



**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](http://www.ohba.ca) [info@ohba.ca](mailto:info@ohba.ca)

March 26, 2016

Atif Durrani  
Senior Policy Advisor  
Ministry of the Environment and Climate Change  
Integrated Environmental Policy Branch  
135 St. Clair Ave West, 6<sup>th</sup> Floor  
Toronto, ON M4V 1P5

**Re: Excess Soil Management Policy Framework**  
**EBR Registry Number: 012-6065**

Introduction

On January 26, 2015, the MOECC released a proposed provincial *Excess Soil Management Policy Framework* on the Environmental Registry for a 60-day period of consultation. OHBA appreciates the opportunity to provide feedback on the proposed framework and had previously responded to the 2013 consultation on *Soil Management – Guide for Best Management Practices* (011-7523). The proposed framework embraces two key goals to protect human health and the environment from the inappropriate relocation of excess soil; and enhance opportunities for the beneficial re-use of excess soil – both of which OHBA generally supports.

The proposals in the framework would also seek to shift more responsibility for “clean” excess construction soil onto the generators of it (often OHBA builder/developer members) called “source sites”. New regulatory requirements would be placed on source sites that meet an as-of-yet undefined size and/or level of risk threshold to prepare and implement *Excess Soil Management Plans*, certified by a Qualified Person. The *Excess Soil Management Plans* are proposed by the *Excess Soil Management Policy Framework* to be integrated into existing land use planning and development approval processes and would include the following components:

- Characterization of excess soil in-situ (including quality, type and volume);
- Requirements for testing excess soil, which could be based on past land use and potential contamination;
- Identify and ensure receiving sites are authorized to accept excess soil;
- Confirmation that the quality of excess soil is appropriate for the receiving site and that testing results are made available to prospective receiving sites;
- Tracking plan to ensure and verify the excess soil arrives at the receiving site; and
- Standard record keeping requirements.

OHBA supports Ontario’s objective to protect human health and the environment from the inappropriate relocation of excess soils while enhancing opportunities for the beneficial reuse of excess soil. However, OHBA is concerned that the overall package potentially brings in a range of new regulations and responsibilities onto source sites without addressing the transfer of liability as excess soils move through the chain of custody. Furthermore, the Ministry should recognize that the proposed additional processes and requirements would increase both timing and costs for development proponents. OHBA notes that at this stage, the Ministry has proposed a policy framework and that it is important that stakeholders be a source of expertise to be included during each of the next steps of policy and regulatory development.

## OHBA Commentary

OHBA is concerned that a major focus of the proposed framework is to shift more responsibility onto the generator of excess soil (the source site) to plan for its re-use and track and record excess soil from “source to reuse”. This proposed framework would require new regulatory requirements on source sites to prepare and implement excess soil management plans, certified by a Qualified Person. These additional proposed regulatory requirements would likely increase costs, timelines and complexity associated with consultants preparing the *Excess Soil Management Plan* as well as potential additional laboratory analysis for handling excess soils and the potential for uncertainty arising from new requirements for the issuance of certain building permits and linkages to applicable *Planning Act* approvals. OHBA has been consistent in outlining concerns that would increase costs and complexity of soil management as a barrier and constraint to opportunities for remediation, reuse and intensification.

The proposed framework notes that these excess soil management plans could be integrated into existing land use planning and development approval processes. While OHBA is generally supportive of better aligning provincial policy with municipal planning, we are concerned that excess soil management plans could slow an already lengthy and cumbersome land use planning process. The proposed framework further notes that consistent application across the province could be achieved through potential amendments to relevant legislation and plans, some of which are currently under review (Municipal Act, Conservation Authorities Act, the Aggregate Resources Act, and the coordinated review). Again, while OHBA is generally supportive of provincial objectives for consistency and alignment, we are again concerned about additional layers of regulatory complexity which often add costs, extend timelines and create uncertainty.

