

## **RCCAO and SOiIL Comments re ERO Instrument #013-5000**

### **Ontario Excess Soil Regulatory Proposal and Amendments to RSC Regulation**

#### **1. INTRODUCTION**

The following stakeholders are submitting their joint comments and recommendations on the proposals put forward by the Ministry of the Environment, Conservation and Parks (**MECP** or the 'Ministry') regarding the proposed regulatory and other changes:

Residential and Civil Construction Alliance of Ontario (**RCCAO**)

Supporting Ontario Infrastructure Investments and Lands (**SOiIL**)

#### **2. ABOUT THE STAKEHOLDERS**

RCCAO is a not-for-profit industry association that represents both labour and management in the residential and civil sectors of Ontario's construction industry. RCCAO and its members strive to provide real solutions to complex issues such as promoting the reuse of excess construction soil. These efforts have included offering advice through the Ministry's Excess Soil Engagement Group (ESEG) and by commenting on environmental bill of rights consultation processes. In addition, RCCAO has worked collaboratively with other organizations such as the Ontario Environment Industry Association (ONEIA) to advance best soil management practices. In addition to the five reports commissioned by RCCAO on excess soil matters, a 2016 report on "Excess Soil Management: Ontario is Wasting a Precious Resource" was produced in collaboration with the Greater Toronto Sewer and Watermain Contractors Association (GTSWCA) and the Ontario Society of Professional Engineers. At the request of the Ministry in 2012 due to the fact that there was no information available, RCCAO has provided estimates of the quantity of excess construction soil generated in Ontario, with two reports on this subject (2012 and 2017). In September 2018, RCCAO and GTSWCA produced a three-part video series to raise awareness about the cost savings and environmental advantages of beneficial reuse.

SOiIL was created several years ago with a primary purpose to develop an electronic database to match parties requiring clean soil with parties having compatible construction soil. Due to the lack of appropriate regulatory and cost drivers, this service has been relatively dormant compared with other web-based sites such as the one offered in the U.K through CL:AIRE. In addition, SOiIL was formed to support the capture and sharing of information on soil data that will facilitate the responsible handling of soil in Ontario.

#### **3. KEY ISSUES**

Background: Overall, RCCAO and SOiIL are supportive of current proposal. From our understanding, other industry sectors are also generally supportive but there are concerns revolving around the rushed nature of this 30-day consultation period, as there has been no formal discussion since the EBR posting #013-2774 which ended in mid-June 2018 (note: this consultation was intentionally held over the general election period so that the previous provincial government would not have to make a decision prior to the election on regulatory and policy direction). Further, despite requests during the new mandate to reconvene the ESEG and meet with Ministry staff to discuss the results of the 2018 EBR consultation and possible next steps, these requests were stonewalled. Other than the ONEIA policy forum on April 30, 2019 (where the Ministry representative was unable to say anything substantive), the Ministry has not had any formal interaction with stakeholders since the last ESEG meeting hosted by the Ministry on December 1, 2017. To add insult, when the regulatory package was distributed on May 1, 2019, we were encouraged by the Ministry to submit comments as early as possible in the May 1-31 timeframe.

**GENERAL COMMENTS**

As requested by MECP and reinforced at the May 10, 2019 ESEG meeting, we are pleased to comment and respond to ERO 013-5000. RCCAO has been actively engaged, as a valued stakeholder, with public and private sector organizations for more than nine years on the excess soil file in Ontario, including roundtables that RCCAO hosted beginning in 2010. Prior to that period, there was significant industry engagement and consultation in the development of Waste and Brownfield guidelines. While there will likely be differences of opinion on the best path forward, there is consensus that much more must be done to minimize the ‘dig and dump’ approach that characterizes much of the soil handling activity in Ontario.

The new proposed On-Site and Excess Soil Management Regulation represents a complex regulatory compliance mosaic that must be carefully rolled out during the implementation phase to ensure that positive outcomes are achieved, given the many actors and diverse nature of the impacted sectors. Both industry regulatory compliance requirements, as well as local municipal government policies, operational procedures and contractual practices, among many other areas, will have an adoption complexity ripple effect. In consideration of these new complexities and the far-reaching impacts on municipalities and industries involved, it is critical that sectoral advice be adhered to in the finalization of the proposed ERO 013-5000 regulatory framework. As such, we wish to put emphasis on and identify ongoing concerns with respect to excess soil regulatory implementation planning and execution.

