



Ontario
Home Builders' Association

20 Upjohn Rd., Suite 101 (416) 443-1545
North York, Ontario Toll Free 1-800-387-0109
M3B 2V9 Fax: (416) 443-9982
www.ohba.ca info@ohba.ca

November 20, 2020

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

**Re: Extending Grandfathering for Infrastructure Projects and Providing Additional Flexibility for Excess Soil Reuse
EBR Registry Number: 019-2462**

Background

OHBA is supportive of the *Made-in-Ontario Environment Plan* and the *Housing Supply Action Plan*. A key component of 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 attended the announcement by Minister Yurek in December 2019 regarding the new excess soils management framework and OHBA was supportive of the regulatory package.

On the date the regulatory package was released (December 5, 2019), OHBA CEO Joe Vaccaro stated:

“The Ontario Home Builders’ Association is supportive of clarifying rules regarding the reuse and management of excess soils generated from construction sites. This will create business certainty, while ensuring the tracking and quality of soil being deposited and increase opportunities for reuse on other sites. Furthermore, exempting historic road salting that was preventing developers from obtaining an RSC is a very positive amendment supporting new housing supply.”

In recent years, OHBA responded to a number of consultations with our recommendations focused on excess soils:

-) Excess Soil Management Regulatory Proposal – June 2019 submission (ERO 013-5000)
-) 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 is a member of the Ministry’s Excess Soil Engagement Group and the Marketing Working Group.

OHBA notes that the excess soil management framework is 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. To that end, OHBA is appreciative that MECP Ontario Public Service staff presented at an educational webinar hosted by OHBA and attended by over 130 OHBA members in May 2020. Education and professional development remain key issues for the industry. OHBA notes

that the December 2019 regulatory package also made a number of OHBA supported complementary and burden reduction amendments to the brownfields regulation (O.Reg 153/04). These amendments include addressing a resolution that OHBA passed at its 2014 Annual Meeting of Members: Exemptions of RSCs for temporary roads. While OHBA remains supportive of the excess soils regulatory framework, we appreciate implementation flexibility in response to the COVID-19 pandemic.

Proposal Summary: Grandfathering for Infrastructure Projects & Providing Flexibility for Excess Soil Reuse

As a result of COVID-19-related delays to infrastructure projects and to support reuse of excess soil, the MECP is proposing amendments to the Excess Soils Regulation and other regulations so that technical assessments are not repeated, delayed projects can proceed and soil can be managed more flexibly while protecting human health and the environment.

OHBA Support for the Excess Soils Management Framework

OHBA welcomes the MECP proposal to extend grandfathering for infrastructure projects and provide additional flexibility for excess soil reuse. The proposed amendments respond to delays that are resulting from COVID-19, to practical challenges that have been identified during implementation and to provide additional flexibility for low risk activities. OHBA remains 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.” The new approach will ensure that excess soils are properly traced without creating a significant new red tape and paperwork regime. OHBA welcomes the 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 old 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 which is why we are appreciative of the MECP recognizing the need for implementation flexibility in response to the COVID-19 related delays. 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 by-lawed to accept such soil.

OHBA notes that the Excess Soil Management Framework stresses the need for industry-driven solutions. 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. OHBA continues to support the need for innovation through industry-driven solutions and private sector service delivery options in the Excess Soil Management Framework. OHBA had recommended to MECP that the Excess Soil Registry be delivered by a third party private sector consortium to support innovation in the sector. Lastly, OHBA remains encouraged by the outreach from the Ministry to work closely with industry stakeholders (including OHBA) over the past year and looks forward to continued engagement.

Transition adjustments in the spring due to COVID-19

OHBA was supportive of the MECP announcement in June in response to practical challenges that arose from the COVID-19 pandemic, the first phase of implementation of the Excess Soil Regulation was extended by six months from July 1, 2020 to January 1, 2021.

Proposed Regulatory Amendments

Through efforts to help municipalities, industry and others to implement the new Excess Soil Regulation, MECP has identified opportunities to provide additional regulatory flexibility, clarity and refinement. Proposed amendments are intended to further increase local excess soil reuse and improve the efficiency of excess soil management, while being protective of human health and the environment. For projects with a low risk of environmental impact, the proposed regulatory changes would allow for additional soil management flexibility, and as a result, would increase the benefits of proper excess soil management and local beneficial soil reuse.

1) Extending Grandfathering

OHBA is supportive of the proposal to revise the current grandfathering provision in clause 8 (2) (b) of the Excess Soil Regulation, for contracts entered into for the management of excess soil as follows:

1. Extend the date by which construction projects must be entered into by one year; to January 1, 2022;
2. Expand the scope of this exemption to provide an exemption from the assessment of past uses, sampling and analysis plan and soil characterization report for projects which have already completed similar soil-related studies before January 1, 2022.

