

Ontario's Excess Soil Management Regulation: Responsibilities Shift to Project Leader

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With the first phase of Ontario's On-site and Excess Soil Management Regulation (Reg. 406/19) coming up on July 1, 2020, there are a lot of questions and uncertainty within the construction and development industry about how the Regulation will change usual business practices.

Regulation 406/19 and the accompanying Rules Document were formally released on December 4, 2019, and will be phased in over two main parts, with the first being on July 1, 2020 [since original posting was delayed until January 1, 2021]. This first part includes the reuse rules use of risk-based standards, waste designation and approvals. The second part will be enacted on January 1, 2022, and will include the requirements for testing, tracking and registration. A third part to be phased in on January 1, 2025, includes the restrictions on landfilling soils for disposal that generally meet residential quality for potable groundwater use areas (Table 2 RPI quality in Ontario's Reg. 153/04).

One of the biggest shifts for the new Regulation is the responsibility of the appropriate assessment, management and relocation of soil deemed to be excess to a construction or development project.

The ultimate responsibility for all aspects of the excess soil lies with the soil generator, or more aptly called, the "Project Leader." The Regulation defines the "Project Leader" as:

"The person or persons who are ultimately responsible for making decisions relating to the planning and implementation of the project."

Examples of Project Leaders are owners, developers, and constructors. Overall, who the "Project Leader" depends upon the ultimate decision-making roles on a project, which may differ depending upon the project size and agreed contracts.

Gone are the days of simply downloading the responsibility of managing the excavated soil to the general contractor or excavation subcontractor to find a new location for the soil that will be excess to a project. This is not to say that contractors on the project teams cannot be involved in assisting in sourcing the relocation efforts; however, the ultimate responsibility lies with the "Project Leader," themselves. This will become especially true if any form of enforcement, charges or fines are levied for the inappropriate management and relocation of the excess soil. As such, there could be real consequences in the old way of downloading the responsibilities. Although yet to be fully announced, there are further enforcement tools coming from the Ministry of Environment, Conservation and Parks (MECP), which are expected to be in the form of administrative penalties (significant monetary fines and possible seizure of vehicle plates). Having these penalties levied against the Project Leader is to deter the inappropriate management of soils and to ensure that the Project Leader is fully aware of the excess soil movement and final placement throughout the entire project timeline.

In O. Reg. 406/19 "project" means any project that involves the excavation of soil and includes:

- a. Any form of development or site alteration,**
- b. Construction, reconstruction, erecting or placing of a building or structure of any kind,**
- c. The establishment, replacement, alteration or extension of infrastructure, or**
- d. Any removal of liquid soil or sediment from a surface water body.**

It is agreed that Reg. 406/19 and the associated Rules have many nuances that can be difficult to understand. Furthermore, what may be applicable for one project, may not be applicable to another. So what are the responsibilities of the Project Leader? In short, get the right team involved early (including your Project QP), stay informed and follow the new rules. The basis for the new regulatory regime is on project planning, assessment and characterization, documentation throughout the process, and finding appropriate places to relocate excess soil. Cut and fill planning is not a new concept in the construction and development industry and has been a proven cost-saver. However, when the soil is deemed to be excess to the project, early planning for the characterization, documentation and relocation of the soil is needed to ensure compliance with the new Regulation. We must keep in mind that geotechnical properties of the excess soil are just as important as the environmental quality in assessing appropriate reuse options of the soil. Ground improvement activities can change the geotechnical properties for reuse on the Project property, but when this is not an option, excess soil management within the new Regulation will be needed.

Qualified Person (QP) in O. Reg. 406/19 is defined the same as is O. Reg. 153/04. The QP must hold a licence under the Professional Engineers Act; or hold a certificate of registration under the Professional Geoscientists Act, 2000 and is a practising member. The appropriate insurance coverages must also be maintained.

QPs for Risk Assessment under O. Reg. 153/04 are also applicable under O.Reg.406/19.

