

November 18, 2016

Ministry of Natural Resources and Forestry
Policy Division, Natural Resources Conservation Policy Branch
Resource Development Section
300 Water Street
Peterborough, Ontario
K9J 8M5

Attention: Hal Leadlay
Coordinator

Dear Mr. Leadlay:

Re: Comments on Bill 39 – The Aggregate Resource and Mining Modernization Act, 2016

The Ontario Stone, Sand & Gravel Association (OSSGA) is pleased to provide comments on Bill 39 which proposes changes to the *Aggregate Resources Act* (ARA). OSSGA has been very involved with the review of the ARA since it was announced in 2011. Our involvement has included providing a tour of pits and quarries for the Standing Committee on General Government, presentations to the Standing Committee, attendance at stakeholder meetings, and providing comments on *A Blueprint for Change* released in October 2015. After much review and discussion, OSSGA is pleased to see the process moving forward and the Bill tabled at the legislature.

OSSGA is a not-for-profit association representing over 280 sand, gravel and stone producers and suppliers of products and services that serve the industry. Collectively, our members supply the majority of the 164 million tonnes of aggregate used, on average, each year in the Province to build and maintain Ontario's infrastructure needs. OSSGA works in partnership with governments, agencies and members of the public to promote a safe and competitive aggregate industry, contributing to the creation of strong communities in the Province.

Bill 39 is "enabling" legislation that will provide new powers to the Minister, with the details of those new powers to be addressed through regulation, standards and policies to be developed at a later date. Given this phased approach, the crucial business at hand is to ensure that the legislation includes language, and enough detail to forestall any unintended consequences in the future.

After extensive review, OSSGA has identified **three areas of primary concern** with respect to the proposed legislation. This letter will first address those issues and our recommended solutions. The balance of the document will provide OSSGA's overall comments and analysis on the proposed amendments using the framework of the four key goals set out in *A Blueprint for Change*.

Primary areas of concern requiring amendments to proposed legislation

1. Minister to direct existing sites to conduct studies and submit reports

Section 62.4 of the legislation speaks to improved control of sites by allowing the Minister to direct existing sites to conduct studies and submit reports (limited to what is required for new applications).

It is critically important to the industry that Bill 39 protect existing resources and the ability for aggregate producers to continue with their business with certainty. The legislation must clearly protect the viability of the existing reserves.

Bill 39 introduces the ability for the Minister to request that studies be carried out at existing licences, which OSSGA continues to strongly oppose. The greatest concern OSSGA has regarding this new provision is the potential for approved licenced areas to be reduced, resulting in valuable, previously approved aggregate resources being 'sterilized'. This would have considerable implications on asset valuations and the ability for producers to retain investor confidence.

OSSGA recognizes that over the course of time the natural environment on a non-operational licensed site can change. For example, new woodlots grow, or in rare instances, a new wetland may even form. **Allowing MNR to require studies of existing licensees over time as land use and natural features change is actually a disincentive to maintaining licenced reserves in their natural state and minimizing disturbed area.**

In the space of a decade it is not uncommon for land adjacent to a non-operating licence to be transformed from natural or agricultural land to developed residential or industrial land uses. When the producer is ready to begin extraction in a previously non-operating area of a licence, it is sometimes surprising to local residents and/or other stakeholders that the site is licensed. Public groups can form to exert pressure on all levels of government to reconsider the licence, largely because of the perception that these sites were licensed long ago and the appropriate environmental rigour was not in place at the time the licence was issued.

The reality is that before a producer can begin operations in these situations, up-to-date permits and approvals must be secured. It continues to be OSSGA's position that there are adequate and appropriate safeguards already in place to properly manage sites with older approvals. Environmental permits (ECAs and PTTWs) are required to be updated. Endangered species are protected, regardless of the status of the licence. Furthermore, the MNR already has the authority to amend Site Plans through a process that provides a reasonable degree of protection for licensees.

For natural environment concerns, no new licensee studies should be required. This is an area of planning where the rules of the game are constantly changing and the list of protected features has evolved rapidly over time. These planning policies are not to be applied retroactively; if they were, many forms of approved development could be rolled back and it would be quite reasonable to expect some form of compensation to be warranted.

