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Home Builders' Association

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

Re: Excess Soil Management Regulatory Proposal
EBR Registry Number: 013-0299

Background

In January 2016, MOECC sought input on a proposed “Excess Soil Management Policy Framework” through EBR Registry # 012-6065. OHBA provided feedback on the 2016 proposed framework in a March 26, 2016 submission to the MOECC and had previously responded to the 2013 consultation on *Soil Management – Guide for Best Management Practices* (011-7523). OHBA continues to work with the MOECC through our involvement with the Excess soil Engagement Group and the Marketing Working Group. The proposed framework included a series of actions guided by key goals and principles. The Excess Soil Management Policy Framework was finalized in December 2016.

The MOECC and partner ministries are now moving ahead with commitments under the framework and have posted a plain-language regulatory proposal to the Environmental Register (013-0299):

- The development of a new excess soil reuse regulation, supported by complementary amendments to existing regulations including Regulation 347 (Waste) and Ontario Regulation 153/04 (Records of Site Condition), made under the Environmental Protection Act (EPA), and Ontario Regulation 332/12 (Building Code), made under the Building Code Act, 1992 (Actions 1, 2 & 18).
- The development of new reuse standards and sampling guidance for excess soil, to support the proposed new excess soil reuse regulation (Actions 12 & 13).
- Clarification on approval requirements related to temporary sites and processing sites (Action 5).

Introduction

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 of proposed regulatory amendments 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. OHBA is concerned that this regulatory package will set back efforts to beneficially reuse excess soils. The proposed regulatory package represents a more complicated approach than the BMP Guide, and would be even more difficult to achieve. 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 finalized a policy framework and that it is important that stakeholders continue to be a source of expertise to be included during each of the next steps of policy and regulatory development. OHBA is also very concerned by the proposed implementation timeline of January 1, 2018 given the complexity of the new regulation and breadth of impacted municipal and industry stakeholders. Lastly, OHBA notes that the proposed regulatory package also includes a number of OHBA supported amendments to the brownfields regulation (O.Reg 153/04), including addressing two resolutions that OHBA passed at its 2014 Annual Meeting of Members: Exemptions of RSCs for temporary roads and relief regarding delineation at a RSC property undergoing Risk Assessment.

OHBA General Commentary

OHBA welcomes the MOECC proposal to advance a more coordinated approach with regulating the removal, disposal and reuse of excess 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. OHBA has however expressed concerns throughout the entire consultation process 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 proposed regulatory requirements would likely increase costs, timelines and complexity associated with consultants (QPs) preparing the *Excess Soil Management Plan* as well as potential additional analysis for handling excess soils and the potential for uncertainty arising from new requirements for the issuance of certain building permits. OHBA, while welcoming a more consistent approach under provincial guidance has outlined concerns that the currently proposed approach would increase costs and complexity of soil management, which could act as a barrier and constraint to opportunities for remediation, reuse and intensification.

OHBA notes that the Excess Soil Management Framework stressed the need for industry-driven solutions. The MOECC would be well-advised to work closely with industry stakeholders to demonstrate the ultimate benefits in developing good soil management practices to their business conduct. OHBA recommends that to achieve positive outcomes, the MOECC needs to engage early adapters in the industry to promote the benefits of the program to industry colleagues, just as has been done with energy-efficiency improvements in residential construction. This will lead to better outcomes in business practices and environmental impact. OHBA notes that while the MOECC should continue to have a focus on regulation and enforcement, that it is important over the longer-term for the Ministry to consider potential partners and private sector service-delivery options. The arena for excess soil management is vast and complex and there will be a need for service delivery to affect change in business practices to better utilize soil as a resource rather than treating it as a waste byproduct.

