



November 20, 2024

Rema Kureishy
Environmental Policy Branch
40 St. Clair Avenue West, 10th Floor
Toronto, Ontario
M4V 1M2

Delivered via Email: mecplandpolicy@ontario.ca

Dear Reema Kureishy:

RE: ERO 019-9196/ Enabling Greater Beneficial Reuse of Excess Soil

The Canadian Environmental Law Association (CELA) is a legal aid clinic which represents low-income and disadvantaged communities in litigation, and undertakes law reform on public interest environmental issues.

We are providing the following comments on the Ministry of the Environment, Conservation and Parks' (MECP) proposal to amend Ontario Regulation 406/19 (the Excess Soil Regulation).

The MECP's proposal summary states that the amendments are intended to advance the goal of "reducing red tape and regulatory burdens on businesses to support the development of housing, highways and other critical infrastructure."¹ CELA is concerned that while the proposal may make it easier for businesses to reuse excess soil, it will be at the expense of undermining the Ministry's core mandate to protect human health and the natural environment. We provide more details about our concerns below:

(i) Exemption of specified excess soil management sites from an Environmental Compliance Approval

¹ Environmental Registry of Ontario, *Enabling greater beneficial use of excess soil*, ERO 019-9196, online: [Enabling greater beneficial reuse of excess soil | Environmental Registry of Ontario](#)
Canadian Environmental Law Association

The MECP is proposing to exempt specified excess soil management sites, such as aggregate reuse depots and small liquid soil depots, from the requirement to obtain an environmental compliance approval. These facilities will instead be subject to rules set out in regulation.

The approval process provides an important mechanism to ensure a proactive up-front assessment by the MECP to ensure business operations do not cause harm to Ontario's environment. We are concerned that the proposal, if implemented, will undermine government oversight over aggregate reuse depots and small liquid soil depots.

Exempting aggregate reuse depots and small liquid soil depots from the approval process will also mean that the public participation rights under the *Environmental Bill of Rights, 1993 (EBR)* will no longer apply to these facilities. The *EBR* has greatly enhanced the government's environmental decision-making process through the public notice and comment provisions and third-party appeal rights. Exempting aggregate reuse depots and small liquid soil depots from the approval process will result in the loss of public oversight over these facilities.

The proposal states that prior to commencing operations and upon closure of operations, these facilities will be required to provide written notice to the MECP Director and to the relevant local municipality. However, the proposal does not establish a mechanism whereby the public will also be provided with access to this information. CELA recommends that the Ministry ensure the public be provided with written notice, prior to the commencement and closure of the operation of these facilities. This could be done by ensuring that the public notice and comment provision under the *EBR* apply to these facilities regarding the commencement and closure of operations. We note that a similar approach was adopted under the *Green Energy Act*, for renewable energy approvals, to ensure transparency and accountability.

Alternatively, these facilities could be required to provide notice on the Excess Soil Registry. However, we caution that members of the public may not be as familiar with the Excess Soil Registry as they are with the Environmental Registry of Ontario established pursuant to the *EBR*.

Finally, we note that financial assurance can be required as a condition of an environmental compliance approval. Financial assurance is intended to achieve a number of objectives, including ensuring that funds are available for the clean-up and remediation of contaminated sites. However, the proposal does not mention whether aggregate reuse depots and small liquid soil depots will be required to post financial assurance prior to commencing operations. Given that these facilities have the potential to cause environmental contamination, we strongly urge the Ministry retain its discretion to require these facilities to post financial assurance before they are allowed to commence operation. Otherwise, there is a serious risk that in the future Ontario taxpayers will have to bear the remediation costs, in the event these facilities do not have the necessary funds to undertake a clean-up of a site. This, in turn, would undermine the polluter pays principle and the principle of intergenerational equity.

Canadian Environmental Law Association

CELA Recommendation No. 1: The MECP should require that public notice and comment be provided on the Environmental Registry of Ontario, by aggregate reuse depots and small liquid soil depots prior to commencement and closure of operations.

CELA Recommendation No. 2: In the alternative, the MECP should require that written notice be provided on the Excess Soil Registry by aggregate reuse depots and small liquid soil depots prior to commencement and closure of operations.

CELA Recommendation No. 3: The MECP should retain discretion to require aggregate reuse depots and small liquid soil depots provide financial assurance prior to commencing operations.

(ii) **Enhanced reuse opportunities for asphalt and storm water management pond sediment**

The MECP is proposing to allow aggregate and storm water management pond (SWMP) sediment to be reused, provided certain conditions are met. These include the requirement that the excess soil is being “reused beneficially as engineered aggregate and finally placed in an asphalt road undertaking or the SWMP sediment is being reused and finally placed within the road right-of-way associated with an asphalt road...”

