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(But Actually Don't)**

Ontario's Soil Management Policy

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Ontario's Soil Management Policy

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Ontario has struggled for many years to provide clear, consistent, effective rules to govern the huge amount of surplus construction soil that contractors move from place to place.¹ Soil movement is big business in Ontario, involving perhaps 170 million tonnes / year, and adding about 15% to infrastructure costs. For example, for the Metrolinx Eglinton Crosstown Light Rail Transit Project alone, the extra costs for managing excess soil could be \$65 to \$100 million.²

Recent changes to Ontario's contaminated sites regulation³ have made soil movement more difficult and expensive than ever, and further cost increases are expected. Soil that could otherwise be beneficially reused can end up (expensively!) in landfill sites, increasing the cost of infrastructure and other public and private projects, while other sites become unwittingly contaminated by accepting fill.

This is causing growing concern in the construction industry. In addition, contractors and developers are often frustrated by contradictions and inconsistency in soil management rules from time to time and place to place.

Is soil a product? A waste? Where can it go? Is it clean? How clean is clean? There is so much confusion that some municipalities, such as Clarington, have passed by-laws forbidding the importation of soil to their jurisdiction.

This paper highlights the complexity of the issue, including the conflicting definitions in Ontario laws, regulations and guidelines. We briefly outline the new draft Guide from the Ministry of the Environment (MOE), which adds a new layer of provincial requirements, without resolving the existing regulatory conflicts. We summarize some caselaw where regulatory confusion has resulted in disputes. And we attach an excellent 2010 report prepared for the Environmental Commissioner of Ontario, *Soil, Groundwater and*

¹ These excess soils are generated at large-scale residential or commercial construction sites and other development activities. Ideally, they would be reused to alter sites, re-grade or fill in excavations, and may need to be temporarily stored at stockpiling sites.

² Residential And Civil Construction Alliance Of Ontario (RCCAO): Eglinton LRT Project: Estimated Costs and Impacts of Addressing Excess Construction Soils. July 2012. At <http://www.rccao.com/news/files/RCCAO-JULY2012-REPORT.pdf>

³ Reg. 153/04, under the *Environmental Protection Act*

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To illustrate the complexity of this issue, it is worthwhile examining Ontario's conflicting definitions of "soil", "rock", "topsoil", "fill", and "inert fill", the most common terms for the materials excavated from construction sites.

MOE: Environmental Protection Act

Ontario Regulation 153/04⁵ under the *Environmental Protection Act* (EPA) is typical.⁶ This regulation distinguishes between "soil", "rock" or "fill"⁷. "Rock" is consistently defined:

"rock" means a naturally occurring aggregation of one or more naturally occurring minerals that is 2 millimetres or larger in size or that does not pass the US #10 sieve.⁸

"Fill" is used frequently in the regulation, but is never defined.

"Soil" has two definitions, depending on where it is located. For most of southern Ontario, soil has to be separate from rock:

"soil" means, except for the purposes of shallow soil property as defined in section 43.1,⁹ unconsolidated naturally occurring mineral particles and other naturally occurring material resulting from the natural breakdown of rock or organic matter by physical, chemical or biological processes that are smaller than 2 millimetres in size or that pass the US #10 sieve.

⁴ Edwards B. *Soil, Groundwater and Sediment Quality Criteria in Ontario: A History of their Development from the 1970s to December 2009*. January 2010 at <http://www.eco.on.ca/uploads/Reports%20-%20Background,%20Discussion,%20Roundtable/2010%20Soil%20Groundwater%20and%20and%20Sediment%20Criteria.pdf>

⁵ Under the *Environmental Protection Act*. O.Reg. 153/04 is entitled Records of Site Condition – Part XV.1 of the Act. See s. 1(1) for the definition of "soil".

⁶ It sets out requirements relating to site assessment and cleanup in order to file a Record of Site Condition (RSC).