OHBA agrees with the MECP rationale that: “extending the timelines by one year for contracts entered into related to excess soil management for construction projects recognizes the ongoing challenges COVID-19 has had on operations, including delayed processes related to the issuance of infrastructure construction contracts. This timing extension would ensure projects previously anticipated to be grandfathered but delayed by the pandemic would continue to be grandfathered.”

OHBA notes and agrees with the MECP position that the proposed amendment to extend the grandfathering provision does not exempt projects from excess soil reuse provisions coming into effect January 1, 2021; it only applies to the provisions which come into effect January 1, 2022. Early adoption of regulatory requirements is a best practice and encouraged for all projects, where possible.

2) Environmental Compliance Approval (ECA) Relief for Low Risk Soil Management Sites

OHBA is supportive of the proposal to provide an exemption from the need to obtain an ECA for the operation of a site temporarily storing excess soil generated from greenfield development sites (residential, parkland, institutional, agricultural uses) and other low-risk development sites to be reused at similar or lower risk development sites. The ERO 019-2462 regulatory package includes rules that would apply to the management of the sites that would be exempt from an ECA. OHBA is generally supportive of the proposed framework for the exemption from the need for an ECA.

OHBA is in agreement with the MECP rationale that, “it is common practice to compile top soil from greenfield and other low risk development sites (e.g., from existing residential areas) and to redistribute it to development sites for landscaping or as fill,” and that, “these are low risk activities that should take place without an ECA if basic rules are adhered to. This change would allow existing low risk operations such as garden centres and residential soil storage sites to continue to operate without the added burden of obtaining an ECA and would promote appropriate soil reuse.”

3) Enabling Site-Specific ECA Soil Management Requirements

MECP is proposing to provide new authority to enable ECAs under the EPA and the *Ontario Water Resources Act* to specify alternative soil management requirements from those identified in the Soil Management Rules for the site or activity to which the ECA applies. MECP has noted that the Soil Management Rules may not always align with best practices for a particular project and in some cases site-specific modifications are required. OHBA is generally supportive of the proposed flexibility to enable an ECA to alter rules for a specific project.

4) Flexibility in Excess Soil Storage for Reuse

The MECP has proposed to provide flexibility, if certain conditions are met, for excess soil to be stored at a location within 10 metres of a property line boundary. This requirement is set out in Section C subsection 1 (1) subparagraph 4 ii of Part 1 of the Soil Management Rules. OHBA is generally supportive of the proposed flexibility that would be provided if any of a number of specific conditions apply.

While MECP notes in the regulatory proposal that, “the intent of the requirement for setbacks from property lines is to help ensure that excess soil is not stored in a manner that may impact neighbouring properties.... It is however recognized that in some cases this setback requirement is not always practical or possible and some soil may need to be stored in close proximity to a neighbouring property.” OHBA is generally supportive of increased flexibility for storage that is low risk provided the volumes are either limited or the storage time is short.

5) Reuse of Salt-Impacted Soil

The MECP has proposed that the current requirement found in Part 1, Section D subsection 1 (3) clause 1 ii (c) of the Soil Management Rules that prohibits the reuse of salt-impacted soil within 2 metres of a water table be removed. OHBA continues to support 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 notes that excess soil quality standards for salt-related parameters (e.g., sodium adsorption ratio and electrical conductivity) were developed to be protective of the surrounding environment, including local groundwater sources. Furthermore, the ERO posting states that the, “MECP has heard that this restriction makes the reuse of salt-impacted soil unfeasible in large parts of Ontario where ground level is less than 2 metres above the water table, particularly in central and northern Ontario.” OHBA is generally supportive of this proposed change that would provide increased flexibility for the beneficial and appropriate reuse of excess soil in these regions of Ontario, reducing the need for hauling of soil long distances and disposal of reusable soil.

6) Reuse of Rock Mechanically Broken Down

The MECP has proposed to add a provision to the Excess Soil Regulation clarifying that the regulation applies to rock that is mechanically broken down into soil-like particles in the same way that the regulation applies to soil. It is OHBA’s understanding that other stakeholders have stated that the definitions in the new Excess Soil Regulation are not clear whether materials that look like soil, such as rock that is mechanically broken down to the same particle size as “soil” (< 2mm), are within the scope of excess soil. OHBA is generally supportive of the MECP providing additional clarity through the proposed amendment that material resulting from mechanical breakdown of rock would be treated as soil - the same as materials naturally broken down under the Excess Soil Regulation, and when it leaves a project area, should be subject to the same rules and exemptions as other excess soils, including consideration of the excess soil quality standards for reuse.

