



*Safeguarding the landscape, communities and heritage of Virginia's Piedmont
by involving citizens in related public policy and land conservation*

To: Deputy Secretary of Natural Resources, Joshua Saks
From: Dan Holmes, Piedmont Environmental Council
Date: March 22, 2019
Subject: Disposal of Nonagricultural Excavation Material Not Generated On The Farm Used for a Claimed "Agricultural" Purpose

Dear Deputy Secretary Saks,

Thank you for taking the time to discuss the matter of unregulated landfills on agricultural properties on Monday. As you are aware, the Piedmont Environmental Council (PEC) promotes and protects the natural resources, rural economy, history and beauty of the Virginia Piedmont. We are writing to you today because believe there is inconsistent application of state regulations related to the use of offsite fill dirt for what is claimed to be agricultural purposes, but in fact are unregulated landfills. The determinations by DEQ in cases in Loudoun and Fauquier may result in detrimental impacts to waters of the Commonwealth and have certainly negatively impacted adjacent properties and other resources.

The storage or disposal of nonagricultural excavation material can impact both surface and ground water quality, agricultural soil health, air quality, and the quality of life for rural residents. As such, we believe the Department of Environmental Quality has the legal ability and obligation to oversee and regulate these sites through state erosion and sediment, stormwater, and solid waste management regulations¹. However, there have recently been numerous large scale dumping activities, under the guise of agriculture, in Loudoun, Prince William, and Fauquier Counties that have failed to trigger reasonable state oversight. We also have reason to believe this problem is occurring in other jurisdictions outside of our region and that determinations made by the Department of Environmental Quality (DEQ) may differ from region to region.

In our opinion, the DEQ Northern Regional Office has applied a broad interpretation of what is accepted as an agriculturally exempt activity. In providing training and technical support for the local stormwater and erosion sediment control programs they oversee, it is our understanding that the agency has advised localities to apply that same broad interpretation. In many cases, these sites should be regulated as a solid waste landfill as they are accepting large amounts of excavated nonagricultural material for questionable agricultural purposes. At these sites of concern there is no clear agricultural engineering operation being practiced and there is abundant documentation that the landowner is accepting significant quantities of nonagricultural excavation material brought from off-site as a business, creating an open dump and public nuisance.

¹ § 62.1-44.15:21. Impacts to wetlands, § 62.1-44.15:20. Virginia Water Protection Permit, § 62.1-44.15:55. Regulated land-disturbing activities, Virginia Water Protection (VWP) Permit Program Regulation (9VAC25-210), General VPDES Permit for Discharges of Stormwater from Construction Activities (9VAC25-880), and Solid Waste Management Regulations (9VAC20-81).

Activity of Concern in Fauquier County

In southeastern Fauquier, a landowner allowed massive amounts of fill dirt to be dumped on their land, raising the property in excess of 20 feet in some places according to the County staff report. PEC got involved when adjacent landowners contacted us about this activity. We directed them to contact the County as we believed this fell under Chapter 11 Stormwater Management and Erosion and Sediment Control. As the fill used is coming from off-site and contains excavation material, waste, and debris not generated on the farm, we do not believe this use is an exempt agricultural activity due to the source of the fill and the lack of any clear engineering operation.²

We found out that the County worked with VDACS and the DEQ to conduct an onsite evaluation in November of 2017. VDACS found it to be out of their jurisdiction as there was no agricultural activity taking place while DEQ gave the County the technical guidance that they would consider the activity agriculturally exempt. This exemption was determined on the basis of the applicant claiming the site was being prepped for a turf farm. However, the site visit clearly should have demonstrated that the amount of fill (also containing some construction debris) being brought in was well beyond the amount necessary to achieve the stated agricultural purpose of preparing a turf farm. We contend this specific site represents an unregulated landfill. This site has clearly become an open dump and public nuisance, impacting the public health, safety, and welfare of neighbors.

The County felt they were unable to impose erosion and sediment control measures due to the state's determination. They have now adopted a new zoning ordinance to control the most egregious of these dumping activities. Since this ordinance was adopted in September of 2018 a number of new dump sites have popped up in southeastern Fauquier. With little state oversight and localities struggling to keep up landowners are seeing an opportunity to make significant amounts of money accepting nonagricultural excavated fill material, claiming questionable agricultural purposes.

Activity of Concern in Loudoun County

In Loudoun County this issue has been ongoing with the most recent abuse getting significant press coverage after adjacent property owners put together a sophisticated video of the issue: <https://www.loudounrurallandfills.com/>. It is an 18 acre site near Hamilton where the topography has been raised by 30 feet. It is estimated that between 220,000 to 420,000 cubic yards of waste have been

² Fauquier County Code Section 11-5.2 Clearing of lands specifically for agricultural purposes and the management, tilling, planting, or harvesting of agricultural, horticultural, or forest crops, livestock feedlot operations, or as additionally set forth by the state board in regulation, including engineering operations as follows: construction of terraces, terrace outlets, check dams, desilting basins, dikes, ponds, ditches, strip cropping, lister furrowing, contour cultivating, contour furrowing, land drainage, and land irrigation; however, this exception shall not apply to harvesting of forest crops unless the area on which harvesting occurs is reforested artificially or naturally in accordance with the provisions of Chapter 11 of the Code of Virginia (Code of Virginia, § 10.1-1100 et seq.) or is converted to bona fide agricultural or improved pasture use as described in Subsection B of Code of Virginia, § 10.1-1163. This exemption shall not apply to the construction of agricultural/farm roads, equestrian facilities such as riding rings/arenas or for buildings and other structures utilized for agricultural purposes.

dumped, equating to around 28,000 truckloads of offsite dirt. The stated purpose was the creation of a “polo field”. That purpose was later defined as a “personal recreation field”.