⁷ See s. s. 12(a)

⁸ S. 1(1)

⁹ S. 43.1 defines "shallow soil property" as meaning a property of which 1/3 or more of the area consists of soil equal to or less than 2 metres in depth beneath the soil surface, excluding any non-soil surface treatment such as asphalt, concrete or aggregate; "soil" means, for the purposes of the definition of shallow soil property, unconsolidated naturally occurring mineral particles and other naturally occurring material resulting from the natural breakdown of rock or organic matter by physical, chemical or biological processes that are smaller than 2 millimetres in size or that pass the US #10 sieve, and includes a mixture of soil and rock if less than 50 per cent by mass of the mixture is rock.

On shallow soil properties, often located on the Canadian Shield and Eastern Ontario's Frontenac Axis, soil can be up to 50% rock:¹⁰

“soil” means, for the purposes of the definition of shallow soil property, unconsolidated naturally occurring mineral particles and other naturally occurring material resulting from the natural breakdown of rock or organic matter by physical, chemical or biological processes that are smaller than 2 millimetres in size or that pass the US #10 sieve, and includes a mixture of soil and rock if less than 50 per cent by mass of the mixture is rock.¹¹

[“Soil”, but presumably not aggregate, gravel, and other non-“soil” materials, is subject to the quantitative standards in the [Soil, Ground Water and Sediment Standards for Use Under Part XV.1 of the Environmental Protection Act, revised version April 15, 2011](#),¹² and to the substantial procedural standards for sampling and tracking in Regulation 153/04. It is not clear whether these standards apply to “fill”.

Strictly speaking, Regulation 153/04 and the Standards only apply if the destination site wishes to be able to obtain a Record of Site Condition. However, few knowledgeable private property owners would lightly give up the option of obtaining an RSC for future sale or development. They should therefore insist on receiving only soil that has been tested and proven to meet Schedule 1 (background) levels of contamination.]

The General Waste Management Regulation (Regulation 347) under the EPA does not define “soil”, but defines “soil mixture” as including:

- a mixture of soil and liquids, sludges or solids, where,
- (a) the mixture cannot be separated by simple mechanical removal processes; and
- (b) based on visual inspection, the volume of the mixture is made up primarily of soil or other finely divided material that is similar to soil.¹³

Regulation 347 defines “inert fill” as

earth or rock fill¹⁴ or waste of a similar nature that contains no putrescible materials or soluble or decomposable chemical substances.¹⁵

¹⁰ Perera A, Euler D, Thompson I. Ecology of a managed terrestrial landscape: patterns and processes of forest landscapes in Ontario (UBC Press, 2000) Chapter 2: Baldwin DJB, Desloges JR, Band LE. Physical geography of Ontario. Available at <http://www.ubcpres.ca/books/pdf/chapters/ecology/chapter2.pdf>

¹¹ A property of which 1/3 or more of the area consists of soil equal to or less than 2 metres in depth beneath the soil surface, excluding any non-soil surface treatment such as asphalt, concrete or aggregate, see s. 43.1

¹² Available at http://www.ene.gov.on.ca/stdprodconsume/groups/lr/@ene/@resources/documents/resouce/stdprod_086516.pdf

¹³ S. 1(1)

¹⁴ Which is not defined.

¹⁵ S. 1(1)

While almost no soil, and certainly no topsoil, is actually free of all putrescible, soluble or decomposable materials, the MOE often uses this definition as a rough proxy for uncontaminated soil.

Ministry of Transportation: Provincial Standard Specification

The Ontario Ministry of Transportation's Provincial Standard Specification 180, its General Specifications for the Management of Excess Materials from provincial and municipal construction projects, has its own definitions:¹⁶

“Rock” means rock as defined in OPSS 206 (which, in turn, defines “rock” as natural beds or massive fragments of the hard, stable, cemented part of the earth's crust, either igneous, metamorphic, or sedimentary in origin, which may or may not be weathered and includes boulders having a volume of 1 m³ or greater).

“Earth” means “all soils except those defined as rock, and excludes stone masonry, concrete, and other manufactured materials.”¹⁷ These would not likely qualify as “inert fill” under Reg. 347.

