



Ontario
Home Builders' Association

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Sanjay Coelho
Ministry of the Environment, Conservation and Parks
40 St. Clair Avenue West, Floor 10
Toronto, ON M4V 1M2

Re: Excess Soil Management Regulatory Proposal
EBR Registry Number: 013-5000

Background

OHBA is supportive of the *Made-in-Ontario Environment Plan* and the *Housing Supply Action Plan*. A key component of both these plans is to modernize the excess soil management framework and to improve efficiencies within the RSC (Record of Site Condition) process. OHBA responded to both the Housing Supply Action Plan consultation in January 2019 and the Made in Ontario Environment Plan consultation in January 2019 with a number of recommendations with respect to excess soils, the RSC process and the brownfields regulatory framework. OHBA is pleased that a number of our recommendations have either been adopted or have been taken into consideration within the government's Environmental Registry proposal.

Under the previous government, OHBA responded to a number of consultations with our recommendations focused on excess soils, including:

-) Excess Soils Management Framework - June 2017 submission (EBR 013-0299)
-) Excess Soils Management Framework - January 2016 submission (EBR 012-6065)
-) Soil Management - Draft Guide for BMP – January 2013 submission (EBR 011-7523)

OHBA was also a member of the Ministry's Excess Soil Engagement Group and the Marketing Working Group. While OHBA was generally supportive of the broad direction under the previous government, our members articulated a number of specific concerns for which we believe the new government has taken into consideration and in some cases addressed directly. OHBA notes however that the newly proposed excess soil management regulation represents a complex regulatory compliance mosaic that must be carefully rolled out during the implementation phase to ensure that positive outcomes are in fact achieved given the many actors and diverse nature of sectors involved in excess soils. Lastly, OHBA notes that the proposed regulatory package also make a number of OHBA supported complementary and burden reduction amendments to the brownfields regulation (O.Reg 153/04). These proposed amendments include addressing a resolution that OHBA passed at its 2014 Annual Meeting of Members: Exemptions of RSCs for temporary roads. OHBA is therefore supportive of the EBR 013-5000 posting as part of the *Made in Ontario Environment Plan* and the *Housing Supply Action Plan*.

OHBA General Commentary

OHBA welcomes the MECP proposal to advance a more coordinated approach with regulating the removal, disposal and reuse of excess soils. OHBA is supportive of the *Made-in-Ontario Environment Plan* commitment to: “recognize that excess soil is often a resource that can be reused. Set clear rules to allow industry to reduce construction costs, limit soil being sent to landfill and lower greenhouse gas emissions from trucking by supporting beneficial reuses of safe soils.” Our members and other construction associations have noted that the current approach is disjointed, can be costly, and is in need of greater provincial oversight to promote a more consistent and efficient approach. Ultimately these is a general consensus that more must be done to minimize the ‘dig and dump’ approach that characterizes much of the soil handling activity in Ontario. OHBA is therefore supportive of the more streamlined approach by the new government to not overburden the sector with new regulatory requirements on source sites to prepare and implement Excess Soil Management Plans (ESMPs), certified by a Qualified Person. The new approach will ensure that excess soils are properly traced without creating a significant new red tape and paperwork regime. OHBA welcomes a more consistent approach under provincial guidance for soil management, which should not act as a barrier to opportunities for remediation, reuse and intensification.

It is important to recognize that the current fractured legislative environment concerning excess soil management contributes to significant and increasing costs of residential construction. Industry regulatory compliance requirements, as well as local municipal government policies, operational procedures and contractual practices will all have adoption complexities. OHBA is supportive of the MECP proceeding with implementation of regulations to facilitate better outcomes acceptable to all stakeholders, however due to the fractured and diverse nature of stakeholders involved (e.g. independent operators in trucking/hauling sector), significant outreach and training will be required by the MECP. OHBA notes that the Excess Soil Management Framework stresses the need for industry-driven solutions. OHBA is encouraged by the language from the Ministry and the Minister to work closely with industry stakeholders to achieve the ultimate benefits in developing good soil management practice.

