

# THE QUICK AND DIRTY ON ONTARIO'S NEW EXCESS SOIL REGULATIONS

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**Update (Apr. 29, 2022):** On April 21, 2022, the Ontario Ministry of the Environment, Conservation and Parks published its decision to suspend certain parts of "Phase 2" of the Regulation until January 1, 2023. For more information, see our bulletin [here](#).

## Introduction

On January 1, 2021, Phase One of Ontario's new [On-Site and Excess Soil Management Regulation](#), O. Reg 406/19, and supporting amendments<sup>[1]</sup> (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.

Subject to certain exceptions, the new framework will now apply to all construction projects that generate "excess soil".<sup>[2]</sup> These regulatory changes will affect property owners, developers, consultants, and the construction industry as a whole, exposing its participants to new risks and legal requirements.

The Regulation will be implemented in three phases over the next five years. Phase One is now in effect. Here is what you need to know about Phase One.

For information on Phase Two of the Regulation, which came into effect on January 1, 2022, and how to prepare and plan your project and related contracts in compliance with the Regulation, please see our bulletins: [The Quick and Dirty on Phase Two of Ontario's Excess Soil Regulation](#) and [Ontario's New Excess Soil Regulations – Construction Contract Implications](#).

## Background

The Regulation defines "excess soil" as soil (or soil mixed with rock) that has been excavated as part of a project and removed from the project area.<sup>[3]</sup> Notably, the Regulation framework does not apply to certain categories of excavated soil such as those involving hazardous or asbestos waste and the operation of pits and quarries, among other exemptions.<sup>[4]</sup>

The Regulation provides rules and requirements for the reuse and management of excess soil, including, but not limited to:

- when excess soil is designated as a waste;
- standards for appropriate reuse of excess soil; and
- new roles and associated risks among those involved in construction projects involving soil excavation.

Each of these rules and requirements are further discussed below.

## **Overview of the New Excess Soil Framework**

### **i. New Reuse Rules and Waste Clarification**

The Regulation designates all excess soil as “waste” unless all of the following criteria are satisfied:

1. The excess soil is directly transported to a reuse site where it will be reused for a “beneficial purpose”;<sup>[5]</sup>
2. The owner or operator of the reuse site has consented in writing to the deposit of the soil (unless the owner or operator is also the Project Leader for the project from which the excess soil was delivered);
3. The excess soil is dry soil and remains dry soil until it is finally placed at the reuse site, or, if it is not dry soil, then the deposit of liquid soil at the reuse site is authorized by an instrument such as an Environmental Compliance Approval;
4. To align with beneficial reuse, the quality and quantity of the soil must meet newly prescribed standards (as further described below); and
5. If the reuse site is governed by one of the instruments outlined in section 3.2(4) of the Regulation, then the conditions set out in section 4 are satisfied.<sup>[6]</sup> If the reuse site is not governed by an instrument detailed in section 3.2(4), then the conditions set out in section 5 are satisfied.<sup>[7]</sup>

If the soil at any time prior to final placement fails to meet any of the above criteria, then the excess soil will be considered waste and must be managed in accordance with the Province’s waste management legislation.<sup>[8]</sup>

### **ii. Excess Soil Standards and Rules for Appropriate Reuse**

Whether or not excess soil may be reused or be treated as waste will depend, in part, on whether it is contaminated and to what degree. Unless an exemption under the Regulation applies, excess soil must meet applicable quality standards in order to be deposited on reuse sites.

The generic standards for allowed concentrations of contaminants in excess soil are set out in the [“Rules for Soil Management and Excess Soil Quality Standards”](#) (the “**Rules**”),<sup>[9]</sup> which are mostly based on the familiar “Soil, Ground Water and Sediment Standards made under Part XV.1 of the EPA”, and allow for excess soil compliant with the applicable generic standards to be deposited on reuse sites governed by the same, or less

strict, generic standards.<sup>[10]</sup>

Unless otherwise exempt under the Regulation, a qualified person (“QP”), as defined in O. Reg. 153/04: Records Of Site Condition, must be engaged to assess the quality of the excess soil from a project site for determining potential reuse. As a result, the QP plays a vital role under the new regime by assessing and identifying appropriate reuse sites for excess soil and managing the environmental liabilities associated with excess soils.

The Regulation also introduces the novel [Beneficial Reuse Assessment Tool](#) (“BART”),<sup>[11]</sup> which allows a QP to develop site-specific standards for allowable concentrations of contaminants at a reuse site. This may allow for the deposit of excess soil with concentrations of contaminants that meet the site-specific standards but not the applicable generic standards at a reuse site.

### iii. **Responsibility Shifts to The “Project Leader”**

A “Project Leader” under the Regulation is broadly defined as the person or persons who are ultimately responsible for making decisions relating to the planning and implementation of the project.<sup>[12]</sup> Those who fall within this definition will be responsible for any excess soil removed from project areas, whether or not soil management is contracted out to a third party.