“Disposable fill” includes earth, aggregate and rock. In some locations, it also includes natural wood, swamp material and fire debris, which are definitely not “inert fill”.¹⁸

OPSS 180 sets out a specific process for approving the disposal of “disposable fill” from provincial and municipal construction projects. This process does not include obtaining the approval of the MOE.

Building Code

The Building Code¹⁹ defines “rock” as:

Rock means a portion of the earth's crust that is consolidated, coherent and relatively hard and that is a naturally formed, solidly bonded, mass of mineral matter that cannot readily be broken by hand.²⁰

¹⁶ Ontario Provincial Standard Specification. General specification for the management of excess materials. November 2011 at

[http://www.raqsb.mto.gov.on.ca/techpubs/ops.nsf/d37f5a16d8174ffa85256d130066857f/76b09cb3de5b7a15852570c9006ae630/\\$FILE/OPSS%20180%20Nov11.pdf](http://www.raqsb.mto.gov.on.ca/techpubs/ops.nsf/d37f5a16d8174ffa85256d130066857f/76b09cb3de5b7a15852570c9006ae630/$FILE/OPSS%20180%20Nov11.pdf)

¹⁷ OPSS 180 states “Earth means earth as defined in OPSS 206 . See Ontario Provincial Standard Specification – Construction specification for grading (OPSS 206 – November 2009, reissued November 2010 at

[http://www.raqsb.mto.gov.on.ca/techpubs/ops.nsf/d37f5a16d8174ffa85256d130066857f/afa58e5561dcaebb8525706e006759ca/\\$FILE/OPSS%20206%20Nov09%20\(Nov10\).pdf](http://www.raqsb.mto.gov.on.ca/techpubs/ops.nsf/d37f5a16d8174ffa85256d130066857f/afa58e5561dcaebb8525706e006759ca/$FILE/OPSS%20206%20Nov09%20(Nov10).pdf)

¹⁸ Disposable Fill is defined as “excess material other than that disposed of at a certified disposal site and that is managed in berms and mounds and as fill other than in road embankments.” Waste is defined to exclude such fill: “Waste means excess material that is not managed by re-use, open burning, or as disposable fill and includes any excess material.”

¹⁹ O.Reg. 350/06 under the *Building Code Act*, 1992.

²⁰ At s. 1.4.1.2(1). The new Building Code, O.Reg. 332/12, which comes into force on January 1, 2014 retains this definition.

It defines “fill” as:

soil, rock, rubble, industrial waste such as slag, organic material or a combination of these that is transported and placed on the natural surface of a soil or rock or organic terrain; it may or may not be compacted.²¹

Under most of the Building Code, gravel, cobbles, and other aggregates do count as “soil”:

Soil means, except for the purposes of Part 8 of Division B, a portion of the earth's crust that is fragmentary or such that individual particles of a dried sample may be readily separated by agitation in water, and includes boulders, cobbles, gravel, sand, silt, clay and organic matter.²²

But Part 8 of Division B of the Code, which regulates septic systems, has its own definition, which excludes some but not all gravels from its definition of “soil”:

Soil means in-situ, naturally occurring, unconsolidated mineral or organic material, at the earth's surface that is at least 100 mm thick and capable of supporting plant growth, and includes material compacted or cemented by soil forming processes, but does not include displaced materials such as gravel dumps, mine spoils, or like deposits.²³

The Aggregate Resources Act

The *Aggregate Resources Act* does not define “soil”, but defines “earth” as not including topsoil and peat.²⁴ It does not define “topsoil”. “Aggregate” is defined as “gravel, sand, clay, earth, shale, stone, limestone, dolostone, sandstone, marble, granite, rock or other prescribed material.”²⁵

In 2008, the Ministry of Natural Resources (MNR) revised its policy on importation of inert fill used to rehabilitate pits and quarries to take into account that most such fill contained too much salt to meet certain Table 1 standards (sodium adsorption ratio (SAR) and electrical conductivity (EC)).²⁶ The MNR determined that these criteria were in place to provide for adequate plant growth, which is affected by surface soil conditions. The policy provided that where inert fill failed one or both of these standards, but was being used over 1.5 metres below the soil surface (beyond the growing zone for plants), the fill was exempted from application of these SAR and EC standards. The policy also includes that “alternative criteria” might be acceptable at aggregate sites on a case-by-case basis.