If, to use the example above, a public group were to push for a study that ultimately found that a woodlot located on an existing licence should become protected, this would open up a Pandora's box of problems. How could a producer ever be expected to appropriately value the reserves on its property? Imagine the implications for a public company that cannot substantiate the value of its asset base. The time and expense that producers invest in the licencing process must afford them certainty in their ability to extract those future resources.

Producers recognize and understand that there are sometimes practical issues that must be resolved when a new area of a site becomes operational. For example, with respect to traffic, there is a reasonable expectation that road authorities are building and maintaining road networks to accommodate movement of goods and services from approved land uses. However, if that has not been done, then municipal governments and producers often work together cooperatively to achieve haul routes that can safely accommodate truck traffic. There is no need for new studies to be required by the provincial government after the licence has been issued.

That leaves water. It is conceivable that there are old licences where lack of hydrogeological study coupled with the current understanding of potential for impact could have undesirable environmental consequences. This would be limited to where water taking (dewatering) is required and there is already an MOECC PTTW requirement that fully addresses any such concern.

Recommendation 1: *Section 62.4 of Bill 39 be amended to remove the ability to require studies and reports to be submitted of existing licensees.*

Recommendation 2: *Should the ability for the Minister to require studies of existing licensees remain in Bill 39, revise the Bill to enshrine the protection of existing licenced reserves.*

Recommendation 3: *Section 62.4 (2) be strengthened to ensure that the Minister protect the resources by having the ability to request new studies only when there is a proven scientific basis for concern.*

2. Standardized annual tonnage limits

The new legislation proposes to control the amount of aggregate leaving the site in a year by including all aggregate and recycled aggregate in the annual tonnage limit. However, **we do not see Bill 39 adequately providing for the ability to recycle aggregate within licenced pits and quarries.**

OSSGA understands the potential for concern surrounding pits and quarries with increased truck activity due to recycling. OSSGA also supports better record keeping of recycling activities, and is a strong advocate for maximizing both the use of, and ability to, recycle aggregates.

As drafted, OSSGA is very concerned about the definition of *aggregate* under section 71.1. Specifically, we believe the inclusion under the definition of aggregate of “recycled aggregates” will discourage recycling. This would be contrary to the Provincial Policy Statement (PPS). We are also concerned that this new section will capture other materials leaving the site that have not previously been considered in the tonnage limit.

There are a number of issues that need to be addressed around this issue, either in legislation or regulation, and clarity on the MNRF’s intent is necessary before the industry could support such a significant change to annual tonnage limits.

- a) There is a potential for a significant problem with Class B pit and quarry operators that also recycle due to their low annual tonnage limit (i.e. 20,000 tonnes per year). Legislative changes would be needed to permit a tonnage increase to accommodate recycling, if the tonnage exceeds 20,000 tonnes per year. Consideration is needed to not unfairly restrict these operators.
- b) It is also important to note that an operator may not be operating close to its limit for a number of years, and then a new, large infrastructure project enters the area and their production suddenly increases. Should that operator be constrained for tonnage, they would likely stop accepting recycled product in favour of the more profitable virgin material counting towards their tonnage – again demonstrating how this interpretation of tonnage may discourage recycling.
- c) There is a significant unintended consequence to section 71.1. As drafted, section 71.1 will capture a significant amount of material not currently considered as tonnage.

Currently, operators only include “virgin” aggregate in their tonnage counts “leaving the site”. At some sites, there is significant material that is imported for blending to create additional products, or used as part of the material required in Asphalt and Concrete Plants. Operators do not currently consider this imported material as part of their annual tonnage “leaving the site”. If this tonnage is to now be included in the definition of aggregate “leaving the site” – there needs to be wide spread education, and ample time for operators to increase annual tonnage limits to fully reflect all current activities on site.

Another similar scenario deals with what the industry calls ‘feeder pits’. This is where pits or quarries are located in close proximity to one another. It is more efficient to ship from one site than multiple sites – so sometimes material is shipped from feeder sites to one main site. All material is then shipped to customers from the main site. In this scenario – the calculation of tonnage “leaving the site” for the main site has traditionally only included the aggregate extracted at that site.

- d) There are also significant administrative record keeping changes that will need to be implemented around tonnage:
 - i) What records need to be kept?
 - ii) What tonnage is reported to TOARC?
 - iii) What portion of aggregate “leaving the site” do you pay TOARC levies on?
 - iv) What is the total tonnage “leaving the site”?