According to an article in the Loudoun Times, DEQ staff inspected the site and said, “Based on what we saw, we didn’t see anything that would be considered a violation.”³ Officials from DEQ found soil, bricks, asphalt, concrete, and rocks with small amounts of woody vegetation, silt fence fabric, and lightweight plastic called polyvinyl chloride. They reported that there was no evidence of “contamination such as an oily sheen or chemical odor”. This finding failed to recognize this site had become an open dump and public nuisance and therefore should be subject to state regulations^{4, 5}. We believe the above-referenced video of this activity demonstrates clearly that the landowner’s primary purpose is to profit from the disposal of nonagricultural excavated material rather than construction of a private playing or recreational field. The finding that the activity was in compliance resulted in the diversion of material from regulated municipal and private landfills which comply with the rules.

Loudoun County has sent the landowner two violation notices and is currently waiting on a revised plan to address the “stockpile”, including some removal of dirt. If the landowner fails to conform with permit approvals, the County will take potential legal action. Support from DEQ stating that this activity is an illegal landfill and subject to penalties would be extremely helpful for Loudoun and the impacted neighbors. Had the proper determination been made initially, it may have prevented additional environmental damages and eliminated a delay in site cleanup. Furthermore, the determination that the activity was in compliance may encourage other bad actors to pursue similar activities.

Inconsistency with Attorney General Opinion

The Code of Virginia Section 15.2-2288 clearly states that disposal of nonagricultural excavation material, waste, and debris not generated on the farm⁶ is not a part of the agricultural practices that are protected by the right to farm act. The Attorney General opinion dated October 11th 2013 supports this interpretation and explicitly states, “regardless of the end use to which the material may be put.”⁷

³ *Department of Environmental Quality says no contamination at Gable Farm site in Hamilton.* Nathaniel Cline. March 7th, 2019. Loudoun Times-Mirror.

⁴ 9VAC20-81-95. Identification of Solid Waste.

⁵ 9VAC20-81-45. Open Dumps.

⁶ Virginia Code Section 15.2-2288 A zoning ordinance shall not require that a special exception or special use permit be obtained for any production agriculture or silviculture activity in an area that is zoned as an agricultural district or classification. For the purposes of this section, production agriculture and silviculture is the bona fide production or harvesting of agricultural products as defined in § 3.2-6400, including silviculture products, but shall not include the processing of agricultural or silviculture products, the above ground application or storage of sewage sludge, or the storage or disposal of nonagricultural excavation material, waste and debris if the excavation material, waste and debris are not generated on the farm, subject to the provisions of the Virginia Waste Management Act. However, localities may adopt setback requirements, minimum area requirements and other requirements that apply to land used for agriculture or silviculture activity within the locality that is zoned as an agricultural district or classification. Nothing herein shall require agencies of the Commonwealth or its contractors to obtain a special exception or a special use permit under this section.

⁷ Office of the Attorney General, October 11th, 2013 Interpretation of Virginia Code Section 15.2-2288 Response: “It is my opinion that 15.2-2288 authorizes localities to require a special use permit for “the storage or disposal of nonagricultural excavation material, waste, and debris if the excavation material, waste, and debris are not generated on the farm,” regardless of the end use to which the materials may be put.”

Although the Attorney General opinion is in reference to zoning regulations, it is inconsistent for the state to exempt a use from basic erosion and sediment controls while allowing that same use to be subject to discretionary legislative approval.

We have heard anecdotally that this issue reaches beyond Northern Virginia counties and affects other jurisdictions in close proximity to large amounts of development but that other DEQ offices may not interpret the agricultural exemption as broadly as the DEQ Northern Regional Office. Consistency throughout the state is important and this may simply a matter of clarifying the definition of "engineering operation" and "terracing" within the agency.

We are not opposed to the current agricultural exemptions and support bonafide agricultural operations use of fill to achieve/pursue legitimate agricultural purposes. But we believe that the amount of fill brought to a site should equate to the amount necessary to achieve the stated agricultural purpose. These exemptions should not be used to allowing illegal dumping operations under the guise of agriculture.

Our primary concerns are that: 1) adjacent property owners be protected from potential groundwater and soil contamination and erosion and sedimentation, 2) localities be supported in their efforts to protect the public health, safety, and welfare, and 3) our streams, wetlands, agricultural soils, and groundwater be protected through the reasonable interpretation and enforcement of state regulations. As always we would be happy to meet with you in Richmond, bringing supplemental information and images about the specific cases, if it would be helpful. In the meantime, please feel free to reach out with any questions you may have regarding the issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Holmes". The signature is fluid and cursive, with a long horizontal stroke at the end.

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