

# THE QUICK AND DIRTY ON PHASE TWO OF ONTARIO'S EXCESS SOIL REGULATION

Posted on January 10, 2022

Categories: [Insights](#), [Publications](#)

**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](#).

Phase Two of Ontario's [On-Site and Excess Soil Management Regulation](#) (the "**Regulation**")<sup>[1]</sup> under the [Environmental Protection Act](#)<sup>[2]</sup> took effect on January 1, 2022. However, on March 11, 2022 the Ontario Ministry of Environment, Conservation and Parks published a proposal to delay the implementation of Phase Two until January 1, 2023. For more information on this proposal, please see our bulletin, [Ontario Proposes to Postpone Implementation of Phase Two of the Excess Soil Regulation](#).

Since coming into force on January 1, 2021, the Regulation has introduced a new framework for the excavation, removal and transport of "excess soil" between two or more sites. These regulatory changes have affected property owners, developers, consultants, and the construction industry as a whole, exposing its participants to new risks and legal requirements.

Phase Two introduced new filing, documentation and tracking requirements for those responsible for leading projects that involve the removal of soil from a site ("**Project Leaders**") and owners and operators of reuse sites at which excess soil will be deposited. Notices now need to be filed prior to the removal or deposit of excess soil with the [Excess Soil Registry](#) (the "**Registry**"), a new online repository operated by the Resource Productivity and Recovery Authority (a provincial regulator with responsibility for overseeing and enforcing compliance with resource recovery and waste reduction activities in Ontario).

Project Leaders will also be responsible for implementing new excess soil tracking systems and ensuring a qualified person ("**QP**")<sup>[3]</sup> prepares certain assessments and reports with respect to the quality of the excess soil as well as the applicable environmental standards for the project and deposit sites. Additionally, Phase Two introduces amendments to the current record keeping rules for transporters of soil.<sup>[4]</sup>

This bulletin provides an overview of these new obligations. For information on Phase One of the Regulation and how to prepare and plan your project in compliance with the Regulation, please see our previous bulletin,

## [The Quick and Dirty on Ontario's New Excess Soil Regulations.](#)

The Regulation also imposes detailed obligations for the handling of excess soils, which should be distinctly addressed in all contracts entered into for a project relating to excess soils. The importance of clearly allocating responsibility and liability for these obligations is only augmented by the new obligations introduced on January 1, 2022 as described below. For more information regarding how to ensure your construction contracts align with the new excess soil regime, please see our previous bulletin, [Ontario's New Excess Soil Regulations – Construction Contract Implications](#).

### **Requirements of Project Leaders**

#### 1. Notice Filings in the Registry

As of January 1, 2022, before removing any excess soil from a project area, a Project Leader must file a notice in the Registry setting out, among other things, information about the Project Leader, the project and proposed deposit sites and an estimate of the quantity of excess soil that will be removed and deposited off site.<sup>[5]</sup>

Project Leaders must file an updated notice within 30 days of removing all excess soil from the project site, which notice must confirm the amount of excess soil deposited at each deposit site and the date on which the last load was removed from the project site.<sup>[6]</sup>

No filing will be required where the Project Leader entered into a contract for the management of excess soil from the project prior to January 1, 2022,<sup>[7]</sup> or where certain circumstances set out in Schedule 2 to the Regulation apply.<sup>[8]</sup>

One such exemption in Schedule 2 is for a project whose primary purpose is not cleaning up contaminated land, where the Project Leader reasonably believes that the project area has never been used as an “enhanced investigation project area”,<sup>[9]</sup> and where the amount of soil to be removed is less than 2,000 m<sup>3</sup>.<sup>[10]</sup> Other exemptions include situations where excess soil is being removed to alleviate a public or environmental health or safety concern,<sup>[11]</sup> or where excess soil is excavated for an infrastructure project (for example, to keep infrastructure in a fit state of repair).<sup>[12]</sup>

Where a Project Leader is required to file a notice with the Registry for the project, it must also comply with the requirements detailed in the following sections 2 and 3.

#### 2. Tracking System

Project Leaders must also develop and implement a tracking system prior to removing excess soil from the project site.<sup>[13]</sup> The system must be able to verify when and where excess soil was transported and deposited. An effectively-designed and managed system will aid in determining whether any updates or corrections are

required to be made to a Project Leader's initial notice.

### 3. Planning, Assessment and Soil Characterization Requirements

A Project Leader may also be required to retain a QP to complete the assessments and reports described below. The Project Leader will generally be exempt from these requirements if the project area is: (a) used for an agricultural purpose (unless the Project Leader knows of a contaminant discharge in the project area), or (b) in an area used for parkland, residential, or institutional use, where the excess soil will not be transported to a reuse site with an agricultural purpose.<sup>[14]</sup>

#### (a) Assessments of Past Uses

A Project Leader must retain a QP to prepare an assessment of past uses of the project area, in accordance with the Ministry of the Environment, Conservation and Parks' requirements outlined in the [Rules for Soil Management and Excess Soil Quality Standards](#).<sup>[15]</sup> However, an assessment will not be required if the project relates to a stormwater management pond, a Phase I Environmental Site Assessment ("ESA") has previously been conducted for the project site,<sup>[16]</sup> or the Project Leader prior to January 1, 2022 assessed the project area to consider whether contaminants may have affected the soil.<sup>[17]</sup>