²¹ O.Reg. 350/06 at s. 1.4.1.2(1). The new Building Code retains this definition.

²² O.Reg. 350/06 at s. 1.4.1.2(1). The new Building Code, retains this definition of “soil”.

²³ O.Reg. 350/06, Part 8 of Div B, s. 8.1.1.2 (1). The new Building Code retains this definition.

²⁴ R.S.O. 1990, c. A.8, s. 1(1)

²⁵ At s. 1(1)

²⁶ MNR. Importation of Inert Fill for the Purpose of Rehabilitation. Policy A.R. 6.00.03. Revised April 14 2008. At <http://www.mnr.gov.on.ca/stdprodconsume/groups/lr/@mnr/@aggregates/documents/document/269650.pdf> . See also Environmental Bill of Rights Registry Number 010-2505

While the Environmental Commissioner found this policy was reasonable for SAR and EC, he cautioned that the MOE and MNR must be “judicious in the use of ‘alternative criteria’ in order to avoid the application of this provision to many other contaminants”. He noted that this could result in certain sites receiving soils that have contaminant levels that exceed the standards, because existing background contamination levels at these sites exceed the standards.²⁷

Municipalities

Under the *Municipal Act, 2001*, a municipality may prohibit or regulate the placing or dumping of “fill”, removal of “topsoil” or alteration of the grade of the land and may require that permits be obtained.²⁸ The statute does not define “soil”, “soil profile” or “fill”. It defines “topsoil” as:

“those horizons in a soil profile, commonly known as the "O" and the "A" horizons, containing organic material and includes deposits of partially decomposed organic matter such as peat.”²⁹

Municipalities may also define “refuse” and prohibit the deposition of refuse or debris, or require that these be cleared from land.³⁰

A by-law review by Hatch, Mott, MacDonald (an award winning consulting engineering firm) concluded that 23 of 85 municipalities reviewed have a relevant by-law that mentions soil quality. Of these, 14 prohibited unacceptable material without reference to either the EPA or specific soil criteria under Reg. 153/04; eight referred to the EPA, but not to 153/04; and only one (the Town of Georgina) defined acceptable fill by reference to Table 1 of *Soil, Ground Water and Sediment Standards for Use under Part XV.1 of the EPA, April 15, 2011*, adopted under Reg. 153/04. This uneven patchwork causes considerable confusion.

On the other hand, some municipalities are moving towards developing long-term soil management policies. For example, the Region of Waterloo recently undertook a study to identify the main issues relating to management of soil from development projects, holding an impressive stakeholder forum, and developing an extensive report detailing its findings.³¹

²⁷ The Environmental Commissioner’s 2008/09 Annual Report (Supplement) Review of Posted Decision: 4.9 MNR Policy on the Importation of Inert Fill for the Purpose of Rehabilitation (Environmental Registry Number 010-2505) at 98-103. At http://www.eco.on.ca/uploads/Reports-Annual/2008_09/ECO-Annual-Report-2008-2009-supplement.pdf

²⁸ S. 142. S. 142(5) sets out exemptions where such a by-law does not apply; section 142(6) provides that a by-law relating to topsoil removal does not apply where such removal is incidental to normal agricultural practices.

²⁹ S.O. 2001, c. 25, s. 142(1)

³⁰ *Municipal Act, 2001*, s. 127. In *Wangler v. Fort Erie (Town)* (2010 ONSC 1089) the municipality defined refuse to include accumulations of broken pavement, sidewalk slabs, rubble and inert fill in its zoning by-law. A property owner failed in his attempt to have the by-law declared invalid.

³¹ Region of Waterloo. *Sustainable Solutions: A Concept for a Soil and Material Management Campus* – Sept 2012. At

Among the recommendation of the report were for the Region to develop and maintain a database to identify both sources and potential users of excess soil and other materials, and to consider establishing a soil and material management campus; findings could be shared with other municipalities.

