain roadway applications, providing an additional outlet for the material beyond recycling.

Comment: 19.018(7) – The performance standards for third-party waste ban compliance inspections appear to be set up for compliance inspections only, and do not appear to provide for assessing compliance with the ongoing monitoring portion of waste ban compliance. Waste ban compliance encompasses both Comprehensive Inspections and Ongoing Monitoring. Thus, if failed loads identified by Ongoing Monitoring are not also included in the analysis performed by third-party inspectors, the full picture of compliance is unlikely to emerge. I offer the following specific comments on this section: (MR)

1. If Comprehensive inspections are used as the only point of comparison (and excluding Ongoing Monitoring- identified failed loads, then the third party inspector should perform the same number of comprehensive inspections as the facility. This is because just a few extra failed loads due to additional inspections by either party can result in significant percentage changes in failed load data (and would not be an “apples-to-apples” comparison).

Response: MassDEP has modified the approach for the third party inspector. The inspector will now only perform ongoing monitoring of waste loads. This ongoing monitoring information gathered by the inspector will be compared by the inspector with the facility’s ongoing monitoring over the previous inspection period.

2. The inclusion of failed loads identified by ongoing monitoring as well as comprehensive inspection, by both the facility and third-party inspectors, is recommended in order to fully assess waste ban compliance.

Response: See above (1).

3. The general performance standard calls for a third-party inspector to “visually monitor all incoming loads received at the facility during the waste ban inspection”. This appears to imply Ongoing Monitoring by the 3rd party inspector. If so, then these failed loads should be compared to the facility’s failed loads identified by Ongoing Monitoring.

Response: See above (1).

4. The General Performance Standard calls for a third-party inspector to “instruct the owner or operator to spread any load not identified as a failed load by the owner or operator...” This would appear to conflict with the duties of the third-party inspector since the third-party inspector, rather than the owner or operator will identify loads when on site.

Response: See above (1).

5. Rather than submit a report following each inspection, it may be preferable for third-party inspectors to submit a report after conducting three or more inspections due to daily fluctuations and relatively low numbers of failed loads per inspections date.

Response: MassDEP prefers to have the report filed after each inspection so that the facility and MassDEP are aware of any compliance issues as they occur as opposed to nine months later.

6. The Background Information conflicts with the proposed regulation: “incoming loads would be selected randomly for examination.”

Response: The Background Document was incorrect, and the regulation has been clarified to say the inspector shall examine every load of waste received by the facility during the inspection until the minimum number of loads has been observed.

Comment: 19.018(7)(c) and (e) – Covanta is not certain that it understands the proposed procedures and standards for the waste ban inspections. The minimum number of loads to be observed is defined by 19.018(7)(e), and the inspector must observe “each and every” load until that number is reached. For example, at a facility that can accept 1000 tpd, the inspector must observe the first twenty vehicles to enter the tipping floor. As those consecutive loads are deposited, the inspector must have facility operator spread any loads that are not failed by the facility via ongoing inspections (or comprehensive

inspection, if the facility's random selection for that occurs during the third-party inspections) and conduct subsequent comprehensive inspections of them. If the facility does not "fail" any of the 20 loads then they will all undergo comprehensive inspections by the inspector. Results of those inspections (and any reported by ongoing monitoring) are then compared to the facility's comprehensive inspection records pursuant to 19.018(7)(c) and (d). It is unclear if "spreading" the load means that a comprehensive inspection must be done, though it is implied because a subsequent comparison to the facility's comprehensive load inspection records is required. Covanta is concerned about the potential for multiple, back-to-back comprehensive load inspection occurring, especially during heavy delivery times. Requests to delay the inspection to a less busy time could be interpreted as attempting to influence the inspector or deny the inspector's requests, in violation of the proposal. At a facility such as Covanta's Braintree transfer station, trucks could potentially back up onto the public road.

Covanta requests that the identification of loads requested for "spreading" be left to the discretion of the inspector based on floor volume or other factors, with perhaps a minimum of every 5th load checked to ensure that the facility cannot be viewed as influencing their decision. (Covanta)

Response: MassDEP has removed the third party inspector requirement to perform comprehensive "spreading" inspections and instead has increased the number of loads that must be observed through on-going monitoring.

Comment: 19.018(7)(d) – The regulation proposes waste ban inspections at active solid waste landfills every two months. We do not oppose the concept of such inspections but are strongly opposed to the frequency. Waste ban inspections disrupt daily operations and the proposed intensity of the inspection process is likely to impact operations for the good part of a business day. We propose a frequency of once every four months. (WMI)

Response: Once every 40 operating days is not considered excessive by the Department, especially since the third party inspector is no longer performing comprehensive waste load inspections.

Comment: 19.018(7)(d) and (e) – Large C&D handling facilities could have their inspection frequency reduced to quarterly. The regulations and any permit allow for the inspection frequency to be more stringent. However, by making this a regulatory requirement, it does not appear that there could be any leeway unless these regulations were revised. (Green Seal)

Response: As the comment identified, the regulations do not have a provision to allow for a less stringent waste ban inspection frequency than what is stated in 19.018(7)(d). This was the intent of the Department, to ensure a minimum amount of waste ban inspections would be required of every similar facility.

Comment: 19.018(7)(d) - With regard to waste ban inspection frequencies, the number of inspections should be based solely on the volume of waste accepted during the inspection interval (e.g. for the past 2 or 3 months). For example, if a C&D facility were permitted for 140 tons per day, it would be required to perform 8 inspections on loads greater than 5 cu yards. However, if the actual daily tonnage during that period averaged 30 tons per day, it could be that they may not even get that many loads to inspect during one business day, which certainly brings a financial hardship to a facility that isn't operating at their permitted capacity. Note that since these facilities are reporting their volumes quarterly, it is a very easy process to institute. (Green Seal)

Response: MassDEP agrees that the number of waste loads to be inspected should be based on the actual tonnage received by a facility; not on its permitted capacity. Changes to 19.018(7)(e) reflect this change to the regulation.

