ONTARIO STONE, SAND
& GRAVEL ASSOCIATION

Essential materials for building a strong Ontario

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Re: OSSGA comments on Excess Soil Management Regulatory Proposal

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The Ontario Stone, Sand & Gravel Association (OSSGA) appreciates the opportunity to comment on the Ministry of the Environment and Climate Change's (MOECC) Proposed Excess Soil Regulatory Package (EBR Registry No. 013-0299). OSSGA strongly supports sustainable excess soil management and believes that the new excess soil management regulatory proposal is generally in line with OSSGA's vision of environmentally responsible resource use. OSSGA is particularly interested in soil quality stewardship since many rehabilitation plans mandated through the *Aggregate Resources Act* (ARA) are dependent on the receipt of "clean" fill. However, in the following sections we provide comments and recommendations to improve the proposed regulations as they pertain to the aggregate industry.

Proposed Excess Soil Regulation

OSSGA strongly supports the introduction of excess soil regulation that places emphasis on the responsibility of source site owners. OSSGA members can be greatly disadvantaged in effectively determining the soil quality product that is being received at facilities despite the best intentions to screen materials. This can occur because there is a practical limit to the "best management practices (BMPs)" that can be employed in fill shipment screening.

Excess Soil and the Waste Designation

OSSGA is pleased to see a clearer definition of excess soil (one that exempts stone, sand and gravel) and agrees that under the proposed regulations, the clarification that excess soil is no longer a component of "inert fill" will ensure better management of excess soil. However, in addition to aggregate material being exempt, it must be explicit that recycled content also being used in the aggregate industry as approved by the Ministry of Natural Resources and Forestry (MNRF) should also be exempt since it is being re-used in aggregate products.

Additionally, in light of the proposed new regulations and the reference to the use of licenced ARA facilities as receiving sites, it would seem necessary that other administrative changes will need to be considered. Under Aggregate Policy 6.00.03 – Importation of Inert Fill for the Purpose of Rehabilitation, inert fill as defined in O.Reg 347/90 has been expanded to include the chemical standards presented in Table 1 (background) of Soil, Ground Water and Sediment Standards for Use Under Part XV.1 of the *Environmental Protection Act*. OSSGA encourages the MOECC to consult with the MNRF to adapt the new excess soil definition (and subsequently, excess soil site-specific reuse standards) for rehabilitation standards under the ARA.

Excess soil that is not part of an infrastructure project ceases to become designated as waste if it is deposited at a receiving site (not governed by a site-specific instrument or by-law), and will be used as backfill or grading, and is stored for no more than 90 days. This time frame should be significantly lengthened, if it is to be applied equally for site-specific instruments. Depending on the project, soil is often required to be stored for much longer time frames and should not be designated as waste after only three months of storage.

Additionally, once excess soil is received at a receiving site, the "waste" designation should immediately cease to apply. There should be no conditions or uncertainty about the steps that would be required for the receiving site to have this designation lifted.

Excess Soil Management Plan (ESMP) Requirement

OSSGA is pleased to see that soil or rock removed from an MNRF licensed pit or quarry is exempt from the definition of excess soil and therefore is exempt from the requirement to prepare an ESMP as these aggregate operations are providing a product and not excess soil.

Under the proposed regulations, there is no indemnity for the receiving site. OSSGA continues to be concerned with the transfer of potentially contaminated excess soil. The responsibility of the receiving site is unclear. For example, if the source site fails to report/update key information (such as the tracking system and hauling records) and soils of unacceptable quality are placed at the receiving site, does assessment/removal of those soils fall under the responsibility of the source site or both source/receiving sites?

Although the onus is on source sites to prepare the ESMP, aggregate operations may still audit the information provided to them to confirm acceptability. This will likely entail the receiving site retaining a Qualified Person (QP) to conduct further sampling and analysis to confirm incoming material is acceptable and in agreement with the source site's ESMP, as has been suggested in the former BMP's.

The proposed regulation outlines the criteria for an ESMP as 1,000 m^3 or more of excess soil or any volume of excess soil removed from an area with a Potentially Contaminating Activity (PCA). Aggregate sites with approval under the ARA routinely import excess soil

from many smaller projects (less than 1,000 m^3) and as receivers, require assurance that the imported material will not pose a threat to the environment or human health. In our opinion, excess soil from smaller source sites should still be managed and characterized in accordance with the regulation. Additionally, source sites generating a small volume of soil should still be required to document and demonstrate that the excess soil generated is not within or near a PCA and is compatible with the receiving site. OSSGA as a receiver sees no difference in proposed minimum standards of care whether the material is received from one or 1,000 source sites. As a receiver, the MNRF will mandate the same environmental diligence regardless of the size of the source site.