#### (b) Sampling and Analysis Plans and Soil Characterization Reports

If the assessment of past uses or a Phase I ESA identifies a potentially contaminating activity at the project site, part of the project area is determined to have been an enhanced investigation project area, or the project involves the removal of excess soil from a stormwater management pond, then a QP must be retained to help prepare and implement a sampling and analysis plan (which will also require the Project Leader to develop procedures for segregation of analyzed samples) and a soil characterization report.<sup>[18]</sup>

A QP's soil characterization report must include an assessment of the sample results, describe which soil can be reused within the project area, which soil can be deposited at another site, and identify the types of reuse sites to which the excess soil can be transported.<sup>[19]</sup>

Sampling and analysis plans and soil characterization reports will not be required if the soil will be deposited at a Class 1 soil management site (as defined in the Regulation)<sup>[20]</sup> or if a Project Leader prior to January 1, 2022 prepares a plan to analyze the concentration of contaminants of soil in the project area and a report describing the results of the plan.<sup>[21]</sup>

#### (c) Excess soil destination assessment reports

An excess soil destination assessment report should identify each site where excess soil will be deposited along with an estimate of the quality and quantity of excess soil that will be so deposited. This report must also

include contingencies (such as alternate sites for deposit) if the excess soil cannot be deposited at the proposed sites.[\[22\]](#)

### **Requirements of Owners and Operators of Reuse Sites**

Beginning on January 1, 2022, the owner or operator of a reuse site at which 10,000 m<sup>3</sup> or more of excess soil is expected to be deposited will be required to file a notice in the Registry prior to the soil being deposited. Among other things, this report must set out certain information relating to the reuse site, how the excess soil will be used, the quantity proposed to be deposited at the site, and the excess soil quality standards for the site.[\[23\]](#) The owner or operator must also make a declaration that procedures providing for the identification of the site from which the excess soil is transported, the receipt of all relevant information relating to the excess soil, and the inspection of all loads before deposit, are in place to ensure that the storage of such soil will not have an adverse effect on the environment or in the vicinity of the property.[\[24\]](#)

Notices must be updated within 30 days after the deposit of the final load of excess soil to disclose the total amount deposited at the site and the date the final load was deposited.[\[25\]](#)

These filing requirements, however, do not apply to reuse sites that have been in operation prior to January 1, 2022 if the reuse site has a use related to infrastructure[\[26\]](#) or the amount of excess soil expected to be deposited at the reuse site after January 1, 2022 is less than 10,000 m<sup>3</sup>.[\[27\]](#)

### **Transporters of Excess Soil**

As of January 1, 2022, a person who transports excess soil must ensure that they have a hauling record on them at all times during transportation setting out, among other things, the location, date, and time at which it was loaded, the quantity, where it will be deposited, and the names of people who can be contacted to answer questions about this information.[\[28\]](#) While this information was already required to be provided upon request by a provincial officer under the Regulation,[\[29\]](#) the amendments will require that transporters have an actual record of this information on them at all times while in transit.

Additionally, the Regulation will now require the transporter, upon arriving at the relevant deposit site, to provide a copy of the record to the individual who is responsible for acknowledging deposit at the reuse site. However, transporters must first ensure that they update their hauling record to include the date and time of deposit, and the name, contact information and a declaration from the individual at the deposit site.[\[30\]](#)

These records must be retained for at least two years following the day the excess soil was loaded for transportation.[\[31\]](#)

### **Conclusion**

If you have questions about your obligations under Phase One or Two of the Regulation, please feel free to contact Talia Gordner or Annik Forristal for further guidance.

[1] [\*On-Site and Excess Soil Management Regulation\*](#), O. Reg. 406/19 [Regulation].

[2] [\*Environmental Protection Act\*](#), R.S.O. 1990, c. E.19.

[3] As defined in [\*Records of Site Condition\*](#), O. Reg. 153/04.

[4] *Regulation*, s. 29(2).

[5] *Regulation*, s. 8, and Schedule 1.

[6] *Regulation*, s. 9(2).

[7] [\*On-Site and Excess Soil Management\*](#), O. Reg. 775/20, s. 7 [Amendments].

[8] *Regulation*, s. 8(2)(a).

[9] As defined in the Regulation, s. 1(1): means a project area used for an industrial use, as a garage, as a bulk liquid dispensing facility, including a gasoline outlet, or for the operation of dry cleaning equipment.

[10] *Regulation*, Schedule 2, para 1.

[11] *Regulation*, Schedule 2, para 3.

[12] *Regulation*, Schedule 2, para 3.

[13] *Regulation*, s. 16.

[14] *Regulation*, s. 14.

[15] *Regulation*, s. 11(1).

[16] *Regulation*, s. 11(2).

[17] *Amendments*, s. 10.

[18] *Regulation*, s. 12.

[19] *Regulation*, s. 12(5).

[20] *Regulation*, s. 12(3).

[21] *Amendments*, s. 11.

[22] *Regulation*, s. 13.

[23] *Regulation*, s. 19(1) and 19(4).

[24] *Regulation*, s. 19(3) and 19(5).

[25] *Regulation*, s. 19(6).

[26] *Amendments*, s. 13(3).

[27] *Amendments*, s. 13(2).

[28] *Regulation*, s. 29(2).

[29] *Regulation*, s. 18.

[30] *Regulation*, s. 29(2).

[31] *Regulation*, s. 29(3).

by [Talia Gordner](#), [Annik Forristal](#) & [Kamal Azmy](#) (Articling Student)

### **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.

© McMillan LLP 2022