How will operators be required to track importation, and how will MNRF and/or TOARC audit recycling and imported material?

A solution could be to not restrict the rights of existing licensees, by including recycled material in annual tonnage limits on a “go forward” basis (i.e. new licences only). We understand this would only require a change in the regulations, not legislation.

If not implemented on a “go forward” basis, existing licensees would need a reasonable amount of time to submit a tonnage application (e.g. one year) and the approval process should be customized to “grandfather” these applications (e.g. justification of the current haul route as opposed to a traffic study, timeline for response by Inspectors, etc.). The current Major Site Plan Amendment process is not appropriate for an operator to have to go through to maintain current activities, due to a change in legislation.

- Recommendation 4:** *The definition of aggregate in section 71.1 be amended to clearly state that it is the amount of aggregate extracted from the site that counts towards the tonnage limit.*
- Recommendation 5:** *Bill 39 be expanded to include a separate clause allowing for recycling to occur in all licenced pits and quarries.*
- Recommendation 6:** *If recycled material continues to be included in the tonnage, the wording to be amended to clearly state that it is aggregate ‘extracted from the site’ and recycled aggregates.*
- Recommendation 7:** *If recycled material is included, a “grandfathered” process must be developed in legislation and regulation to enable tonnage increase for existing licensees that is more streamlined than the current site plan amendment process.*

3. First Nations Consultation

Section 3.1 states that for greater certainty, the Minister will consider whether adequate consultation with Aboriginal communities has been carried out.

This provision within Bill 39 continues to be one of considerable concern for OSSGA. We understand that the Ministry has the obligation or “duty to consult”. We also support the applicant’s responsibility to consult with Aboriginal communities. What is unclear within Bill 39 is the terminology that the Minister “...will consider whether adequate consultation...” has been carried out.

This begs the question “What is adequate consultation?”

OSSGA's understanding is that this amendment is meant to rectify that the ARA legislation was silent on Aboriginal consultation. As a remedy, OSSGA recommends that the legislation simply underscore that the Province of Ontario will carry out its duty to consult with Aboriginal Communities (i.e. provide less detail than the phrase 'adequate consultation').

As to the how, it is recommended that the Government's expectations of third parties to carry out consultation on their behalf (as described on the Government of Ontario's website <https://www.ontario.ca/page/duty-consult-aboriginal-peoples-ontario>), be laid out in the regulations, parallel to the current notification and consultation.

Currently there is a timeline and list of requirements for consultation within the Provincial Standards. By adding First Nation consultation as a new legislative requirement the Ministry needs to expand the regulations to include details on timing and a list of requirements for First Nations consultations. It is critical that there be a timing component to any regulations so that applications are maintained as proponent driven and there is a way to complete the process. If MNRF feels further consultation is required, it is then the Ministry's requirement to undertake further First Nations consultation.

Recommendation 8: *Delete "adequate" in Bill 39 when referring to Aboriginal consultation.*

Recommendation 9: *Develop clear regulations that detail timing, minimum requirements, and the fact that consultation does not equal acceptance.*

Recommendation 10: *There must be a provision in Bill 39 whereby the Minister is required to make a decision regarding forwarding an application to the OMB or issuing a licence, within a specific timeframe.*

OSSGA Analysis and Recommendations on other proposed amendments

Bill 39's proposed amendments to the ARA are the legislative changes required to modernize and strengthen the management of aggregate resources in four key areas as set out in *A Blueprint for Change*. In addition to the concerns outlined above, the balance of this document will provide comment and proposed recommendations in line with MNRF's four stated goals:

1. Stronger Oversight
2. Environmental Accountability
3. Improved Information and Participation; and
4. Increased and Equalized Fees and Royalties

Stronger Oversight

New Tools to Deal with Non-Commercial and Low Risk Activities

OSSGA has previously identified the need to allow extraction of a Road Allowance between two licenced properties, without the need for the Road Allowance to be licenced. We understand that

the “Rules in Regulation” would allow this activity to occur, as long as it is provided for in the regulations.