Comment: 19.018(7)(d) and (e) – Currently, our approved waste ban plan requires us, as the permittee, to conduct 20 comprehensive load inspections per month. Is the intent of this requirement to be in lieu of the current program? At a minimum allow us to forego the self-inspected waste ban inspections on the month that the 3rd party inspection is conducted?

The proposed regulations should quantify the expectation of a waste ban inspection. For an active landfill the draft regulations requires the third party to conduct 20 vehicle inspections at any given time. It will take several days to complete due to lulls in daily vehicle traffic, etc. In addition, this concentrated effort of waste ban inspections will cause significant impact on the working face operation. We ask that DEP re-evaluate the effectiveness of this mandate. Alternately, the permittee could be allowed to propose an alternate program for waste ban inspections that is suitable for the design of the site. (Casella)

Response: MassDEP has changed the regulation by removing the requirement for third-party inspectors to conduct comprehensive inspections, and to reflect that the number of waste loads required to be inspected will be based on the actual waste amounts received, not permitted capacity.

Comment: 19.018(7)(e) – This regulation proposes a minimum load number for waste ban inspections. The enhanced inspection procedures proposed will add significant time and cost to facility operations and the proposal to standardize the number of waste load inspections based on facility permit capacity is too burdensome as most sites operate well below their permitted capacity. Impose a minimum of not less than 2 truck loads at a facility receiving more than 1 truck load on the day of an inspection and a maximum of not more than 5% of the truck loads received during the day of the inspection up to a maximum number of 10. (WMI)

Response: MassDEP has changed the regulations to remove the requirement for comprehensive inspections and to allow the minimum number of loads to be based on actual waste amounts received. MassDEP believes these changes will reduce the potential impacts of having a third party inspector perform a waste ban compliance inspection while still yielding sufficient information for the facility and MassDEP to assess compliance rates with waste ban requirements.

Comment: 19.018(8)(a)1. – This regulation proposes to establish inspection requirements on a form to be provided by DEP. Such form, if it imposes any requirements in addition to what is currently proposed in the rule must be subject to formal notice and comment during this rulemaking. If a proposed form will impose any new enforceable requirements, the regulated community needs to have the ability of comment on it in a rulemaking process. (WMI)

Response: MassDEP will develop forms to implement the third party inspection program, just as it has done to implement many programs over which the agency has authority. The forms will be designed to help facilitate communication between regulated parties, third party inspectors and MassDEP, as well as to facilitate tracking of the information submitted by regulated parties and third- party inspectors. MassDEP will design the forms to be consistent with the requirements set forth in the final regulations and will provide the draft forms to the Solid Waste Advisory Committee for discussion and comment.

Comment: 19.018(8)(a)2.b. – Regarding reporting and record keeping, the regulations state that the third party inspector must report on the status of all monitoring equipment, structures, appurtenances and devices. The Department should clarify in guidance that the third party inspector shall identify the status (e.g. blanket statement stating that it's all functioning as intended) and report on “any” monitoring equipment, structures, appurtenances and devices that are deficient in an effort to make the report as concise and as clear as possible. (Green Seal)

Response: In principle, MassDEP agrees with the comment and will put appropriate clarifying language on this issue in the inspection form it will develop for use by TPI. The regulation was modified to remove “all” to provide some flexibility as proposed.

Comment: 19.018(8)(a)2.d. - This section requires a summary of all waste materials received at the facility. This requirement should be clarified. Also, note that summaries are already prepared quarterly that go into far greater detail. This requirement is therefore somewhat redundant and will likely not be relied upon by the Department as much as the quarterly reports. (Green Seal)

Response: MassDEP is not looking for duplicative submittals. The TPI could indicate that the required report has already been submitted to MassDEP by the operator. The inspection form to be developed by MassDEP will clarify the type of information that needs to be provided allow the TPI to note if such information has already been submitted by the facility.

Comment: 19.018(8)(a)3. – The regulation requires separate waste ban reports to be prepared. Clarify that it is allowed to be coupled within third party inspection reports. This will increase inspector efficiency, reduce the number of reports and combine their certification requirements required by the inspector as well as the facility. (Green Seal)

Response: MassDEP agrees that waste ban reports should be coupled with third-party inspection reports wherever possible and be submitted at the same time.

Comment: 19.018(8)(a)5 - Third-party inspectors are to supply the requested reports and information within 7 business days. This seems too few days and more reasonable to increase that to at least 10 business days and in reality more than that.

Response: No change has been made. Seven days is a reasonable amount of time to locate and submit a report that has already been completed.

Comment: 19.018(8)(b)1. – This regulation proposes that the facility owner or operator must also sign and certify each third party inspector report. We believe this is wholly inappropriate. The third party inspector is intended to be independent of the facility being inspected. DEP is asking the facility owner/operator to certify to the accuracy and truthfulness of the inspector’s report, then the owner/operator does not have the ability to verify the contents of the report or the methods used to create the report. (WMI)

Response: MassDEP has revised this section so that the responsible official acknowledges receipt of the third-party inspection report, is aware of the findings contained in the report, has not unduly influenced the third-party inspector, and indicates how he/she plans to address the findings in the report.

Comment: Records 19.018(8)(b)4 – The requirement to maintain a copy of the third-party inspection report at the facility is not practical for municipal transfer stations. All such records should be maintained at the municipal offices. (FCSWMD)

Response: MassDEP believes it is important for the effective operation of a solid waste facility that certain documents, such as the facility’s MassDEP permit and the TPI report, be maintained at the facility for ready access by the operator.