Proposed New On-Site Excess Soil Management Regulation and Amendments to Existing Regulations

OHBA is generally supportive of the new 2019 regulatory proposal including:

-) Burden reduction through reduced requirements related to sampling, tracking system, hauling records, registration and other excess soil management actions;
-) OHBA supports not designating excess soil as a waste product as soon as it is removed from a source site if specific conditions are met:
 - o The excess soil is being directly transported to a reuse site for final placement;
 - o The operator of the reuse site has consented in writing to the deposit of the excess soil;
 - o The excess soil is dry and remains dry until it is finally placed; and
 - o The quality and quantity of soil are appropriate for the beneficial use, determined in accordance with a site specific instrument or the regulated Soil Rules.
-) OHBA is concerned by the proposed approach that excess soil must be ‘dry soil’ and must remain dry soil until it is finally placed at the reuse site. We are concerned that this would not promote greater reuse of excess soil in a way that helps to ensure protection of human health and the environment when it considers soil that is not dry as waste. The currently proposed approach that limits wet vs dry would increase costs and complexity of soil management, which could act as a barrier and constraint to opportunities for remediation, reuse and intensification.
-) Reverting to a “waste” orientation for all excess soils would have been counterproductive to the MECP objective to reuse clean excess construction soils. OHBA previously expressed concern under previous proposals that defining Excess Soil as a waste when it is removed from a source site may in fact encourage the default position of some contractors to deal with excess soil by sending it to a landfill to avoid risk and liability. OHBA is supportive of the newly proposed approach.

- J OHBA supports that hauling of excess soils would not be subject to waste approvals, but rather regulated rules. OHBA is also supportive of the reduced recording requirements for haulers. OHBA continues to support record keeping, including information on quantity, source and destination sites, contracts and date/time of leaving.
- J OHBA believes that the MECP should continue to provide province-wide leadership regarding excess soil management and curtail the ability of municipalities to refuse accepting excess soil from beyond their boundaries provided that measures ensuring the soil's quality and provenance are in place and that the receiving site is properly licensed and bylawed to accept such soil.
- J The MECP should foster the growth of innovative, industry-driven solutions to excess soil management and partner, as the regulator, with private sector service providers to achieve improved environmental, community and industry outcomes.
- J OHBA continues to support the need for innovation through industry-driven solutions and private sector service delivery options in the Excess Soil Management Framework.
- J OHBA remains concerned that not enough action has been taken to better address the transfer of liability as excess soils move through the chain of custody.

Excess Soil Reuse Planning

OHBA is supportive of the new approach that will not require a complicated and costly Excess Soil Management Plan (ESMP) to be prepared and implemented for movements of excess soil. OHBA believes that the new approach for excess soil management actions for certain sites will achieve the government's objective to better manage, track and reuse excess soils without placing significant new regulatory burdens on industry. OHBA is also supportive of increasing the threshold from 1000m³ (about 100 truckloads) of excess soil is being removed from a project area to 2000m³ which reflects our recommendations to the previous government that small businesses and smaller infill sites should not be captured by the new requirements. OHBA has consistently flagged to the Ministry our specific concern regarding impacts of the proposal in smaller or northern communities that may lack access to QPs. OHBA believes that the higher threshold of 2000m³ and the amendments to the requirements with respect to an Excess Soil Management Plan go a long way towards alleviating these concerns, however, the Ministry should closely monitor the impacts through implementation.

OHBA is also supportive of greater clarification on previous uses that would be captured by a new complex and potentially expensive regulatory regime under the framework and for where planning requirements would not be required. OHBA is generally supportive of the (reduced from previous proposals) source site registration requirements.

OHBA is generally supportive of the tracking provisions in the regulatory proposal. While this will likely lead to short-term cost increases, the certainty provided with respect to the quality and provenance of the excess soil combined with other aspects of the regulatory package should reduce overall transportation costs by opening more sites (more choice and competition in closer proximity to markets) to receive excess soils. Ensuring greater certainty within the system should over the long-term reduce costs, reduce municipal by-law interference (prohibiting excess soil movements) and allow for more receiving sites and reuse.

OHBA notes that a sampling and analysis plan is required as a component of excess soil management actions. OHBA is concerned that the sampling requirements are onerous and we recommend that the MECP identify additional areas for which the administrative burden can be alleviated without compromising broader objectives. The preparation of Excess Soil Management actions may take several weeks or even a few months as it may involve intrusive soil testing and analysis amongst other information that may be made necessary from consultants and associated laboratory costs. These proposed requirements include new costs and potentially extended timelines for completing and implementing a sampling and analysis plan, assessing results and completing an excess soil characterization report.

Beneficial Reuse Assessment Tool (BRAT)

OHBA is supportive of the MECP approach to developing site-specific excess soil standards using a Beneficial Reuse Assessment Tool (BRAT) or by conducting a risk assessment. The BRAT is modeled on the modified generic risk assessment model for brownfields. Such an excel based tool that allows the development of site specific excess soil standards creates different opportunities to allow for the modification of a limited number of physical characteristics. This allows for a modern, streamlined and more site specific approach to dealing with excess soils. These proposed excess soil reuse standards have been developed for different land uses, ground water potability, soil texture etc. OHBA notes and is supportive of MECP plans to create additional standards over time to provide further flexibility for excess soil reuse (e.g. soil at depth, situations where there are no buildings). OHBA also supports alternative rules and approaches that are also to be provided to promote greater reuse of excess soil in a way that helps to ensure protection of human health and the environment. OHBA is supportive of the additional flexibility of the proposed excess soils regulation.