Recommendation 11: *Although not proposed in A Blueprint for Change, include this ability in the regulations.*

Strengthening Enforcement and Offence Provisions

Currently there is no clarity around the interpretation of what constitutes “when an offence is occurring”. For example, if extraction of a setback occurs on day 1 and 2, and there is no further extraction in the setback for 10 days, is the occurrence for 2 days because it only occurred for 2 days, or is it 12 days? Legislative or Regulatory clarification is needed.

Although we support the use of tickets for minor offenses, these tickets should only be issued by Aggregate Inspectors and not by Conservation Officers, due to their knowledge of the sites and applicable legislative framework.

Recommendation 12: *Define the term “when an offence is occurring”.*

Recommendation 13: *Ensure that tickets are only issued by Aggregate Inspectors.*

Create the Ability to Require Peer Review of Technical Studies in the Future

OSSGA continues to support the appropriate funding of the Aggregate Program within MNRF so that the necessary experts are available to review applications and ensure the public interest is properly upheld. However, if this legislative change is to remain in Bill 39, the legislation and regulations must state that only the MNRF has the ability to make this request for external Peer Review where needed.

OSSGA has been advised this situation may only apply when MNRF does not have the expertise to undertake a review of a technical document (e.g. Geotechnical Report), and would like to see this stipulation in legislation.

Also, duplication should not be allowed. For instance, if a Geotechnical Report is being peer reviewed through the municipal planning approval process, the MNRF should not be able to require a second peer review of the same Report. This should also be clarified in legislation.

Controls will have to be set in regulations to ensure an appropriate process to establish Terms of Reference, cost controls, and an appeal mechanism. OSSGA would be pleased to work with MNRF to establish appropriate guidelines.

Recommendation 14: *Should the ARA program not be sufficiently funded to hire the necessary staff, establish in legislation that only MNRF can request external peer reviews.*

Recommendation 15: *Revise Bill 39 to require that peer review can only occur in situations where MNRF does not have adequate expertise and cannot duplicate other peer reviews.*

Recommendation 16: *Regulations will have to establish an appropriate process to develop Terms of Reference, cost controls and an appeal mechanism.*

Create Flexibility for Setting Frequency and Format of Industry Self-Compliance Reporting

OSSGA continues to support annual Compliance Reporting at a minimum. Our concern is based on maintaining accountability to the public and the local municipalities. However, it is appropriate to develop alternate reporting formats for sites that are dormant or have not been disturbed, with no onsite activity.

Recommendation 17: *Revise Bill 39 to require annual Compliance Reporting as a minimum.*

Enhanced Environmental Accountability

Flexibility to Require Customized Plans to Establish Study and/or Consultation Requirements for Unique Applications

It is understood that the details of the Customized Plans will be in the regulations. It is essential that the regulations maintain the same “proponent driven” aspect that currently is provided for all licence and permit applications.

Recommendation 18: *Bill 39 should be amended to set out circumstances that would warrant this special consideration (e.g. tonnage).*

Recommendation 19: *Regulations must enable Customized Plans and notification/consultation to be proponent driven.*

Improved Information and Participation

Standardizing Provisions for Amending Site Plans and Approval Conditions

OSSGA understands that this section enables changes to the regulations for Site Plan Amendments for all permits and licences. We support the idea of self-filing site plan amendment for minor administrative issues (e.g. stockpile relocation). The list in the regulations needs to be clear and thorough and should apply to applications internal to the site, with no impacts externally. The examples provided in *A Blueprint for Change* are good, however, there is a much longer list that needs to be developed in regulation.

One of the biggest problems licensees experience with Site Plan Amendment requests is the length of time they take (e.g. most over one year, some over 5 years). We believe that timelines must be associated with site plan amendment applications in the regulations, similar to those required for licence application timelines. Without the commitment to meet review and comment deadlines, these applications sit in MNRF offices unattended, in many cases, for years. It is critical for operators to obtain timely approvals to deal with necessary amendments to keep their site operational. MNRF does not allow the Compliance Assessment Reporting (CAR) process to grant permission for Site Plan Amendments, yet they are not able to respond to amendment requests in a timely fashion.

Recommendation 20: *Develop in Regulation, a list of self-filing site plan amendments that are similar to the current minor amendments.*

Updated and Equalized Fees and Royalties

Establishing current fees in regulations (these fees are currently set by the Minister and communicated in policy)

OSSGA is supportive of moving fees into regulations. As the Regulations are developed, new fees must be calculated to adequately support the MNRF program proposed by Bill 39. Correspondingly, this will address the joint request by The Top Aggregate Producing Municipalities of Ontario (TAPMO) and OSSGA, to increase fees to adequately support the Industry, municipalities, and the Province.