OHBA also notes that many components of the proposed framework are already being implemented with brownfield properties through mandatory requirements of Certificates of Property Use. OHBA therefore questions whether the management of excess soil requirements related to construction for a “greenfield” property or a “clean” infill property should be just as rigorous as a brownfield site. OHBA believes that the Ministry should have an objective of establishing a modern “smart regulation” regime that is market driven, self-sustaining and is able to meet the goals and principles established by the Ministry. Therefore an *Excess Soil Management Policy* framework should adopt a risk based approach that uses local background conditions and land-use planning as determiners for what excess soil is acceptable for re-use. A risk based approach should also allow for flexibility for lower risk and smaller sites

## Definitions

OHBA is concerned by the lack of clear definitions within the proposed framework. It is not clear if the focus of the proposed framework on excess soil is intended to address other types of fill (which may or may not fall under the proposed framework). The term “soil” is defined in the proposed framework in part as “soil that has been excavated, typically as a result of construction activities that cannot or will not be used at the site where the soil was excavated and must be moved off site.” Many other materials fall outside the definition of excess soil such as asphalt, concrete, re-used or recycled aggregate product, shingles, painted wood, and other construction debris that can often be mixed into excavated materials. These materials can be found on fill sites or within excess soils and would potentially fall outside the proposed framework and yet still not necessarily be considered subject to the *Environmental Protection Act* (EPA) provisions for waste management.

Furthermore, OHBA notes another common issue (especially in the GTA near north shore of Lake Ontario) that the definition of soil (in O.Reg. 153/04) would appear to exclude friable/weathered bedrock (e.g. shale). With deep foundation work conducted by many of our members building high-rise condominium projects in the GTA, there appears to often be availability of excess shale which is easily excavated and can be a suitable fill material on receiving sites. Analytical testing of these materials to achieve the QA/QC requirements for both the laboratory and the QP is difficult if not impossible. The MOECC should therefore provide greater clarity as to the scope of the framework and clearly differentiate excess soils (and other excess materials) vs waste.

## Goals and Principles

OHBA is generally supportive of the two goals that would guide the implementation of the provincial framework:

1. Protect human health and the environment from inappropriate relocation of excess soil; and
2. Enhance opportunities for the beneficial reuse of excess soil.

With respect to the nine proposed principles, OHBA is concerned that principle #2 that requires *Generators of excess soil should be responsible for appropriate management of excess soil* does not allow for flexibility for the transfer of liability when the ownership of the soil is effectively transferred from the source-site to interim-sites and ultimately the receiving-site. OHBA strongly recommends that the framework allows for responsibility to be transferred as soil is transferred (“carry and control”). OHBA is concerned that despite record keeping requirements that the generator site owner (typically a builder/developer) ultimately loses control at certain transfer points. Therefore responsibility should be transferable through the chain of custody.

## Policy Needs and Actions: Source Sites

The main new legal instrument proposed in the framework, other than amending portions of existing legislation, is a new regulation to be made under the *Environmental Protection Act* (EPA) by the MOECC with respect to excess soil management on source sites. This regulation would enhance the responsibilities for the owners of source sites through life-cycle management of soil to ensure that excess soils reach the appropriate receiving sites. OHBA is concerned by the proposed increase in regulatory oversight and numerous additional requirements for excess soil management plans, tracking and verification. The minimum requirements of an *Excess Soil Management Plan* appear to be cumbersome, costly and potentially very time consuming.

OHBA is concerned by the additional proposed requirements for a proof of *Excess Soil Management Plans* certified by a QP to receive certain Building Permits and linking these requirements to the *Planning Act*. The proposed framework is unclear as to what types of building permits would be included under the requirements to have an excess soils management plan under applicable law and unclear regarding specific connections to *Planning Act* approvals. OHBA strongly recommends that if management plans are required to receive a Building Permit or a part of a Complete Application under the *Planning Act* that they NOT be subject to municipal approval. An excess soil management plan prepared by technically qualified experts (QP) should not be subject to municipal approval as neither Building nor Planning Departments have the technical expertise to “approve” a plan submitted by a QP. Furthermore, OHBA is concerned that these regulations could inadvertently be used to stall development proposals from moving forward on a timely basis. The only role for the Building or Planning Department should be to check off that the applicant has an *Excess Soil Management Plan* prepared by a QP. This should simply be a listed requirement and not subject to municipal approval.

## Policy Needs and Actions: Interim Sites

It is critical that the Ministry addresses and clarifies the transfer of liability throughout the chain of ownership/custody of excess soil in the proposed *Excess Soil Management Policy Framework*. This is an important issue as soils are transferred from the source site, to interim site(s) and ultimately to their final destination at a receiving site. OHBA previously noted this issue under our comments regarding principle #2 (*Generators of excess soil should be responsible for appropriate management of excess soil*). OHBA recommends that the framework recognize and provide clarity for the transfer of liability as excess soils move through certain transfer points (“chain-of-custody”). A developer (source site generator) cannot track and verify soils once they are transferred to a certified destination such as a transfer station (interim site) and the soils are potentially mixed in with other soils from different source sites.

