

Environmental Hot Topics: Excess Soil Movement and Liability Issues

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Agenda

- Review of soil
- Overview of O. Reg. 347
- Why excess soil is an issue
- Where can you take excess soil
- What needs to change?
- Remediation options - end products
- Movement of soil
- Best Management Practices
- Recent case
- Consultant concerns and liability
- Director and Officer liability

What is The Issue with Soil?

- When faced with any work involving the handling of soil, owners are forced to determine what category the soil falls into.
- Is the soil “clean”
- What does “clean” mean?
- Does “clean” mean different things in different contexts?
- What are the options for “clean” soil?
- What are the options for “dirty” soil?

Definition of “Soil”

- “soil” means, except for the purposes of shallow soil property as defined in section 43.1, unconsolidated naturally occurring mineral particles and other naturally occurring material resulting from the natural breakdown of rock or organic matter by physical, chemical or biological processes that are smaller than 2 millimetres in size or that pass the US #10 sieve.

Ontario Regulation 153/04 as amended

Definition of “Shallow Soil”

- O. Reg. 153/04 as amended s. 43.1
- “shallow soil property” means a property of which 1/3 or more of the area consists of soil equal to or less than 2 metres in depth beneath the soil surface, excluding any non-soil surface treatment such as asphalt, concrete or aggregate

Definition of “Shallow Soil”

- “soil” means, for the purposes of the definition of shallow soil property, unconsolidated naturally occurring mineral particles and other naturally occurring material resulting from the natural breakdown of rock or organic matter by physical, chemical or biological processes that are smaller than 2 millimetres in size or that pass the US #10 sieve, and includes a mixture of soil and rock if less than 50 per cent by mass of the mixture is rock.

O. Reg. 511/09, s. 21

Classification of Soil

- “soil type” means soil texture class as determined pursuant to Figure 3.16 and Chapter 3 of the Soil Survey Manual, United States Department of Agriculture, Natural Resources Conservation Service, published at its website.

