

February 18, 2013

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Ministry of the Environment
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Re: Conservation Ontario's Comments on Soil Management – A Guide for Best Management Practices (EBR #011-7523)

Thank you for the opportunity to provide comment on the Ministry of the Environment's (MOE) "Soil Management – A Guide for Best Management Practices" and for taking the time to meet with Conservation Ontario staff on January 23rd. These comments are submitted for your consideration in addition to the comments submitted by Conservation Ontario on a previous draft of this document, addressed to Kathleen Anderson on June 28, 2012. The comments provided in this letter will provide a general overview of the Conservation Authority (CA) perspective on fill management and then focus specifically on the CA mandate in relation to the best management practices identified within this document.

General Comments

Need for a Provincial Fill Strategy

Consistent with what the Ministry has heard from other sectors, such as the Ontario Waste Management Association and the Association of Municipalities Ontario, there is a need for an overall strategy for the management of excess soil in the province which promotes the integration of soils management with other aspects of the planning process. While Conservation Ontario recognizes this document as an important first step, this document does not eliminate the need for a provincial fill strategy to integrate the full life-cycle of fill, including into the planning process. Conservation Ontario encourages the MOE to continue working with other Ministries, Municipalities, Conservation Authorities, other regulatory and land use approval authorities and industry to develop a provincial fill strategy which encourages the integration of soils management with other aspects of the planning process.

Compliance with a Best Management Practices Document

This document represents a commendable first step by MOE staff to address large-scale fill issues at an operational level. As a BMP document there are inherent limitations with its application, as there is no trigger for its adoption. It is understood that typically there is no legislated ability to require fill management plans for excess fill. The reliance on voluntary adoption may put "good players" at a disadvantage when quoting for a job, which is a concern for all involved in review of these applications. This document should clearly state that it is setting the expectations for compliance and perhaps delve into some of the legal mechanisms MOE has available to them should there be any major infractions associated with improper soil management.

Fill Quality

Under the *Conservation Authorities Act* the control of pollution test has traditionally been tied to sedimentation associated with development. Based on this BMP document, it appears that MOE may want CAs to take a stronger role in managing fill quality associated with their permits. As indicated in Conservation Ontario's June 28, 2012 letter, while CAs understand the role of the Qualified Professional, in order to review applications, CAs need clear direction and standards of what is acceptable soil quality. The MOE tables have been used as a proxy in lieu of Provincial direction on this subject however this BMP document is clear that these tables may not be appropriate for use in review. It is noted however that if MOE's "adverse effect" under the *Environmental Protection Act* did not apply to the site, it would be a challenge for CAs to say that the control of pollution was negatively affected via fill quality.

Comments Related to the CA Mandate in Relation to MOE's BMP Document

Placement of Fill in Conservation Authority Regulated Areas

Conservation Authorities are empowered to regulate development (including the placement of fill) and activities in or adjacent to river or stream valleys, Great Lakes and inland lakes shorelines, watercourses, hazardous lands and wetlands. Development taking place on these lands may require permission from the CA to confirm that the control of flooding, erosion, dynamic beaches, pollution or the conservation of land are not affected. CAs also regulate the straightening, changing, diverting or interfering in any way with the existing channel of a river, creek, stream, watercourse or for changing or interfering in any way with a wetland. These areas are regulated due to their hazardous characteristics and potential sensitivity to development. It is important to note that these sites may not be appropriate for the placement of fill.

When proposing to place fill in a CA regulated area, it is recommended that the Fill Management Plan should include a rationale as to why it is appropriate to do so. Therefore, it is recommended that the BMP document be amended to read "The Fill Management Plan should include a rationale for site location, including considerations related to future use of agricultural lands, source water protection areas, **natural hazard areas, surface water features, wetlands and their areas of hydrologic influence,** and groundwater recharge areas" (p. 5).