The Ministry’s 18-page “Management of Excess Soil – A Guide for Best Management Practices” (BMP Guide) was supported by RCCAO and SOiIL. While there was potential for the BMP Guide to result in better outcomes, the lack of follow up implementation was problematic. For example, there was improper planning, no timetable, and a distinct lack of outreach and training. While there was potential for an effective guidance approach, it will now be replaced by a strict, legal regulatory compliance model.

Industry in general, but particularly major entities and corporations must always be in compliance. Unfortunately, risk aversion could result in unintended consequences. Larger corporations, for example, may “fail safe” and avoid compliance exposure by directing more material to licensed landfills which is counterproductive to the objective of beneficial reuse.

While it is recognized that the proposed new regulation provides clarification in some areas, there is only directional encouragement to responsibly and beneficially reuse excess soils. Based on previous experience to date, there are significant concerns around the timely outreach and proper training requirements not only for industry sectors but also across government bodies and agencies (provincial and local). As demonstrated by the lack of uptake on the BMP Guide, if outreach is not done in a timely, organized fashion, this new regulatory proposal will ultimately fail, but now with serious compliance and legal liability consequences.

RCCAO and SOiIL have been generally supportive of the Ministry’s Excess Soil Management Policy Framework which was published in December 2016. For this document, a list of 21 key actions was derived from consultation feedback. While there was some progress on the 21 action items, the lack of a critical path approach meant that the desired results were not achieved as per the short-term (one year) and longer-term priorities that were set out. Unfortunately a number of items in this plan never properly materialized. For example, #17 on using pilot projects to identify opportunities and procedures for excess soil reuse has not proceeded in any systematic way. While we have heard that certain soil projects

received informal Ministry advice, no documents have been produced by MECP which demonstrate what might have been learned through different approaches and methods.

A general concern is the lack of emphasis on how this regulatory proposal will encourage the beneficial reuse of excess soil in Ontario. For instance, clarification is required on how temporary soil storage sites would operate. Will there be consultation on the Soil Rules? Furthermore, there is a lack of detail on how soil matching activities will be promoted. The role of an enforcement capability that is referenced in the proposal needs to be clarified and how this expanded capacity will in fact drive beneficial reuse in a positive, pro-business sense.

Of significant concern is the reference to a new “Excess Soil Registry” with very limited description. Our specific concern is the MECP’s directional change from reliance on a structured single focal point document, the Excess Soils Management Plan (ESMP), to now a yet undefined “Registry”. This is a significant last-minute directional change with no details provided. If the previous implementation actions supporting the introduction of the BMP Guide were unsuccessful, then the lack of detail or timing on how the new regulatory-driven Registry model will function is a huge Achilles heel to the successful implementation of the new regulatory changes.

Given the concerns with both the fundamental importance of the Registry and the timely design and development of a workable Registry, the ESEG must be involved to fast track its creation. Associated with the importance of the new Registry it is essential to put in place a proper managing system or governance capacity to coordinate operation of the new Registry. This is vital for start-up, ongoing oversight and to provide a continuous improvement capability.

MECP should revisit a previous RCCAO proposal for the creation of a proposed Soil Ontario entity. Based on learnings in other jurisdictions, this model would oversee the Registry with the governance objectives of eventually creating a self-funding organization. This approach would advance excess soil electronic tracking, data collection, permit effective soil matching and provide a basis for metrics to be used to benchmark progress on things like greenhouse gas (GHG) reductions, amongst other variables, from more efficient management of excess soil.

## **SPECIFIC CONCERNS ABOUT THE PROPOSAL**

In addition to the previously identified comments with respect the proposed regulatory changes, we wish to highlight the following issues and provide background. Specific actions are identified for consideration.

