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## Conservation Ontario Council Report

From: Leslie Rich, Policy and Planning Liaison & Nicholas Fischer, Policy and Planning Officer

Date: September 12, 2018

Subject: Conservation Ontario's Comments on the "Excess soil management regulatory proposal" (EBR #013-2774)

### Summary

On April 16, 2018 the Ministry of Environment and Climate Change (MOECC) put forth the "Excess Soil Management Regulatory Proposal" which includes draft regulations, as well as a document to be incorporated by reference into the main regulation. Conservation Ontario submitted a coordinated response to the Province on June 14, 2018 which focusses on identifying how CAs will operate within this new regulatory framework. An update to the CO Large-Scale Fill Discussion Paper/Guidance Materials will be required.

### Recommendation

***THAT the comments on the "Excess soil management regulatory proposal" (EBR#: 013-2774) submitted to the Ministry of Environment and Climate Change on June 14<sup>th</sup>, 2018 be endorsed.***

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### Background

In December of 2016, MOECC finalized an "Excess Soil Management Policy Framework" which included the proposal to develop a new excess soil reuse regulation. CO led a coordinated review of the framework and submitted comments which were endorsed by Council at the April 11<sup>th</sup>, 2016 Council meeting. On May 30<sup>th</sup>, 2017 the *Modernizing Ontario's Municipal Legislation Act, 2017* was passed, which resulted in overlap between municipal site alteration bylaws and CA regulated areas.

On April 24<sup>th</sup>, 2017 MOECC posted the plain-language "Excess soil management regulatory proposal" (EBR#: 013-0299) to the Environmental Registry. This proposal included a new excess soil reuse regulation, excess soil reuse standards and sampling guidance to support the proposed regulation. CO prepared comments to be submitted on the proposal, which were endorsed by Council at the June 26<sup>th</sup>, 2017 Council meeting.

Following a public consultation period, the current updated “Excess soil management regulatory proposal” (EBR#: 013-2774) which included proposed legislative drafting, as well as a document containing standards for reuse of excess soil at reuse sites to be incorporated by reference into the main regulation was posted on the Environmental Registry for public feedback on April 16, 2018. The Ministry indicated that key changes to the proposal included:

- A revised approach to waste designation, which designated excess soil as waste the moment it leaves a project area (unless reused in accordance with rules set out in the regulation);
- A beneficial reuse assessment tool (BRAT) which allows a qualified person to generate site specific standards at a reuse site in a streamlined way;
- A phased approach to implementing regulatory requirements to allow for education and training; and
- Reduced regulatory complexity for proponents.

### **Current Status**

Conservation Ontario developed the attached coordinated response in consultation with the members of the CO large-scale fill writing team (Barbara Veale (CH), Fred Natolochny (GRCA), and Chris Jones (CLOCA)). This response includes feedback from Grand River, Conservation Halton and Toronto and Region Conservation Authorities and source water protection comments that were provided by Chitra Gowda (CO). The comments have been divided into three recommendation categories: broadening considerations for the appropriateness of the receiving/reuse site; increasing compliance, accountability and transparency by clarifying access to the registry; and expanding the regulatory focus beyond contaminated sites so that other environmental effects associated with removal and reuse of excess soil may be addressed.

In addition to the recommendations on the regulatory proposal, CO’s comments outlined the envisioned role CAs will have under the new regime (as endorsed by Council at their June, 2017 meeting), and noted that CO will be drafting guidance for CAs in response to the changes to the *Municipal Act* and potential introduction of the excess soil management regulations. The comments have been circulated to all Conservation Authorities, including the General Managers/CAOs and their Section 28 regulations contacts.

### **Conclusion**

Given the change in government, no timeline has been identified for the release of the final excess soil management regulations. It is anticipated that CO will commence work on the development of guidance materials for CAs in response to changes to the *Municipal Act* and will await the potential introduction of regulations by the Ministry of Environment Conservation and Parks in the future.



June 14, 2018

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**Re: Conservation Ontario's Comments on the "Excess soil management regulatory proposal" (EBR #013-2774)**

Dear Ms. Blease:

Thank you for the opportunity to provide comments on the Ministry of Environment and Climate Change's (MOECC) "Excess Soil Management Regulatory Proposal". Conservation Ontario (CO) is the network of Ontario's 36 Conservation Authorities (CAs). In addition to the opportunity to provide these comments, Conservation Ontario is appreciative of MOECC including CA/CO staff members as part of the Excess Soil Engagement Group and Excess Soil Market Support Team.