Permitting

Comment: 19.020 – Permit for Construction and Operation – It is imperative for new facilities to submit a permit for operation of a transfer station. This section should remain in its current form – not in the proposed draft. (FCSWMD)

Response: Currently, two permits are required to construct and operate a new transfer station: an Authorization to Construct (ATC); and an Authorization to Operate (ATO). Under the proposed regulations a new (or expanded) transfer station will still go through a complete permit review by MassDEP and be issued an ATC. However, under the proposed revisions a transfer station operator will now submit a certification that the transfer station has been constructed in accordance with approved plans and is ready to be operated rather than an application for an ATO, saving the facility and MassDEP time and expenses.

19.034 - Presumptive Approvals

Comment: - Proposed new sections 19.016(1)(c), 19.061(1)(a)2, 19.061(3)(b) and 19.143(1)(b) reference section 310 CMR 19.039(7). However, it appears that the proposed new 19.039 is to be changed to “Reserved” and the reference should be 19.034, not 19.039(7). (Covanta)

Response: The references to the presumptive approval section, 19.034, have been corrected in the sections noted and throughout the regulations.

Comment: - We are generally supportive of the presumptive approval process that is proposed. We do think there are numerous changes that can be accomplished without the need for DEP issuance of paper approvals. (WMI)

Response: MassDEP intends to review other sections of the regulations to determine if presumptive approvals would be appropriate for future consideration.

Comment: - Significant regulatory reform can be achieved by expanding selected use of the presumptive approval process. (NSWMA)

Response: MassDEP will look at other sections of the regulations where presumptive approvals may be appropriate for future consideration.

Comment: - In many instances identified in other comments we showcase our belief that applying the use of such presumptive approvals will upset existing programs that are protective of the environment and may well be detrimental to our efforts to efficiently manage them on behalf of our customers. (NSWMA)

Response: MassDEP will carefully consider those comments on other sections of the regulations to determine whether presumptive approvals are appropriate to use.

Comment: Covanta believes that approval of waste ban compliance plans should also be processed under the presumptive approval process as proposed at 19.034. Solid waste management facilities are required to implement a waste ban compliance plan to comply with the waste ban regulations. Facilities must currently submit site-specific WBCPs to DEP for approval as a modification to the facility’s solid waste permit and any modification, however small, must likewise be processed as a full permit modification. These WBCPs could be implemented more efficiently for DEP and affected companies under 19.034. The Waste Ban Guidance is essentially a permit-by-rule that could be used as is with relatively minor changes. However, it would presumably need to be incorporated into the regulations. Since DEP already denies approval of WBCPs that are inconsistent with the Guidance, the practical impact of this would be minimal. In response to the 2011 ban on clean gypsum wallboard, Covanta submitted 10 permit modifications for its facilities. (Covanta)

Response: MassDEP has carefully considered whether waste ban compliance plans should be processed as presumptive approvals and has decided to maintain the current level of review. Waste bans are a major focus of MassDEP's solid waste management program.

Comment: It would be beneficial to include approval of recycling operations such as transfer and/or separation at existing facilities, under the presumptive approval process of 19.034. Covanta has had recent experience where collection of recyclables at existing transfer stations was proposed, but the solid waste regulations posed barriers to doing this. Primarily, recyclable materials had to be accepted under solid waste permit limits. In addition, the site assignment approval process often discourages acceptance of recyclables by requiring major site assignment modifications and a burdensome regulatory process. The presumptive approval process at 19.034 would still give DEP 45 days to decide if a more thorough permit modification process would be necessary. (Covanta)

Response: The recent regulatory revisions to the Site Assignment Regulations at 310 CMR 16.01(11) and 310 CMR 16.21 addressed this issue by establishing that the owner and operator of a solid waste facility with a solid waste permit issued pursuant to 310 CMR 19.000 may conduct recycling, composting or conversion activities exempted under 310 CMR 16.03, 16.04 or 16.05 at any solid waste management facility by complying with the requirements of 16.03, 16.04 or 16.05, as applicable, provided that:

(a) if the activity conducted pursuant to 310 CMR 16.03, 16.04 or 16.05 is conducted on the landfill footprint, then the owner and operator shall also comply with 310 CMR 19.039:

Applicant's Request to Modify a Permit; and

(b) the activity conducted pursuant to 310 CMR 16.03, 16.04 or 16.05 will be conducted consistently with the solid waste management facility's site assignment and will not adversely affect the solid waste management facility.

Transfer Station Streamlining

General

Comment: In general, I do not support the proposed changes related to transfer station permitting that includes eliminating the Authorization to Operate and includes the new Certification section. These sections do not support environmental protection and rely on self-policing for all sizes of transfer stations. Without DEP's involvement and oversight, facilities can and will do anything they want under their impression of "compliance." (FCSWMD)

Response: These changes streamline solid waste review and approval activities without compromising protection of public health, safety and the environment, by building on streamlining actions MassDEP has taken, with good effect, in other programs, such as the Environmental Results Program (ERP). Coupled with third-party inspection requirements, MassDEP believes there will be sufficient oversight of transfer stations so that MassDEP may focus its limited resources on more serious compliance and enforcement issues.

Comment: 19.029 – Transfer Station Permit Requirement, 19.035 – Transfer Station Certifications, 19.042 – Authorization to Operate – We do not support these sections. We are strongly opposed to the certification requirement for transfer station operating permits. This is a dangerous and slippery slope for solid waste permitting regulations. Some facilities may begin to take new wastes without proper controls and create nuisance conditions, or they might certify a modification that will truly have an adverse affect, but DEP would not know about it. Submitted documentation of modifications needs DEP review – albeit quicker than a full modification process – and a follow-up process to require a more complete permit application, if deemed necessary. The regulations can easily include presumptive approval for minor modifications without allowing for self-certification for operations. (FCSWMD)

Response: The certification process for transfer stations will remain. A transfer station must have full permit review by MassDEP, as is currently the case, whether it is a new facility or if it is undergoing an expansion. Certifications will be required prior to a new facility starting operations and to modifications that are not expansions. In concert with the requirements for site assignment (for new facilities or expansions) and third-party inspections MassDEP believes there will be sufficient oversight of transfer stations.