Because the QP, or their employer, must not have any direct or indirect interest in the Project, the QP cannot be the Project Leader.

From the Regulation, here are some examples of the responsibilities of the Project Leader **until January 1, 2022**:

Waste Definition:

- Manage the excess soil recognizing that if not following the new rules that the soil is generally designated as a “waste,” with few exceptions;

Class 2 Soil Management Sites:

- If operating a Class 2 Soil Management Site as part of a Project:
 - Ensure only soils from the Project are stored at the Class 2 Soil Management Site;
 - Ensure soil storage at the Class 2 Soil Management Site does not exceed 10,000 m³ at any given time;
 - Ensure that the reuse site for which the excess soil will be moved from the Class 2 Soil Management Site provides written consent;
 - Prepare a written record describing the intended reuse site for the excess soil and confirm the consent and update the records if changes;
 - Provide written notice to the Director (MECP) before the soil is deposited at the Class 2 Soil Management Site; and
 - Where is it discovered that information included in the documentation listed above, within 30 days, notify the Director and correct/update the appropriate information.

Under O. Reg. 406/19: Class 2 Soil Management Sites are waste disposal sites at which excess soil is managed on a temporary basis and that is:

- a) Located on a property owned by a public body or the Project Leader for the project where the excess soil was excavated, or*
- b) Operated by the Project Leader for the project from which the excess soil was excavated.*

These Sites do not need a Waste ECA; where Class 1 Soil Management Sites do.

Contamination:

- Ensure that a procedure is developed and applied for observing the soil when excavated to detect evidence that the soil may be affected by the discharge of a contaminant;
- Obtain the advice of a Qualified Person (QP) upon discovery of a contaminant to assist in ensuring that the impacts are properly identified, segregated and delineated as well as ensuring that the impacted soils are appropriately managed in accordance with Reg. 406/19; and

- Get the QP to update any of the documentation required under Reg. 406/19, if necessary.

Records Retention:

- Retain all records for a period of at least 7 years, including contracts for management and transportation.

Operations:

- Ensure that the Haulers have the appropriate information for the transfer (verbal Hauling Record before 2022); and
- Ensure that any low-risk processing activities in the project area are in accordance with Soil Rules, specific storage requirements and any requirements detailed under Section 9 of the Environmental Protection Act (air and noise contaminant discharges) and Section 53 of the Ontario Water Resources Act (sewage works approvals).

And requirements **after January 1, 2022:**

- All requirements from prior to January 1, 2022, remain applicable;
- Registration of the Project generating the Excess Soil and declaration statements (most circumstances, but there are situations where Registration is not needed);
- Project Planning Documentation (Assessment of Past Uses, Sampling and Analysis Plan, Soil Characterization Report, and Destination Assessment Report) prepared by a Qualified Person;
- Develop and apply a Tracking System;
- Ensure that the Haulers have the appropriate information for the transfer (Hauling Record); and
- Ensure that any low-risk processing activities in the project area are completed in accordance with the storage requirements and any requirements detailed under Section 9 of the Environmental Protection Act and Section 53 of the Ontario Water Resources Act.

What does all this mean? There are many new requirements for the “Project Leader” respecting the excess soil management. These new requirements need to be understood early in the project planning and often before procurement. New responsibilities to know the soil quality, where the soil will go and by whom, as well as knowing that the excess soil meets the acceptance criteria for the ultimate relocation or reuse site. Documentation is the key. Having a trusted and appropriately experienced QP on the team will assist the “Project Leader.”

So, the shift is definitely on! The Project Leader is now officially the responsible party for the appropriate management of excess soils. A “blind-eye” or “no-knowledge” approach can no longer be used as a defence for those few bad actors. Following the new Regulatory process should ensure that no innocent parties are affected by misrepresentation of soils and the quality. Furthermore, by not following the new Regulation and Rules, the excess soil is classified as a Waste and will be enforced under that classification. Getting used to all the new requirements will take some time, but it all starts now.

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