Is soil “waste”?

In a classic case of regulatory creep, the MOE is treating more and more “soil” as “waste”. S. 25 of the EPA gives the province power to designate “wastes” by regulation:

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

The *General Waste Management Regulation* (Regulation 347)³² then defines “waste” very broadly, by designating virtually everything, including inert fill and rock fill as “waste”.³³ Inert fill and rock fill are then exempted back out of the waste management requirements of the EPA and Regulation 347.³⁴ However, as noted above, most soils are not actually either “inert fill” or “rock fill.”

Moving “soil” that the MOE classifies as “waste” can lead to charges under the EPA, for transporting and/or depositing waste without an environmental compliance approval, or at an unapproved site. Another consequence could be that the MOE could issue an order to remove the waste, per s. 43 of the EPA; regulators could issue such an order to a current or previous owner or occupant or the site or person who deposited the waste. In the worst case scenario, such an order could be issued following construction on the site, significantly escalating costs.

Caselaw: Getting it wrong

In *Re Wil-Manufacturing Inc.*,³⁵ at issue was the whether fibreglass was “inert fill”. The analysis provided by the EAB is of interest because the issues addressed remain unresolved.³⁶ The MOE Director issued a s. 43 Order under the EPA requiring the

<http://www.regionofwaterloo.ca/en/aboutTheEnvironment/resources/WMMPFinalBloomForumReportOct2012.pdf>.

³² S. 1(1) of Regulation 347 defines a “generator” as “the operator of a waste generation facility” and a “receiver” as “the operator of any facility to which waste is transferred by a carrier”; a “carrier” is “the operator of a waste transportation system”.

³³ Sections 2(1) and 2(2)

³⁴ Regulation 347, s. 3(1)

³⁵ (1996) 19 C.E.L.R. (N.S.) 252 (Ont. Environmental Appeal Board)

³⁶ The province released its material management policy, *Proposed Policy for Management of Excess Soil, Rock and Like Materials: Technical Consultation Document*, 1992. The policy, which proposed to revise the definition of inert fill and add three new classes of fill (urban residential fill; urban industrial fill and controlled fill). In 1998, the MOE again proposed criteria for managing excess soil, proposing four classes of inert fill; again, the MOE decided not to proceed with the proposal. (EBR Registry No.RA8E0030, August 208, 1998; decision loaded to Registry August 22 2002 at <http://www.ebr.gov.on.ca/ERS-WEB->

company to remove fiberglass waste from a gravel pit and transport it to an approved waste disposal site. WMI appealed the Order to the EAB, arguing that the material was “inert fill” as defined in Regulation 347, therefore was exempt from the requirement that it be disposed of at an approved site. Even if the material was not “inert fill”, WMI argued, it is harmless and need not be removed from the pit. The parties agreed that the definition of “inert fill” was challenging and the EAB noted the following:

- The word “inert” was not defined in the statute and did not have its “normal meaning in the field of chemistry”;
- The term “fill” was not defined;
- In the definition of “inert fill”, it was not clear whether the word “fill” was intended to modify both earth and rock, or only rock;
- Must “waste of a similar nature” be “fill”?
- Does the requirement that a material “contains no putrescible materials or soluble or decomposable chemical substances” relate only to “waste of a similar nature” to earth or rock, or does it apply to earth and rock? (the EAB noted that this was an important issue, given that earth is often contaminated with chemicals deposited through human activity, and as earth/rock contain contaminants that occur naturally)
- Is the word “chemical” redundant, as “everything in the world is made up of chemicals”?
- As over time, everything dissolves or decomposes to some degree, nothing is *completely* non-putrescible, insoluble or non-decomposable; if the definition is construed literally, virtually nothing would qualify as inert waste

As well, the Board stated ***“The Ministry itself has acknowledged the problems caused by the current definition of inert fill”***.³⁷ Yet 17 years later, the definition has not changed.

