

**Ontario Sewer and Watermain Construction Association**



***OSWCA Submission for ERO# 019-5203 – Implementation Pause of  
Excess Soil Requirements in Effect January 1, 2022***

April 2022

April 6, 2022

Submitted via email to: [laura.blease@ontario.ca](mailto:laura.blease@ontario.ca)

Ms. Laura Blease  
Ministry of the Environment and Climate Change  
Land Use Policy, Environmental Policy Branch  
40 St Clair Avenue West (Floor 10)  
Toronto, ON M4V 1M2

**Re: OSWCA Response to the Ministry of Environment, Conservation and Parks'  
Proposal to Pause the Implementation of Excess Soil Requirements in Effect  
January 1, 2022**

On behalf of our members, the Ontario Sewer and Watermain Construction Association (OSWCA) would like to provide the following comments and recommendations to the Ministry of Environment, Conservation and Parks' (MECP) consultation on its proposal for an *Implementation Pause of Excess Soil Requirements in Effect January 1, 2022*.

OSWCA understands the need for a pause in the implementation of Ontario Regulation 406/19 (O.Reg 406/19) in order to adjust its rollout to help organizations better understand their requirements and help them to implement proper soil management processes that meet the intent of the regulation. It is important to note, though, that most excavation contractors in the province are already engaged in projects that require them to follow the new soil removal, disposal, tracking, testing, and re-use rules as a condition of contract. Even with a regulatory pause, our contractor members are not likely to see a change in the field for how they are required to operate under their current contracts. So, it is important that the MECP capitalizes on this unique opportunity to address the concerns of inconsistent implementation across the province, ambiguous and confusing responsibilities and requirements, excessive costs, and construction delays.

OSWCA would like to make the following recommendations for necessary changes that will help to address these issues.

### **1. Project Leader Clarity**

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***Recommendation:*** Replace references to "project leader" in O.Reg 406/19 with "project owner."

The most significant cause for confusion with O.Reg 406/19 is the use of the term "project leader" instead of "project owner." The problem with "project leader" is two-fold. Firstly, the term which sets out responsibility and liability is vague and of ambiguous meaning, a fatal flaw for such a crucial element within a policy document. With reference to the loose definition provided in the current iteration, "project leader" can be interpreted to mean whatever the project owner chooses. Much worse, without a clear definition, this term can be applied in different ways to similar situations, threatening any intention of consistency in its application.

Secondly, and stemming from its ambiguity, is that the “project leader” definition removes the certainty of responsibility from this regulation and appears contrary to its ultimate intention – to increase due diligence, certainty, consistency, and rigour in the management of excess soils. In fact, the reference to a “project leader” perpetuates many of the existing problems and has the potential to encourage much of the environmental harm this regulation has sought to address.

Compounding these concerns is the reference to a project leader’s activities in the regulation. Many of the duties referenced, such as “managing and relocating excess soil generated by a project” could be interpreted to mean either the responsibility of the prime contractor or the owner. However, the distinction between such entities is crucial. For a term that ultimately determines responsibility, and aims to ensure certainty in such responsibilities, clarity is essential.

From a liability perspective, there continues to be no clear understanding of who is responsible for what elements of due diligence, placing all parties in a position of significant uncertainty and risk. Contrariwise, if the responsibility is clearly outlined, the party responsible can take all steps they feel necessary to ensure due diligence. Referencing the “project owners” responsibility will:

1. level the playing field regarding expectations for soil management amongst all source site owners (i.e. classifying soil in tender documents and identifying end use and/or disposal sites), which in turn will provide certainty on what exactly contractors need to ‘price’ for in their bid;
2. encourage source site owners to manage their liability by conducting due diligence on potential receiving sites, including increased monitoring and testing of incoming contaminated material, as well as tracking the locations of received loads; and,
3. discourage unscrupulous contractors who will not consider costs associated with the risk of discovery, proper assessment or disposal of contaminated soil.

As presently defined, “project leader” is ambiguous, and jeopardizes any certainty in responsibility or due diligence. As a result, in its current state, the use of “project leader” has the potential to encourage poor management of excess soil, rather than improve it.

## **2. Reduce Sampling Requirements**

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***Recommendation:*** *Revise soil testing rules for different property classifications and reduce the number of samples required to bring it back in line with historic norms.*

Invasive and costly sampling and testing requirements in the MECP Soil Rules are excessive and should be reduced significantly, based upon recommendations from local Qualified Persons. Not all project areas have the same risk of contamination and should be sampled accordingly. For example, farm fields or deep soils with poor percolation rates don’t have the same inherent risk of contamination as industrial lands. We recommend revising MECP Soil Rules tables for different property classifications and

areas of potential concern. Historically, sampling rates have been taken at approximately 5-20% of what is required under O.Reg 406/19.