<http://soils.usda.gov/technical/manual/contents/chapter3.html>

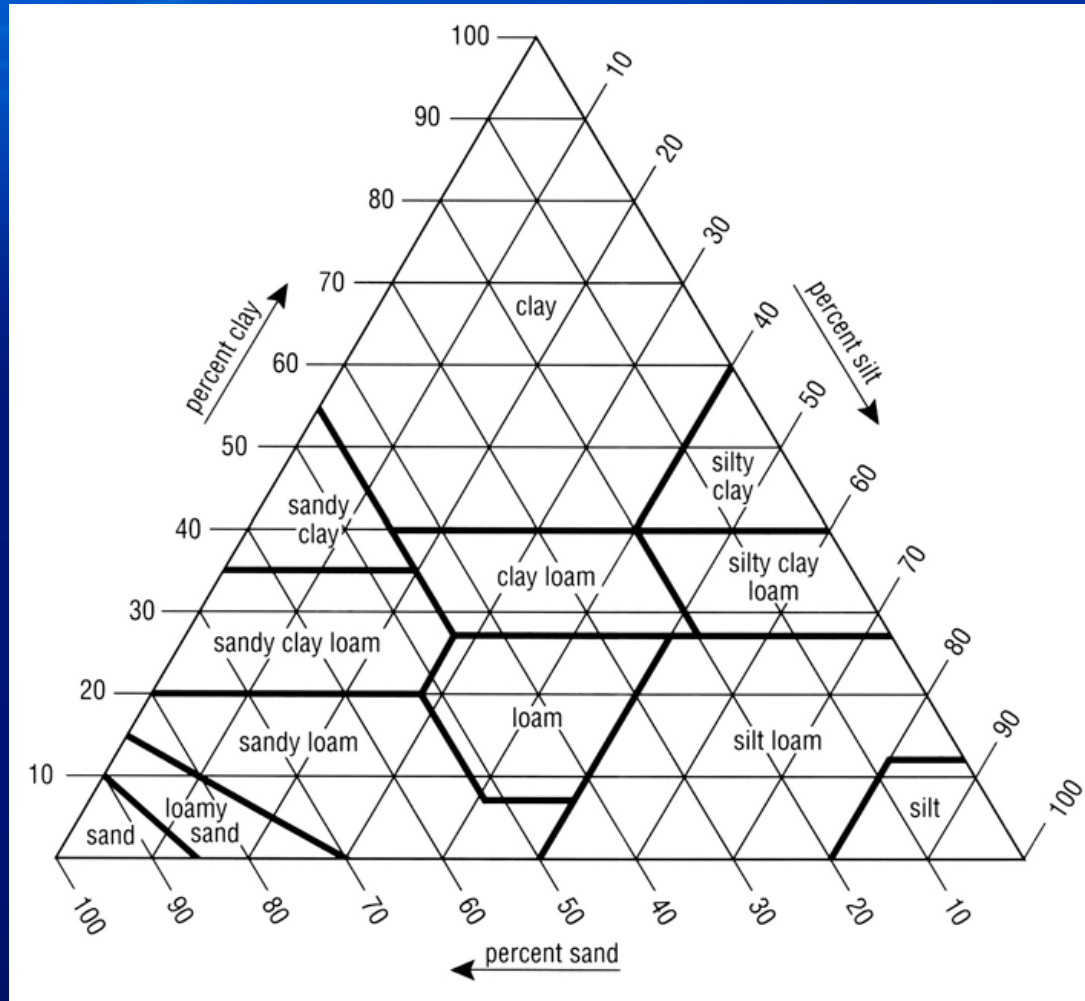


Fig. 3.16

Environmental Protection Act Definitions

- s. 25 “waste” includes ashes, garbage, refuse, domestic waste, industrial waste, or municipal refuse and such other materials as are designated in the regulations

Environmental Protection Act

Definitions

- s. 25 “waste disposal site” means,
 - (a) any land upon, into, in or through which, or building or structure in which, waste is deposited, disposed of, handled, stored, transferred, treated or processed, and
 - (b) any operation carried out or machinery or equipment used in connection with the depositing, disposal, handling, storage, transfer, treatment or processing referred to in clause (a)

Environmental Protection Act Definitions

- s. 25 “waste management system” means any facilities or equipment used in, and any operations carried out for, the management of waste including the collection, handling, transportation, storage, processing or disposal of waste, and may include one or more waste disposal sites.

Aggregate Resources Act

- “aggregate” means gravel, sand, clay, earth, shale, stone, limestone, dolostone, sandstone, marble, granite, rock or other prescribed material
- “earth” does not include topsoil and peat

Inert Fill Guidance

- Inert fill governed by O. Reg. 347 Waste Management of the *Environmental Protection Act* (EPA)
- Defined as “earth or rock fill or waste of a similar nature that contains no putrescible material or soluble or decomposable chemical substance”
- If results from a bulk analysis meet the criteria in Table 1 of the Ministry of the Environment’s (MOE) “Soil, Ground Water and Sediment Standards for Use under Part XV.1 of the *Environmental Protection Act*”, as amended, the material is considered as “inert fill”

Importation of Inert Fill for the Purpose of Rehabilitation, Lands & Waters Aggregate & Petroleum Resources April 14, 2008

O. Reg. 347 Definitions

- “soil mixture” includes a mixture of soil and liquids, sludges or solids, where,
 - (a) the mixture cannot be separated by simple mechanical removal processes; and
 - (b) based on visual inspection, the volume of the mixture is made up primarily of soil or other finely divided material that is similar to soil;

Waste Exemptions O. Reg. 347

- 3. (1) The following wastes are exempted from Part V of the Act and this Regulation:

1. Agricultural wastes.

...

5. Inert fill.

6. Rock fill or mill tailings from a mine.

7. Material set out in subsection (2).

Definition of Inert Fill O. Reg. 347

means earth or rock or waste of a similar nature that contains no putrescible materials or soluble or decomposable chemical substances

Exemption O. Reg. 347 (Jan 2013)

3 (2) The material referred to in paragraph 7 of subsection (1) is any of the following:

1. Municipal waste, hazardous waste or liquid industrial waste, if,

i. the waste is transferred by a generator for direct transportation to a site to be wholly used at the site in an ongoing agricultural, commercial, manufacturing or industrial process or operation that,

A. is used principally for functions other than waste management, and

B. does not involve combustion or land application of the waste ... [deleted composting ref.] o. Reg. 347

O. Reg. 347 Exemptions

17. Waste asphalt pavement transferred by a generator for direct transportation to,

i. a site at which it is to be used as construction aggregate, or

ii. a site at which waste asphalt pavement is processed for use as construction aggregate and at which no disposal of waste or processed waste takes place.