Proposed New Excess Soil Reuse Regulation and Amendments to Existing Regulations

OHBA does not support the immediate designation of excess soil as a waste product as soon as it is removed from a source site. Reverting to a “waste” orientation for all excess soils is counterproductive to the MOECC objective to reuse clean excess construction soils. Rather than streamlining processes to beneficially reuse excess soils, the proposed approach would add unnecessary complexity to the process. Knowing when excess soil is a “waste” is important because it establishes when the material is subject to the requirements Part V of the EPA. The proposed regulation would designate as a waste any excess soil from the time it leaves the property from which it is excavated. This designation would apply regardless of the quality or quantity of excess soil that is destined for deposit at a receiving site, and the waste designation would apply irrespective of whether an ESMP is required. The waste designation would attach to the excess soil until the time the excess soil is deposited at a receiving site that is not a waste disposal site within the meaning of Part V of the EPA. OHBA believes that this waste-based approach reflects an extended source site responsibility perspective and will result in greater uncertainty in terms of long-term liability.

OHBA is concerned 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. This default position entirely misses the point of the excess soil management framework to target beneficial reuse. OHBA is also concerned that the designation of excess soils as a waste product may impact risk and liability for the transfer of the soil by haulers of excess soil to maintain environmental compliance approvals in order to move these materials to processing sites, thus potentially increasing transportation costs and unnecessarily adding to the administrative burden.

Excess Soil Management Plan (ESMP)

The Environmental Registry posting proposes that an ESMP be required to be prepared and implemented for movements of excess soil that exceed a quantitative or qualitative threshold, to ensure the excess soil is properly managed and relocated. An ESMP be prepared in two general circumstances:

- 1) if more than 1000m³ (about 100 truckloads) of excess soil is being removed from a project area, or
- 2) if any part of the project area has or had a potentially contaminated activity that may have affected a planned area of excavation.

OHBA has concerns with the project threshold and with additional costs for plans that would be required to be completed, certified by a qualified person, and information registered on an online excess soil reuse registry before excess soil leaves a project area. OHBA is unclear as to whom is responsible for determining the threshold and is concerned that collecting another report may be onerous for building departments to collect for each building permit. This will place an additional administrative stain on municipal building departments.

OHBA is also unclear as to how the 1000 m³ threshold will be determined when multiple buildings are proposed on one large land parcel or if the ESMP threshold only applies per building (per building permit). OHBA notes that it is common for multiple buildings to be built in phases on one site. Building permits are not always issued for each building at the same time (phasing). OHBA therefore requests the regulation be clear for sites with multiple buildings and furthermore OHBA recommends this requirement no apply to new homes in new subdivisions as building permits for each home may be applied for and issued at different times. OHBA notes that subdivisions often have different owners/builders involved in construction and the full build-out timing (due to the market or other conditions) may not always be known at the time of the first permit application.

OHBA further notes that in the case of phased residential subdivisions, we have concerns with the proposed regulation, as much of the rough grading and servicing is actually completed prior to the first building permit application being filed. OHBA notes that there is a significant difference between excess soil generated from general site grading and servicing and that generated at the actual home construction and that there are in fact different “generators” of excess soil between developers and builders (whom are often different entities). Furthermore there is often a significant time lag between servicing/grading and home construction. An ESMP regulation on a residential subdivision seems excessive from OHBA’s perspective since much of the soil may not in fact leave the development site and the process would be difficult to track given the timing and potential for different lots to have different owners/builders. OHBA therefore again recommends that low-rise residential subdivisions be exempt from ESMP.

OHBA is also unclear as to whether an ESMP would be required if generated excess soil was exclusively exported to a MOECC licensed landfill (e.g., non-hazardous soil that exceeds applicable generic or risk derived standards). Pending clarification of whether an ESMP is required for soil being exported to a licensed landfill, OHBA notes that clarification is required from the MOECC associated with sampling expectations. Specifically – if significant volumes (e.g., >1000m³) of soil are to be exported from the site to licensed landfills (i.e., soil that exceeds applicable O.Reg. 153/04 SCS or associated PSS), sampling of those soils at the required in-situ/ex-situ frequencies do not appear warranted. OHBA recommends that soil analysis from Phase Two ESA, O.Reg, 347 TCLP, and any landfill requirements should be sufficient.