Transfer Station Certifications - 19.035

Comment: The extreme severity of the proposed changes for facility permitting (i.e. certification for all transfer stations) and for post-closure use do not begin to match the low economic savings that will result from these changes should they be promulgated. DEP is proposing changes that will negatively impact the environmental integrity of the permitting process for what appears to be a pittance in financial savings. (FCSWMD)

Response: MassDEP disagrees with this comment. The environmental risks associated with transfer stations generally are not large. In addition, post-closure uses that do not impact the cap of a landfill also pose little risk and do not require significant MassDEP oversight.

Comment: 19.035(1) – The regulation proposes to allow certain expansions of transfer stations using a presumptive approval process. We oppose this change, as we believe that DEP should be involved in formally reviewing and approving any increase in allowed throughput at a transfer station with a permitted capacity greater than 50 TPD. (WMI)

Response: The regulations authorize expansions up to 25% to proceed using the certification process (not a presumptive approval as the commenter incorrectly states) and larger expansions to proceed only after review by MassDEP as an expansion. MassDEP believes this is a reasonable balance because, in either case, under the Site Assignment Regulations **any** increase in the amount of waste the facility can accept (“throughput”) will be required to go through either the minor modification or major modification process with the local board of health, requiring at a minimum a public hearing. This will provide for public review and input at the site assignment stage and additional conditions to be placed on the site assignment by the board of health.

Comment: 19.035(1) - We believe these provisions should apply to all transfer stations, whether or not they manage C&D materials. We do not believe there is any appreciable difference in environmental impact and therefore do not see that there is a basis for distinction. (WMI)

Response: The regulations distinguish between facilities that handle C&D and those handling MSW because compliance rates with the waste bans at C&D handling facilities is lower than at MSW transfer stations and because certain C&D materials, such as wallboard, may become non-recyclable solid waste if not handled properly, even at transfer stations.

Comment: 19.035(1) - Two items in this section are problematic. First, current procedures governing transfer station expansions should remain in place. Second, we do not understand or see why this section seeks to change the current way transfer stations are managed, whether or not they manage C&D debris. The current regulatory model should remain in place. (NSWMA)

Response: See previous response. Also, see response to the comment on the definition of “Construction and Demolition Waste Transfer Station” in the Definition section of this document.

Comment: 19.035(4) –This section proposes a very substantial certification process for any presumptive approval. We oppose this provision as drafted. Certifications are serious undertakings for responsible

companies, and they are typically approached with a high degree of caution and consideration. DEP needs to ensure that the certification is very specific, very clear, and rationally related to its solid waste objective. The certification statement proposed here is extremely burdensome, vague, and overreaching for the following reasons: (WMI)

- As proposed under (4)(a) the responsible official would need to state whether the transfer stations is in compliance with “all....applicable requirements.” There is no limitation stated for “all requirements.” The certification should not extend beyond the requirements of 310 CMR 19.000. As drafted, it could apply to all air, water, wetlands and other environmental requirements administered by DEP, USEPA, even apply to non-environmental requirements.
- Under (4)(b) the responsible official would need to identify “any violations that occurred...within the certification period, ...including... any notifications required pursuant to M.G.L. c.21E, s.7...” There is no limitation stated for “any violations” and it should not extend beyond 310 CMR 19.000. It could apply broadly to any environmental or even non-environmental requirement. How would a company audit compliance to determine whether the certification could be signed? Further, while DEP proposed that only violations must be reported, the example of “any notifications required pursuant to M.G.L. c.21E, s.7...” involves a notification procedure that is not a violation.
- For five year certifications, a requirement to disclose any violation going back five years is extremely burdensome. The provision should be limited to a statement, based on reasonable inquiry, of violations known to the owner/operator to exist as of the date of certification.
- The systems provision in the certification proposed under (4)(d) attempts to impose a requirement that does not otherwise exist in the regulations and is too vague to understand. There is no requirement in 19.000 to maintain systems and it is inappropriate to attempt to impose such a requirement in a certification. How would maintenance of systems be objectively verified, what standards would apply, what components would be covered, how would a responsible official determine whether the requirement has been met? The provision should be deleted.

Response: MassDEP has revised this section so that the certification applies only to 310 CMR 16.00 and 19.000 and related permits. Further, a facility operator will only need to identify current violations, though MassDEP recommends the facility maintain a log of operations so that the operator is able to discern any patterns of noncompliance. To clarify what a transfer station must do to remain in compliance, MassDEP has revised the term “systems” to “procedures.”

Comment: 19.035(4) - The certification process called for in this section is much too expansive given the nature of the effective, historical and current regulations of industry facilities by the department. The certifications process should be limited to specific, established criteria and standards for managing the waste materials. We do not believe the department can create new requirements that are not based on the statute or found in the regulations. Certification of systems is not an appropriate task for any facility responsible official to undertake. The attempt to shift the burden of proof regarding nuisance or threat issues of facilities from the government to owners is unwarranted and is not sustainable. (NSWMA)

Response: The certification process is appropriate for the operation of transfer stations as described in the regulations. MassDEP is not creating new standards through the certification process; it is exercising its broad regulatory authority granted to MassDEP in MGL c. 111, s. 150A. MassDEP believes it is appropriate to require a responsible official to certify that the facility has procedures (note MassDEP has revised the term “systems” to “procedures”) in place to ensure compliance with the regulations. MassDEP allows a transfer station to operate (or to continue to operate) if the operator has demonstrated that the facility does not create nuisance conditions and does not pose a threat to the public health, safety or the environment. This is the same standard that applies to a permit applicant.

