

The Case for Prohibiting a Commercial Fill Operation from an Area of High Aquifer Vulnerability in the Oak Ridges Moraine

Within Ontario law, the Oak Ridges Moraine Conservation Plan (ORMCP) states¹ that in an Area of High Aquifer Vulnerability, the following are some of the uses prohibited:

Waste disposal sites and facilities, organic soil conditioning sites, and snow storage and disposal facilities.

The ORMCP plan maps the Earthworx site as covering an Area of High Aquifer Vulnerability.

It can be argued that a commercial fill operation accepting contaminated fill from brownfield sites, as the Earthworx operation is doing, falls within the spirit of these prohibitions. Any forthcoming review of the regulation should consider adding “commercial fill operation” to this list of prohibitions.

It could even be argued that the commercial fill operation is prohibited under the letter of the prohibition of “waste disposal sites”.

“Waste disposal site” is not defined in the ORMCP but the Ontario Environmental Protection Act (EPA) defines in Part V on waste management:

*"waste disposal site" means,
(a) any land upon, into, in or through which, or building or structure in which,
waste is deposited, disposed of, handled, stored, transferred, treated or processed,
and...*

and further,

"waste" includes ashes, garbage, refuse, domestic waste, industrial waste, or municipal refuse and such other materials as are designated in the regulations;

Does “waste” include fill?

Regulation 347² of the EPA in the section on Waste Management, says:

2. (1) *The following are designated as wastes:*

...

2. *Inert fill.*

And defines

"inert fill" means earth or rock fill or waste of a similar nature that contains no putrescible materials or soluble or decomposable chemical substances;

¹ Ontario Regulation 140/02 clause 29. (1)

² EPA – R.R.O. 1990, REGULATION 347

Furthermore, in the EPA it says

176. (1) The Lieutenant Governor in Council may make regulations,

...

(g) governing the disposal of soil, rock or related material from property;

Soil is not purposely excluded from the EPA and if “inert fill” is defined as a “waste” surely contaminated fill is a “waste”. And indeed in a Certificate of Approval³ for a contaminated soil processing facility “waste” is defined by MOE as:

contaminated soil waste and any residual waste generated at the Site and destined for final off-site disposal;

Further on in Regulation 347 in Section 3 of it says

3. (1) The following wastes are exempted from Part V of the Act and this Regulation:

...

5. Inert fill.

6. Rock fill or mill tailings from a mine.

(We might presume that rock fill or mill tailings are covered under a mining act.)

Part V of the Act is on Waste Management, therefore the disposal of “inert fill” does not constitute a “waste disposal site”.

However, the definition of “inert fill” is “*earth or rock fill or waste of a similar nature that contains no putrescible materials or soluble or decomposable chemical substances*”. Soil from brownfield sites is not similar to rock fill which is quite inert, biologically and chemically. It is almost by definition that soil from brownfield sites contains “soluble or decomposable chemical substances” in that it is tested using solubility techniques to contain toxic chemical substances to levels categorized in tables utilized by MOE in managing brownfield sites⁴.

Thusly, it could be argued that while “inert soil” is exempt from the waste management regulations of the EPA, soil from brownfield sites contaminated by chemicals is not exempt. It follows then that the disposal of soil meeting or exceeding MOE’s Table 2 constitutes a “waste disposal site” and is therefore prohibited in an “Area of High Aquifer Vulnerability” of the Oak Ridges Moraine.

³ Amendment to Provisional Certificate of Approval - Waste Disposal Site Number A680301, Notice No. 3, 2009-1-09

⁴ Amendments to Regulation 347 were proposed by the Ministry in 1998 to redefine “inert fill” into four classifications. Their subsequent decision to not proceed was based on the need to make the amendments in conjunction with the Brownfields Statute Law Amendment Act, 2001. But that act does not contain the word “fill” and “inert fill” is not found in any of the current consolidated statutes or regulations except EPA Regulation 347.