OHBA notes that Certificates of Property Use (CPU) often include a requirement that a Soil Management Plan (SMP) be prepared for a property where Property Specific Standards have been derived through completion of an O.Reg. 153/04 Risk Assessment. Mandatory requirements of the ESMP would be complementary to a developed SMP. Therefore, clarification should be provided from the MOECC to confirm that mandatory elements of an ESMP can be incorporated into a SMP without a requirement that the proponent/owner develop separate plans.

Another point regarding the filing of an ESMP is that the requirement to identify at the outset, where the excess soil is going to be transported to, may be administratively complicated. The on the ground reality is that the ultimate location of excess soil generated by a site may change over the course of a construction project. If each time the destination of the excess soil changes, the generator needs to send in a notice of change, this will be an administratively onerous process. Instead, the generator should be required to have records that can verify where any excess soils subject to an ESMP were actually transported to, however to be required to provide a play-by-play of where such soil may be going over the course of a construction project is not realistic.

OHBA is especially concerned regarding impacts of the proposal in smaller or northern communities that may lack access to QPs. While OHBA has concerns with increasing costs, we appreciate that the proposal provides clarity by including the required contents of an ESMP (listed in Schedule A of the regulatory proposal), including soil characterization, confirmation of appropriate receiving sites, and a tracking system.

The framework notes that Excess Soil Management Plans (ESMPs) would be integrated into the development approvals processes. While OHBA is generally supportive of better aligning provincial policy with municipal planning, we are concerned that ESMPs could slow an already lengthy and cumbersome land use planning process. 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.

Reuse of Excess Soil at Receiving Sites

OHBA supports the principle that excess soil should be treated as a resource, where it can be appropriately reused. Reuse of excess soil at a receiving site that is not a waste disposal site is proposed to be determined by an applicable site specific instrument or by-law. If the receiving site is not a waste disposal site and is not governed by a site-specific instrument or by-law, excess soil could be deposited in accordance with the proposed excess soil reuse standards.

These proposed excess soil reuse standards have been developed for different land uses, ground water potability and for three volume categories. OHBA notes and is supportive of MOECC 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 supports the proposal that temporary excess soil storage sites would not require Environmental Compliance Approvals if certain conditions are met.

Sampling Direction / Standardized Tracking

OHBA is concerned that the proposed requirements include new costs and potentially extended timelines for completing a phase one environmental site assessment (for some sites), developing and implementing a sampling and analysis plan, assessing results and completing an excess soil characterization report. OHBA is concerned the preparation of an ESMP 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. The sampling and standardized tracking requirements are onerous and we recommend that the MOECC identify areas for which the administrative burden can be alleviated without compromising broader objectives. Furthermore, rather than leaving the tracking system to be developed by a QP, the MOECC should create a single and straightforward standardized reporting format for all sites to follow.

Construction Restriction and Building Code Applicable Law

The Excess Soil Management Policy Framework encourages earlier excess soil planning to help integrate soil reuse considerations into planning, design and management decisions. It is proposed that the Excess Soil Reuse Regulation prohibit the construction of a building in certain circumstances unless an ESMP has been prepared. Specifically, it is proposed that the Excess Soil Regulation include a prohibition on construction of shoring for excavations unless an ESMP has been prepared and registered. This requirement would only apply if 1000m³ or more of excess soil is removed from the project area. OHBA recommends that the MOECC consider a higher threshold to ensure that smaller sites and businesses are not captured by the proposed regulatory requirements.

OHBA is concerned by the additional proposed requirements for a proof of ESMPs certified by a QP to receive certain Building Permits. The MOECC has proposed that the applicable law requirements of the Building Code would be amended to reference these proposed provisions of the EPA Regulation in relation to excavations. OHBA strongly recommends that if excess soil management plans are required to receive a Building Permit 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 ESMP prepared by a QP. This should simply be a listed requirement and not subject to municipal approval.