The proposal states that “[a]dditional rules for final placement may be contemplated to ensure there is no adverse impact, including possible setbacks from waterbodies.” It is not possible to provide comments on whether these additional measures will be adequate to prevent contamination as no further details are provided in the proposal. We note, however, that degraded asphalt poses a much higher risk of leaching contaminants than solid compacted asphalt and the environmental risk to waterbodies may be very significant. In addition, SWMP sediment are also likely to be fairly concentrated in terms of potential contaminants and may pose a threat to the wider environment. The proposed amendment, thus, has potential to cause adverse impacts to human health and the environment.

(iii) **Naturally occurring exceedances in engineered aggregate**

The MECP is proposing to allow excess soil that is part of engineered aggregate, with naturally occurring exceedances of the applicable excess soil quality standards for the reuse site in respect of certain parameters, to be deemed to meet the standards for those parameters, if certain conditions are met. There is no mandatory requirement for sampling to be first undertaken at the site where the excess soil will be reused before the deeming provision can apply.

Canadian Environmental Law Association

The proposal states that “[t]his approach is in contrast to the existing provision in the Soil Rules deeming compliance with the excess soil quality standards for excess soil with naturally elevated concentrations not exceeding local background concentrations, where the reuse site is required to be sampled by a qualified person to take advantage of the deeming provision.”

The current approach ensures a vastly more accurate method of assessing whether excess soil with naturally elevated concentrations do not exceed local background concentrations. In contrast, the proposed amendment allows the deeming provision to apply based on the subjective assessment by a project leader making “reasonable efforts to take into consideration any past reports about past uses and activities respecting the project area...” CELA, therefore, recommends that if excess soil with naturally occurring exceedance of the applicable excess soil quality standards is to be reused, sampling of the reuse site should first be undertaken to ensure that the excess soil does not exceed local background concentrations.

CELA Recommendation No. 4: If excess soil with naturally occurring exceedance of the applicable excess soil quality standards is to be reused, sampling of the reuse site should first be undertaken to ensure that the excess soil does not exceed local background concentrations.

(iv) **Allow greater reuse of soil to be coordinated between similar infrastructure projects**

CELA is concerned about the proposal to allow greater reuse of soil between similar infrastructure projects, subject to certain conditions, including “no visual or olfactory signs of contamination.” Reliance simply on “visual or olfactory signs of contamination” will not disclose contamination caused by heavy metals such as lead, chromium, mercury or arsenic which pose significant risk of adverse effects to human health and the environment. Soil sampling is the most effective and accurate method to confirm or rule out the presence of contamination at a site given that contaminated soil can not always be identified visually or by smell.

CELA, therefore, is of the firm view that excess soil should not be reused between similar infrastructure projects without undergoing sampling to assess if the soil is contaminated. As the Ministry webpage on excess soil notes “some excess soil may have limited levels of contaminants and care must be taken when determining where it may be reused. This is a significant concern in urban centres and surrounding communities (including suburban municipalities, rural areas and Indigenous communities.”²

² Ontario Ministry of Environment, Conservation and Parks, *Handling Excess Soil*, online: [Handling excess soil | ontario.ca](https://www.ontario.ca/handling-excess-soil)

CELA Recommendation No. 5: Excess soil should not be reused between similar infrastructure projects without undergoing sampling to assess whether the excess soil is contaminated.

(v) **Reduce reuse planning requirements for excess soil moved between infrastructure projects**

The MECP is proposing to reduce regulatory requirements for excess soil moved between infrastructure projects. The proposal would allow a project leader for an infrastructure project area to move excess soil to another infrastructure-related undertaking without completing an assessment of past uses, a sampling and analysis plan and sampling analysis report, excess soil destination assessment report, and implementing a tracking system.

CELA does not support this proposal. At a minimum, before excess soil is moved off-site, there should be a sampling and analysis plan and a sampling analysis report, to first test and assess whether the excess soil exceeds applicable standards before it is taken to another site for reuse. The failure to obtain this information raises the likelihood that contaminated soil could be transferred to other parts of the province, without appropriate due diligence measures. As the Ministry's *Excess soil management and reuse requirements for project areas* states "sampling provides greater confidence that soil quality is appropriate for the intended reuse site(s) than not sampling."³ CELA, therefore, recommends that before excess soil is moved to another infrastructure-related undertaking, the excess soil in the project area should be subject, at a minimum, to a sampling and analysis plan and sampling analysis report.

CELA Recommendation No. 6: Before excess soil is moved to another infrastructure-related undertaking, the excess soil in the project area should be subject, at a minimum, to a sampling and analysis plan and sampling analysis report.

In conclusion, CELA is of the view that the proposal, if implemented, will likely increase soil contamination in Ontario and potentially cause adverse impacts to human health and the environment. It also lays the groundwork for the need for significant environmental remediation of infrastructure projects in the future.

Yours truly,
CANADIAN ENVIRONMENTAL LAW ASSOCIATION



Ramani Nadarajah
Counsel

³ Ontario Ministry of the Environment, Conservation and Parks, Excess soil management and reuse requirements for project areas, online: [Excess soil management and reuse requirements for project areas | Excess soil fact sheets | ontario.ca](#)

Canadian Environmental Law Association