



December 1, 2023

Land Use Policy, Environmental Policy Branch
Ministry of the Environment, Conservation and Parks
40 St. Clair Avenue West, 10th Floor
Toronto, ON M4V 1M2

Re. ACEC-Ontario Response to ERO number 019-7636 (Proposed regulatory amendments to encourage greater reuse of excess soil)

On behalf of the Association of Consulting Engineering Companies-Ontario (ACEC-Ontario), and its 140 member firms operating across the province, we are writing to provide a response to the Ministry of the Environment, Conservation and Parks (MECP) on the proposed amendments to Ontario Regulation 406/19 (the excess soil regulation) and the Rules for Soil Management and Excess Soil Quality Standards.

We agree with the ministry's goal of increasing opportunities for soil reuse. To help support that goal, ACEC-Ontario offers the following feedback.

Enhanced reuse opportunities for salt-impacted soil (Section D, Part I in the Soil Rules)

Currently, the Soil Rules prescribe a 100-meter setback from a potable water well or area with an intended property use that may require a potable water well. This criterion may end up limiting reuse particularly for Ministry of Transportation (MTO) projects from which a lot of potentially salt impacted soil may come. Section 2.14.27 of the MTO Highway Corridor Management sets a 30-meter setback from MTO property line for water wells. To therefore maximize reuse, it is suggested that the Soil Rules also prescribe a 30-meter setback.

With regards to the reuse of salt-impacted excess soil, the Soil Rules currently indicate that salt-impacted excess soil can be placed at one of the following locations: where continued application of salt is anticipated, at a commercial/industrial property to which the non-potable standards apply, or at least 1.5 m below the ground surface. It is noted that the current rules specifically indicates "or" with regards to these management options. Apparently, some agencies consider this wording to mean "and" which limits the reuse options for salt impacted excess soil. It is requested the Ministry provide greater clarity regarding the wording in this section of the Soil Rules.

The proposed change to the Soil Rules regarding the permitted reuse of salt-impacted excess soil on community, institutional, parkland or residential land use subject to a plan prepared by a certified expert is unclear. Specifically, the wording suggests that the certified experts is a licenced landscape architect, and they are required to identify, on the plan, areas, and depths at which salt-impacted soil can be reused. However, an architect may not have sufficient expertise with regards to the placement of salt impacted excess soil. As such, it is suggested that the Qualified Person (QP) be the designated expert that sets out where the salt-impacted excess soil can be placed.

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The need for a plan, prepared by an expert, that set out areas where salt impacted soil can be placed seems restrictive and may contribute to fewer reuse options. Specifically, soil is often moved prior to formal site plans being fully developed. For example, site grading may occur well ahead of developing a detailed site layout. In this case, the reuse of salt-impacted soil would not be permitted as the final plans are not yet prepared.

The revision to the Soil Rules that allows soil to be placed at an agricultural property under certain circumstances seems less onerous than the requirement for a plan prepared by an expert for reuse at other less sensitive land uses. It is requested that the Ministry provided greater clarity regarding these options.

When it comes to salt impacted soil, there also appears to be some confusion between the requirements for testing and the requirements for sampling frequency. As such, it is suggested that the Ministry clarify that salt impacted soil constitutes a PCA for the purpose of an APU under O. Reg. 406/19. It is further suggested that APECs identified on the basis of suspected salt impact alone be exempt from the minimum sampling frequency requirements and that sampling frequency be left to the QP's discretion.

Exempt landscaping projects at enhanced investigation project areas from the reuse planning requirements (Schedule 2 of the Excess Soil Regulation)

The proposed amendment requires one to complete a background search in order to know if they are exempt from having to complete a background search. As such, all exemption scenarios should specify on what basis QPs or project leaders are expected to evaluate the conditions of the applicability of each exemption scenario.

Clarifying sampling and analysis requirements (Section B of Part 1 of the Soil Rules)

The purpose of O. Reg. 406/19 is to investigate reuse options for all soil to be removed from a project area, including outside APECs. When it comes to reuse, options can only be evaluated on the basis of an SAP/SCR. As such, it is suggested that the Ministry remove the exemption of having to prepare an SAP/SCR where an APU/ESA has concluded to the absence of APECs. Alternatively, the Ministry could clarify the basis on which a QP is required to investigate the suitability for reuse at any given site without the results of an SAP/SCR.

When describing the requirements for "Preparing a Sampling and Analysis Plan" the Soil Rules asks the QP to identify "all other areas of the project area where excavations are planned and that will not be subject to sampling and provide a rationale explaining why...". It seems that the content of that rationale has not been addressed in the regulation or other technical sheets issued by the Ministry.

For example, would any of the following explanations be considered valid rationale for proceeding without sampling a certain part of the project area (in all cases, "sampling" means according to the parameter sets and sampling frequency given in paragraphs I.B.2.(3)14 and 15 of the Soil Rules):

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- “Though some APECs have been identified in the Project Area, excavation area X is outside of the interpreted Areas of Potential Environmental Concern and so sampling is not required in area X, even though some of the material from area X may be sent to a reuse site.
 - As noted above, it is important to complete some degree of sampling for any soil that is destined for reuse when taken from a project area that is subject to filing notice.
- “The soil in excavation area Y is within an APEC but that soil will be retained on-site for re-use, so sampling will not be conducted in area Y.”
- “The soil from excavation area Y is within an APEC but that soil will not be sent to a reuse site but will instead be disposed of at landfill, so sampling will not be conducted in excavation area Y.”

It should also be noted that Article 3.1.13 of Section B of Part I of the Soil Rules sets a maximum age (18 months) on reports that may be used in place of a new SAP or SCR. It would be ideal to provide clarity on the use of existing sampling data for the purpose of preparing an SCR, and to also allow the QP to use their discretion as to whether the data is to be considered valid (rather than having a specified maximum age or time limit).

The Ministry should therefore consider amending the Soil Rules to clarify that existing soil quality data from a prior report / investigation may be used by the QP in preparing a new SCR if the QP is satisfied that the data remains representative of the project area, provided that the project area has not in the meantime changed to a less sensitive land use.

Other clarifications and corrections

Clause 6 of Schedule 2 Paragraph 3 of O. Reg. 406/19 applies to Projects consisting of “Maintaining infrastructure in a fit state of repair, except if the excavation of soil is from a stormwater management pond for the purpose of maintaining the facility in a fit state of repair.” It is suggested that the ministry clarify the terms of this clause.

It is also suggested that the Ministry provide clarification with regards to the identification of Project Areas for road corridors, and in particular the term “area of continuous operations”.

When it comes to the planning requirements under O.Reg. 406/19, it is not clear how a project leader or QP can determine whether a project is exempt without first reviewing the results of an APU/SAP/SCR.

To address this, it is suggested the ministry clarify the basis on which determinations regarding past activities of the project area (enhanced investigation area, contamination, etc.) are to be made, as well as determinations regarding the anticipated destination for the soil. Here is some possible wording for the ministry’s consideration:

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- 4 -

- Has an APU or ESA I been completed recently for the project area? If no, then all the scenarios that include criteria based on the project area's past activities are not applicable.
- Has an SCR or ESA II consistent with O. Reg. 406/19 been completed for the project area? If no, then all exemption scenarios relying on site condition or excess soil anticipated reuse site are not applicable.

We hope the points raised above will help further increase opportunities for soil reuse. Should MECP have any questions regarding these points, or would like additional information, please contact Doug DeRabbie, ACEC-Ontario's Director of Government and Stakeholder Relations at dderabbie@acecontario.ca.