COVID-19 delays Ontario's new excess soil regime

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Ontario's comprehensive excess soil management regime was set to be phased in starting July 1, 2020, much to the anticipation of the land development industry, municipalities, landowners, and consultants. The implementation of the first phase of the new excess soil regime is now pushed back to January 1, 2021, due to the COVID-19 outbreak.

What you need to know

- The *On-Site and Excess Soil Management Regulation* (Excess Soil Regulation) creates new obligations for persons ultimately responsible for projects involving the excavation of soil, including any site alteration, construction of a building or infrastructure, or sediment removal.
- The Excess Soil Regulation was filed on December 4, 2019, and is set to come into effect in a phased approach, beginning on July 1, 2020.
- Supporting consequential amendments were made at the time to the *Records of Site Condition Regulation* (O. Reg. 153/04), *General: Waste Management* (Regulation 347), and the *Waste Management Systems EASR Regulation* (O. Reg. 351/12), all under the *Ontario Environmental Protection Act.*
- Ontario Ministry of Environment, Conservation, and Parks (MECP) provided notice on June 12, 2020, delaying the provisions that would have come into effect on July 1, 2020, until January 1, 2021. The current waste regulatory framework will continue to apply until that time.
- The implementation of the consequential amendments to other regulations, which relate to the first phase of changes, are also delayed.
- The timing of the next phases of the implementation of the Excess Soil Regulation remain unchanged.

Important features of the new excess soil management regime

Construction and other excavation activities in Ontario generate an estimated 25 million cubic metres of excess soil annually, which is generally classified as "waste". Currently, excess soil is transported and disposed of at landfill sites at significant cost, re-used on or offsite under uncertain conditions, or, occasionally, illegally dumped.

The aim of the changes to the excess soil management regime is to provide certainty in how excess soil is to be characterized, and clarify the conditions pursuant to which soil may be reused on-site, or transferred to another site for re-use. One of the goals of the new regime is to encourage the reuse of excess soil that meets prescribed standards, and limit the impacts to the environment, community health, and transportation infrastructure.

The new regime will also seek to enhance certainty for parties that choose to accept excess soil, as well as the consultants, haulers, and developers involved in transporting excess soil, by establishing testing requirements, and a system for tracking and registration of soil shipments.

Excess Soil: from waste to reuse for a beneficial purpose

The Excess Soil Regulation allows soil to not be designated as waste if all of the prescribed conditions are met, including:

- The soil is directly transported to a reuse site from a soil storage site, a soil-processing site, or a project area. The regulation broadly defines “project” to include any project that involves the excavation of soil;
- The operator of the reuse site has consented in writing to the deposit of the excess soil;
- The quality and quantity of the soil meets the prescribed standards according to the MECP guidance document entitled “Rules for On-Site and Excess Soil Management”;
- The excess soil will be used for a “beneficial purpose.” This term is not defined in the regulation, but examples given in connection with development are backfill for excavation, final grading, and achieving the necessary grade for a planned development or infrastructure project.

The provisions of the Excess Soil Regulation that govern the designation of excess soil are part of the first phase of implementation that is now set for January 1, 2021.

Responsibilities of the “Project Leader”

The Excess Soil Regulation places responsibility for excess soil onto the person or persons “who are ultimately responsible for making decisions relating to the planning and implementation” of the project which is the source of the excess soil.

The project leader will be required to ensure a Qualified Professional will implement a soil sampling and analysis plan, and prepare a soil characterization report as well as other documentation obligations. A tracking system must then be implemented to track each load of soil as it is transported from the project area to the reuse site. The Regulation will also establish a public registry where the project leader will be required to publish a notice before removing the soil, subject to certain exemptions. This next phase will come into effect on January 1, 2022.

The final phase to be implemented is the restrictions on landfilling of specified excess soil, which is set to come into effect on January 1, 2025.

Extensive changes underway despite delay

The new excess soil management regime will alter the way risk is allocated amongst those involved in construction projects and soil reuse sites at the same time as it may reduce development costs and environmental impacts associated with shipping excess soils. While soil management contracts that are entered into before January 1, 2021, will be grandfathered until 2026, project leaders and consultants will benefit from ensuring their business is ready for the new world of soil assessments and tracking systems.

BLG's environmental team can assist you with understanding the implications of the Excess Soil Regulation.

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