

*Our Free Construction Law Seminar Series*

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**Robert Kennaley**

**New Excess Soils Regulation Comes to Ontario: An Entirely New Regime with an Entirely New Focus**



**Ruxandra Côté, head of EXP's Risk Assessment and Markham Environmental Teams.**



# Overview of Ontario's O. Reg. 406/19 On-Site and Excess Soil Management

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- ❖ The first phase of O. Reg. 406/19 (passed under Ontario's *Environmental Protection Act*) came into force on January 1, 2021.
- ❖ to be phased in over 5 years, the regulatory requirements are intended:
  - ❖ to ensure that excavated soils are treated as a resource; and
  - ❖ to ensure that excavated soils are beneficially re-used wherever possible.

# An Overview of O. Reg 406/19: Scope

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- ❖ The Regulation:
  - ❖ defines “excess soil” as excavated soil that must be removed from a project site;
  - ❖ places strict responsibilities on generators, haulers and receivers of excess soils in Ontario;
  - ❖ applies to all “projects”, which are defined broadly to include “any form of development or site alteration”; and

# An Overview of O. Reg 406/19: Exemptions

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- ❖ The Regulation's application is subject to numerous exemptions. It will not apply, for example:
  - ❖ to soil excavations and placements involving hazardous or asbestos waste (which continue to be governed by Ont. Reg. 347)
  - ❖ to the operation of most pits and quarries and certain other excavations under the *Aggregate Resources Act*; or
  - ❖ to a peat extraction operation or to the final placement of excess soils on the bed of a surface body of water.

# An Overview of O. Reg 406/19: Exemptions

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- ❖ The Regulation's application is subject to numerous exemptions. It will not apply, for example:
  - ❖ to certain “infrastructure” projects;
  - ❖ to certain agricultural or other uses governed by Ontario's “brownfields” regulation 153/04;
  - ❖ to soil certain volumes of removals in some circumstances; or
  - ❖ Where less stringent site-specific requirements have been established under provincial legislation or a local by-law or permit.

# An Overview of O. Reg 406/19: Excess Soils

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- ❖ Subject to exceptions, the Regulation:
  - ❖ deems excess soils to be a waste that cannot be reused, stored, transported or disposed of except as specified;
  - ❖ sets out a complete code for the excavation and movement of excess soils between properties; and
  - ❖ imposes requirements for soil testing, transportation, temporary storage at processing sites or transfer facilities, the interim clean-up of soils, data tracking, re-use (on-site or at other sites) and disposal at a landfill or dump.

# The Project Leader and Qualified Persons

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- ❖ Responsibility for the assessment, management and relocation of excess soils is placed squarely on the “**project leader**”:
  - ❖ ie. the “person or persons ultimately responsible for making decisions relating to the planning and implementation of the project”;
  - ❖ this is a brand new role and designation and it is not clear how the definition will be applied in actual circumstances.

# The Project Leader and Qualified Persons

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- ❖ Responsibility for the assessment, management and relocation of excess soils is placed squarely on the “**project leader**”:
  - ❖ Ultimately, the project leader will have to made a declaration declaring that the project leader:
    - “will develop and apply all necessary procedures to ensure that all necessary steps are taken to ensure that this Regulation is complied with and to ensure that excess soil from the project area will be disposed of in compliance with this Regulation”.



# The Project Leader and Qualified Persons

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- ❖ Responsibility for the assessment, management and relocation of excess soils is placed squarely on the “**project leader**”:
  - ❖ the definition places responsibility in much the same way the *Occupational Health and Safety Act* places overall responsibility for health and safety on the “constructor”;
  - ❖ owners will most likely only be able to off-load their project leader responsibilities, if at all, where all of the planning and implementation decisions are clearly assigned to another person under a contract.

# The Project Leader and Qualified Persons

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- ❖ Unless an exemption applies, the project leader:
  - ❖ will be responsible to have a “qualified person” (defined with reference to Ont. Reg. 153/04) prepare an assessment of the past uses of the site and determine if excavated soils are potentially impacted, based on criteria including contaminants, fluidity and odour;
  - ❖ this may be a difficult for many a project leader, who might not have the expertise required to make the determination

# The Project Leader and Qualified Persons

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- ❖ Unless an exemption applies, the project leader:
  - ❖ must, if soils are determined to be potentially impacted upon the initial assessment, ensure that a qualified person is retained to properly assess and manage them; and
  - ❖ Must, thereafter, remain responsible to manage the use, transportation and temporary and/or final placement of the soils (with some exceptions relating to off-site processing sites).

# Understanding The Exemptions

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# Options for Reuse and Disposal

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- ❖ Subject to the various exceptions, excess soils will no longer be considered waste if they are processed to meet specified standards.
  - ❖ the available processes include aeration, dewatering, mixing, turning and sorting;
  - ❖ if the standards are met, and proper record keeping occurs, the soils may be reused – either on site or at a re-use site.