In order to ensure Excess Soil Reuse Planning activities are prepared in accordance with this regulation and best professional practices, it is proposed that it would need to be prepared and certified by a QP on behalf of the proponent. It is proposed that the definition of “qualified person” align with that of O. Reg. 153/04. OHBA is supportive of this proposed alignment that would recognize the continuity and overlap of effort associated with brownfield redevelopment and management of excess soil, and the comparable expertise associated with each.

Record of Site Condition Regulation Amendments

MECP is proposing amendments to Ontario Regulation 153/04 to make excess soil management on brownfield properties more consistent with and complementary to the proposed excess soil management requirements. Amendments would address matters such as aligning soil importation policies and sampling frequencies. OHBA is generally supportive of ensuring consistency between the Excess Soil Management Policy Framework and the brownfields regulations and reducing burden requirements for proponents.

Further Proposed Amendments to O. Reg. 153/04

The MECP has also proposed amendments to O. Reg. 153/04 have limited relationship to excess soil but are proposed as part of this regulatory package to provide clarity and reduce unnecessary burden on the regulated community. These include:

-)] Delineation: OHBA has previously recommended allowing an applicant to be able to request that the Ministry provide relief from the rules governing how contaminants are to be delineated at a RSC property undergoing risk assessment. OHBA noted that consideration should be given to include the MECP District representatives in the evaluation of provided rationale demonstrating that relief from delineation requirements have been achieved. At the OHBA Annual Meeting of Members in 2014, OHBA passed a resolution recommending that the MECP undertake a review Ontario Regulation 153/04, Records of Site Condition specific to conducting the site investigation and delineation. OHBA is generally supportive of the additional level of flexibility proposed in the regulation. That would provide ministry discretion on delineation requirements when a QP provides a rationale that shows:
 - o All contaminants of concern (COC) are identified
 - o Appropriate steps have been taken to locate the maximum concentration.
 - o Additional efforts to delineate are unlikely to contribute meaningful information about the distribution and extent of contaminants at the property.
 - o The RA property is appropriately characterized
-)] Substances used for purpose of safety under conditions of snow/ice: OHBA supports the *Made-in-Ontario Environment Plan* commitment to: “work with municipalities, conservation authorities, the private sector, and other partners to promote best management practise, certification and road salt alternatives.” OHBA notes that road salt has significantly degraded many sites and adds additional costs for the redevelopment of many sites

in Ontario. OHBA agrees with the MECP that there have been challenges for when activities undertaken to satisfy the requirements to file a RSC, including the undertaking of RA where salt is the only substance that exceeds the applicable site condition standard, which may not actually lead to significant environmental or human health benefits. The regulatory proposal includes flexibility for substances used for purpose of safety under conditions of snow/ice (road salt). OHBA is generally supportive of this proposed amendment.

- J) Converting low-rise commercial buildings to mixed use: The regulation proposes an amendment that would allow property owners that are renovating a portion of a low-rise commercial use building, but not demolishing and rebuilding or altering the building footprint, to convert upper floors to residential without requiring a RSC. OHBA is generally supportive of this additional level of flexibility.
- J) Temporary roads related to development: The current definition of “road” in O. Reg. 153/04 does not distinguish between temporary roads and more permanent roads, and because roads are part of “community use”, an RSC may be required before a temporary road is converted to a residential use. It is proposed that O. Reg. 153/04 be amended such that the use of property as a temporary road would not, for that reason alone, trigger the need for a RSC when the property is converted to a residential use. At the OHBA Annual Meeting of Members in 2014, OHBA passed a resolution requesting an exemption of a RSC for Temporary Roads. Temporary roads may be required on development sites to address second access or for construction access and by this nature are located to fulfill this function with the intent to be removed when not required/warranted. OHBA is strongly in support of this proposed amendment to remove the RSC requirement for a temporary road if this road will no longer exist when all phases of the construction/development are complete.
- J) Naturally elevated concentrations of substances: In certain areas of the province, soil contains naturally elevated concentrations of substances. If the presence of a substance did not result directly or indirectly from human activity, it is not considered a “contaminant” under the EPA and is therefore not required to be investigated under O. Reg. 153/04, even if it exceeds an applicable site condition standard. A proposed amendment to O. Reg. 153/04 would clarify that a substance in fill that was deposited at a property prior to the ESA (i.e. through historical activity) is deemed to not exceed the applicable site condition standards if the QP determines that the concentration of the substance does not exceed local naturally occurring concentrations. OHBA is generally supportive of the clarity provided by the proposed amendment.
- J) Buildings used for indoor gatherings of people for religious purposes: Currently, buildings used for indoor gatherings of people for religious purposes are a type of “community use” under O. Reg. 153/04. This results in RSCs being required prior to converting such buildings to a residential use. An amendment to O. Reg. 153/04 would remove buildings of this nature from the definition of “community use” and place them within the definition of “institutional use”. OHBA is generally supportive of this proposed amendment.