TAPMO and OSSGA created the Joint TAPMO/OSSGA Committee with the objective of working together to present a mutually agreed upon solution regarding fees to the MNRF. In various consultations with MRNF, the Committee has been very clear that increased fees are supported, provided that all of the following seven principles are met:

1. Licence fees are charged on all products produced in Ontario;
2. Money to regions and municipalities is used for infrastructure only;
3. Exports out of province and imports into province are addressed;
4. Discrepancies between the *Mining Act* the ARA are resolved;
5. More funding for the Management of Abandoned Aggregate Properties Program (MAAP) program in TOARC is provided;
6. The increased fee results in increased enforcement, staffing and results from the Ontario government; and
7. The fee is no longer directed to general revenues of the Provincial Government.

OSSGA stands behind the work of this group, including its recommendation for a Delegated Administrative Authority (DAA) model to address a number of concerns of industry in addition to the licence fee (increased enforcement, etc.).

OSSGA is supportive in indexing fees and royalties to the Consumer Price Index, as outlined in *A Blueprint for Change*, but recommends a one-year lag to accommodate financial planning and pricing requirements.

Recommendation 21: *Create a Delegated Administrative Authority for the management of the ARA.*

Recommendation 22: *Provide in legislation a one year lag regarding indexing fees and royalties to the Consumer Price Index.*

Other Changes

Allow the Minister to Specify When the Ministry Will Require Official Party Status at an Ontario Municipal Board Hearing

The actual rewording of the legislation is confusing in that the term “party” is introduced. Experience has shown that once at the OMB, objectors have an opportunity to fall under “party” or participant” status. Bringing the term “party” into legislation raises questions as to the participant role and the legislative role for this status. Further clarification is required before we can comment further.

OSSGA is also concerned that Bill 39 deviates from current MNRF policy and proposes that staff not attend, unless as an “objector” having party status. With increased project funding, MNRF should be attending prehearings or hearings, in order to introduce themselves as a friend to the Board, testify as to the legislation, regulations and policy, and overseeing any changes to Site Plans to ensure “enforceability”.

Recommendation 23: *Clarify the term “party” in Bill 39.*

Recommendation 24: *Delete the section of Bill 39 that enables MNRF to not attend OMB Hearings.*

Allow the OMB to Send Referrals Back to MNRF Where Objections Have Been Resolved Before a Hearing Starts

OSSGA supports this change and wants to ensure that it applies to objections being resolved by a mediation process as well.

Recommendation 25: *Add “mediation” to this section of Bill 39.*

Key Changes that would be Effective if/when the Bill is Passed: Royalty Payments for New Sites with a Mining Lease

It appears through discussions with our Members that there are still extenuating circumstances on licences/permits in the north where the transition would not in fact “level the playing field”. These are site specific, and we would want to ensure there is enough flexibility in the legislation to achieve the goals for equal payment throughout the Province.

Recommendation 26: *Ensure flexibility is in Bill 39 to deal with all situations.*

Transition Period

It is critical that the transition from the current ARA framework (regulations and policy) to the revised ARA framework provide sufficient time to allow producers to accommodate the change. This fundamentally applies to fees and setting contracts, but also for new requirements that need to be grandfathered.

Recommendation 27: *Further discussion with OSSGA is requested to ensure that the transitional time period is adequate.*

Recommendation 28: *Legislation and/or regulations must ensure that applications underway would not be captured under Bill 39 – they need to be grandfathered.*

Conclusion

OSSGA appreciates the opportunity to be engaged with the ongoing consultation of the proposed legislation and is most interested in participating in the development and review of the regulations and policies. In this regard, OSSGA respectfully requests that the portions of Bill 39 that pertain to the former *Aggregate Resources Act* not be proclaimed until the regulations have been passed.

We remain available for further dialogue that will constructively contribute to the ongoing improvement of aggregate resource management in Ontario.

Yours truly,

ONTARIO STONE, SAND AND GRAVEL ASSOCIATION

Norman Cheesman
Executive Director

c.c.