



Getting Down and Dirty about Excess Soil Laws in Ontario and Beyond



Matthew Gardner & Madiha Vallani
Willms & Shier Environmental Lawyers LLP

SMART Remediation
Toronto, ON | March 31, 2022

SMART is
Powered by:



VERTEX
Environmental Inc.

www.vertexenvironmental.ca

Getting Down and Dirty about Excess Soil Laws in Ontario and Beyond

Matthew Gardner

Partner, Specialist in Environmental Law Certified by the Law Society of Ontario

Madiha Vallani

Associate Lawyer

This presentation provides general information and is not intended to provide legal advice.
Audience members should seek legal advice for specific situations.

SMART Remediation Seminar Series
Toronto, Ontario
March 31, 2022



1

Overview

- **Excess Soil Case Study**
- **Ontario's Excess Soil Laws and Guidance**
- **What is Excess Soil? Where Can it Go?**
- **Excess Soil Risks and Liabilities**
- **Implementation Timeline**
- **Other Provinces?**



2

EXCESS SOIL CASE STUDY

3

Case Study (1/2)

- **Company A is owner of project area (source site) within City of Toronto from which excess soil was excavated**
- **Company A entered into contract with Company B requiring Company B to load, transport and receive Company A's excess soil as well as other waste (cement and plastic debris)**
- **Total volume of Company A's excess soil is 1,900 m³**
- **Company A and Company B executed their contract for this work on December 1, 2021**

4

Case Study (2/2)

- **Company A retained Qualified Person to conduct soil sampling and testing of Company A's excess soil before excess soil was transported from project area**
- **Company B owns and has Environmental Compliance Approval for "class 1 soil management site" to temporarily store and process excess soil and other non-hazardous waste**
- **Company B intends to eventually either send Company A's excess soil to reuse site(s) for beneficial reuse and/or landfill for disposal**

5

EXCESS SOIL LAWS AND GUIDANCE APPLICABLE TO COMPANY A'S EXCESS SOIL

6

Ontario's Excess Soil Laws and Guidance

- [O. Reg. 406/19: On-Site and Excess Soil Management Regulation](#) (“Excess Soil Reg.”)
- Amendments to [O. Reg. 153/04](#) (RSC)
- Amendments to [Reg. 347](#) and [O. Reg. 351/12](#) (Waste Management)
- [Rules for Soil Management and Excess Soil Quality Standards](#) (“Soil Rules”)
- [Beneficial Reuse Assessment Tool](#)
- [Rationale Document for Reuse of Excess Soil at Reuse Sites](#) (Guidance)

7

WHAT IS EXCESS SOIL AND WHERE CAN IT GO?

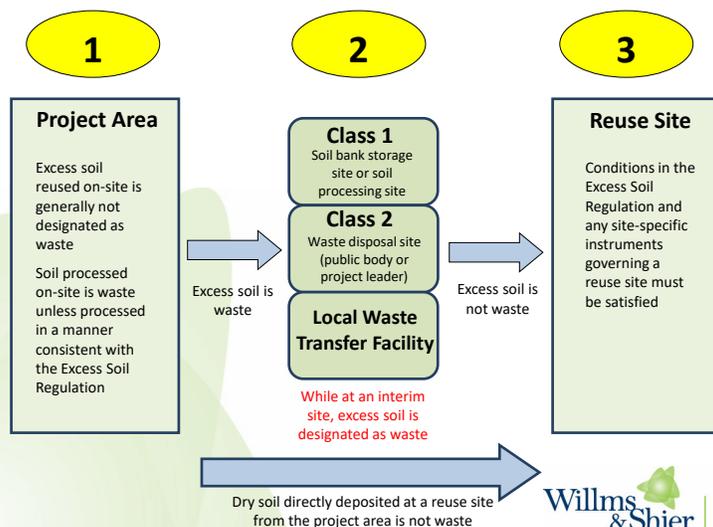
8

What is Excess Soil?

- **Excess soil is soil excavated and removed from “project area” – Company A’s soil will become excess soil once it leaves project area**
- **Excess soil is designated as “waste” unless it meets requirements set out in Excess Soil Reg. and Soil Rules and is reused (beneficial purpose)**
- **Excess Soil Reg. incorporates by reference**
 - Soil Rules, which contain specific rules and generic excess soil quality standards (ESQS) for excess soil management
 - Beneficial Reuse Assessment Tool (BRAT) to develop site-specific excess soil quality standards

9

When is Excess Soil Waste and Where Can Excess Soil Go?



Liquid soil is subject to different requirements

10

Where Can Company A's Excess Soil Go?

- **Sites where Company A's excess soil may be received for temporary storage and/or processing, beneficial reuse, or final disposal**

1. interim sites
 - a) class 1 soil management sites (soil bank or soil processing)
 - b) class 2 soil management sites (ECA not required)
 - c) local waste transfer facilities
2. reuse sites governed by an instrument (for beneficial reuse purpose)
 - a) licence/permit issued pursuant to municipal fill/site alteration by-law
 - b) licence/permit issued under *Aggregate Resources Act*, or
 - c) approval issued under *Planning Act*
3. other reuse sites for beneficial reuse purpose
4. landfills

11

Can Company B Send Company A's Excess Soil to Landfill?

