



Soil Management

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Submitted by: The Ontario Bar Association,
Environmental Law Section



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The Ontario Bar Association (the "OBA") Environmental Law Section appreciates the opportunity to provide input to the Ministry of Environment (the "Ministry") on the proposed Draft Soil Management – a Guide for Best Management Practice, version 2 (the "BMP").

The OBA

Established in 1907, the OBA is the largest legal advocacy organization in the province, representing more than 18,000 lawyers, judges, law professors and law students in Ontario. OBA members practice law in no fewer than 38 different sectors. In addition to providing legal education for its members, the OBA has assisted government and other policy makers with countless policy initiatives - both in the interest of the legal profession and in the interest of the public.

This submission was formulated by the OBA Environmental Law Section which is comprised of nearly 400 members including the leading practitioners in the field. The members of the section count among their clients a wide variety of stakeholders interested in the effective and efficient regulation of soil movement in this province, including developers, municipalities, corporations and environmental protection organizations.

Introduction

The OBA appreciates the circulation of the draft BMP. The Environmental Law Section agrees that much better guidance is needed for soil management in Ontario, including strong support for sustainable, beneficial reuse of soil. Soil movement is big business in Ontario, involving perhaps 170 million tonnes/ year, and adding about 15% to infrastructure costs.

The current regulatory patchwork is confusing, leads to inconsistent practices and creates an uneven playing field that rewards those who do *not* follow best practices. It also hampers beneficial reuse of soil.

The draft guidance document is a useful step in the right direction. The document contains a thoughtful approach with best management practices for both source and receiving sites, fill management plans, plans around the movement between sites, and procurement practices, all of which are helpful. It also recognizes that soil movement can have a variety of environmental and economic effects, not merely those related to whether the soil meets ministry standards for contaminated sites.

The OBA encourages the Ministry to continue to develop an appropriate regulatory scheme for soil movement across the province.



Regulation Required rather than Guidance alone

We support the comment of the Ontario Environment Industry Association (ONEIA) that no soil management protocol will be effective or fair until it is adopted by regulation, applicable to all material soil movements, and evenly enforced to create a level playing field. We also agree that a tiered approach is appropriate based on potential risk, and suggest that an EASR system be considered for low or medium risk sites.

It is our opinion that it is essential that the government make regulatory amendments to replace the extremely restrictive provisions now found in section 55 of Regulation 153/04,¹ and the definition of “inert fill” in Regulation 347. The combined effect of these two provisions create a significant barrier to the beneficial reuse of soil in Ontario, especially because of the confusion over the boundary between “soil” and “waste”.² Flexibility is also needed on issues such as hotspots and soil mixing. An unnecessarily rigid intolerance of heterogeneity in soils may unnecessarily hamper beneficial soil reuse. In many cases, small areas of contamination above ministry criteria, or debris, may have no environmental significance in a large volume of soil.

In addition, this regulatory framework should clarify and harmonize the thicket of inconsistent definitions now found in Ontario statutes and regulations on such terms as “soil”, “fill”, “inert fill” and “rock fill.”

¹ As of July 1, 2011, O.Reg. 153/04 (Records of Site Condition) includes strict requirements for soils transported to an RSC property. In most cases, the imported soil must meet Table 1 requirements. Soils that meet Table 2 or 3 parameters may be imported only to a contaminated site that is a former drycleaner, garage, or bulk liquid dispensing facility. This has made soil movement more difficult and expensive than ever.

Strictly speaking, the regulation only applies if the destination site wishes to be able to obtain a Record of Site Condition (“RSC”). However, since it would be foolish for a property owner to lightly give up the option of obtaining a RSC for future sale or development, knowledgeable property owners across the province are starting to follow the new rules, and to insist on receiving only soil that has been tested and proven to meet Table I (background) levels of contamination.

² Our clients frequently ask us for legal opinions on how to handle excess soil from a construction site. Unfortunately, in the majority of situations, existing statutes and case law do not enable lawyers to clearly define excess “soil” as waste or otherwise. As a result, we must advise that much of the excavated “soil” (which could otherwise be put to good use and diverted from landfill sites) be treated as waste.



We look forward to working with MOE to develop such a regulatory framework.

Qualified Persons

The draft BMP leaves a great deal to the professional judgment (and liability) of the Qualified Person (“QP”), including characterization of excavated soil as “appropriate” in quality for the intended receiving site. This invites divergent interpretation, leaving lots of room for confusion and inconsistency. QPs need more guidance on how to objectively determine what “appropriate” means.

In addition to recognizing those with appropriate qualifications, there will need to be a form of education, training and up-grading courses in the future, offered to members of all applicable licensing organizations. Qualified Persons may also require guidance on the liability which they are expected to assume relating to soil movement, and on the insurance that they must hold to address such liability. Once again regulatory certainty and regulatory reform would be helpful in this area

Awareness and Encouragement

We agree with ONEIA that the guidance document may have limited value unless municipalities, contractors and others are actively educated and encouraged to use it. In addition, municipalities, contractors and others need assurance that they will be protected from Ministry criticism and/or sanctions if they have made a reasonable good faith effort to comply with the guidance document.

Public Consultation

More guidance may be appropriate as to what constitutes adequate public consultation, especially when it is not possible to obtain unanimous public support. Much greater clarity from your Ministry about the distinction between “soil” and “waste”, and about the limited significance of minor fluctuations in soil quality, may also help. Centralized and consistent messages and information, advice and education will be very important to the successful adoption of best management practices for soil. This consultation service (such as the Dutch model), could be provided by the government through the MOE and/or MMAH to municipalities as well as the private sector (or partnerships).

Soil banks

Some municipalities (such as the Region of Waterloo) are considering soil management campuses. The Ministry should actively support this type of approach. The guidance document’s severely



limited support for soil banks creates a significant obstacle to appropriate soil management and reuse.

Conclusion

Thank you for the opportunity to comment on the second draft of the guidance document. The OBA supports Ontario's objectives to promote beneficial reuse of soil and prevent and mitigate the potential for adverse effects. The second draft of the guidance document is a step in the right direction, but is unlikely to be sufficient by itself.

We look forward to continue working cooperatively with the Ministry of the Environment in the development of a workable and effective regulatory approach for soil management in Ontario.