Subject Waste O. Reg. 347

“subject waste” means,

(a) liquid industrial waste,

(b) hazardous waste, and

(b.1) waste that was characteristic waste but that has been treated so that it is no longer characteristic waste, if the waste may not be disposed of by land disposal under subsection 79 (1)

Characteristic Waste O. Reg.347

“characteristic waste” means hazardous waste that is,

- (a) corrosive waste,
- (b) ignitable waste,
- (c) leachate toxic waste, or
- (d) reactive waste

Leachate Toxic O. Reg. 347

“leachate toxic waste” means a waste producing leachate containing any of the contaminants listed in Schedule 4 at a concentration equal to or in excess of the concentration specified for that contaminant in Schedule 4 using the Toxicity Characteristic Leaching Procedure

Cover Material O. Reg. 347

“cover material” means soil or other material approved for use in sealing cells in landfilling

Organic Soil Conditioning

O. Reg. 347

“organic soil conditioning” means the incorporation of processed organic waste in the soil to improve its characteristics for crop or ground cover growth

What's Missing?

- No definition of soil in O. Reg. 347
- No definition or exemption for excess soil
- No legal guidance on what to do with material that does not fit definition of inert fill
- For exemption no definition of “wholly” or “land application”
- In absence of clarity conservative view is that excess soil that does not meet Table 1 is “waste” and dispose of accordingly

Due Diligence

Documentation Requirements for Section 3 Exemptions
MOE guidance manual provides some direction.

Registration Guidance Manual For Generators Of Liquid
Industrial And Hazardous Waste, April 1995 Amended
December 2009 Amended June 2011

http://www.ene.gov.on.ca/stdprodconsume/groups/lr/@ene/@resources/documents/resource/std01_079529.pdf

To maintain the validity of the exemptions the carrier
must comply with s. 3 (3) of Reg. 347.

Due Diligence

- The carrier must have in his or her possession a document from the owner or operator of the site to which the material is being transported, and this document must:
 - i. indicate that the owner or operator of the site agrees to accept the material
 - ii. specify the use that will be made of the material, and
 - iii. stipulate that the transported material is being shipped to an ongoing process or operation that is currently in operation, if the exemption refers to an ongoing process or operation.

The Downside

- If you get the classification of soils wrong there are regulatory consequences
- *EPA* prohibits the deposit of waste unless approved
- MOE has ability to issue orders for the removal of waste - no time limits or cost limitations
- s. 43 Waste Removal order

Waste Removal Order - s. 43 *EPA*

- If waste deposited upon, in, into or through any land or land covered by water or in any building not approved as a waste disposal site.
- Director may issue order to remove the waste and to restore the site:
 - issued to an owner or previous owner;
 - a person who otherwise has or had charge or control of the land or building or waste;
 - an occupant or previous occupant of the land or building; or,
 - a person that a Director reasonably believes engaged in prohibited waste disposal activity
- KEY: remove waste no matter where it is nor how old it is

RSC Properties

MOE has adopted new, mainly more stringent, soil, groundwater and sediment standards as of July 1, 2011

Soil, Ground Water and Sediment Standards for Use Under Part XV.1 of the *Environmental Protection Act*
Ministry of the Environment April 15, 2011

http://www.ene.gov.on.ca/stdprodconsume/groups/lr/@ene/@resources/documents/resource/stdprod_086516.pdf

New Standards

- When the new standards came into effect many more properties overnight became “contaminated”
- Concern now what to do with the excess soil from these properties
- Property/soil may meet Table 2 or Table 3 Standards
- Where can the soil go?
- Table 1 Standard - is this “inert” for all uses?

New Standards

- MOE has clear rules in relation how to move and test for soil that is moving between RSC properties
- The rules are set out in Part XVI of O. Reg. 153/04 as amended

Ontario Regulation 153/04

PART XII SOIL - Soil brought from another property

- 55. (1) Soil that did not originate at a RSC property may be brought from another property to a RSC property to remain there following the filing of a record of site condition only where the RSC property,
 - (a) is being used or has been used, in whole or in part, for one of the uses described in clause 32(1) (b);

• • •

Ontario Regulation 153/04

- (2) Soil referred to in subsection (1) may only be brought to an RSC property referred to in subsection (1) where a qualified person has ensured in the course of the phase two environmental site assessment with respect to the RSC property that the requirements of Schedule E regarding soil brought to the phase two property have been met and the RSC property is the same as or within the phase two property. O. Reg. 511/09, s. 27.

Ontario Regulation 153/04

- (3) Despite subsection (1), soil that did not originate at a RSC property may be brought from another property to the RSC property to remain there following the filing of a record of site condition if either of the following circumstances apply:
 1. A qualified person conducting or supervising the phase two environmental site

Ontario Regulation 153/04

assessment has determined that the soil meets the standards set out in Table 1 of the Soil, Ground Water and Sediment Standards with respect to all contaminants in the soil to be brought from the other property to the RSC property and the determination was made during the course of a phase two environmental site assessment and, with necessary modifications, in

Ontario Regulation 153/04

accordance with the provisions in Schedule E that apply to soil brought to the phase two property with respect to a RSC property described in subsection (1).

