

ONTARIO'S NEW EXCESS SOIL REGULATIONS – CONSTRUCTION CONTRACT IMPLICATIONS

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On January 1, 2021, Phase One of Ontario's new [On-Site and Excess Soil Management Regulation](#), O. Reg 406/19, and supporting amendments (the "**Regulation**") took effect under the *Province's Environmental Protection Act* ("**EPA**"). The Regulation introduces a new framework for the excavation, removal and transport of "excess soils" between two or more sites that will affect property owners, developers, consultants and the construction industry as a whole.

The details of the Regulation are described in our Environmental Law Bulletin of January 25, 2021, [The Quick and Dirty on Ontario's New Excess Soil Regulations](#).

This bulletin focuses on how these changes may impact your construction contracts with a focus on the following five things you should know with respect to your existing and future construction contracts:

(1) Expressly address the new excess soil management obligations in your contract

Obligations imposed under the Regulation include the requirement to have all excess soil removed from the site sampled and tested, the need to have an established procedure and training protocol for the management of excess soil, the obligation to engage a "Qualified Person" (defined in the Regulation) to assist with soil quality assessment, and the obligation to monitor and maintain records relating to excess soil. As failure to meet these obligations will result in liability under the Regulation, all project parties should expressly set out their obligations for excess soil management in their contracts to ensure they have a clear understanding of their respective responsibilities.

Although many construction contracts between an owner and contractor will require the contractor to perform the work in accordance with applicable laws, including with respect to removing and disposing of waste products and debris from the site, these forms of blanket obligations are not likely sufficient to ensure clear delegation of the owner's responsibilities under the Regulation to the contractor.

Similarly, in contracts between an owner and consultant, any obligations for excess soil management to be performed by the consultant should be expressly stated in the contract. In particular, where a consultant is

being retained to act as the Qualified Person the scope of these obligations should be distinguished from general obligations to comply with applicable laws.

In all instances, parties would be wise to further expressly exclude or otherwise specifically identify any obligations they are not undertaking under the contract.

(2) The Owner is likely the Project Leader and cannot contract out of this role

The Regulation broadly defines “Project Leader” as the person ultimately responsible for making decisions relating to the planning and implementation of the project. Thus, any person who meets the definition of “Owner” under the Ontario *Construction Act* will likely also meet the definition of “Project Leader” under the Regulation. This is because the person with an interest in the premises upon whose, credit, behalf, privity or direct benefit an improvement is made is also likely to be the person with ultimate decision-making authority for the project.

This remains the case even though the contractor generally has full control over the construction means, methods, techniques, sequences and procedures. Notably, however, more than one person may be the Project Leader under the Regulation, meaning that under certain circumstances a contractor or construction manager (for example) could also be considered to be the Project Leader together with the owner.

Although the Regulation allows a Project Leader to have its obligations for excess soil management performed by a third party, such as the contractor or construction manager, the Regulation expressly designates the Project Leader as responsible for the management and reuse of excess soil, thereby preventing it from excluding, limiting or altering its liability under the Regulation by contract. This means that for all intents and purposes under the Regulation the buck stops with the Project Leader who will be liable for any failure to comply with the Regulation, including any resultant orders or charges issued by the Ministry of Environment, Conservation and Parks (the “**Ministry**”).

Where a Project Leader delegates its excess soil management responsibilities to a third party under contract, however, the Project Leader will continue to have a cause of action against such third party where they are in breach of these contractual obligations or are negligent in their performance or where the Project Leader incurs costs and expenses associated with any enforcement action under the Regulation by the Ministry. If a Project Leader wishes to ensure this civil liability and its scope is clear, an appropriate indemnity to this effect may be added to the construction contract.

(3) The Regulation may apply to work being performed under existing contracts

The Regulation took effect on January 1st, 2021 meaning that it immediately began to apply as of that date to

any work involving excess soil, regardless of when the project started or the contract was signed.

We note that there are additional testing, tracking and notice and report filing requirements that take effect on January 1, 2022 for certain designated projects under the Regulation. There is an exemption for these requirements with respect to such designated projects where a Project Leader entered into a contract with another person with respect to the management of excess soil from the project before January 1, 2021. However, this does not impact the obligations under the Regulation that came into effect on January 1, 2021.

Owners of ongoing projects should thus review their existing contracts to determine how the most recent and upcoming change in law may be fairly addressed. In all cases, the specific contract language will need to be carefully reviewed, including as it relates to waste disposal, excess soil management and any relevant changes to applicable laws. In many instances, issuance of a change order may be most appropriate to clearly identify any new obligations to be undertaken by the parties and to address any resultant cost or schedule implications.

In all instances, it is strongly recommended that the parties' respective obligations for excess soil management under the Regulation be clearly set out and allocated in writing in order to prevent any failure to comply.

(4) Establish a protocol for excess soil management and include it in your contract

Project Leaders should implement well-documented procedures and policies relating to excess soil management and the related obligations under the Regulation.

Any such policy should establish necessary qualifications and training obligations for those persons undertaking excess soil management responsibilities. The policy should further include clear communication obligations as between all project parties to ensure the Project Leader is well positioned to meet its monitoring and record keeping obligations and ensure compliance with the Regulation.

Inclusion of such procedures and policies as a contract document in all applicable construction contracts is a reliable way to ensure that all project parties are aware of these responsibilities.

(5) Address excess soil in the early project stages

Project Leaders should address soil management obligations as early as possible in the design and planning stages of the project, including by:

- Sampling the soil at the project site to determine its environmental condition and what generic or site-specific standards will apply to excess soil from the site under the Regulation;
- Identifying the obligations to be undertaken by the various project parties; and
- Engaging a Qualified Person early to assist with excess soil quality assessment and development of any

necessary protocols.

The better the Project Leader's understanding of the anticipated excess soil management obligations at the outset, the better positioned the Project Leader will be to properly delegate these obligations in its contracts.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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