

Ontario Sewer and Watermain Construction Association



**OSWCA Response to the Ministry of Environment and Climate
Change's *Proposed Excess Soil Regulatory Package***

June 23, 2017



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Submitted via email to: sanjay.coelho@ontario.ca

Mr. Sanjay Coelho
Ministry of the Environment and Climate Change
Climate Change and Environmental Policy Division – Land and Water Policy Branch
40 St. Clair Avenue West (Floor 10)
Toronto, Ontario M4V 1M2

Re: OSWCA Response to the Ministry of Environment and Climate Change's Proposed Excess Soil Regulatory Package

On behalf of our members, the Ontario Sewer and Watermain Construction Association (OSWCA) would like to provide the following comments and recommendations for changes to the Ministry of Environment and Climate Change's (MOECC) consultations around its *Proposed Excess Soil Regulatory Package* (Regulatory Package).

General Comment

The OSWCA welcomes the MOECC proposal to move forward with regulating the removal, disposal, and re-use of excess soils. The current approach is disjointed, costly, and in need of greater provincial direction and oversight to promote greater environmental, cost, and logistical efficiencies.

Presently, excess soils represent one of the most difficult items for contractors to account for on excavation and earthmoving projects. Rarely are these soils properly characterized in the project design phase, which results in very limited information being included in tender documents. Consequently, contractors are often stuck with unexpected logistical problems on projects sites that delay completion times, often require extra and inefficient transportation requirements (i.e. shipping contaminated excess soils further afield to dispose of) creating substantially more greenhouse gas emissions, and sometimes result in substantial extra costs, which encourages illegal dumping and negative environmental impacts.

The risk associated with the uncertainty of disposal sites, unclear soil characterizations in contract tender documents, improperly estimated quantities, and the general downloading of responsibility for handling these soils by the owner (proponent) creates a problematic operating environment for contractors. Improving tendering practices so proponents are required to properly address these factors in their project design will allow contractors to price appropriately for fill management so that they won't be encouraged to cut corners. A likely result is cost savings to the proponent over the life of the project, fewer disputes over added claims costs, and more positive environmental outcomes.



We believe that the Regulatory Package has identified some of the key areas for where efficiencies and risk mitigation opportunities exist and we commend the MOECC for identifying ways to better address excess soils at the front-end of construction projects. Nevertheless, we do believe that there is still much to be done to refine the proposal and provide municipalities, contractors, and site operators an appropriate amount of lead-time to absorb and integrate these new regulations into practice.

Timeline and Implementation

At present, OSWCA contractor members are amongst the most negatively affected stakeholders by the lack of provincial regulation of excess soil. Despite this, we do believe that it is necessary to take an appropriate amount of time to get these regulations right through a slow sector-by-sector rollout and revision of the regulations based on initial experiences in each sector. The Regulatory Package represents a very large and complex set of changes to numerous pieces of legislation and regulation, the sum of which overhauls how excess soils are presently managed across the province. Due to the scale and scope of these changes, we do not believe that a 2018 implementation timeline is reasonable.

After the regulation is satisfactorily completed, we recommend that the MOECC set a full implementation date for January 1, 2023, with a focus on sector-specific implementations throughout the interim period. This approach will allow every municipality, land developer, contractor, QP, and consultant to fully prepare and account for these changes [e.g. hire new staff, locate and reserve disposal sites and Temporary Excess Soil Storage Sites (TESSS), apply for Environmental Compliance Approvals (ECA) where necessary, reconstitute budgets and project cost estimates, etc]. Given past experience around how long it takes for these types of regulatory changes to fully take hold (i.e. rules around contaminated sites in the province – first with the Guideline for Use at Contaminated Sites in Ontario, followed by the Record of Site Condition regulation – took 15 years to be fully realized), five years is likely a very aggressive timeline to have everyone meet these new standards.

Additionally, as noted above, a sector-based phased-implementation should be considered. For instance, launching these regulatory changes on public infrastructure projects first would provide for a large-scale pilot test and would allow for any issues with the roll-out of the regulations to be adjusted prior to a wide implementation. This would also provide the MOECC with a smaller control group to monitor and refine the enforcement process.

Reconsider the Immediate Designation of Soil as “Waste”

The immediate designation of excess soil as a waste product under Part V of the Environmental Protection Act as soon as it is removed from a source site is very problematic. The default position of dealing with excess soil immediately becomes



sending it to a landfill to avoid adding risk and liability to a project because of this designation. Due to the added risk associated with transferring a waste product to a TESSS or to a Process Site/Soil Bank, we foresee a situation where an avoidance of this risk becomes standard practice. This ultimately misses the idea of beneficial reuse, which was one of the primary drivers for this regulatory change.