As reiterated in OSSGA's comments on the proposed framework, we believe that the MOECC should develop guidance for smaller, lower risk source sites. This could include the development of testing protocols (with reference to sampling quantity/frequency and a minimum parameter list for analysis) for smaller source sites that are pragmatic and cost effective, while still providing assurance to receiving sites.

The MOECC should also ensure that updating the ESMP (i.e. in the scenario of a change in the excess soil receiving site location) is not a rigid process. Conditions frequently change due to changes in construction schedules and the ESMP should be a flexible, living document, easily allowing for modifications if required.

Exemptions

According to the proposed regulations, excess soil generated during regular maintenance and repair of infrastructure is exempt from the need for an ESMP as these are routine processes and typically generate smaller volumes of soil. "Regular maintenance and repair of infrastructure" should be better defined and assessed on a project specific basis. There may be situations (e.g. large scale MTO highway repair work) that would generate large volumes of soil and should require the development of an ESMP.

The movement of excess soil between infrastructure projects of the same proponent is also proposed to be exempt; however, some of these exempt projects will be required to register on the on-line environmental site registry. Although these sites may be exempt, they will still need to be in line with the site approvals (which would stipulate acceptable soil quality) required for aggregate operation. This would likely require that sampling be undertaken by a source or receiving site. This sampling should also be required to confirm that potentially contaminated soil is not inadvertently transferred between sites.

Building Restrictions and Applicable Law under the Building Code

Under the proposed regulations, no building permit would be approved unless the applicant has registered their ESMP or there is written confirmation from a QP that less than 1000 m^3 of excess soil is to be generated.

OSSGA is concerned about the requirement to identify excess soil receiving site locations in an ESMP, which must be registered prior to the commencement of operations. There should be flexibility to indicate in the ESMP that a receiving site will be identified prior to commencement of excavation. The regulation does not address the potential reality that there could be more source sites than available receiving sites.

There should be no possibility to prohibit development due to the lack of local / viable receiving sites. This limitation could result in preventing municipalities from issuing building permits because no available receiving site can be determined. Additionally, municipalities could succumb to public pressure and entice builders to select receiving sites far away from source sites to obtain their approved building permit. The use of receiving sites close to source sites should be encouraged to reduce truck traffic and greenhouse gas emissions.

Temporary Excess Soil Storage Sites

We are in agreement with the two-year maximum time frame for storage of excess soil at a temporary storage site, although there was little specificity on how this is to be enforced. OSSGA would note that a significant quantity of material could be received at a registered Temporary Excess Soil Storage Site (TESSS) over a two-year window and thus what safeguards are to be proposed by the MOECC to prevent default ownership of such receiving sites beyond the two-year operational time frame.

It must be clear that the Sampling and Analysis Plan includes measures to ensure that soil stored at a TESSS is appropriately characterized throughout the time it is stored. This should include spot auditing. The proposed regulation states that the QP must ensure that there are quality control and quality assurance procedures in place to ensure the tracking system is being implemented. QPs should also be responsible for ensuring (through sampling and analysis) that excess soil remains segregated and properly managed to prevent contamination and any adverse impacts while in storage. Although the owner of the TESSS is required to meet certain requirements, in order to minimize the risk from temporary storage of material for receivers, it is imperative that the liability for soil at the temporary site fall to the source site.

Close to market aggregate sites could be utilized as both TESSSs and receiving sites. Generally aggregate sites are close to market and have the ability to incorporate back hauling which increases efficiency, reduces truck traffic, and helps to mitigate climate change. However, authorizing authority over the TESSS application process between the MOECC and MNRF will need to be determined.

Definition of Qualified Person (QP)

It is OSSGA's opinion that the definition of "qualified person" may be too general. The current requirement of a QP is to be a certified professional engineer or professional geoscientist. OSSGA would support a situation where qualifications of the QP are strengthened to include specific training requirements relevant to excess soil. This would help to avoid the myriad of issues that have occurred with excess soil management up

until this point in time. As there is no approval process in place for ESMPs, it is imperative that the responsible QP has the specific qualifications and expertise necessary to certify the plan. Another option could be special designation within APGO/PEO for qualified practitioners as has been advocated in other inspection disciplines (i.e. Algo Mall Inquiry). Regardless, QPs should have significantly increased liability insurance to protect the receiving site from potential risk incurred from any potential errors.