Comment: 19.035(4) - The language in this section should be modified to be more in line with the language from the 21E program for waste site clean-up. (NSWMA)

Response: MassDEP believes the Environmental Results Program with regulations at 310 CMR 70.00 is a more appropriate model for the transfer station certification. This language follows that model. See response at 310 CMR 19.011.

Comment: 19.035(5) – This regulation proposes to require “the owner or operator of any transfer station which qualifies for a certification” to bear the burden to persuade DEP that the facility does not create nuisance conditions or pose a threat to public health, safety or the environment. The provision impermissibly attempts to impose on the facility owner or operator a burden that state and federal law imposes on the DEP. DEP cannot use this requirement as a vehicle to reverse the burdens of proof that it bears under applicable law. Delete this provision. (WMI)

Response: MassDEP allows a transfer station to operate (or to continue to operate) if the operator has demonstrated that the facility does not create nuisance conditions and does not pose a threat to the public health, safety or the environment. This is the same standard that applies to a permit applicant.

Authorizations to Construct (19.041) & Authorizations to Operate (19.042)

Comment: 19.041(2) and 19.042(2) – MassDEP should not make a distinction between transfer stations that manage C&D and those that do not. (Several commenters)

Response: The regulations distinguish between facilities that handle C&D and those handling MSW (or other wastes) because compliance rates with the waste bans at C&D handling facilities is lower than at MSW transfer stations and because certain C&D materials, such as wallboard, can be destroyed if not handled properly, even at transfer stations.

Comment: 19.041(7) – The regulation proposes to create a new requirement for recording a notice of ATC for any transfer station and be incorporated into “all future deeds, easements, mortgages, leases, licenses, occupancy agreements, or any other instrument of transfer.” We strongly disagree with this proposal. Under MGL c. 111, s. 150A, a notice of solid waste permit must be filed at the registry of deeds. That is all the statute requires and similar language is already in 19.044. There is no reason for a separate notice for an ATC or notice of any other component of a solid waste permit. What problem is DEP attempting to address? For hundreds of years, filing a single notice at the registry of deeds has served as sufficient notice of record for real estate purposes. No reason or justification for DEP to seek to change that well established process just for solid waste facilities. (WMI)

Response: MGL c. 111 s. 150A provides that “[n]o facility shall be established, constructed, expanded, maintained, operated or devoted to any past closure as defined by regulation unless ... the department has granted a permit for the facility and *notice of the permit is recorded in the registry of deeds...*” (emphasis added) MassDEP has revised the proposed language based on the comment to follow the statute. The revised language clarifies at what stage of the permitting process the statutory notice must be filed and what the notice must contain.

Comment: 19.042(4)(b)1. – Why does this section say that “if the Department determines that the applicant has complied hereunder, the authorization to operate **may** be reissued.” The regulation should say “will” be reissued. (Mackie)

Response: This section of the regulations, 19.042(4)(b)1. was not proposed to be revised and was not included in the public hearing draft. Therefore, MassDEP is not making any changes.

Review Criteria - 19.038

Comment: 19.038 – What criteria will the Department use to review C&D waste transfer station renewal applications? The draft regulations propose to extend the criteria set forth at 19.038 to all “permit applications”, not just ATCs and permit modifications as currently drafted. None of 19.038(2) is proposed to be changed. As a result, it appears that a permit renewal will need to meet all of the criteria of 19.038. For a C&D waste transfer station, this will include all of the general criteria at 19.038(2)(a) and the facility specific criteria at 19.038(2)(b), including the numerical setbacks and proximities to homes, property lines, etc. This is simply unworkable. Outside the control of the operator there can be encroachments by unwanted neighbors that could result in violation of the setback distances and potential ineligibility for renewal. (Mackie)

Response: The review criteria for a C&D transfer station renewal are identified at 19.038(1)(d). The applicable review criteria are 19.038(2)(a)1-11 only. The identified criteria do not include any numerical setbacks and are within the control of owner and operator.

19.044 - Transfer of Permits

Comment: 19.044 – DEP has the opportunity to resolve an unnecessary ambiguity in the solid waste permitting rule arising whenever a party seeks to transfer a solid waste permit. The requirements in 19.044 are not simple and require unnecessary resources to be expended by DEP staff and the private facility owners in order complete a transfer. There are two problems: (WMI)

- The rule does not provide for an automatic transfer of the solid waste permit. The rule does not simply state that the permit will be deemed transferred if the conditions for transfer are met. As drafted, the rule requires unnecessary staff time to administer, and buyer/seller time to work through.
- The condition in 19.044(1)(c) injects DEP into the allocation of contractual liabilities between seller and buyer. The rule inexplicably requires language in the purchase agreement that indicates the buyer is responsible for certain conditions that may exist at a site. This interferes with contractual allocations that form the basis of purchase agreements and adds no extra security for DEP. Suggest two changes to the rule to address concerns:
 - Redraft 19.044(1) to state that the transfer of the permit shall be “deemed to be automatically effective upon the completion of the following:”
 - Revise 19.044(1)(c) to say “notwithstanding any contractual agreement between the transferor and transferee, the transferee shall be responsible to correct any and all conditions...The transferee shall document its acceptance of this responsibility in a letter to the Department.”

In 19.044 DEP proposes to amend the existing deed notice provision in the rule. As noted above, we strongly object to these changes, for the reasons discussed.

The transfer of permits process currently in place is favored over the proposed process. The proposed process creates new burdens and costs and will confound smooth transfer of permits. Any change in the area of transferring permits needs to provide a clear and simple pathway to effect the permit transfer.

Response: The proposed changes to 19.044 provide notice to any transferee of the solid waste management uses of the property. MassDEP believes it is appropriate to ensure that future transferees are aware of the use of the property. MassDEP has revised this section so that the transfer may occur after a transfer certification form has been submitted to MassDEP and the requirements of the section

have been met. MassDEP believes that using such a process will allow all parties to know whether the permit has been transferred in accordance with this section.