We believe that the designation of soil as waste should only occur if: 1) the soil is in excess of Table 1 characteristics; and, 2) there *isn't* a beneficial reuse option, similar to how excess soils is classified and accounted for in the United Kingdom through its Contaminated Land: Applications in Real Environments (CL:AIRE) model. These changes will allow for the greater ease of movement of soil between sites, particularly TESSS and processing sites, and will avoid some of the more substantial issues that we can foresee occurring in the transportation industry as a result of this classification (which we outline in the following section in more detail). Avoiding the default position of “waste” will also allow for more of a market to develop around reuse, without adding additional and unnecessary risk to this process.

Furthermore, the classification of soil as waste eliminates the capacity of a proponent to utilize a risk-based approach to reusing excess soils, which should be one of the primary motivations for moving this regulation forward. If the objectives of this regulation are to divert as much reusable material as possible away from landfills and reduce the carbon footprint of major excavation and earthmoving projects, then this initial classification must be reconsidered and revised.

Problems with the Movement of Excess Soil Off Site

The designation of excess soil as a waste product will create problems with the actual movement of this material off site on excavation and earthmoving projects. The classification will require haulers of excess soil to obtain and maintain Environmental Compliance Approvals in order to move these materials to processing sites, soil banks, or landfills. This will be a challenge for two primary reasons:

1. The designation of excess soil as waste in the immediate-term will likely result in more material being diverted to landfills as a default position to limit risk and liability to the source-site owner (while costing more, it will provide greater surety). This will mean that more haulers will be required to hold ECA's to move soil. While this will increase the cost to move excess soil, it will also create a more problematic administrative issue due to the make-up of the hauling industry;
2. In major urban centres in the province (especially in the GTA), the soil hauling industry is dominated by independent owner/operators of dump trucks. So, rather than having 70-100 companies register for ECAs for their trucks, it will instead require 1000-2000 independent truck owners to register for ECAs for their trucks.



This is going to create an administrative burden that many will ignore, which will likely encourage a growth in the underground economy. This effectively defeats the purpose of some of what this regulation is seeking to accomplish (i.e. tracking).

As noted above, we believe that the immediate classification of excess soil as a waste product needs to be reconsidered. Additionally, we propose that a new process be developed on the Environmental Activity and Sector Registry (EASR) that allows operators to register trucks as soil/excavated material haulers, that is a separate process approval from an ECA.

The registration and approval process must be a permit-by-rule to limit the administrative burden. This EASR should allow for excess soil haulers to move material to any of the four identified categories of receiving site (i.e. receiving site; TESSS; soil processing/soil bank site; landfill). Limiting the number of approved haulers for moving soil to processing sites/soil banks and landfill sites will significantly increase the costs of moving soil and will have a negative impact on the business opportunities for owner/operators of these trucks.

The MOECC also needs to reach out to the trucking industry and independent owner/operators in order to educate them on these proposed changes and garner their opinion on these proposed changes.

EASR / Permit-by-Rule

From an administration perspective, the MOECC should be seeking to move as much of the permitting process as possible to the EASR. Similar to what the MOECC has adopted for its permit to take water process, an EASR process should be warranted where the movement of excess soil is deemed to be low-risk given certain soil characteristics and the nature/location of the material being excavated.

The speed and ease of an EASR will encourage good industry behavior in handling excess soils, as any poor performer can be required to navigate through the ECA process instead.

Standardized Tracking

The reporting requirements laid out in the regulatory proposal are onerous. The MOECC needs to identify areas where the administrative burden can be alleviated without compromising its objectives. We recommend that rather than simply prescribing the elements that are required for soil tracking and leaving the tracking system to be developed by a QP, the MOECC should create a standardized reporting format for all sites to follow. This will ensure that the appropriate information is being captured and tracked across various proponents, and those doing the tracking are not learning new



reporting processes for every project. A standardized approach will result in better reporting and will become a routine component of earthmoving jobs.

Extend the 28-day Reporting Window

As part of the Excess Soil Tracking requirements, a QP will be required to “within 14 days of any excess soil leaving the project areas, and every 28 days thereafter...” update the MOECC on its soil movement progress through the posting of information on the Environmental Registry site. This is precisely the type of scenario that we were referring to above, when noting the expanded administrative burden that is being created as a result of this Regulatory Package. While we appreciate the MOECC’s intention of monitoring the movement of soil, we believe that a more reasonable reporting timeline would be every 60-days, after the initial report is filed after 14-days.

A longer reporting window will not compromise the transparency or accountability of the movement of excess soil from a source site to a receiving site (temporary or permanent). All the same safeguards and requirements will still be in place, including the initial registry which will identify where soils are being moved from and to, as well as the estimated volumes to be moved. Allowing a longer reporting window simply alleviates some of the administrative burden on QPs and contractors as part of their tracking requirements.

Need for a True “Plain Language” Document

The MOECC needs to develop a true “plain language” guideline document to assist proponents in understanding what all of their new responsibilities are as a result of the (proposed) changes. The Regulatory Package represents a significant departure from current practice and it will be necessary to educate proponents on how the operating environment will change as a result. A guideline document should be succinct and include checklists and practical examples of how, when, and where proponents should be reusing excess soil. This will be critically important in achieving success on the promotion of reuse, as the risk and liability issues will make disposal at a landfill the initially preferred method due to its predictability.