Excess Soil Characterization

Excess soil characterizations are proceeded by a Phase One or Phase Two Environmental Site Assessment (ESA). Often Phase One or Phase Two ESAs are out of date and additional sampling is required to support the excess soil characterization (which is often carried out by the receiving site). The onus should be on the source site to ensure their ESA is up-to-date and accurate. This could be accomplished by requiring a QP to update older ESA reports or by establishing a shelf life for ESA reports prepared for the source site.

Similarly, OSSGA proposes a stale date on the Excess Soil Characterization Report to ensure that the analytical results for excess soil arriving at a receiving site are relatively current. We suggest that the timing be consistent with Ontario Reg 153/04 (which requires that the ESA report be completed no later than 18 months before the submission of the Record of Site Condition (ROSC). However, even within this timeframe, the report will need to be reviewed to ensure that there has been no change to the quality of excess soil material or changes to the site that may impact the quality of material to be received.

Another significant concern to receiving sites is if/when standards change over time or if new standards are added. Will receiving sites be grandfathered in based on the standards at the time the soil was received? For example, if the permissible amount of TCE in soil drops from 1.6 µg/g to 0.2 µg/g at some point in the future, what ramification will this have for a TESSS or receiving site that accepted soil at a higher standard? Similarly, if an excess soil characterization was inaccurate and a contaminant of concern (not identified in the ESMP) was realized after the soil was received, who will be held responsible and what role/support will the MOECC provide in this situation? OSSGA advocates that receiving site participants need to be fully aware of the ramification of this legislation on future land use(s).

Excess Soil Reuse Standards

OSSGA continues to emphasize the need for greater flexibility for soil quality standards in the form of risk-based, site specific standards that allow for consideration of receiving site risk management options and regional soil characteristics. Therefore, OSSGA is encouraged by the development of a Site-Specific Beneficial Reuse Assessment Tool (SSBRAT) as an alternative option to using the generic excess soil reuse standards if it can be applied cost effectively.

Receiving sites with site specific instruments under the ARA are equipped to receive soil through their Fill Management plan, in accordance with MOECC Best Management Practices. As a result, there are a number of existing controls in place at aggregate operations to assess and mitigate risk, justifying the application of a site-specific standard instead of the generic excess soil reuse standard. OSSGA strongly encourages the MOECC to:

- work closely with the MNRF to determine appropriate standards for rehabilitation and not default to the background standards (Table 1) as has traditionally been the case. The use of the conservative standards (Table 1) limits the ability of aggregate operations to promote the beneficial re-use of soil and complete rehabilitation that is consistent with the surrounding landscape.
- support the development of specific standards for pits and quarries and encourages the MOECC to engage the MNRF and OSSGA on this proposed development.

ARA licences should be exempt from municipal requirements since ARA sites are adjudicated by the MNRF. Yet, it has been OSSGA's experience that municipalities continue to apply a conservative, risk-adverse approach to excess soil management, through the banning of imported soil. This practice will negate the intentions of this regulation to promote the beneficial reuse of soil and create a circular economy in Ontario. Additionally, the importation of excess soil has historically been restricted to the Table 1 (background) standards. There are also concerns about the variability in standards across municipalities – a science-based standard should be applied evenly across municipalities to ensure consistency.

Inert Fill Definition

We recognize that this is not within the scope of this proposed regulation but a regulatory framework for the management of inert fill (within similar reuse standards and sampling guidance) is needed. Further consultation with the MOECC and MNRF will be required to develop regulatory tools that properly address the beneficial use and re-use of aggregate products. However, OSSGA is cognizant that the continued demand for recycled content in our aggregate products challenges the interpretation for some interest groups.

The new definitions of "inert fill" and "soil" need to avoid development conflicts with new products, including the use of "fines" from crushing operations or like products in the aggregate industry. These products, although soil 'like', should be exempt from all excess soil and waste regulations.

Conclusion

We are pleased that the new excess soil regulations are a step in the right direction; however, OSSGA has identified a few important ways that these regulations can be strengthened to provide greater assurances to the receiving site, encourage better rehabilitation of pits and quarries, and utilize aggregate sites as receiving sites and temporary excess soil storage sites.

Thank you again for the consideration of our comments. Should you have any questions or concerns, please do not hesitate to contact Ashlee Zelek, Manager of Environment and Education at 647-727-8778.

Sincerely,

Norm Cheesman,
Executive Director
Ontario Stone, Sand & Gravel Association