Definition of Qualified Person

In order to ensure an ESMP is prepared in accordance with this regulation and best professional practices, it is proposed that an ESMP 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. As such, the proposed regulation would require ESMPs to be prepared and certified by professional engineers or professional geoscientists. OHBA however reiterates our concern that rural and northern communities often lack access to a wide range of professional consulting services including QPs and therefore recommend that the site size threshold of 1000 cubic meters at a minimum be increased and that flexibility be provided in the regulation for northern and remote communities.

Excess Soil Tracking System

A key objective of the proposed regulation is to ensure that excess soil is tracked to ensure it is taken to appropriate receiving sites, and to allow soil deposited at a receiving site to be traced back to a particular project area. The regulation would require an excess soil tracking system to be developed by a QP on behalf of the proponent. OHBA is concerned that the development of Excess Soil Tracking systems will be costly and very time consuming, especially for smaller sites/projects. OHBA strongly recommends that the MOECC develop guidance materials and optional standardized and straightforward templates as a reporting format for QPs and proponents of smaller sites/project to have access to. The Excess Soil Engagement Group should be tasked with working with the MOECC to develop the guidance materials and standardized template documents.

Record of Site Condition Regulation Amendments

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

Transition

OHBA notes that a key component for any new regulatory proposal is how to manage transition to a new compliance regime. The regulatory posting notes that, "Transition provisions would be included in the proposed Excess Soil Reuse Regulation that would take into consideration projects that are substantially planned, approved or underway." OHBA believes that there is still more work to be completed in order to refine the proposal and to provide municipalities, contractors, site operators and home builders an appropriate amount of lead-time to absorb the proposed changes and integrate the new regulations into business practice.

OHBA notes that the proposed regulatory package represents a very large and complex set of changes to a number of different pieces of legislation and regulation, therefore we are not supportive of the proposed 2018 implementation timeline as being reasonable. OHBA recommends a five year roll-out as being reasonable (yet still an aggressive timeline) until 2023 in order 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 and where necessary potentially applying for environmental compliance approvals (ECAs). Furthermore, OHBA recommends that prior to a full roll-out of the proposed regulatory changes, that pilots be initiated on large public infrastructure projects in order to work out any technical issues prior to a broader roll-out and implementation.

Further Proposed Amendments to O. Reg. 153/04

The MOECC 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: Allowing an applicant to be able to request that the MOECC provide relief from the rules governing how contaminants are to be delineated at a RSC property undergoing risk assessment. OHBA notes that consideration should be given to include the MOECC District representatives (e.g., District Engineer) in the evaluation of provided rationale demonstrating that relief from delineation requirements have been achieved. Representatives at the District level are often more familiar with characteristics specific to the area of an individual property (e.g., geology, hydrogeology, source water protection, etc). At the OHBA Annual Meeting of Members in 2014, OHBA passed a resolution recommending that the MOECC 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.
- Substances used for purpose of safety under conditions of snow/ice: Flexibility for substances used for purpose of safety under conditions of snow/ice. OHBA is generally supportive of this proposed amendment.
- Converting low-rise commercial buildings to mixed use: 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.
- 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 Record of Site Condition 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 has since been engaged with the MOECC regarding providing clarity for an exemption of an RSC regarding temporary roads and is strongly in support of this proposed amendment.

- Treated drinking water: OHBA has no comments on this proposed amendment.
- 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. An 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.
- Day care centres: OHBA has no comments on this proposed amendment.
- 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.

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 now finalized framework significantly increases regulatory burdens and fails to adequately address the transfer of liability as excess soil is transferred between locations/owners. OHBA appreciates that elements of the proposed regulatory framework provide for greater clarity for both source sites and receiving sites, however our members continue to express concern with respect to additional costs and potentially extended timelines. OHBA is concerned that the negative ramifications of the proposed initiative may outweigh the benefits of the new initiatives as currently proposed. Lastly, OHBA is generally supportive of a number of proposed amendments to the Brownfields O.Reg 153/04 that provide additional clarity in some cases streamlines specific processes. 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,



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