Consultation

The emphasis on public consultation within this document is supported by Conservation Authorities. In order to be clear in relation to the CA mandate, it is recommended that wording from the "Best Management Practices for Commercial Fill and Other Large Receiving Sites" be utilized, as it puts the emphasis on the owner of the site undertaking public consultation. As described in Conservation Ontario's June 28, 2012 letter, CAs have a scoped regulatory authority under Section 28 of the *Conservation Authorities Act* and must adhere to what is set out in the Act and accompanying regulations for their regulatory reviews. There is no ability under the *Conservation Authorities Act* to require public consultation, so the public's ability to participate in decision-making will be limited in CA regulated areas unless public consultation is undertaken by the proponent. It is therefore recommended that the Ministry's document be clear in the "General" section (p. 4) of the document, that public consultation be undertaken by the owner/proponent of the site.

As presumably Municipalities and Conservation Authorities will be the lead agencies in issuing approvals for soil management activities, pre-consultation with Municipalities and CAs should also be emphasized within this document. For example, it is recommended that a paragraph on pre-consultation be added to the "Best Management Practices for Commercial Fill and Other Large Receiving Sites" section. While it

is acknowledged that the document recommends that Fill Management Plans should include “copies of applicable permits/zoning Municipalities, Conservation Authorities, and Provincial Ministries where applicable)” (*sic*) the reference to pre-consultation should be made more explicit. It is also important to note that CAs have individual development policies which should be discussed in advance of making an application. This is especially important in situations where CAs have Board-approved policies that generally direct soil management activities outside of CA regulated areas.

Finally, as Section 142(8) of the *Municipal Act* states that site alteration by-laws cease to have effect in CA regulated areas, pre-consultation between Municipalities and Conservation Authorities in advance of approvals being issued should also be emphasized within this document.

Financial Assurances

The “Best Management Practices for Commercial Fill and Other Large Receiving Sites” recommends that “owners/operators may need to establish Financial Assurance, with the appropriate Municipality or Conservation Authority, against the site in advance of establishing operations to address any issues that may arise” (*sic*). It is recommended that the reference to CAs taking Financial Assurances be **removed** as CAs have limited regulatory ability to enforce conditions associated with the Financial Assurances outside of judicial processes. For example, Conservation Authorities have no ability to make orders under the *Conservation Authorities Act* or an ability to undertake remedial work on a property without a court order.

Soil Banks

Further to the comments related to CA regulatory authority above, The “Best Management Practices for Temporary Soil Banks” references that Conservation Authority approvals or permits may be required for soil bank sites. While it is appreciated that the BMP document references the need for CA approvals, it is recommended that soil banking activities generally be directed **outside** of CA regulated areas. These areas are regulated due to their hazardous characteristics and potential sensitivity to development and given CAs’ limited ability to have soil removed from a site once it is established it is likely that these sites are not appropriate for banking activities. Conservation Authorities could only issue permits for the placement of fill where they were satisfied that the control of flooding, erosion, dynamic beaches or pollution or the conservation of land is not affected by the development. If they were satisfied that those tests were met, then it would be difficult for a CA to later prove that the fill should be removed.

Conservation Authorities may consider allowing soil banking activities where another agency with the powers to ensure that fill is removed after a two or five year period (i.e. MOE) is involved in the approval.

Civil Construction

In recent years, a number of CAs have experienced an influx of large-scale fill sites within their watershed. These activities often stem from soil generated at brownfield developments and infrastructure projects within the Greater Toronto Area, as a result of intensification within existing urban areas. Through conversation with MOE staff, CO staff have learned that the intention is not to exempt civil construction activities from the Soil Management BMP, however, this is not clear within the document. It is recommended that the “Civil Construction and Other Development Activities” section be amended to make it clear that this exemption would apply only to small-scale development activities, as compared to the industry as a whole. Moreover, as small-scale is not defined in this BMP document, it should be clear throughout the document that the definition of “small-scale” is up to the regulator.

Once again, thank you for the opportunity to provide comment on MOE's "Soil Management – A Guide for Best Management Practices" and for meeting with Conservation Ontario staff to further discuss the document. Conservation Ontario is keenly interested in remaining engaged in the development and finalization of this BMP document and would be interested in participating in any future working groups that MOE assembles on this topic.

Should you have any questions about this letter, particularly as it relates to the CA mandate, please do not hesitate to contact Bonnie Fox, Manager, Policy and Planning at extension 223 or myself at extension 228.

Sincerely,

A handwritten signature in black ink that reads "Leslie Rich". The signature is written in a cursive, flowing style.

Leslie Rich
Policy and Planning Officer