The EAB did not need to resolve all the issues relating to the above definition; it determined that to be “inert fill”, the fibreglass would have to (a) be similar in nature to earth/rock fill and (b) contain no materials that would decompose/rot/dissolve to an appreciable extent under ordinary circumstances. The EAB found that the purpose of regulating waste under Part V of the EPA was not just to prevent pollution; it was also intended to prevent disposal of materials that could interfere with use and enjoyment of their properties, e.g., to avoid causing landowners alarm because of the appearance of such materials.

As leachate extraction tests that showed that some fibreglass samples leached lead and cadmium in concentrations that exceeded Ontario Drinking Water Objectives, the EAB

[External/displaynoticecontent.do?noticeId=OTQ2Ng==&statusId=OTQ2Ng==&language=en](https://www.ontario.ca/gov/content/external/displaynoticecontent.do?noticeId=OTQ2Ng==&statusId=OTQ2Ng==&language=en))

³⁷ At para 52

found that fibreglass was not inert waste; under normal conditions, these substances could leach out of fibreglass in a landfill.

In *R. v. Clifford W. Johnson*,³⁸ Mr. Johnson removed soil that he knew was contaminated by old gas lines and a motor oil tank that were found buried during a repaving operation. He sold it to a homeowner who wanted clean fill. Johnson arranged to have the soil transported to the property, but did not tell the transporter that the soil was contaminated, only that it was "old gravel". Ten truckloads of the dirty soil were moved to the residential property. Mr. Johnson pleaded guilty to arranging for collection, transportation and disposal of waste that was not part of an approved waste management system, and for arranging to deposit waste on land that was not approved as a waste disposal site. He was fined \$6000 (+ 25% victim fine surcharge, VFS). The Court also issued a s. 190 Order requiring Johnson to remove all waste he had deposited on the site and to notify the MOE before the waste was removed.

In *R. v. Nethercott Excavating Ltd.*,³⁹ the defendant construction and excavation company excavated contaminated soil containing diesel oil and transported it (identified as non-hazardous solid waste) to a waste transfer/processing facility. It relied on the advice of a recycling company, which had erroneously conveyed the results of a Trow consulting report as indicating the soil was not contaminated, and advised that the material could be dealt with as clean fill. Nethercott did not know that the common law definition of "waste" could include material having characteristics described in the Trow report. The company pleaded guilty to using or operating a waste management system without a certificate of approval and was fined \$8000 (+ VFS).

In *Doug Boehner Trucking & Excavating Ltd. v. United Gulf Developments Ltd.*⁴⁰ Boehner Trucking agreed to pay Whebby (the excavation contractor) to transport excess fill from a development site; both parties believed the soil was suitable for use in a residential subdivision, despite having had virtually no conversation about fill quality. Boehner Trucking was aware of a geotechnical report that had noted a petroleum hydrocarbon odour at one borehole on the source site, as well as a followup report that noted that the contamination was likely limited to a small area.

Whebby moved 268 loads of fill to the subdivision, some of which was backfilled around house foundations, the remainder being stockpiled. Neighbours complained and United retained a consultant to test the soil. The consultant saw a stockpile that was stained orange and black at the edges, with fragments of other materials around the pile, including concrete, glass, rebar, and roofing materials that smelled like creosote. Some pile samples were found to exceed residential soil quality guidelines relating to petroleum hydrocarbons, lead and arsenic.

United remediated the sites, including removal of soil where it had been spread and stockpiled, at a cost of over \$500,000. At trial, all parties were found liable to varying degrees. The Court of Appeal ordered a new trial. The case was then settled.

³⁸ Unreported, May 1 2010, Ont. Ct. of Justice.

³⁹ Unreported, June 21 2010, Ont. Ct. of Justice.

⁴⁰ 2007 NSCA 92

In *Township of Uxbridge v. Corbar Holdings Inc. et al.*,⁴¹ a couple had purchased a 108-acre property on the Oak Ridges Moraine, planning to deposit 300,000 cubic metres of fill on the property (approximately 30,000 dump truck loads). They claimed the fill would enhance their ability to farm the property, and that this was a “normal farming practice”(in accordance with an objective of the Oak Ridges Moraine Conservation Plan); this use of the property contradicted their earlier interest in using the property as a fill site for clean fill. The municipality obtained an injunction to stop the dumping. The court had no trouble deciding that it is not “normal farming practice to alter the topography of lands by the depositing of large quantities of fill”.