### **(1) Multi-ministry Coordination**

A key learning of the development and implementation from Ontario’s Brownfields Regulation, O.Reg. 153/04 was the creation of a Brownfields Coordinator position within MMAH. This position became a focal point to coordinate outreach and training programs involving implementation of the Record of Site Condition (RSC). Success was achieved in large part because the Coordinator was able to liaise both externally with industry and internally with government departments. To effectively implement excess soil program objectives and continuously monitor progress against policy objectives, the following points are relevant:

- Creation of a permanent Excess Soil Coordinator position within MECP or MMAH (preferably) for industry to work with on a go forward basis in a continuous improvement model.
- There would be merit in having this position within the MMAH as this Ministry has a track record of interacting with the municipal sector, whereas this is not a natural fit for MECP. In consideration of all the issues to be addressed at the local level this is where serious focus is required, otherwise implementation of the regulatory proposal will be difficult to achieve.
- Proposed position would be a focal point for developing training programs both externally and most importantly internally. As well, one important component of a successful soil management program will be the willingness of the municipal sector to establish soil depots\* where options for immediate reuse are unavailable. (\*includes soil bank, soil processing or temporary sites)
- The Excess Soil Coordinator would utilize the new Registry to capture excess soil project-related information and assist the government with developing metrics to understand how excess soil will be responsibly handled and reused in Ontario.
- A “Road Map” flow chart should be developed to illustrate the various roles and activities that should be performed at both at the provincial and municipal levels to responsibly manage and encourage beneficial reuse of excess soils in compliance with the new proposed regulatory changes. A similar project was done by the federal government to track how each province redeveloped Brownfield sites.
- As there are overlapping responsibilities, a multi-ministry approach is necessary to generate positive change. These include but are not limited to Agriculture, Food and Rural Affairs; Infrastructure; Natural Resources and Forestry; and Transportation, as well as agencies such as conservation authorities, Infrastructure Ontario and Metrolinx.

## **(2) Outreach and Training**

Ongoing engagement of the ESEG is required for the achievement of better outcomes. ESEG should be utilized properly to oversee and assist in the execution of outreach and training programs as this group is comprised of representatives from the various audiences, including citizen groups. With proper oversight and an agreed upon implementation action plan, the following elements must be addressed in a timely fashion:

- Clarification of the new Project Leader (PL) role and how it will fit in with existing industry and municipal work practices, including contractual practices.
- It is highly recommended that work process flow charts be developed to illustrate how the new roles of excess soil stakeholders will interface.
- Updating of BMP guidance materials to reflect the new regulatory changes.
- Finalization of the design (with ESEG or related organizational input) of the new Registry and how the structured ESMP document will now be replaced by a Registry of key action items.
- Development of training materials and outreach/education programs to implement new regulatory requirements pertaining to the Registry.
- Significant outreach and training will be required with the trucking/hauling sector. As this is a diverse and largely unregulated group concerning excess soil, focus on key issues will be necessary, such as waste categorization implications and manifest requirements, to ensure consistent sector compliance.

- Training standards for Qualified Persons (QPs) who will have responsibility for carrying out the new regulatory requirements will be essential, both from a process standpoint and from a technical standards perspective. Note the MECP has advised that for many years that they have been working with the Professional Engineers of Ontario (PEO) on training and guidance documentation for QPs. Any work product from these meetings has never been shared with the ESEG. New QP training and education materials are required, clearly recognizing the greater responsibility that will be held by PLs. (Note: the Association of Professional Geoscientists of Ontario is another organization that has been consulted with).
- Will other professionals be considered for the QP role such as those with experience in bioremediation?
- As established in other jurisdictions, if the objective of the new regulation is to encourage the beneficial reuse of excess soils, a formal training and certification program should be developed for QPs.
- Unlike the Brownfield sector where there are a select number of sophisticated developers and QPs, the excess soil sector is totally different. Excess soil industry players consist of many diverse, often smaller and less sophisticated contracting and haulage companies. Training and outreach programs will have to reflect this. Communication methods such as the videos produced by RCCAO and the GTSWCA will be helpful as visual aids which could be viewed in both office and on-site settings.

