

## IS ONTARIO “OPEN FOR BUSINESS” WHEN IT COMES TO EXCESS SOIL MANAGEMENT?

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## Is Ontario “Open for Business” when it comes to Excess Soil Management?

*By Grant Walsom Posted December 5, 2018 In Feature Articles*

Since the 2013 call for a review in the regulatory gaps surrounding the ability for enforcement on mismanagement of excess soils in Ontario, the Ministry of Environment (now called Ministry of Environment, Conservation and Parks – MECP) has tirelessly worked towards a proposed Excess Soil Regulatory package for Ontario. The efforts have included an unprecedented process of stakeholder

listening sessions, consultations and engagement group meetings and inter-Ministerial reviews over the past 5 years.

The proposed Excess Soil Regulatory Package was formed through 2 separate postings on the Environmental Bill of Rights (EBR) and is reportedly ready for Cabinet Approval. Further, the regulatory package is formulated with general overall acceptance by the construction and development industry in Ontario as well as the supporting industries (i.e., legal, consulting, laboratories) and municipalities. It is generally agreed that the proposed Regulation outlines possible opportunities for beneficial reuse with sustainable considerations (examples would be reduced truck traffic and reduced greenhouse gases creation).

We are coming to understand that the current Conservative Provincial Government is strongly opposed to a majority of initiatives created by the previous Liberal Government. The Conservatives are in favour of the red-tape reduction, streamlining operations and fiscal responsibility. In fact, there is now a Deputy Minister of Red Tape and Regulatory Burden Reduction in the Ontario Cabinet. His job is to make Ontario “Open for Business.” Any new Regulation such as those being reviewed by MECP could certainly be viewed as counter-productive in terms of red-tape reduction. However, with the release of the Made-in- Ontario Environment Plan on November 29, 2018, it appears that Excess Soil Regulation will be enacted in some form in the not-to-distant future. There will no doubt be some changes to the proposed Regulatory package, but it is good to see that Regulation will proceed.

To date, one of the biggest challenges that the enforcement regime of the Environment Ministry had was the gap in how excess soil (impacted with contaminants or not) could be classified as a “waste material” if it’s not managed properly or if it’s illegally dumped. We have all seen the extensive media coverage of a number of illegal dump sites, innocent property owners misled on the quality of the fill they are accepting, and private air-fields who have capitalized on the regulatory gaps in Ontario where excess soil is concerned. Enforcement against illegal dumping or misrepresentation of the soil quality is not clear or easily achieved under the current Environmental Protection Act and regulations such as Regulation 347 (Waste Management). Minor amendments to Regulation 153/04 (Brownfields Regulation) have also been proposed to assist in streamlining and simplifying filing of Records of Site Condition and redevelopment of Brownfield properties. Further definitions of soil, waste and inert fill are also forthcoming in the new proposed Excess Soil Regulatory package.

One of the main benefits of the proposed Excess Soil Regulation is the clarity it provides in the expectations of appropriate management of excess soil along with the steps that would be followed to provide the level of certainty that the public would expect. It puts a heavy onus on the generator of the excess soil (or the source site) to assess the quality against a set of new standards. The Standards were developed as a subset of the O. Reg. 153//04 Brownfield Standards, aimed at assisting in identifying acceptable and beneficial re-use of the excess soil.

Beneficial reuse of excess soil has a strong consideration for soil quality in terms of chemical testing to assess for contaminants; however, Ontario soils are highly variable with respect to the geotechnical quality for engineered reuse (i.e., silt, clay, sands, gravels and poor quality mixed fill). Recovered excess soil may require some screening/grading to classify the geotechnical qualities prior to identifying an appropriate engineered and beneficial reuse. Market-based solutions and opportunities for excess soil supply and demand services are sure to be identified as creative Ontarians have historically shown innovation in finding geotechnical solutions for excess soil. The new regulatory package allows for this to happen to the benefit of both sender and receiver parties. Increasingly, clients are also choosing to avoid moving soils by employing methods to limit or even eliminate the amount of soils that have to be moved from a poor fill site with things like landscaped architectural features or ground improvement to treat soils in place.

Another benefit of the proposed excess soil regulation is the placement of the responsibility to ensure and “certify” the quality of the excess soil and the appropriate handling and re-use of the material by the source site or generator. This requires a shift in the thinking

around management of any excess soil materials to be assessed and pre-planned at the beginning of a project, versus at the last minute and left to the excavation contractor, as has historically been done. The shift in thinking and pre-planning may take time, but with the assistance of the “Qualified Person” community in Ontario, the planning can be simplified. The industry is already starting to shift to a more responsible management of excess soils, with the knowledge of potential Regulatory changes. The proposed Excess Soil Regulatory package has a well-defined transition period of two full years to be fully enacted, giving the construction and development industry time to become used to the shift in thinking and pre-planning as well as the procurement groups to ensure that the appropriate assessment and characterization activities are completed.

The benefits of many aspects of the proposed Excess Soil Regulatory package are clear and are desired in Ontario. The business community has hoped that the current Conservative Government in Ontario understands that the Excess Soil Regulatory package has been requested by the citizens of Ontario, and formulated through an exhaustive consultation and engagement of the various stakeholders in the Province. It has also been hoped that the current Provincial Government sees the value in many aspects of the proposed regulatory package for management of excess soils. With reference to Excess Soil Regulation in the Environment Plan, it certainly appears that the current Provincial Government does see the value. Further, the complimentary minor amendments to the soil and waste definitions are needed as are the proposed amendments to the Brownfield Regulation.

Since the June 2018 election, the construction and development industries in Ontario have been patiently waiting for clarity on how the current Provincial Government plans to proceed. It is clear that this new legislative change will help to make Ontario open for business and it appears that the current Provincial Government agrees. We will now see what changes to the proposed Regulatory Package will be made, hopefully, sooner than later.

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