#### **Local Implementation and the *Conservation Authorities Act***

Much of the proposal focuses on producing guidance materials for others to implement on an operational basis. This regulatory proposal, once finalized, in concert with the prior amendments to the *Municipal Act* which allow municipalities to apply their site alteration by-laws throughout their municipalities, represents a significant shift in how fill placement will be addressed locally. As endorsed by Conservation Ontario Council at their June, 2017 meeting, under this new regime, the CA role is envisioned to include the following:

1. Integration with Municipal Approvals - Municipalities would have the lead for decision-making locally with regard to the placement and quality of fill. CAs would request that municipalities coordinate CA approvals with municipal site alteration bylaws. This would include requiring pre-consultation locally; prior to the issuance of a municipal site-alteration permit to ensure coordination between the two approvals.
2. Interests of the CAs within their jurisdiction -CAs would be involved through their regulatory responsibilities/ policy interests – including S. 28 permissions, natural hazard management, natural heritage concerns (through their municipal MOUs or watershed plans) and the local implementation of the Provincial Plans and associated policies
3. Water/Groundwater/Source Protection Concerns- CA involvement may include concerns related to natural hazards, storm water, watershed plans and source protection concerns, where CAs have the lead for implementation.
4. CAs as excess soil recipients – based on Board direction, CAs may operate as excess soil receivers. In this case, CAs would set expectations around soil quality that meets or exceeds Provincial standards.

Under this new framework it makes the most sense that municipalities or the Province would have the lead for setting fill quality considerations, as their regulatory authority applies throughout their

jurisdiction (as compared to CAs who have limited regulatory jurisdiction). This will help to address concerns related to duplication of effort and a lack of regulatory clarity. While some CAs have included fill quality considerations in their S. 28 permissions in the past, the legislative mechanisms to do so were not always clear. Moreover, compliance powers under the *Conservation Authorities Act* were not designed for the purpose of large-scale fill regulation. It should be noted that with the amendments to the *Municipal Act* municipalities may currently be in a difficult regulatory position, as they have additional regulatory powers, potentially out-of-date site alteration by-laws and MOECC does not have their Excess Soil Management Regulatory Framework in place. Assistance with addressing excess soil issues in the interim by the Province will be essential until the necessary policy and legislative work is complete.

Conservation Ontario will be drafting guidance for Conservation Authorities in light of changes to the *Municipal Act* and the potential introduction of excess soil management regulations to describe a role for Conservation Authorities under this new regime, which could be adapted locally.

### **Relationship to the *Clean Water Act***

The proposed regulatory framework should place a greater emphasis on, and integration with, the Source Water Protection Plans established under the *Clean Water Act, 2006*. The *Clean Water Act* is a significant piece of provincial legislation that strongly aligns with one of the main goals of the proposed framework: the protection of human health and the environment. If fill is proposed to be imported to a site within a vulnerable area, a risk assessment must be conducted. This must include screening for vulnerable areas delineated under the *Clean Water Act*, an evaluation of risks of contamination and depletion of sources of municipal drinking water, keeping in mind the requirements of local Source Protection Plans. The proposed policy framework has identified the need for stringent standards to assess the fill; these standards must also ensure the protection of sources of drinking water. The exercise of matching the source site and reuse site should include source water protection considerations such that both water quality and water quantity (supply) is not impacted. The proposed framework should also assess the risk of fill being transport pathways, in order to avoid an increase in vulnerability of the municipal drinking water source.

### **Key Recommendations for Improvement to the Regulatory Proposal**

#### **1) *In addition to soil quality considerations, include considerations related to the appropriateness of the receiving/reuse site***

The “New proposed On-Site and Excess Soil Management Regulation” focuses almost exclusively on contaminated soils or soils which may cause contamination. There is little recognition that other environmental impacts could result from the placement of large quantities of fill. These impacts could affect: groundwater and surface water drainage; adjacent natural features (including hazardous lands and natural heritage features); and surrounding land use patterns. In order to address these impacts, it is recommended that the regulation be amended to include the following (bolded):

Under 7. Requirements re preparation, contents of plan [excess soil management plan]

(3) The plan shall set out the following in accordance with the Soil Rules:

- **Conformity with provincial planning policy, including the Provincial Policy Statement and any other provincial plan in effect.**

In addition, the “Rules for On-Site and Excess Soil Management” should be amended to include a broader definition of “environmentally sensitive areas” to be better aligned with existing provincial legislation, plans and policies. This would include reinstating groundwater discharge and recharge areas identified under the Provincial Policy Statement (PPS) and significant ground water recharge areas under the *Clean Water Act* as factors for determining environmental sensitivity. Certain designations within the *Niagara Escarpment Plan* and the *Oak Ridges Moraine Conservation Plan* areas are included in the definition, yet the *Growth Plan*, *Greenbelt Plan* and municipal natural heritage systems are not explicitly included. Areas affected by natural hazards (identified under the PPS and through the administration of S. 28 regulations made under the *Conservation Authorities Act*) are not included. Finally, while it is recognized that sites within 30 m of a water body have specific rules within the excess soil standards tables, it is recommended that water bodies and their adjacent areas be included as part of the definition of “environmentally sensitive areas”.