A guideline document should also cover:

- the MOECC enforcement protocols and processes;
- the expectations for how municipalities will enforce the *Rationale Document for Reuse of Excess Soil at Receiving Sites* (for those utilizing it);
- the fine/penalty structure for non-compliance;
- the appeal process; etc.; and,



- a staged process for how the MOECC plans to operationalize the regulatory changes, among other items.

Hydrovac as a Liquid Waste

Industry-specific outreach needs to be undertaken with the hydrovac industry to ensure that they are fully aware and understand the implications of the reclassification of its excavated material as a “liquid waste.” It is our belief that few, if any, companies in this industry are aware of what these changes mean, particularly given that this industry is presently consumed by the recent Ministry of Transportation (MTO) regulatory changes which are reclassifying hydrovac as commercial motor vehicles beginning July 1, 2017. The impact of this proposed change is very significant to this industry and will result in a substantial operating cost increase. This is important to note because the above noted MTO changes are also significantly increasing operating costs. Beyond targeted outreach, the MOECC should also be producing industry-specific guidelines to help companies understand what these changes would mean for their daily/monthly/yearly operations.

5-key recommendations in OSPE Report

As part of its 2016 report, *Excess Soils Management: Ontario is Wasting a Precious Resource*, the Ontario Society of Professional Engineers (OSPE) made the following five recommendations for how to improve the way the province manages excess soils:

1. Excess soils generated from projects in Ontario should be treated as a resource, not a waste.
2. Reducing the transport of soils that can be re-used or recycled makes economic and environmental sense.
3. A model by-law should be created to promote the use of the Guide on infrastructure projects.
4. Industry should collect data to highlight opportunities for both government and business to prioritize the handling of excess soil.
5. Responsibility and onus should be placed on the QP, and QP regulators need to be involved in ensuring QPs have the proper qualifications.

While recommendations three through five were largely covered in the Regulatory Package, recommendations one and two seem to be counteracted by it. As noted above, we believe that the designation of excess soil as waste works counter to the idea of beneficial reuse and, in fact, will unnecessarily increase the cost and carbon footprint related to excavation and earthmoving construction projects.

As part of this study, OSPE reviewed 24 excavation and earthmoving construction projects in the Greater Toronto Area. The project sizes ranged in scope from \$1 million



up to \$50 million, with a total value of \$330 million. Across all of these projects, one-way travel distance to dispose of excess soil totalled 200,000 km, while the importation of virgin soil and/or granular material to replace the excavated soil accounted for an additional 115,000 km of haulage. Ultimately, over the 24-reviewed projects, over 300 tonnes of CO₂ were released as a result of trucking soil into and out of these projects. Had soil reuse been an encouraged option, the estimated project costs savings would have been approximately 13% on average, or a total cost savings of almost \$43 million.

These type of cost savings and positive environmental outcomes need to be thoroughly encouraged as part of this process, rather than hindered, which the classification of soil as a waste product does. By revisiting this idea as we have noted above, we believe there are positive and easily measurable financial and environmental outcomes that can be accrued from this process.

Summary of Recommendations

1. Set a full implementation date for these regulatory changes of January 1, 2023, with a focus on sector-specific implementations beginning January 1, 2020.
2. Revise the immediate designation of excess soil as a waste product under Part V of the Environmental Protection Act. The designation of soil as waste should only occur if: a) the soil is in excess of Table 1 characteristics; and, b) there *isn't* a beneficial reuse option.
3. A new process should be developed on the Environmental Activity and Sector Registry (EASR) that allows trucking/hauling operators to register trucks as soil/excavated material haulers, that is a separate process approval from an ECA. The registration and approval process must be a permit-by-rule to limit the administrative burden.
4. Rather than simply prescribing the elements that are required for soil tracking and leaving the tracking system to be developed by a QP, the MOECC should create a standardized reporting format for all sites to follow.
5. Extend the reporting window for the Excess Soil Tracking requirements from 28-days to 60-day after the initial report is filed after 14 days.
6. Create a true “plain language” document for municipalities and land owners so that they can very easily understand what they would not be responsible for.
7. Produce industry-specific guidelines for the hydrovac industry to help companies clearly understand what these changes would mean for their daily/monthly/yearly operations.



Concluding Notes

OSWCA appreciates having the opportunity to provide input into this consultation process. The proposed Regulatory Package makes an important step in the right direction for how excess soils are managed in the province. Moving this process forward is important to managing the costs and long-term environmental sustainability of excavation and earthmoving projects across the province. Nevertheless, it is crucial that we get this entire process right before it moves forward to the next step.

Please do not hesitate to contact Patrick McManus in our office (905-629-7766 ext. 222 or patrick.mcmanus@oswca.org) if you have any questions or need information regarding OSWCA and its membership.

Sincerely,

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

Harry Bauman
President