7) Updates to Leachate Testing and Related Requirements

OHBA does not have any specific technical comments regarding the proposed amendments in the current regulatory package. OHBA does however note that we have previously (ERO 013-5000 OHBA submission) been 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. Such a tool that allows site specific excess soil standards creates different opportunities to allow for the modification of a limited number of characteristics.

8) Clarifications on Application to Aggregate Operations

OHBA has not comments on section #8.

9) Registry Delivery

OHBA notes that the registry is intended to contain information regarding the characterization of the soil being relocated, the source and receiving sites, the transport contractor and dates of such movement. The MECP has now proposed significant changes to the creation of an Excess Soils Registry such that the registry would be operated by the Resource Productivity and Recovery Authority (RPRRA), instead of MECP's existing Environmental Site Registry. The purposes would be expanded to include integration with other third-party platforms (e.g., tracking and/or soil matching systems and other non-regulatory programs).

The MECP has explained its rationale in the ERO 019-2462 that, "the online excess soil registry operated by RPRRA would be publicly accessible, provides a source of information for regulatory agencies and others, and must be available for the filing of notices including key regulatory information." The MECP adds that, "RPRRA oversees waste diversion programs, enforces individual producer responsibility requirements, and operates current and future registries for MECP programs (e.g., producer responsibility, tires, hazardous waste) while providing a general role in helping to manage data and to spur innovation. Delivery of the excess soil registry would build upon and leverage RPRRA's existing platforms and would further centralize MECP services for stakeholders."

OHBA has been directly engaged with the MECP through 2019 and 2020 regarding the development and delivery of a new excess soil registry. This registry must be in place before January 1, 2022, to support implementation of mandatory requirements in the On-Site and Excess Soil Management Regulation (O. Reg. 406/19). The registry will play an important role in enforcement and compliance efforts and will be used to generate information and statistics on soil movements and reductions in GHG emissions over time.

OHBA has been involved in discussions with a partner organization (SoilKey), which is a for-profit proposal building on an existing consortium of industry stakeholders who are interested in establishing an organization to develop a registry to be integrated with existing tracking systems and potentially other programs. The proposed structure was similar to Teranet as well as the EnerQuality Corporation. Although implementation of the Registry would be the initial priority of the proposed organization, MECP stakeholder consultations strongly and consistently supported the vision of a "one stop service" for all matters related to excess soil management in Ontario with the exception of regulatory and enforcement functions. Such an organization could offer a variety of services, some of which would also serve as revenue generation centres for the organization.

It has been OHBA's perspective that an external organization may be more flexible and adaptable to on the ground problem-solving in regulation implementation. An industry-led external organization from our perspective would have best understand the resistances to change and adoption of new practices in excess soil management. Furthermore, an industry-led external organization would have spoken the language of business and be better equipped to demonstrate the real benefits of regulatory compliance to stakeholders.

It is OHBA's understanding the MECP is proposing for the purpose of the Excess Soil Registry to be expanded to include integration with other third party platforms (e.g. tracking and/or soil matching systems with other non-regulatory programs), considering cost, security and other relevant matters. OHBA is encouraged that MECP appears to be flexible regarding the opportunity for integration with third parties. OHBA recommends that the MECP ensure maximum flexibility for third party, private sector delivered programs that are connected to the registry working in partnership with RPRRA.

OHBA is disappointed that the MECP through the regulatory proposal has indicated that it intendeds to more in a different direction with RPRRA delivering the Excess Soils Registry. From OHBA's perspective, the SoilKey Group was a consortium of well-regarded individuals, companies and industry associations sharing a common interest in

establishing a for-profit, arm's-length Soil Management Corporation in Ontario that would be accountable to and operate within the regulatory parameters established by the MECP. The Corporation would have been a private self-sustaining entity that would not have required financial assistance from the Ministry.

10) Minor Clerical Updates

OHBA is generally supportive of the MECP has proposed updates to help to clarify the intent of the Excess Soil Regulation and correct any inaccuracies.

11) Minor Amendments to the Record of Site Condition Regulation (O. Reg. 153/04)

The MECP has proposed a few minor amendments to O. Reg. 153/04 (RSC Regulation) including a consequential amendment related to recent changes under the *Emergency Management and Civil Protection Act* (EMCPA), amend the RSC Regulation to continue to exempt temporary health and residential facilities from the need for a RSC if it is in response to the COVID-19 pandemic and its effects. OHBA is supporting of the proposed amendment to allow the RSC exemption for temporary health and residential facilities to continue to apply in response to COVID-19 and its effects even though the declared emergency has ended.

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. 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."

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 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
Senior Director, Planning & Policy
Ontario Home Builders' Association

c. Hon. Jeff Yurek, Minister of the Environment, Conservation and Parks