Soil Movement rules for Record of Site Condition properties

As of July 1, 2011, Reg. 153/04 includes strict requirements for soils transported to an RSC property. In most cases, the imported soil must meet Table 1. Table 2 / 3 soils may be imported only to a contaminated site that is a current or former drycleaner, garage, or bulk liquid dispensing facility:

55. (1) Soil that did not originate at a RSC property may be brought from another property to a RSC property to remain there following the filing of a record of site condition only where the RSC property,

(a) is being used or has been used, in whole or in part, for one of the uses described in clause 32 (1) (b);

(b) is a property with respect to which a potentially contaminating activity on, in or under the property has been identified as occurring or having occurred;

(c) is not a property described in subsection 32 (2);⁴² and

(d) is a property with respect to which one or more contaminants of concern have been identified as present.

(2) Soil referred to in subsection (1) may only be brought to an RSC property referred to in subsection (1) where a qualified person has ensured in the course of the phase two environmental site assessment with respect to the RSC property that the requirements of Schedule E regarding soil brought to the phase two property have been met and the RSC property is the same as or within the phase two property.

(3) Despite subsection (1), soil that did not originate at a RSC property may be brought from another property to the RSC property to remain there following the filing of a record of site condition if either of the following circumstances apply:

1. A qualified person conducting or supervising the phase two environmental site assessment has determined that the soil meets the standards set out in Table 1 of the Soil, Ground Water and Sediment

⁴¹ 2012 ONSC 3527 at <http://canlii.ca/en/on/onsc/doc/2012/2012onsc3527/2012onsc3527.pdf>

⁴² e.g., if the property is currently used for agriculture, community, institutional, parkland or residential use

Standards with respect to all contaminants in the soil to be brought from the other property to the RSC property and the determination was made during the course of a phase two environmental site assessment and, with necessary modifications, in accordance with the provisions in Schedule E that apply to soil brought to the phase two property with respect to a RSC property described in subsection (1).

2. A qualified person has determined that a record of site condition may be submitted without a phase two environmental site assessment, the record of site condition is to be submitted or has been submitted and the qualified person who is conducting or supervising or has conducted or supervised the phase one environmental site assessment has determined in accordance with Schedule F that soil intended to be brought from the other property to the RSC property meets the standards set out in Table 1 of the Soil, Ground Water and Sediment Standards with respect to all contaminants in the soil to be brought from the other property to the RSC property.

(4) Soil that did not originate at a RSC property and that is brought from another property to a RSC property to remain at the RSC property following the filing of a record of site condition shall be used at the RSC property solely to backfill an excavation or for final grading.

In early 2009, the OBA commented on the proposed amendments to O.Reg. 153/04, urging the MOE to clarify soil movement rules:⁴³

The Ministry needs to clarify the rules about soil movement from one site to another. We were glad to see that Section 40, Schedule E would allow soil to be brought onto a property, provided it meets the applicable site condition standards. However, this is inconsistent with some Ministry staff's interpretation of Regulation 347 and the definition of inert fill. Staff sometimes argue that soil moved from one site to another is "waste" unless it is "inert fill". In the absence of a clear definition of "inert fill", some staff demand that imported soils meet Table 1 Standards, regardless of the standards applicable to the receiving site. This is illogical. The Ministry should clarify the conditions under which soil may be moved from one site to another.