- **On January 1, 2025, landfilling excess soil will be prohibited unless**

- excess soil supports operation of landfill
- Qualified Person (QP) declares that it would be "unsafe" to finally place excess soil at a reuse site, or
- excess soil exceeds Table 2.1 of ESQS

- **Same laws applicable to waste apply to excess soil being landfilled rather than beneficially re-used**

12

Is Company A Required to File Notice on Registry?

- **Company A is exempt from notice-filing requirement for two reasons**
 - Company A's excess soil falls under first exemption in Schedule 2 of Excess Soil Reg.
 - Company A's project area is not and has never been, in whole or in part, an "enhanced investigation project area"
 - primary purpose of project is not remediating contaminated land, and
 - amount of soil to be removed from project area is less than 2,000 m³ (1,900 m³) and is within "area of settlement" (City of Toronto)
 - Company A and Company B executed their contract for excess soil management on December 1, 2021

13

EXCESS SOIL RISKS AND LIABILITIES

14

Potential Environmental Liabilities Apply to Company A's Excess Soil

- **Regulatory Liability**

- MECP can issue orders and lay charges (prosecute) under Ontario's *Environmental Protection Act* (EPA) for non-compliance with excess soil laws
 - against companies
 - against individuals (including corporate D&Os)

- **Civil Liability (Lawsuits)**

- companies and individuals may be sued
- precedent from Ontario Court of Appeal (*Midwest*) for lifting corporate veil in environmental lawsuit against corporate D&Os

Project Leader(s) is/are Ultimately Responsible

- **Broad definition of “project leader” in Excess Soil Reg. can result in far-reaching liability**

- persons who are “ultimately responsible” for decisions relating to project planning and implementation will be subject to project leader's obligations when managing excess soil
- future case law will clarify who may be “ultimately responsible”

IMPLEMENTATION TIMELINE

17

Implementation Timeline

Key Parts of the Framework	Implementation Date
- Some amendments made to O. Reg. 153/04 (Records of Site Condition)	December 4, 2019
- Excess soil, as defined under the Excess Soil Reg., is designated as waste unless prescribed criteria are satisfied - Soil excavated on-site is also designated as waste unless the excavated soil is processed in a manner prescribed by the Excess Soil Reg. at the Project Area - Complementary amendments to Ontario's waste management regulations (O. Reg. 351/12 and Reg. 347) came into force - Excess soil must be collected and transported lawfully in a manner prescribed by the Excess Soil Reg. - Procedure must be developed and implemented to manage excavated soil that may be affected by discharge of a contaminant	January 1, 2021 (extended from July 1, 2020)
- Requirements for filing notice on the Registry come into force - QP reports/soil testing/sampling, tracking, and record-keeping requirements come into force - MECP extended the date by which contracts must be entered into to be exempt from notice/planning requirements by one year - from January 1, 2021 to January 1, 2022	January 1, 2022 (may be delayed by MECP to 2023)
- Landfilling excess soil permitted in only prescribed circumstances	January 1, 2025
- Expiry of the exemption from notice/planning requirements for grandfathered contracts	January 1, 2026

18

18

What's Happening in Other Provinces?

- **British Columbia**

- Contaminated soil is governed by *Contaminated Sites Regulation* (“CSR”) under *Environmental Management Act* (“EMA”)
- Proposed amendments to CSR and other regulations governing soil relocation include
 - new process for uncontaminated soil relocation
 - proposed process will require person removing soil to determine soil quality
 - if substances in soil meet relevant land use standards, then person removing soil must submit online notification form to BC’s Ministry of Environment and Climate Change Strategy

What's Happening in Other Provinces?

- **Quebec**

- The *Regulation respecting the traceability of excavated contaminated soils* (the “Regulation”) came into force on November 1, 2021
- The Regulation will be implemented in phases
 - November 1, 2021: applies to transportation of certain large-scale projects (5,000 metric tonnes or more)
 - January 1, 2022: applies to transportation of certain medium-sized projects (1,000 metric tonnes or more) and certain receiving sites (1,000 metric tonnes or more) where conditions apply, and
 - January 1, 2023: applies to all projects

Willms & Shier Environmental Lawyers

- **Established over 40 years ago**
- **Environmental, Indigenous, and Energy law**
- **18 lawyers**
 - seven lawyers are certified by the Law Society of Ontario as Environmental Law Specialists and one in Indigenous Legal Issues
 - lawyers called to the Bars of Alberta, British Columbia, Ontario, New Brunswick, Northwest Territories, Nunavut and the Yukon
 - offices in Toronto, Ottawa, Calgary, and Yellowknife



21

Contact Information



Matthew Gardner

mgardner@willmsshier.com

(416) 862-4825



Madiha Vallani

mvallani@willmsshier.com

(416) 862-4835

Willms & Shier Environmental Lawyers LLP

www.willmsshier.com



22