

Excess Soil Regulation Partial Pause Commences April 20, until December 31, 2022 – What you need to know!

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By Janet Bobechko and Patricia Chehadé

On March 11, 2022, the Ministry of Environment, Conservation and Parks posted on the [Environmental Registry of Ontario \("ERO"\)](#) a potential “pause” of certain requirements under the [Excess Soil Regulation 406/19](#) (the “Regulation”). This came as a surprise as phase in of the additional requirements had come into force on January 1, 2022 and parties were already adjusting their practices to be in compliance with the requirements. Admittedly, there was significant confusion about the requirements and many parties were unprepared. The ERO comment period was open for 30 days until April 10. The excess soil community appeared fairly equally divided as to whether or not the pause should take place and when, if successful, it would take effect given the start of an active construction season.

On April 20, 2022, [O. Regulation 388/22](#) (the “Amending Regulation”) came into effect pausing certain requirements of the Regulation until December 31, 2022.

What's Paused:

The pause or temporary suspension until December 31, 2022 only relates to the following requirements of the Regulation (that came into force originally on January 1, 2022):

1. An operator of a residential development soil depot to file (and update) a notice on the [Registry](#) (s. 7);
2. A Project Leader to file (and update) a notice on the Registry prior to removal of excess soil from the project area; (s. 8-9);
3. Any of the planning requirements to prepare an assessment of past uses (s. 11), a sampling and analysis plan, soil characterization report (s. 12) and an excess soil destination assessment report (s. 13) and any requirements to update those documents (s. 15);
4. Any requirements to track each load of excess soil in accordance with the Soil Rules (s. 16); and
5. To file a notice (and update) a reuse site on the Registry (s. 19).

Haulers are able to revert to providing verbal information in relation to the s. 18 hauling record requirements. It's a nuance in the deeming provision in s. 28.1(2) of Amending Regulation, however the form of the information could also be provided through a tracking app or paper record. The Amending Regulation only sets the threshold. Although many project leaders for liability purposes have implemented, through contractual terms, a more sophisticated tracking system that provides more detailed information for haulers.

Any assessment of past uses and sampling and analysis plan and soil characterization reports for a specific project completed prior to January 1, 2023 would be recognized under the Regulation for that project post January 1, 2023.

What's still in effect?

All the other provisions of the Excess Soil Regulation and the [Rules for Soil Management and Excess Soil Quality Standards](#) remain in

force, including all the key operative requirements in section 3, 4 and 5 to determine if excess soil is a waste, written consent from the reuse site, the beneficial use and that the excess soil is dry (subject to exception).

What did not change?

It is also important to note that the provision relating to exemption afforded by grandfathering excess soil contracts is not paused. Section 8(2)(b) of the Regulation provided an exemption where if a project leader entered into a contract with another person with respect to the management excess soil from the project area prior to January 1, 2022 they would not have to comply with the planning requirements until January 1, 2026 if the project had not been completed by that time.

The requirement in relation to the Ministry's Synthetic Precipitation Leaching Procedure (mSPLP) if leachate sampling is undertaken also continues to apply as of January 1, 2022.

Next Steps:

It is important to immediately review existing contracts that contain requirements relating to excess soil and understand the implications of any "pause". If you are in the process of putting a contract out to tender, confirm that the wording you have will cover the requirements you need. In some instances parties may decide to require that the portions of the Regulation that are paused remain in effect from a contractual perspective. If you are bidding on a contract you should clarify the impact of the "pause".

Reuse sites may require the planning documents be provided whether or not they were paused or exempted.

During consultations, the MECP indicated that the Registry would still be "open" to accept voluntary registrations of both project areas and reuse sites.

There is going to be significant confusion as to what to do next. It's important to thoroughly review the options and ensure that your contracts are clear as to what has to happen between now and December 31, 2022. We are here to help. For more information, please contact [Janet Bobechko](#), [Jeff Scorgie](#), [John Buhlman](#), or [Patricia Chehadé](#).

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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