

May 30, 2019

Mr. Sanjay Coelho
Environment Policy Branch
40 St. Clair Avenue West Floor 10
Toronto, ON M4V 1P5

RE: ERO 013 – 5000: Excess Soil Regulatory Proposal and Amendments to Record of Site Condition (Brownfields) Regulation

Dear Mr. Coelho,

The Ontario Society of Professional Engineers (OSPE) is pleased to present the following submission concerning the *Excess Soil Regulatory Proposal and Amendments*, published on May 1, 2019.

OSPE is the voice of the engineering profession in Ontario. As an organization, we advance the professional and economic interests of our members, many of whom work in the environmental sectors. OSPE is pleased to respond to this request for public comments on regulatory issues related to the management of excess soil.

We are very pleased that the Ministry of Environment, Conservation and Parks (MECP) referenced our report, *Excess Soil Management: Ontario is Wasting a Precious Resource*, in the ERO description. This study, conducted with the Greater Toronto Sewer and Watermain Construction Association (GTSWCA) and the Residential and Civil Construction Alliance of Ontario (RCCAO), demonstrates the cost savings and environmental benefits of proper management of excess soil.

OSPE Comments on the Excess Soil Regulatory Proposal and Amendments to Record of Site Condition (Brownfields) Regulation

Introduction

The proposal and amendments seek to protect human health and the environment from inappropriate relocation of excess soil and to enhance opportunities for the economic benefits of reuse of excess soil. As such, soil must be managed as a resource, not as waste. This change in approach is fundamentally important to move beyond the mindset of transporting soils, which now defaults in soils being transported to landfills for disposal. OSPE considers this as the foundational principle behind the initiatives and a message that must become ingrained in, and followed by, all stakeholders involved with excavating and transporting soil.

OSPE is pleased that MECP is implementing the new regulatory proposal and amendments. OSPE was part of the ongoing consultations held with stakeholders and we acknowledge and appreciate the time and effort of ministry staff to compile information and evidence that were used to develop them

OSPE has a few overall comments and specific suggestions or questions about the proposal and amendments.

Overall Comments

Inter-Ministry Coordination: OSPE is concerned that other ministries that are affected by excess soil regulations may not be as engaged as MECP with excess soil management and therefore may not consider new regulations as high priority. For example, will the Ministry of Municipal Affairs and Housing enforce excess soil management procedures/regulations within municipalities? Will the Ministry of Agriculture, Food, and Rural Affairs implement guidelines and enforce procedures for excess soil management in rural areas?

It is especially important for MECP to work together with the Ministry of Natural Resources and Forestry (MNR), as there appears to be a disconnect between MNR and MECP on pits and quarry closures. Many pit/quarry operators are interested in opportunities to import soil to fill up pits and quarries before closure. This may be an appropriate reuse, provided that groundwater resources are protected.

Training and Certification of Qualified Persons: OSPE can provide MECP with insight and quality assurance in terms of establishing and defining competencies needed by Qualified Persons (QPs). OSPE represents individual engineers acting as QPs, while Professional Engineers Ontario (PEO) and the Association of Professional Geoscientists of Ontario (APGO) oversee regulations governing QPs. OSPE welcomes discussion with MECP to ensure licensing bodies are accountable for their respective licence holders and that QPs are fully qualified.

In regard to professional engineers, PEO believes that as a self-regulated profession with ethical obligations, engineers themselves will determine whether they possess the competencies to be considered a QP. Stakeholders, however, report that they have encountered engineers stating they are qualified but are not. Unless the government, through MECP or the Attorney General, imposes a mandatory certification or professional development process to ensure QPs are qualified, the status quo will continue.

Lack of Implementation Plan: OSPE is concerned there may be a governance issue once regulations are in place concerning who enforces new rules, who educates stakeholders and how, and whether data from tracking will be input, saved, analyzed, used, etc. As a corollary, OSPE has advocated for more than a decade with the previous government that engineers should be consulted in the design and use of Ontario's electricity grid. Engineers were not consulted, resulting in sky high hydro prices. OSPE believes that excess soil regulations must be properly planned and implemented and would be pleased to work with the Ministry to allow knowledgeable QPs to provide evidence-based guidance and expertise.

Specific Comments – Environmental Protection Act On-Site and Excess Soil Management

Page 2, Interpretation: “enhanced investigation project area” – (e) “oil and gas pipeline or any associated facilities” may require clarification. Would this include lines servicing residences? Why the difference between requiring an enhanced investigation for this in the soil regulation, but not as a mandatory Phase 2 ESA in O. Reg. 153/04?

Page 9/10, Item 6, Points (2), (3), (4): OSPE agrees that the QP is matched with O. Reg. 153/04 which defines one as a P.Eng. or P.Geo.