Brownfields

While not directly or extensively included in this regulatory posting, OHBA would like to reiterate to the MECP that Brownfield redevelopment has been identified by in the *Made-in-Ontario Environment Plan* and by the building and development industry as a strategic opportunity to utilize existing infrastructure and build complete communities, while also cleaning up contaminants left behind from historic industrial sites. OHBA has expressed concerns that amendments made to brownfields regulations by the previous government could undermine the broader provincial objectives of intensification, environmental clean-up and sustainable development. While brownfield redevelopment is feasible and successfully occurring on higher value strategically located sites, a more practical and less stringent approach could facilitate more opportunities to clean-up and revitalize contaminated sites.

A regulatory framework, with codified standards that are not achievable, or a risk assessment process that is not functional, undermines the economic viability of some brownfield opportunities and sterilizes land in municipally strategic locations. OHBA is therefore supportive of the *Made-in-Ontario Environment Plan* commitment to: “revise the brownfields regulation and the record of site condition guide to reduce barriers to redevelop and revitalize historically contaminated lands, putting vacant prime land back to good use.”

OHBA reminds the MECP of a number of recommendations from our *Made in Ontario Environment* submission with respect to brownfields:

-) The Ministry should consult with stakeholders and consider opportunities to amending the background standards to ensure that the best available data is used to benefit redevelopment through greater soil retention and reduced land filling of soils that meet background standards.
-) Consider updates to the Modified Generic Risk Assessment model based on improvements in science as well as evolving mitigation measures. The MECP should refine items to ensure provincial objectives are achieved and that a process exists to evaluate and remediate brownfields in an efficient manner.
-) The Ministry should streamline the Records of Site Condition (RSC) process, improve the functionality of Tier II model, and streamline the Tier III risk assessment process.
-) OHBA notes that presently the RSC is required for any building permit issued for a residential building on a previously commercial property. Therefore, if the site requires environmental remediation, a shoring and excavation permit cannot be issued if an RSC has not been completed. OHBA proposes the Ministry review alternates to the requirement for an RSC prior to the issuance of a shoring and excavation permit.
-) OHBA supports a new approach to respect professional designations for the purpose of 'certified approvals' which should be adopted by the MECP.

Transition

OHBA notes that a key component for any new regulatory proposal is how to manage transition to a new compliance regime. The brownfields amendments are proposed to come into effect on filing. OHBA is supportive of this approach. OHBA notes that the proposed regulatory package with respect to excess soils represents a very large and complex set of changes to a number of different pieces of legislation and regulations. The Excess soil regulations are proposed to be phased in allowing greater time for aspects that require more education, guidance or program development, and that may affect existing contracts due to procedural changes:

-) **January 2020** – revised excess soil reuse rules and waste designation
-) **January 2021** – requirements for testing, tracking and registration
-) **January 2023** – restrictions on landfilling of soil that can be used at a sensitive use site.

OHBA notes we had previously recommended a 2023 transition timeline and that the MECP is proposing a phased transition with some more aggressive timelines. It is important to allow municipalities, builders, contractors, QPs and consultants the lead time to fully prepare and account for the numerous proposed changes. These proposed changes will require the hiring of new staff, locating disposal sites and temporary excess soil sites, adjusting of project budgets. Should the MECP be committed to this transition timeline, it will be important to quickly development guidance and educational materials to support a smooth transition.

Conclusion

Overall OHBA is supportive of the regulatory proposal. OHBA supports the provincial government's objective to continuously improve the protection of health and the environment while facilitating the safe and appropriate relocation of soil. It is important that the government have a strong framework for excess soils management without overburdening the sector with significant additional red tape. OHBA believes that the current proposal is a significant enhancement over previous proposals that were not actually implemented. OHBA appreciates the opportunity to provide feedback on the proposed excess soil management regulation, and looks forward to ongoing dialogue and consultation with the provincial government.

Sincerely,



Michael Collins-Williams, MCIP, RPP
 Director, Policy
 Ontario Home Builders' Association