### **(3) Pilot Testing of New Processes to Encourage Beneficial Soil Reuse**

As Ontario moves from a basically unregulated to a more regulated excess soil management regime, there is a need to be able to advance learnings and efficient methods based on compliance activities. The most expedient way to do this is for the MECP to encourage and work with industry partners that may require regulatory compliance exemptions. MECP participation and support is required with the successful project learnings promoted more broadly through guidance documents. To do this the following actions are required:

- The development of the proposed Registry should include consultation with subject matter experts familiar with excess soil project work.
- There is an immediate need to look at simplified truck tracking requirements with the intention of pilot testing state-of-the-art solutions. After initial regulatory start up, efforts should be made to pilot test effective digital options to soil management. This will also assist with building a data base and making improvements based on an agreed set of metrics.
- Pilot testing of the hydro-vac regulatory requirements should be conducted as soon as possible as this sector is complex and has been unregulated to date. As this practice is rapidly growing there is limited understanding of the processes involved. Promotion of training will be important to achieve better outcomes.

### **(4) Governance Model Requirements**

In conjunction with previously identified needs around outreach, training and pilot testing, it would be worthwhile to put in place an ongoing governance entity and model to strategically manage the ongoing development, implementation and monitoring of all aspects of the programs and regulations to encourage beneficial reuse of excess soils. This governance body would receive direction through the ESEG to



facilitate balanced government, industry and citizen inputs. Based on establishing an ongoing governance capability, there are a number of benefits:

- Proposed governance entity would monitor and report regarding the overall effectiveness of the new proposed excess soils regulations. This would encourage stewardship with respect to the stated beneficial excess soil reuse policy objectives. This governance and oversight capability would monitor effectiveness of programs and identify needed corrective actions or training needs going forward.
- The Ministry commissioned a report on through Ernst Young (EY) called “Market Based Tools for Excess Soil Management”. This report was distributed to ESEG and working group members in August 2017. There were neither follow up discussions on the report nor implementation plans. At the time, RCCAO and SOiL expressed concern to the deputy minister that the cost of implementing the regulatory approach proposed by E&Y would be unnecessarily high. As an alternative, we suggested that an interim tripartite organizational committee be formed with representation from the broader industry, government and others (e.g., public, academia). This organizational structure would be useful to ensure that Ontario’s excess soil Registry would be focused on best available market approaches. The working name we proposed at that time was Soils Ontario.
- In conjunction with the implementation of the new excess soil regulatory changes and proposed new Registry, the formation of a “hands on” governance model would facilitate the development of a Smart Regulation approach in Ontario. This regulatory approach has resulted in success in the UK in establishing robust excess soil programs covering all aspects involved (training, outreach, certification, excess soil registration, establishing soil depots, oversight capacity and soil matching).
- The current regulatory proposal, while intending to promote and encourage the beneficial reuse of excess soils, makes no specific reference to incorporating soil matching as an initiative (although it is perhaps implicitly recognized through the phrase “reuse site”). Soil matching, based on UK experience, is the most practical way to balance soil movements, reduce haulage distances and corresponding truck traffic and GHG emissions.
- While enforcement is recognized as a strong tool to change behaviour, there is limited information on how enforcement activities and penalties would work. A “hands on” governance body to follow up with those sectors and companies that are deemed to be out-of-line will have the authority, in conjunction with MECP, to implement appropriate corrective actions. If enforcement is lax, the threat of fines may be insufficient to change current practices and behaviour.

#### **(5) Items Requiring Further Clarification**

The proposed new regulation has several new definitions that require further clarification to assist stakeholders in understanding and complying with the new provisions:

- Project Leader – conceptually, having a PL to oversee and be accountable for all aspects of an excess soils project is logical. There are concerns, however, involving declarations and ultimate responsibility and legal liability for the project. More detail should be provided on how this downloading of responsibility will either enhance accountability or possibly place a chill on beneficial reuse objectives. Could this entity be a limited numbered company?
- Updates to new and changing information in the new Registry – The onus and liability exposure on the Project Leader, Section 10(2) to update new Registry within 30 days would appear to be a very

short lead time to coordinate with all the different parties involved in a large project involving soil management. In the real world there are many project and contract variables which could impact progress. A key variable, for example, would be unplanned for adverse weather conditions both at source site and receiving or reuse sites.