Page 11, Item 7 – Before removing soil from project area: OSPE understands the rationale to try to have a project leader manage most of the paperwork. However, in the event that a QP is required to characterize a site, some thought should be given to ensuring that the QP retains some engagement with the implementation of the excess soil management plan to validate that the soil has indeed been moved in accordance with the design.

Page 12, Item (3) – Subsection (2) does not apply to a project leader..., 2: OSPE suggests reconsideration of the exemption that no QP and evaluation is required in moving soil from parkland, residential or institutional uses. For example, in one project by an OSPE member QP, parkland was encountered that was contaminated – it had received poor quality fill material prior to any regulation that would trigger the present-day change of use investigations. Other park sites have been established on closed landfills prior to the current environmental regulatory regime.

Page 16, Qualified person, conflict of interest, Item 8 (1): This requires clarification on direct or indirect interest. For example, if the QP was retained by a receiving site to vet soil from a soil site, would this be considered a direct or indirect purpose?

Page 16, Qualified person, conflict of interest, Item 8 (2): This is inconsistent with 8 (1). If there is concern about a QP bias due to a direct or indirect interest, would there not also be a potential conflict in the case of an employer-employee relationship? The interest would be not losing a job or a promotion. Both 8 (1) and 8 (2) should not be required due to the *Professional Engineers Act* and code of ethics.

Pages 18/19, Transportation (4), (5): Tracking: OSPE concurs that tracking and record keeping is necessary to properly manage excess soil. However, in prior consultations OSPE mentioned that draft tracking procedures may be viewed as onerous and lead to higher costs, and the danger of the hauler ignoring measures that are deemed too detailed to be effectively recorded. The new proposed regulations on tracking now seem too simple and do not capture details such as quality of soil being moved or type of soil.

OSPE also has concerns over where/how the data will be stored. There is no mention of a registry. How will the data be used? What analysis will be performed on the data? For example, the operator needs to only record the addresses of where the soil was loaded

and where it is deposited. Measuring and including distances would be useful as numeric indicators to determine wear and tear of roadways, amount of emissions generated, whether distances are shorter as regulations take hold, etc. Based on the new regulations, however, distances could only be determined by inputting start and end addresses into a GPS system or even google maps. The operator should be asked to record distance driven in addition to addresses.

Page 21/22, General requirement re excavation of soil (2): The rationale for this section makes sense, but in practice, who will enforce it? Who is holding the project leader accountable? If the QP is not actively involved in the soil movement process after they write the report, OSPE is concerned that there are a number of project leaders that may not actually complete this step, versus a QP, or someone working under the supervision of a QP, being involved throughout. Where are the checks and balances? Consideration should be given to the risk associated with the site in deciding whether or not to leave this call to a project leader or to require the involvement of a QP.

Specific Comments – Environmental Protection Act Amending O. Reg. 153/04

Page 4, Section 6.2: The removal of the certificate of status requirement is a good, positive change, particularly the requirement for it to be current within 30 days of filing.

Page 7, 14 (3) Subsection 48 (3) and 15. Part IX of the Regulation is amended by adding the following section: The removal of 48 (3) and addition of Section 15 is a positive change. It expands the salt exemption to include pedestrian safety as well. It also adds language for exemptions related to excess soil (to ensure this regulation works with the new excess soil regulation and rules), an exemption for naturally occurring elevated concentrations of a parameter, and impacts related to the discharge of treated water (e.g. this can happen when chlorinated water interacts with organics and creates chloroform).

Page 15, Non-standard delineation: This is one of the changes that was discussed in the working groups that seems reasonable. It allows for more latitude in delineation through a process of consultation between the QP and district engineer. The old regulation sometimes forced delineation in situations when it was not reasonable and/or might have caused harm.

Page 23, Table 2 Minimum Stockpile Sampling Frequency: The revised stockpile sampling table is a material change from the existing regulation in terms of the upper volume and by narrowing some of the sample volume bands. The proposed table appears to be consistent with the proposed sampling frequency for stockpiles in the excess soil rules document. The number of samples also appears to be consistent with the 2018 EBR proposal.

Soil screening appears to have been removed from the stockpile table. As a best practice, screening should continue to support the sample submission rationale, and

perhaps MECP thinks it is covered in other areas of the regulation where the QP must comment on their screening methodology for sample selection. Soil screening for sample selection is mentioned in O. Reg. 153/04 and in the proposed excess soil rules document. Will it be clear to the stakeholder that soil screening is still necessary?

Conclusion

OSPE looks forward to continued dialogue with the ministries involved with excess soil management, and improved excess soil management practices as a result of the government's current initiative to advance the state of practice across the province.