19.061 – Special Waste

Comment: – The proposed regulatory change to remove DEP special waste determinations should not be pursued. We believe this determination is critical to the sound management of special wastes. If this process is relaxed as proposed, we, as an industry, will likely find the managing of special wastes more difficult and problematic. (WMI)

Response: The Special Waste section of the regulations was drafted before hazardous waste was regulated and before landfills were subject to current requirements. This section should be amended as proposed in the draft. Therefore, the special waste section has not been significantly modified based on the comments received.

Comment: - Covanta supports the proposal to manage special waste pursuant to the presumptive approval process in 19.061. Special waste could be managed pursuant to 19.034. Section 19.034(1)(c) requires submittal of “as-built plans and/or a report describing the modification” within 45 days of completing a modification. It is unclear if commencement of receipt of a special waste would require such a report, and if so what such a report would contain. (Covanta)

Response: A facility proposing to manage one of the listed special wastes will need to submit a presumptive approval application and include appropriate documentation (plans, reports, etc.) of how the facility plans to manage the listed special waste. The presumptive approval application must be provided 45 days before receipt of the listed waste can begin. The regulations have been revised to require “as-built plans and/or a report describing the modification” only in cases where a physical change to the facility has been made. Managing a listed special waste would not require as-built plans if no physical changes were made to the facility to manage the special waste.

Comment: 19.061 – DEP proposes to substantially eliminate its special waste management program and to replace this program with a set of much looser performance standards. We strongly disagree with this approach and believe that DEP should require any regulated solid waste facility that desires to accept any unlisted special wastes to obtain DEP approval through an application for a permit modification. This practice is significantly more protective of the environment and public health, and is of particular importance to and fully supported by communities near landfills and the local Boards of Health. (WMI)

There are many wastes that should be managed using special procedures. Such wastes create dusts, or odors or need special handling due to physical, biological, or chemical properties of the waste stream. If DEP does not address these issues directly through a permitting process, or through a clear regulatory program, disposal facilities will improperly manage these waste materials and will end up going to the least costly and least protective facility.

If DEP disagrees and considers it is essential to reduce the protective measures now in place for special waste, we propose that DEP retain in place rules that require generators to manage specific waste streams as listed special wastes under 19.061 to ensure that these wastes are appropriately managed, and are consistently managed safely. Examples of just some of the wastes of concern include:

- Open burning ash;
- Medical waste/infectious waste incinerator ash;
- Medical waste/infectious waste that has been autoclaved and sterilized;
- All forms of sludges;

- Sand blasting grit;
- Coal tar;
- Manufactured gas production derived waste;
- Leather scraps; and
- Contaminated wood chips.

Response: Regarding the list of specific waste materials suggested for inclusion as “ listed special wastes”:

- Sludges are already included as a listed special waste;
- It is not clear why leather scraps and contaminated wood chips would be considered special wastes or what the special handling requirements for those materials would need to be;
- The existing regulations specifically establish that medical/infectious waste that has been autoclaved and sterilized is no longer special waste, sterilization being the special handling requirement for that waste; and
- Open burning ash and sand-blasting grit could potentially be a dust nuisance, but MassDEP does not believe that attribute warrants the necessity of listing them as special waste. Instead, every solid waste facility should have the ability to readily recognize that potential adverse impact and prevent it from happening.

The remaining items on the list can be managed as solid waste using existing criteria in the Operation and Maintenance Requirements at 310 CMR 19.130. Therefore, as noted above, MassDEP has not significantly modified this section in response to the comment.

Comment: - Current performance standards for the management of special waste should remain in place for environmental protection reasons, as well as our industry’s ability to efficiently manage them. (NSWMA)

Response: The performance standards for the listed special wastes remain in the regulations. Beyond those standards for listed special wastes there were no definitive performance standards other than the ones reiterated at 310 CMR 19.061(1).

19.081 – Enforcement

Comment: - This section contains new enforcement and penalty provisions which are the cause for some alarm as well. The creation of a new joint and severally liable standard, as well as variations through the draft text when referring to “owner or operator” vs. “owner and operator” vs. “owner, operator or permittee” are two such items of concern. Some of the new provisions appear redundant or work at cross purposes with one another. The language also further expands liability and subjects us to enforcement even if we do not intentionally endeavor to provide insufficient, misleading or responsible officials to accept such new liabilities. Two other parts of this section, the one that makes it a violation to even talk with third party inspectors before their report is final, and the one that expands DEP authority to pursue any order or enforcement action also needs to be revised or otherwise removed. (NSWMA)

Response: The current regulations impose liability on the owner, operator and permittee. See 19.043. These revisions clarify that the owner and operator may be found liable. MassDEP may exercise its enforcement discretion where appropriate if the owner has not had any influence over the operation of the facility. MassDEP has reviewed the proposed regulations to ensure consistency with the terms “owner and operator,” and “owner or operator.” Generally both parties are jointly and severally liable to MassDEP but where a document submittal is required, only one party is required to submit the document.

Comment: It seems very confusing where in some cases the regulations refer to “owner or operator” and other places to “owner and operator.” There is a major problem with 19.081 making owner and operator jointly and severally liable. That is NOT the current state of affairs or the understanding of the industry. There are owners who are NOT on existing permits who will be very upset to find that they are now jointly liable with the permitted operator for the operator’s violations. What about municipalities that own facilities operated by private operators? Are they aware that they will now be jointly liable for operational violations of a permit that they are not holding?

In the past the regulations have always provided flexibility as to whether the owner and the operator or the operator alone applies for and obtains a permit. The existing rules provide flexibility in compliance by referring to “owner, operator or permittee.” This does not appear to have been thought through, especially where there must be existing permits that name operator only. (Mackie)

Response: See previous response. MassDEP will retain authority and discretion to pursue enforcement against an owner and/or operator. Owners and operators may arrange their affairs based on this scenario.