- Transportation – Section 12 outlines a more relaxed, paper-based record keeping process for excess soil. While this is initially welcome by industry, every attempt should be made (via MECP sanctioned pilot testing) to utilize advanced electronic capabilities that would facilitate more timely transfer and collection, reporting of information addressing previously referenced Registry update timing concerns
- Elimination of the Excess Soil Management Plan (ESMP) – Lessons learned. The ESMP document, following introduction of the BMP Guide in 2014, was viewed as an effective means of communicating and coordinating project work involving excess soil movements. This type of central document has been successfully used in jurisdictions like the UK for over ten years. In Ontario, O.Reg. 153/04 has utilized the Record of Site Condition (RSC) document as its central focus for the redevelopment of Brownfield sites. In 2004, there were a few developers and contractors who employed the RSC document as a redevelopment tool, but after the early adoption years this approach resulted in the successful remediation of many contaminated sites. Of course, there was significant industry consultation and formal outreach programs to get it right. Unfortunately, the current excess soil proposal will not utilize an ESMP focal point document; instead an undefined new Registry and process will be used. This proposal and new approach will impact a significantly larger industry cross-section – literally thousands of unfamiliar individuals and companies, big and small, who for the most part are not as focused or sophisticated environmentally as Brownfield developers following RSC registration protocols.
- Enforcement details and timing – Many organizations and individuals have significant concerns moving from an unregulated to regulated approach to handling and managing excess soils. Notwithstanding the complexities of the new regulatory changes, the uncertainty of a yet to be developed and tested Registry and the concerns on past failures with training and proper outreach, there are serious concerns on how the new system will be enforced. While the threat of enforcement will provide the necessary “big stick” for previously marginal operators, there needs to be reasonable or possibly staggered timing for the enforcement regime to be put in place. The possibility of a phase in with warnings, remedial training for poor operators and then finally regulatory penalties for flagrant and or repeat offenders.

## **CLOSING COMMENTS**

RCCAO and SOiIL are pleased to provide comments and some historical context to the current excess soil proposal and the challenges involved to successfully implement a new system in a complex regulatory compliance setting. As referenced in this response, RCCAO and SOiIL spent considerable effort to work with the ministry on a proposed governance model and Registry originally called Soil Ontario. We feel this approach has merit, particularly in today’s environment of government spending restraint and reliance on market-based solutions. Soil Ontario would be founded on the basis of a standalone agency involving industry, government and academia responsible for encouraging the responsible beneficial reuse of excess soils in Ontario.

#### **4. SUMMARY OF MAIN RECOMMENDATIONS**

While there are many sub themes contained in this submission, here are the key recommendations to support the MECP and other stakeholder ministries in the effective implementation of the proposed new regulatory approach:

- (1) Members of the ESEG should be re-engaged as soon as possible to develop a credible new Action Plan which will support the proposed regulatory requirements with clear key deliverables and a realistic time frame for implementation. Priority action items would include updating of the BMP guidance document and identifying pilot programs for testing new procedures.
- (2) Immediate ESEG engagement with the MECP in scoping out requirements and developing the proposed new Excess Soil Registry, including the Governance capability required to oversee and ensure success.
- (3) The Province must work toward a multi-ministry framework to foster positive outcomes. An emphasis by MMAH on reaching out to the municipal sector will be critical to a successful rollout and could include encouragement of upfront planning, better procurement practices, adoption of complementary municipal soil/fill by-laws and the establishment of temporary soil storage sites.
- (4) ESEG to identify and work with MECP and other ministries in the development and implementation of required new outreach and training materials and programs, including video messages for on-site use.
- (5) As part of the Action Plan, the MECP is encouraged to fast track pilot testing projects which will support the effective adoption of new regulatory requirements. For starters, this could include enhanced digital truck tracking capability (with metrics), and incentives to encourage more beneficial soil reuse locally through soil matching services.
- (6) A risk-based approach should be encouraged whereby reuse can be fostered at both smaller scale projects and larger ones. For example, investigate the reuse of stormwater pond sediment or facilitate transport of excess soil to pits and quarry for end-of-life mitigation.

As many organizations have confirmed during previous discussions with the Ministry, excess soil should be viewed as a resource, and not a waste. We congratulate the government for recognizing this in its Made-in-Ontario Environment Plan. We look forward to working with MECP on a multi-ministry, multi-sectoral way to advance the regulatory and best practices modernization agenda.

End of Submission