

Ontario Proposes Changes to its *On-Site and Excess Soil Regulation* Scheduled for Further (Substantial) Implementation on January 1, 2023

Rob Kennaley
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On April 21, 2022 the Ministry of Environment, Conservation and Parks paused the implementation date for the notice, reporting and tracking provisions of Ontario's On-Site and Excess Soil Regulation (*O.Reg 406/19*) until January 1, 2023, to give stakeholders time to better understand, and plan to meet, its requirements. The Ministry also advised that it would take the time to consult on refinements "to ensure they are clear, practical, and focused to circumstances for which they are most necessary".

On November 4, 2022, the Ministry confirmed that the Regulation's notice, reporting and soil-tracking provisions remain scheduled to come into force on January 1, 2023. In response to specific concerns raised during consultations, however, the Ministry announced its intention to tweak the Regulation, in limited ways, before the January 1st implementation date.

The Ministry firstly announced that, in certain circumstances, it would exempt certain "low risk" sites from the Regulation's reuse planning requirements (i.e., where the project area is or was most recently used for a residential, parkland, institutional or "agricultural or other" uses, all as defined in Regulation *153/04* Records of Site Conditions). The Ministry also advised that it intended to increase the size limitation on soil stockpiles from 2,500 to 10,000 cubic metres, to provide flexibility if a project area has limited space for storage.

The proposed changes are subject to the results of a consultation process scheduled to end on December 3, 2022, during which time stakeholders were invited to share their thoughts on the proposal. Although, in the announcement, the Ministry advised that "opportunities may be taken to clarify in the regulation

the triggers for the reuse planning requirements and to clarify the scope of remediation projects subject to these requirements”, it also made it clear that the “need for transition provisions” and “other regulatory amendments” will be considered if (and only if) they “clarify, but do not substantively change” the Regulation. This, we suggest, is important.

We suggest that a number of points can be taken away from the announcement.

First, while many stakeholders had hoped or believed that the sheer scope of the testing requirements for excess soils would be reduced, it does not appear that this will occur. The Ministry has made it clear that (other than in relation to so-called “low-risk” sites), there is no plan to reduce the testing requirements.

Second, and nonetheless, it may be unwise to assume that a further pause to some or all of the requirements will be forthcoming. The notice, reporting and record keeping requirements are the ‘meat’ of the Regulation, and their implementation date has already been extended twice.

Third, the contractual allocation of responsibility and risk needs to be considered. The lion’s share of responsibility under the Regulation lies with the “Project Leader(s)”, who are responsible (where applicable) to file a notice in the excess soil registry, retain qualified person(s) to provide and report on assessment and testing and implement a tracking system to ensure that excess soils are disposed of for a beneficial use as required. Significantly, however, the responsibilities can be assigned to others under contracts or subcontracts. Accordingly, risk allocation of who-is-responsible-to-do-what should be detailed and accounted for, at the planning stages, in drafting contracts and subcontracts, in estimating and in execution. A failure to do so can have significant consequences.

Fourth, those responsible for or involved in the movement of excess soils will accordingly need to revisit the Regulation to ensure they are familiar with its requirements and ready to implement them as, and when, required. The requirements will have a significant impact on the timing and cost of construction projects, such that a failure to accommodate for them will make it difficult to bring projects in on time and on budget. Pre-planning for project development and contract execution will be critical in this regard.

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We will be offering seminars in relation to all of the above through a number of Ontario Construction Associations in the coming weeks. For more information, please contact inquiries@kennaley.ca.

**Rob Kennaley,
Kennaley Construction Law**