Before the enactment of the Regulation, Project Leaders could contractually exclude their liability for soil management by shifting the responsibility onto third party contractors. Now, Project Leaders can no longer exclude, limit, or alter their liability through contract or other arrangements with third party contractors.

Project Leaders will therefore be solely responsible for regulatory compliance under the new Regulation and may be subject to a range of penalties under the EPA if they fail to comply.

## **Key Takeaways**

### i. **Address Excess Soil Early in Planning Stages**

To position your project for success, it is important that developers and project owners address excess soil management at the early design and planning stages of the project to avoid unexpected costs and delays in the project schedule. This planning should include:

- 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 Project Leader to manage and take responsibility for excess soil at the project site;
- engaging a QP early to assist with excess soil quality assessment; and
- creating procedures and training protocols for the management of excess soil by the Project Leader and any employees or contractors involved in the project.

## ii. Manage Risks and Account for New Roles and Responsibilities

To reduce the risks associated with management of excess soil, Project Leaders should implement well-documented procedures and policies and provide training for employees, contractors and themselves (if necessary) to facilitate and ensure compliance with their obligations under the Regulation. In addition, Project Leaders should engage people with the appropriate expertise to assist with excess soil management and allocate personnel and financial resources specifically for this purpose.

## iii. Be Proactive and Prepare for Future Changes

The rules described above with respect to the re-use and on-site processing of excess soils, and designating excess soils as waste came into effect at the beginning of 2021. However, further requirements to test, track, and file notices related to excess soil will take effect in 2022. In 2025, restrictions on the deposit of excess soil at landfilling sites will come into force. Subject to certain exceptions, these restrictions will apply to excess soils that satisfy specified quality standards under the [Excess Soil Standards](#).<sup>[13]</sup>

Project Leaders should take proactive steps to ensure that their project delivery processes align with Ontario's new soil management regime. For guidance on how to manage these new changes to the regulations, please feel free to contact [Ralph Cuervo-Lorens](#), [Jason J. Annibale](#), [Talia Gordner](#), and [Jeremy Rankin](#).

[1] These include amendments to Ontario's [O. Reg. 153/04: Records Of Site Condition, Reg 347: General Waste Management, and the Waste Management Systems EASRT Regulation \(O. Reg 351/12\)](#).

[2] [O.Reg 406/19](#) broadly defines the term "project" to include (among other things) "any form of development or site alteration."

[3] [O. Reg. 406/19: On-Site And Excess Soil Management, s.1\(1\)](#) amended as of December 21, 2020 by Ontario Regulation 775/20. For clarity, O.Reg 406/19 further defines a "project area" as a single property or adjoining properties on which the project is carried out.

[4] [Section 2 of O.Reg 406/19](#) provides a list of excavations and placements that are exempted from the regulation.

[5] The term "beneficial purpose" is not defined in the regulation. However, it provides examples in connection with development, which include the following: (i) backfill for an excavation; (ii) final grading; (iii) final grading for any development, infrastructure project, landscaping, or another project governed by an instrument issued; or (iv) the placement of fill to assist in the rehabilitation of the reuse site. See [O.Reg 406/19 at s.5\(3\)](#).

[6] [Section 4 of O. Reg 406/19](#) establishes the following conditions: (i) the excess soil, which is governed by a site specific instrument, complies with the quality and quantity requirements in that instrument; (ii) where the instrument does not contain quality requirements, the Rules apply; or (iii) where the instrument does not contain quantity requirements, the quantity of excess soil deposited at the reuse site must not exceed the

quantity identified for the beneficial purpose.

[7] [Section 5 of O.Reg 406/19](#) sets out the following conditions: (i) There is a beneficial purpose connected to an undertaking; (ii) the quantity of excess soil brought to the reuse site must be consistent with the identified beneficial purpose; (iii) the quality of excess soil complies with the [Rules](#) or site-specific quality standards; (iv) the reuse site is not being used primarily for depositing excess soil; (v) the excess soil must be finally placed no later than two years after it is deposited at the reuse site; and (vi) the excess soil is placed in accordance with the [Rules](#).

[8] See [sections 3 to 6 of O.Reg 406/19](#).

[9] In particular, the generic excess soil quality standards can be found under the Rules within [Part II: Excess Soil Quality Standards](#).

[10] Ontario Ministry of the Environment "[Soil, ground water and sediment standards for use under Part XV.1 of the Environmental Protection Act](#)" (2011 April 15).

[11] A Guide for Developing Site Specific Excess Soil Quality Standards Using the Beneficial Reuse Assessment Tool (BRAT), version: 1.0 (November 19, 2019).

[12] [O. Reg. 406/19: On-Site And Excess Soil Management, s.1\(1\)](#).

[13] These restrictions will not apply if the excess soil will be used for daily cover, final cover, the construction of roads or berms or for any other type of ancillary use that supports the operation of a landfilling site or dump. See [section 22\(2\) of O.Reg 406/19](#).

by [Jason A. Annibale](#), [Ralph Cuervo-Lorens](#), [Talia Gordner](#), [Jeremy Rankin](#)

### **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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