



Department of Environmental Protection

One Winter Street Boston, MA 02108 • 617-292-5500

Charles D. Baker
Governor

Karyn E. Polito
Lieutenant Governor

Matthew A. Beaton
Secretary

Martin Suuberg
Commissioner

“Ask the Office of the Permit & Regulatory Ombudsman”

Issue Summary: Transfer of Post-Closure Use Approvals for Photo-Voltaic (PV) Arrays at Closed Landfills

MassDEP’s Office of Permit and Regulatory Ombudsman serves as a Point of Contact for facilitating the resolution of issues about permitting or questions about how law, policy, and regulations are being applied across the agency. This summary provides information about an issue raised to the Office and should not be considered legal or consulting advice. Project proponents should consult the regulations and appropriate MassDEP Regional Office on how this information may apply to their specific projects.

Issue: Requirements for transferring a Post-Closure Use Approval from the initial developer of a Photo-Voltaic (PV) facility on a closed landfill to a subsequent Operator.

Inquiry: MassDEP was contacted by a developer of PV facilities to inquire about the requirement for transferring a Post-Closure Use Approval for a PV facility on a closed landfill to a new operator. Specifically, the developer questioned:

- What approval is required for transferring a Post-Closure Use Approval (PCUA)? The developer noted he recently applied for transferring two PCUAs--in one region MassDEP’s transfer application approval letter informed him that the new operator (the “transferee”) needed to complete a Certification for Transfer of Permit form (BWP SW 49) (pursuant to 310 CMR 19.044) to transfer the PCUA. However this form was not required in the approval letter issued by another region. The facility developer asked whether there is a consistent MassDEP procedure on this requirement.
- In addition, the developer noted that the Certification for Transfer of Permit form (BWP SW 49) required that the developer and subsequent operators of the PV facility both be held responsible for correcting any problems that arise at the landfill, and not just those that are caused by, or related to, the activity authorized by the post-closure use permit. The PV facility developer therefore also inquired into why the Operators of the PV facility should be responsible for problems that are not caused by, or related to, the PV facility.

Regulatory Background: The requirement for holders of solid waste permits to submit a certification to MassDEP when transferring their Permit to another entity (310 CMR 19.044) has been in MassDEP's solid waste management facility regulation for many years. The certification form is used for transferring all solid waste permits from a permittee to a new party. In the form, for the transfer to be valid, the transferee has to agree to be "responsible to correct any and all conditions at the site or facility which result in a threat to public health, safety or the environment or constitute violations of the [facility's] site assignment, laws, regulations, or conditions of the permit, approvals, or authorizations existing at the time of transfer..., and to obtain financial assurance as required by 310 CMR 19.051." The transfer of the PCUA is a transfer of a solid waste permit triggering this requirement and ensures the post-closure use will not reduce protection to the public health, safety and the environment which is ensured through conditions of the facility's site assignment, permits and approvals, and in the solid waste regulations and laws.

Historically, most Post-Closure Uses (e.g., municipal transfer or recycling stations, recreational facilities) have been built and operated by the landfill owner itself, and are not usually transferred to other entities who would become permit holders. While the operation of Post-Closure uses may be leased or otherwise contracted to entities who do not own the underlying landfill, these entities do not become permit holders.

Since 2009, MassDEP has encouraged the owners of closed landfills to consider developing renewable energy generation facilities at closed landfills, and has issued 70 Post-Closure Use Permits for this type of use to date. In almost all of these cases, the owner of the closed landfill (frequently a municipality) leases the area of the landfill needed for a renewable energy project to an entity that designs, builds, operates, and maintains the renewable energy facility. Most applications for Post-Closure Use Approvals for renewable energy facilities have been submitted jointly by the landfill owner and the project developer/operator. In these cases, MassDEP has issued its approval of these applications jointly to both parties, and considers both parties to "hold" the Post-Closure Use Permit.

The transfer of ownership or responsibility for operating a PV system at a closed landfill was not specifically contemplated when MassDEP started to issue approvals for this particular type of Post-Closure Use in 2010. However, the business models used by PV system developers have evolved over the last five years and, in a few cases, the developer of a PV facility has transferred its responsibilities under its lease with the landfill owner to another corporate entity once the facility has been built and operation commences. This was the case for both Post-Closure Use facilities involved in this inquiry.

Response: In response to the developer's inquiry, MassDEP evaluated whether the transfer of PCUAs should require use of the BWP SW 49 form and how the requirements related to transfer of PCUAs have been applied across regional offices. MassDEP determined that the transfer of the PCUA is in fact the transfer of a solid waste permit triggering the certification requirements pursuant to 310 CMR 19.044. MassDEP also determined that this requirement was not stated in all PCUAs. To ensure consistent application of this requirement, MassDEP issued guidance to regional offices instructing them as follows:

- All PCUAs should include a "Transfer" condition notifying the permit holder that the transfer of the permit requires submittal of the BWP SW 49 form.
- In situations where the landfill owner and the "Operator" of the Post-Closure Use signed the Post-Closure Use permit application, both are considered to be "holders" of the permit. The transfer of responsibilities from one "Operator" to another will require submittal of a Certification for Transfer of a Permit form (BWP SW 49).
- In cases where the developer is not a permit holder for the Post-Closure Use Permit, the developer/operator will need to comply with the terms and conditions of the Post-Closure Use Approval, but will not be required to file a Certification for Transfer of a Permit form (BWP SW-49), to transfer the PV array.

To address the second question raised by this inquiry, of why the Operators of the PV facility should be responsible for problems that are not caused by, or related to, the PV facility, MassDEP reevaluated the requirement in the BWP SW 49 form which required the permittee to agree to be held responsible to correct *any and all conditions* at the site or facility which result in a threat to public health, safety or the environment. MassDEP has modified the BWP SW 49 form to clarify that the Department will seek to hold the developer or operator of a post-closure use for a solar array responsible for problems arising from the development, construction, operation and maintenance of that use, and would not hold the developer or operator responsible for problems at the closed landfill that did not arise from the post-closure use. The owner of the closed landfill remains responsible for correcting problematic conditions at the entire solid waste management facility. MassDEP believes that making this revision to the BWP SW 49 form does not reduce protection of the environment because the owner and operator of the underlying solid waste management facility will continue to be responsible to correct any and all conditions at the site or facility which result in a threat to public health, safety or the environment or constitute violations of the facility's site assignment, laws, regulations, or conditions of the permit, approvals, or authorizations.

The updated BWP SW 49 form has replaced the previous version here on the Department's website:

<http://www.mass.gov/eea/agencies/massdep/service/approvals/bwp-sw-49-certification-for-transfer-of-a-permit.html>