Draft BMP Guide

The construction and development industry has complained bitterly about the regulatory confusion and the strait jacket imposed by O.Reg. 153/04, coupled with the very high penalties for guessing wrong. In response, the MOE has released a draft BMP Guide: *Soil Management – A Guide for Best Management Practices*,⁴⁴ developed in cooperation with the Residential and Civil Construction Alliance of Ontario (RCCAO). This Guide might

⁴³ OBA. Comments on Proposal for Amending Ontario Regulation 153/04, Brownfields Records of Site Conditions – EBR Registry Number 010-4642. February 9 2009 at http://www.oba.org/En/publicaffairs_en/PDF/OBA_Brownfields_9feb09.pdf

⁴⁴ Environmental Registry #011-7523 posted November 19 2012. At <http://www.ebr.gov.on.ca/ERS-WEB-External/displaynoticecontent.do?noticeId=MTE3ODk1&statusId=MTc2NDY0&language=en>

help a bit, for sites where the receiving site owner does *not* require an RSC. It won't help solve any of the problems created by Reg. 153/04 for RSC sites.

The Guide proposes an elaborate system of source testing, segregation, and soil tracking, all under the supervision of a Qualified Person, *i.e.*, a professional engineer or geoscientist, to ensure that soil movement does not have an “adverse effect” on the receiving site. Possible adverse effects are expanded to include issues such as invasive species.

The Guide is restricted to “soil” as defined in O.Reg. 153/04. According to the draft, the Guide will not apply to “materials outside the scope of the...definition, such as engineered fill products, asphalt, concrete and re-used or recycled aggregate product and/or mine tailings”.⁴⁵

The Guide is directed at “large-scale” construction projects, and is not “intended to apply” to small-scale construction or maintenance / construction activities at single-dwelling residential sites, or small-scale municipal roadwork, or sewer/water-main construction.⁴⁶

The Guide would severely limit soil banks, rejecting a key industry demand. Instead, it contemplates the following uses for excess soil from large-scale construction projects:⁴⁷

- reuse as fill at the project or other redevelopment sites where the quality of the soil is appropriate (*i.e.*, does not have the potential to cause adverse effects to the environment or human health);
- use to alter or re-grade the site;
- management of approved soil recycling or treatment facilities;
- placement at a commercial fill site; or
- disposal at a MOE-approved landfill site.

However, the MOE recognizes that soil may often require storage for a period of over two years, and the Guide provides that soil banking may be extended to up to 5 years upon consultation with the Ministry; it notes that MOE approval may be required for this extension.

The Guide will leave a great deal to the professional judgment (and liability) of the Qualified Person, including the overarching question of what soil quality is “appropriate”.⁴⁸ There will therefore continue to be lots of room for confusion and

⁴⁵ At p. 3.

⁴⁶ We do not know what “small”-scale means. Consider how the term “minor variance” has been (inconsistently) interpreted by Committees of Adjustment or the Ontario Municipal Board.

⁴⁷ The Guide would not apply to small-scale construction projects or activities (e.g., at single-dwelling residential sites) or to activities associated with small-scale municipal road, sewer or water-main construction or repair.

⁴⁸ The Nov 2012 draft at p.8 states that the *Rationale For The Development Of Soil And Ground Water Standards For Use At Contaminated Sites In Ontario* dated April 15, 2011 (at

inconsistency. For example, the excess soil must be free of odours, visible staining or debris, and all garbage, shingles, or painted wood should go to a waste management or recycling facility. What kind of odours? Even topsoil has an odour. What kinds of stains? And many soils contain some debris; if a 1-tonne pile of soil contains a piece of steel or a paper cup, must the entire pile be rejected or screened?

The draft was open for comments until January 21, 2013. The Bar Association comments are enclosed; we concluded that the Guide is a step in the right direction, but that additional regulatory changes are urgently needed.

Conclusion

The Guide could be finalized by the spring of 2013. It will not stop soil disposal costs from construction and infrastructure projects from continuing to rise, nor will it resolve the straitjacket on soil disposal options created by Regulation 153/04 and by the conflicting and poorly designed definitions. Confusion will undoubtedly remain. However, it is a small step in the right direction and perhaps will avoid some unintended spread of contaminated soils.

http://www.ene.gov.on.ca/stdprodconsume/groups/lr/@ene/@resources/documents/resource/stdprod_086518.pdf) should be considered when assessing appropriate soil standards that will apply to a site.