2. A qualified person has determined that a record of site condition may be submitted without a phase two environmental site assessment, the record of site condition is to be

Ontario Regulation 153/04

submitted or has been submitted and the qualified person who is conducting or supervising or has conducted or supervised the phase one environmental site assessment has determined in accordance with Schedule F that soil intended to be brought from the other property to the RSC property meets the standards set out in Table 1 of the Soil, Ground Water and Sediment Standards with respect to all contaminants in the soil to be brought from the other property to the RSC property.

O. Reg. 511/09, s. 27.

Ontario Regulation 153/04

- (4) Soil that did not originate at a RSC property and that is brought from another property to a RSC property to remain at the RSC property following the filing of a record of site condition shall be used at the RSC property solely to backfill an excavation or for final grading. O. Reg. 511/09, s. 27.
- Q. is this land application?

Sampling of Soil to be Brought to the Phase Two Property

- 34. (1) Samples of the soil referred to in section 32 shall be collected and selected for analysis so as to obtain representative results that locate any areas in the soil being sampled where a contaminant may be present at concentrations greater than the applicable site condition standard for the contaminant.

Sampling of Soil to be Brought to the Phase Two Property

- (2) At least one soil sample shall be analyzed for each 160 cubic metres of soil for the first 5,000 cubic metres to be assessed at each source from which soil is being brought to the phase two property, following which at least one sample for each additional 300 cubic metres of soil which is to remain on, in or under the phase two property shall be analyzed.

Remediation Options

- Need to have clear communication between consultant and client as to what are the end products from remediation
- Does the remediation option end up with concentrated waste to be removed at the end of the process?
- Does the remediation option leave any “waste” on site
- Does the remediation option have a cost benefit analysis for excess disposal?

“How to Dispose of Excess Soil”

“Down the toilet, 1 tablespoon at a time!”

“Aren’t you supposed to eat the spoonful of dirt? At least that’s what I recall in those old time jailbreak movies.”

“Put a sign on your lawn advertising “Free clean fill”. Someone will knock on your door relatively immediately. I’m sure there’s someone in the area needing to build up their grade and needing fill.”

MOE Best Management Practices

- While the Government has no mandate to engage in regulatory discussions it has undertaken a consultation on Best Management Practices for excess soil from large construction projects

Soil Management

- The Management of Excess Soil - A Guide for Best Management Practices ("BMP") was released by the Ministry of Environment on January 24, 2014
- http://www.ene.gov.on.ca/environment/en/resources/STDPROD_110253.html
- Not legal requirements
- Provide general concepts that "may" be used to address management of excess soil
- Similar to the earlier postings but now "official"
- Big question - will it be adopted and used?

Excess Soil Movement - Guidance

- Excess soil now considered a resource
- Source site - where soil excavated
- Receiving sites - where soil can be beneficially re-used
- Soil treatment facilities not part of BMP
- All excess soil should be tracked
- “Encourage” use of Qualified Person (QP) within the meaning of s. 5, O. Reg. 153/04

QP Role

- QPs exercise professional judgment
- Provide options for excavated soil or excess soil
- Make decision based on “appropriate analysis and characterization of the soil”
- QP to take a “risk based approach”
- Consider effects of loading of soil and pre-existing conditions
- Use a Risk Assessment as in s. 6, O. Reg 153/04
- Time consuming and costly!

Source Site

- QP to be retained to develop Soil Management Plan
- Show detailed analysis and sampling plan for excavated soil
- Track areas to be excavated with estimated volumes and soil type, and quality of each area
copy of instructions to on site contractors
identifying are and depth of soil
- List of potential Receiving Sites linked to area of the site plan

Receiving Site

- Create Fill Management Plan
- Understand pre-existing site conditions
- Addition of new soil could cause an adverse effect or a degradation of pre-existing conditions
- Know quality of soil from source site
- Encourages chemical analysis - no guidance on how many samples
- "Reasonable identification of potential contaminants based on history and conditions of the sites"

Public Consultation

- Encourages Receiving sites to engaged in public consultation
- Could be done in conjunction with municipal requirements for fill permits
- Advertise
- Engagement of First Nations and Metis

Maintain Records

- Recommend keeping records for minimum of 7 years after completion of all excess soil management activities or removal of soil from Temporary Soil Storage Sites
- Need to consider this in contractual requirements and indemnities for similar length of time

Invasive Species

- Should consider the spread of invasive species
- Provides some names like European fire ants, Japanese knotweed, Phragmites, Giant hogweed, Garlic mustard, Dog strangling vine
- Need to control and mitigate or eradicate invasive species