### **3. Create Greater Opportunities for Reuse Sites**

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**Recommendation:** *Educate public buyers on the economic and administrative benefits of establishing a Class 2 Management and how to do it.*

The expressed goals of the regulation include reducing the amount of excess soil disposed of in landfills, preventing improper reuse of soil and encouraging and facilitating local reuse, thus decreasing greenhouse gas emissions. Understanding these goals, Section 21 of the regulation provides for exemptions from the planning requirements provided the two following conditions are met:

1. the excess soil is excavated as a part of an infrastructure project; and,
2. the Project Leader for the infrastructure project intends, after removing the excess soil from the project area, to finally place it at a reuse site that is owned by the project leader or a public body that is a part of an undertaking related to another infrastructure project.

The municipality therefore has the option of storing their materials excavated from an infrastructure project at a Class 2 Soil Management Site to help facilitate additional reuse options and significantly lower the total project cost.

Unfortunately, however, there is little knowledge in the public buyer community for the establishment and utilization of the Class 2 Management Site. As such, education is a critically important element which cannot be overstated. It is particularly important MECP communicate to public buyers their ability to partner with local landowners via a lease agreement, for the purposes of operating a Class 2 Management site.

Further, in order to expand opportunities for soil reuse, for both small rural communities and large urban centers generating significant excess fill, the MECP ought to consider increasing the amount of excess soil stored at the Class 2 soil management site at any one time, from 10,000 m<sup>3</sup> to 50,000 m<sup>3</sup>. For reference, Peel Region produced at least 1,208,880 m<sup>3</sup> of fill (beneficially reused at the Jim Tovey Conservation Area) between 2016 and 2020, or an average of 242,000 m<sup>3</sup> per year. Under the current rules, this amount of fill would have to be spread across 24 sites (if no immediate reuse site was available) versus 5 sites under an expansion to 50,000 m<sup>3</sup>. An expanded number makes for great opportunities for reuse. This expansion would ensure public bodies intending to reuse their excavated materials, could utilize the class 2 site and limit the impacts to the environment related to managing and transporting excess soil.

### **4. Uniform Application of the Requirements**

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**Recommendation:** *the MECP must develop and provide standardized municipal requirements to ensure all municipalities are provided with a clear, uniform path to achieving the objectives of the regulation.*

Historically, the management of excess materials has been downloaded entirely to the constructor community. As such many public buyers are unaware of the opportunities which exist to manage their own material. Specifically, the benefits resulting from retaining Qualified Persons during design and maintaining such services to prepare the Assessment of Past Uses, Soil Characterization Reports, Sampling and Analysis Plans as well as all required testing and analysis during construction, and the further opportunities which exist when owners identify beneficial reuse site, partner with a conservation authorities to beneficially reuse soil, coordinate capital projects or developments in need of material, and operate class 2 management sites to reuse native on projects.

The historic practice of downloading, combined with the introduction of complex and ambiguous Regulation, has created confusion, inconsistency, and varying interpretations of the new rules around the management of excess materials across the province. Ultimately, this has resulted in the rapidly escalating costs of construction without any significant improvement to the process the Regulation sought to remedy. Unfortunately, when owners continue the practice of downloading these responsibilities and do not capitalize on the incentives to reuse their soil, the purpose of the Regulation to promote the reuse of soils, reduce the amount of soil movement and disincentive the reliance on virgin aggregate is lost.

Understanding the complexity of the Regulation and the inexperience of many owners in managing their excess materials has resulted in limited, if any, achievement of the intention of the Regulation, it is imperative the Ministry clarify the intention of the Regulation and provide unambiguous guidance regarding implementation. Specifically, the Ministry ought to provide standardized municipal requirements to ensure all municipalities are provided with a clear, uniform path to achievement.


### **Concluding Notes**

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OSWCA appreciates having the opportunity to provide input into this consultation process. By reviewing and addressing these concerns and recommendations, the MECP would be ensuring the proper adoption of rules based on the intent of this regulation and would be helping to clarify some of the ongoing uncertainty.

Please do not hesitate to contact us (905-629-7766 or [steven.crombie@oswca.org](mailto:steven.crombie@oswca.org)) if you have any questions or need information regarding OSWCA and its membership.

Sincerely,



Patrick McManus  
Executive Director