## **2) Compliance, Accountability and Transparency**

As noted at the outset of this letter, much of this proposal focuses on producing guidance materials for others to implement on an operational basis. In creating this implementation framework, MOECC should ensure that the local regulators are equipped for success. For example, the proposed regulation requires that some information from the Excess Soil Management Plan (ESMP) be filed in the registry, but does not provide for MOECC review of the completed plans. It is also unclear who has access to the registry and what information may be shared. Conservation Ontario recommends that when an approval authority is issuing a site specific instrument, as defined through this regulation, they should have full access to the information on the registry. Overall, access to the registry should be clarified. CAs, as regulators of development, should also have access to the information on the registry as necessary. It is recommended that more thought be given to which circumstances would warrant sharing of the information found within the registry for enforcement purposes.

Under the current proposal, there is no provision for the contents of the ESMP to be made available to approval authorities. This, in effect, means that the preparation and implementation of the ESMP will be self-governed. It is recommended that a random third-party auditing of the ESMPs included on the registry be undertaken to promote accountability and instill public confidence in this regulatory framework.

To improve compliance, accountability and transparency within this regulation, the following changes are recommended:

- That the Table found under 4(1) item #2 be amended to clearly state that the higher standard would apply.
- Section 7 (12) – the excess soil destination assessment and identification should also outline that part of the reuse site that requires additional permissions (e.g. municipal site alteration permit; CA permit) and include copies of the permissions.
- Section 12 (3) the “Notice of plan completion to be filed in the Registry” does not require the filing of information about the quality of the soil intended to be deposited at each reuse site. While it is recognized that this may change subject to construction constraints, the regulation should provide for additional information in the ESMP, including the quality of soil to be placed at each reuse site, to be made available to approval authorities and/or operators of reuse sites either via the Registry or upon request.

Furthermore, this notice should include a description of any site constraints for the receiving site(s) which would limit areas for soil re-use.

- 20(3) This section should be amended to clearly state that changes to a municipal address would require a new filing.

It is noted that monitoring and compliance issues contributed greatly to the genesis of this excess soil management regulatory framework. Having third-party oversight during the creation of and implementation of the ESMP is critical. Without compliance protocols, this proposed regulation amounts to guidance to be voluntarily implemented. In addition to increased field-level support from MOECC, it is suggested that a multi-agency enforcement and compliance partnership between MOECC, the Ministry of Natural Resources and Forestry, municipalities and conservation authorities be established under the leadership of MOECC, to outline compliance protocols and to collaborate on prosecution efforts where appropriate. Without a strategic partnership, municipalities or conservation authorities are left to handle non-compliance issues on their own with inadequate resources and legislation. The current lack of leadership from MOECC in this regard has led municipalities to increasingly turn to severe restrictions or outright prohibitions on fill placement in their jurisdictions. Unfortunately, this often results in more illegal dumping and excess soil being transported greater distances.

### ***3) Exemptions for Preparations of an excess soil management plan***

It is noted that 6 (5) of the proposed regulation exempts topsoil from the need to develop an excess soil management plan. While it is recognized that topsoil is often marketable and readily employed for a beneficial reuse, multi-hectare greenfield development sites have the potential to generate large quantities of excess soil that should be included in the regulation. Expanding the regulatory focus beyond contaminated sites would acknowledge that other environmental impacts could result from the placement of large quantities of fill as described in recommendation #1. This expansion of regulatory purview would warrant the requirement for excess soil management plans to be developed when greater than 2000m<sup>3</sup> of topsoil is to leave a source site.

Thank you for the opportunity to provide feedback on the proposed “Excess Soil Management Regulatory Proposal”. Conservation Ontario looks forward to continuing to work with the Ministry as they complete this regulatory proposal. Please contact me directly at extension 226 should you wish to discuss this further.

Sincerely,



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c.c. Conservation Authority CAOs

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