The Process

- BMP provides 5 pages of detailed “instruction” on what to consider for each part of the cycle
- What you need for source site, transportation, receiving sites, temporary soil storage sites
- Onerous requirements
- Bottom line comes down to documentation
- Procurement issue- numerous contractual considerations
- No simple precedent can protect against liability

BMP Guidance

- May be some flexibility in requirements for receiving sites but must consider equivalent of cumulative or compounding effects
- Need to consider invasive species - no clarity on what these are and where to find them
- Temporary Soil Storage Sites - only as an interim use for 2 years
- Difficult for larger projects
- Prohibits comingling of material

Excess Soil BMP

- Expensive and difficult to follow
- Requires better knowledge of excess soil
- Who will pay for extra testing and documentation?
- Timing is difficult when moving excess soil

Fill Site - Unwanted?

- Municipalities are still struggling with what to do with the fill that is coming in from outside their boundaries
- Clarington - passed by-law prohibiting outside fill
- Fill permits are harder to come by
- AMO is assisting municipalities grapple with the reality of unwanted fill
- Will municipalities now adopt BMP into their by-laws?



Greenbank Airport expansion. GREENBANK -- Greenbank Airport owners prepared to make renovations at the local airfield. June 6, 2012 *Celia Klemenz / Metroland*

Greenbank Airport

- Scugog issued the Regional Road 47 airport a site-alteration permit on October 15, 2012 paving the way for Greenbank Airways to start trucking in the estimated 2.5-million cubic metres of soil they need to upgrade the airport
- the maximum number of heavy haulers allowed under the airport's permits -- 17 per hour, up to 200 each day
- No stipulation as to where fill comes from
- Need approval of sites

<http://www.durhamregion.com/news/article/1520214--scugog-issues-long-awaited-permit-to-greenbank-airport>

Recent Case Law

- *Township of Uxbridge v. Corbar Holdings Inc. et al.*, 2012 ONSC 3527 (CanLII)
- Large property on Oak Ridges Moraine to be used for 300,000 cubic metres of fill
- Defence that it was a “normal farming practice”.
- Court held that it was not a normal farming practice to dump 30,000 loads of fill

Liability Exposure for QP

- Be much more vigilant and much more thorough on Environmental Site Assessments (ESAs) and intended disposal options
- Need to know and understand
 - (a) new standards;
 - (b) new definitions;
 - (c) remediation options and outcomes; and
 - (d) due diligence procedures

Liability Exposure for QP

- Potential to expose QPs to considerably more liability
- Need dialogue between QP and client regarding potential limitations to manage expectations
- Limitation sections of reports should be explicit
- Liability for breach of contract will depend on terms but may also include negligence and potential regulatory liability
- Document, document, document

Practical Issues

- Understand what type of material- is it soil?
- Understand the volume
- Understand all legal and non legal definitions
- Ensure proper documentation if relying on an exemption
- Conduct due diligence on options
- Work with QPs and contractors
- Be realistic about risks and liabilities
- Review insurance and approval documentation
- Create effective paper trail to protect against enforcement and civil liability (7 years)

Take Away Points

- Excess soil is still confusing
- Be aware of all definitions
- Need to understand disposal options
- Conduct due diligence to understand where soil ends up
- Best Management Plans – the “gold standard”
- Need clear legislative guidance for certainty
- Ensure contractual documents are clear
- Document, Document, Document! 7 Years

Liability Reminders

- There have been several recent cases which highlight for directors and officers that personal environmental liability is a real risk
- Main concerns are in relation to legacy sites and brownfield development situations
- Personal liability can be found for pre-existing contamination even if you did not cause it

Liability Reminders

- Due diligence prior to purchase is critical in the development process and any transaction
- Need to understand how the environmental condition of the site may be an ongoing concern
- If you are in the chain of title to a contaminated property you will always be liable even after selling the property or cleaning it up if there were offsite impacts from it

EPA Considerations

- *EPA* does not distinguish between those who caused contamination and those who are innocent occupiers or owners
- Due to hard economic times, legacy sites get abandoned and no culpable party is around to cleanup. Ministry then looks to directors and officers

Practical Advice

- Remember that “Polluter Pay” and fairness principles no longer applied in environmental cases
- Create the “team” to uncover and understand the environmental risks and liabilities and how to deal with them
- Sometimes it does take longer and cost more
- Make business decisions based on the best advice
- Some deals and developments are not worth the potential liability
- Sites with off site impacts are the most difficult to manage and risk assess

Thank you!
**If you have any questions,
or would like more
information, please
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