Comment: It is unclear from the proposal whether a deficiency noted by a third-party inspector during their “O&M” inspection would constitute a violation potentially subject to enforcement action by DEP under proposed 19.081(3). Covanta understands that any deviations noted by the inspector must be addressed in the report submittal. However, it is Covanta’s interpretation based on solid waste precedent that enforcement will not be taken unless DEP personnel observe the deviation. DEP has taken the position that it cannot conduct waste ban enforcement against generators based on the waste ban failure documentation generated by solid waste disposal facilities. Covanta requests clarification of this issue. (Covanta)

Response: MassDEP does not intend to take enforcement action based on deficiencies noted solely by a third-party inspector in most situations. Third-party inspections serve to notify the regulated entity of possible violations sooner or more frequently than if the regulated entity relied on MassDEP to conduct an inspection. The third-party inspection also encourages the regulated entity to correct such possible violations. However, MassDEP will retain its authority to take appropriate enforcement based on a third-party inspection in appropriate situations.

Comment: 19.081(2)(a) – The regulation proposes to create violations for not meeting certain submittal deadlines. We do not understand why this clause is necessary given that there are submittal deadlines in the rules already. We request that DEP either remove this provision or clarify in its response to comments that DEP intends that there would only be one violation for single late submittal. (WMI)

Response: MassDEP agrees that a single late submittal should result in only one violation per day. No change was made to this section of the regulations.

Comment: 19.081(2)(b) and (c) – The regulations propose to make a violation for any false, inaccurate, incomplete or misleading information that is provided in a wide variety of documents. We request that this language be modified to require intent for a violation to exist. (WMI)

Response: MassDEP will not change the regulation as proposed, because MassDEP is not required to prove intent in order to cite a person for making a submittal with false, inaccurate, incomplete or misleading information in a notice of noncompliance. In order for MassDEP to assess a penalty for such noncompliance without prior notices of noncompliance, MassDEP must make a demonstration that the violation was willful or not the result of error, a demonstration that the violation caused significant harm or one of the other pre-conditions in the Administrative Penalty Act, M.G.L. c. 21A, § 16. Those

preconditions are spelled out in detail in the Administrative Penalty regulations at 310 CMR 5.00, and they do not have to be repeated in the proposed amendments to 310 CMR 19.000.

Comment: 19.081(2)(d) – The regulation proposes to make a violation of the rules any alteration or misrepresentation of findings or recommendations made by third party inspectors. We do not believe third party inspectors should make recommendations. Language could be interpreted to prevent a discussion of the findings of a third party inspector before a final report is prepared. Please clarify that this prohibition does not apply to the fact gathering and deliberative process that the third party inspector will engage in with the facility owner/operator prior to submittal of the third party inspection report. (WMI)

Response: MassDEP believes third-party inspectors should be making recommendations to the facility on how to comply with the regulations. The owner and operator are not precluded from discussing proposed resolutions, particularly where the owner and operator believe there are options the TPI has not considered. However, the observations or findings of the TPI are facts and should not be altered. With regard to those recommendations the owner or operation is required to do one of three things:

- Submit a report documenting the completion of the corrective action;
- Document or explain why the corrective action is not needed; or
- Submit a plan and schedule for completing the corrective action.

The owner or operator may also elect to correct deviations in a manner that is different than what the third-party inspector recommended, as long as the action brings the facility back into compliance. Therefore, there are several options for how to respond to the recommendations made.

Comment: 19.081(2)(f) – This regulation proposes to grant DEP access to facilities or any other property under a wide variety of circumstances. This is duplicative of 19.007. DEP seeks to grant itself access rights by issuing “any order or other enforcement document.” This is too broad and exceeds DEP’s statutory rights. This language should be removed. In addition, the language in (2)(f)2. Is vague and unclear and we cannot determine what it is intended to accomplish. (WMI)

Response: MassDEP has revised this section so that it does not repeat the requirements of 310 CMR 19.007. It is a violation not to comply with the terms of any permit, determination or other approval or consented to enforcement document conditioned upon granting DEP reasonable access.

Standardization/Monitoring and Reporting

Comment: 19.132(5)(c) - Within the amendment to 19.132(5)(c), the regulations establish when the Department will not accept landfill gas monitoring data. Landfill gas monitoring and sampling at landfills occur in-situ utilizing a 4 and/or 5 gas meter. It is our assumption that the Department is stating that the in-situ equipment used should be properly calibrated, in good functioning order and that the company performing the sampling has an acceptable QA/QC procedure for this activity? We ask this ensure that this standard practice, if properly followed is still acceptable. (Green Seal)

Response: The “device,” as referenced in the regulations at 19.132(5)(c) and as defined in the Landfill Technical Guidance Manual, is the monitoring well or probe from which samples are collected. As used in the referenced regulation, the device refers to the pathway for obtaining the sample, not the detector that registers the absence or presence of the gas. As discussed in the Landfill Technical Guidance Manual, quality assurance/quality control schedules and procedures for maintaining and calibrating monitoring equipment (i.e. OVAs, PIDs, LEL meters) should be contained in the Landfill Facility Plan, Closure Plan, and/or Post-Closure Plan.

MassDEP reviews and approves the construction and use of gas monitoring wells and locations. MassDEP also requires that monitoring wells not be damaged during sampling and that sampling is done in accordance with the regulations. Standard sampling practices, if followed, will be acceptable.

Comment: 19.141 & 19.143 – This regulation proposes a new requirement for recording of deed notices similar to that proposed for transfer stations at 19.041(7). Please see comments regarding that section, which apply equally to this proposal.