OHBA also notes that inevitably there is a need to move soils within a building site or between sites during the course of site preparation for development and service installations, or during the different phases of new home

construction. Our members often already find the existing rules onerous from practical and timing perspectives. Many of our members must temporarily stock pile excess fill and/or topsoil off-site at interim locations in order to make room to maneuver during construction. These materials are often reused on the original site during final stages and landscaping. OHBA therefore recommends that the *Excess Soil Management Policy* framework recognize that interim sites can be used for both excess soil being returned to a source site or for moving it on to a receiving site. The policy framework should therefore treat excess soils that were temporarily stored on another site and redirected back to the original site for reuse differently than soils moving on to receiving sites.

#### Policy Needs and Actions: Receiving Sites

Receiving site regulation continues under the proposed framework to be based on existing, but enhanced tools. Municipalities and Conservation Authorities are and will continue to be the main permitting bodies for receiving sites. The proposed policy actions addressing receiving sites are largely based on the development of guidance material. The proposed excess soil management policy framework provides clearer direction for what soil can be used where and considers soil to be utilized as a resource. The proposed framework also provides enhanced protection of sensitive areas of provincial and local interest. OHBA appreciates the provincial objective for clearer direction, but recommends that the framework maintain some flexibility in terms of reuse of soil and types of receiving sites. While OHBA supporting having “some” flexibility for local circumstances, it is important to avoid the current problem of each municipality developing its own requirements. OHBA therefore recommends that the MOECC develop a model excess soils site alteration by-law for municipal use referencing BMPs as well as developing training support materials (which could also include tailored BMPs for those local circumstances where more specific requirements are involved) to ensure greater regulatory consistency in local jurisdictions across Ontario.

OHBA is concerned by the potential for jurisdictional overlap that could be created by continuing to have both the municipality and conservation authority regulate filling within conservation authority regulated areas and where a municipality might issue a fill permit in the absence of a conservation authority permit. Without proper coordinating provisions between the *Municipal Act* and the *Conservation Authorities Act* owners of excess soil could be placed in the middle of two jurisdictions, further complicating the regulation of receiving sites. OHBA recommends that the Ministry have a greater oversight role to ensure consistent application of the policy framework across Ontario.

#### Role of the Provincial Government in Regulating Excess Fill

OHBA is concerned that neither the current, nor the proposed legislative/regulatory framework appear to be well designed to address the large-scale boundary issues presented by the movement of excess soil across different jurisdictions within Ontario. The lack of provincial-level oversight and regulatory action on an operational-level has left the management of a provincial-scale issue in the hands of municipal by-laws and conservation authority regulatory oversight.

In order to recognize the trans-boundary nature of excess soils at a provincial scale there is a greater need for multi-agency coordination. This means there needs to be an enhanced operational role for the MOECC to establish clear, consistent and enforceable rules that neither municipalities, nor conservation authorities can contravene.

OHBA also requests clarification from the province regarding the thresholds being considered for “larger” and/or “riskier” source sites under proposed action #1. Furthermore OHBA requests clarification from the province regarding the thresholds being considered for “smaller” and “lower risk” receiving sites. OHBA is generally supportive of a risk based approach to excess soils management.

OHBA notes that through a review of the proposed actions that much of the work to be undertaken by Ministries focuses on producing guidance materials for others to implement on an operational basis. It is important to

recognize that the production of guidance material needs to be on an ongoing commitment otherwise the guidance can become out-of-date.

### Conclusion

While 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, OHBA remains concerned that the broader framework significantly increases regulatory burdens and fails to adequately address the transfer of liability as excess soil is transferred between locations/owners. OHBA notes that the MOECC is undertaking a modernization effort for other regulatory and permitting processes and recommends that an EASR / rules-in-regulation approach be considered for excess soils. OHBA also notes the MOECC intends to create an Excess Soil Stakeholder Engagement Group and requests industry stakeholder representation. Lastly, OHBA is concerned that the negative ramifications of the proposed initiative may outweigh the benefits of the new initiatives as currently proposed. OHBA appreciates the opportunity to provide feedback on the proposed excess soil management framework, and looks forward to ongoing dialogue and consultation with the provincial government.

Sincerely,



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