In addition, this section also contains a requirement that specific language be used in the deed notice for a landfill, but that language conflicts with the post-closure use language proposed by DEP in this draft rulemaking proceeding. The language at issue states that the premises shall not be used for any purpose other than a landfill without the prior written approval of DEP. See Section 19.143. If the changes proposed by DEP are adopted, there will be uses to which former landfill sites may be put that do not require prior written DEP approval. The language required for the deed notice should therefore be modified to be consistent with DEP’s intended language allowing some post-closure uses without DEP approval. (WMI)

Response: MassDEP agrees with the comment and has changed the phrase “prior written approval” in 310 CMR 19.141 to “appropriate approval.” Since the regulation already references the amended 310 CMR 19.143 which incorporates references to those situations that require prior written approval and those situation that require only presumptive approval, MassDEP believes the changes address the potential inconsistency flagged by the commenter.

Comment: - 19.140 and 19.141 – The regulation creates new filing of notice requirements for landfills akin to the proposed changes regarding transfer stations. We believe this is an inappropriate change for landfills too. Also, there appears to be a conflict with other parts of this section about new allowable uses at landfills which should be adjusted accordingly. (NSWMA)

Response: Please see previous responses.

19.143: Post-Closure Use

Comment: The regulation will allow for post-closure use at a transfer station or closed landfill with only notification to DEP, except if the use is on the cap of the landfill. The proposed regulations allow for siting of projects, such as solar panels, off the cap but there is no restriction on going up and over the cap to run interconnection lines. There are too many situations possible where an eager contractor will not understand the need to maintain cap integrity and the current regulations have no control over these situations. (FCSWMD)

Response: This regulation requires a written approval for any post-closure use on the landfill’s final cover, which would include running interconnection lines across the top (lined) portion of the facility.

Comment: I do not support the post-closure use changes that allow for post-closure use projects to follow a certification or presumptive approval process. I can support in very limited situations, such as recreational activity, but energy production projects must be required to get written approval as in current regulations. (FCSWMD)

Response: MassDEP’s major concern with post-closure use projects is that they not disrupt the final cover or any necessary structures, such as detention basins, monitoring wells, etc. Presumptive approval will be sufficient to provide notice to the Department of proposed uses that will not be located on the capped portion of the site, thereby protecting the cap. Third-party inspectors will also be inspecting these facilities, which, when combined with DEP inspections, will provide adequate oversight.

Asbestos

Comment: (Part 1) We wish to note several gaps associated with how “confirmed” and “suspect” asbestos-containing material (ACM) is handled if it arrives at solid waste management facilities, specifically related to timely notifications and inspector training. (Covanta)

1. Timely Notifications – There is not a uniform standard or provision in various Covanta Energy facility solid waste Authorizations to Operate permits with respect to notifications in the event of receipt of ACM. In many cases, a clear definition of “suspect” ACM is not well defined. Are notifications required when the material is “suspect” ACM or only when lab results confirm ACM content? Covanta suggests that the latter criterion should apply; if a material is suspect ACM it should be isolated on the tipping floor, sampled, and DEP notified only upon receipt of a positive result. Covanta’s asbestos training contractors have often stated that all the material on the tipping floor should be considered “suspect” lacking any confirmatory lab analysis. This leads to unworkable situations. DEP should develop a uniform standard applicable to all solid waste management facilities.

Response: Notification is only required where lab results confirm ACM content in a suspect material.

Comment: (Part 2) We wish to note several gaps associated with how “confirmed” and “suspect” asbestos-containing material (ACM) is handled if it arrives at solid waste management facilities, specifically related to timely notifications and inspector training. (Covanta)

2. Asbestos Inspector Training. The requirement for asbestos inspector training is not uniformly applied across all permits and the type of training cited is a poor fit for solid waste management facilities. Some facilities have requirements for Asbestos Inspector Training per 453 CMR 6.07(2)(a)1. Other facilities have no such requirement for training. Furthermore, asbestos inspector training, at present, is focused on training building inspectors to assess existing buildings and structures for the presence of ACM. For example, much of the asbestos training is related to how to properly conduct Asbestos Hazard Emergency Response Act (AHERA) assessments of schools per Federal requirements. This has nothing to do with conditions found on a solid waste tipping floor. We suggest DEP contact Covanta’s current training contractor, the Institute for Environmental Education (IEE), Wilmington, MA to discuss improved ways to develop an asbestos inspector training program that better fits solid waste and C&D management facilities.

Response: MassDEP agrees that the training requirements for asbestos inspectors at Solid Waste Management facilities are not uniformly applied, and that the training used may be a poor fit for solid waste management facilities. Further discussion on this issue should take place with the Solid Waste Advisory Committee and with the Department of Labor Standards (DLS). DLS determines who can perform what asbestos abatement activities and what licensing, training and certification is required.

Errata

Comment: References to Certification – Proposed new sections 19.061(1)(b)1 and 19.061(3)(a)1.b reference section 19.034 as a certification section for transfer stations. However, proposed new 19.034 is the “Presumptive Approval Process”. Certifications for transfer stations are in proposed new section 19.035. Please clarify.

Response: The identified references to certifications for transfer stations have been corrected and now reference 19.035.

List of Commenters

1. ACE – Alternatives for Community & Environment (ACE)
2. Casella Waste Systems, Inc. (Casella)
3. Center for EcoTechnology (CET)
4. Civil and Environmental Consultants, Inc. (CEC)
5. Covanta Energy (Covanta)
6. Franklin County Solid Waste Management District (FCSWMD)
7. Green Seal Environmental, Inc. (Green Seal)
8. NSWMA – The National Solid Wastes Management Association (NSWMA)
9. Marian Rambelle (MR)
10. Thomas A. Mackie, Mackie Shea O’Brien, PC (Mackie)
11. Thomas B. Speight, CHMM (TS)
12. Waste Management of Massachusetts, Inc. (WMI)