# Options for Reuse and Disposal

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- ❖ placement at a re-use must be no more than what is required by that site for a beneficial purpose tied to the site's operations (and so long as the purpose is not itself the disposal of soils).
- ❖ to assist participants in the process, site-specific re-use options or standards may be developed using a Beneficial Reuse Assessment Tool (or "BRAT").
- ❖ come 2025, disposal at a landfill will be prohibited

# Options for Reuse and Disposal

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- ❖ Off-site locations may be used to temporarily store the soils for the purposes of assessment and processing.
- ❖ this option should help ensure that ensure that the assessment and processing requirements do not unreasonably impact the scheduling and sequencing of work at the project site.
- ❖ so long as certain specified requirements are met, responsibility for the soils can be transferred to the operator of the interim assessment/processing site by the project leader(s).

# Options for Reuse and Disposal

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- ❖ it is thus likely, we suggest, that an entire new sub-industry will develop to provide soil processing options, both on and off-site;
- ❖ in addition, we anticipate that cost/benefit analyses of alternative excavation methods (such as directional drilling and hydrovac), will be made to reduce the volume of excavated soils generated on a project



# Options for Reuse, Sampling and the BRAT

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# Record Keeping and Reporting

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- ❖ The new requirements are record keeping and reporting intensive.
- ❖ subject to the exceptions, initial notices must be filed by the project leader;
- ❖ thereafter, documentation must be kept and/or filed by the project leader, qualified persons, haulers, interim sites, re-use sites, landfills and dump sites.
- ❖ the records, including contracts for the management or transportation of soils, will have to be kept for a period of 7 years

# Record Keeping and Reporting

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- ❖ Suffice it to say that anyone involved in the excavation and removal of excess soils, from owners and developers down through excavation trades and haulage companies, will need to understand and put processes in place to meet their record keeping and reporting obligations.
- ❖ Like any other breaches of the Regulation, a failure to keep records as required is an offence under the *Environmental Protection Act* and is subject to fines and imprisonment.

# Record Keeping and Reporting

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# Transition and Application

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- ❖ subject to the various exceptions set out under the Regulation, the rules established for reuse and placement/disposal of materials are effective as at January 1, 2021.
- ❖ notice, record keeping and materials tracking requirements will generally not be in force until January 1, 2022.
- ❖ the regulation's restrictions on landfilling soils will not become effective until January 1, 2025, when materials that do not exceed Table 2 requirements will not be accepted at a landfill.

# Transition and Application

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- ❖ thus the rules relating to reuse and placement came into force on January 1, 2021, while the notice and documentary tracking requirements will not, generally, come into force until *at least* January 1, 2022
- ❖ a grandfathering provision provides that the record keeping and material tracking obligations won't apply to a project leader until January 1, 2026 under any soil management contract the project leader has entered into prior to January 1, 2021.

# Transition and Application

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- ❖ haulers will have to have specific information available on request as at January 1, 2021 (including information on the source, quality and destination of the soils they carry).
- ❖ haulers will not have to have the carry records containing the requisite information until January 1, 2022.
- ❖ New requirements governing haulage vehicles themselves will come into in force in 2022.

# The Need for Planning and Practical Strategies

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- ❖ Owners want projects delivered on time and on budget. To meet these goals, pre-planning will be necessary. This, because:
  - ❖ the assessment and processing of soils will take time;
  - ❖ on-site assessment and processing will impact construction schedules and sequencing such that off-site storage options may become economic necessities; and
  - ❖ qualified persons, processing methods and and re-use sites with sufficient capacity to accept the soils for a beneficial purpose will have to be lined up in advance to avoid problems and delay.



# The Need for Planning and Practical Strategies

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- ❖ Addressing excess soils issues prior to procurement or contracting will become important:
  - ❖ selecting the project leader and qualified persons early in the process;
  - ❖ pre-assessments towards better budgets and scheduling;
  - ❖ prequalifying contractors and subcontractors to ensure they have proper teams in place;
  - ❖ considering the benefits of vertical integration.

# The Need for Planning and Practical Strategies

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- ❖ Addressing excess soils issues prior to procurement or contracting will become important:
  - ❖ policies, procedures and training;
  - ❖ *better* policies, procedures and training;
  - ❖ understanding the concept of due diligence: having a system in place to ensure the policies and procedures are being followed

# The Need for Planning and Practical Strategies

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- ❖ Municipalities will have unique issues, beyond those of other large generator of excess soils:
  - ❖ policies and practices in operating landfills and dump sites;
  - ❖ the role of by-laws and site-specific standards;
  - ❖ the role of zoning by-laws and enforcement issues vis-à-vis off-site processing sites, traffic, odour, etc.;
  - ❖ the need to manage resident expectations and complaints



# The Need for Planning and Practical Strategies

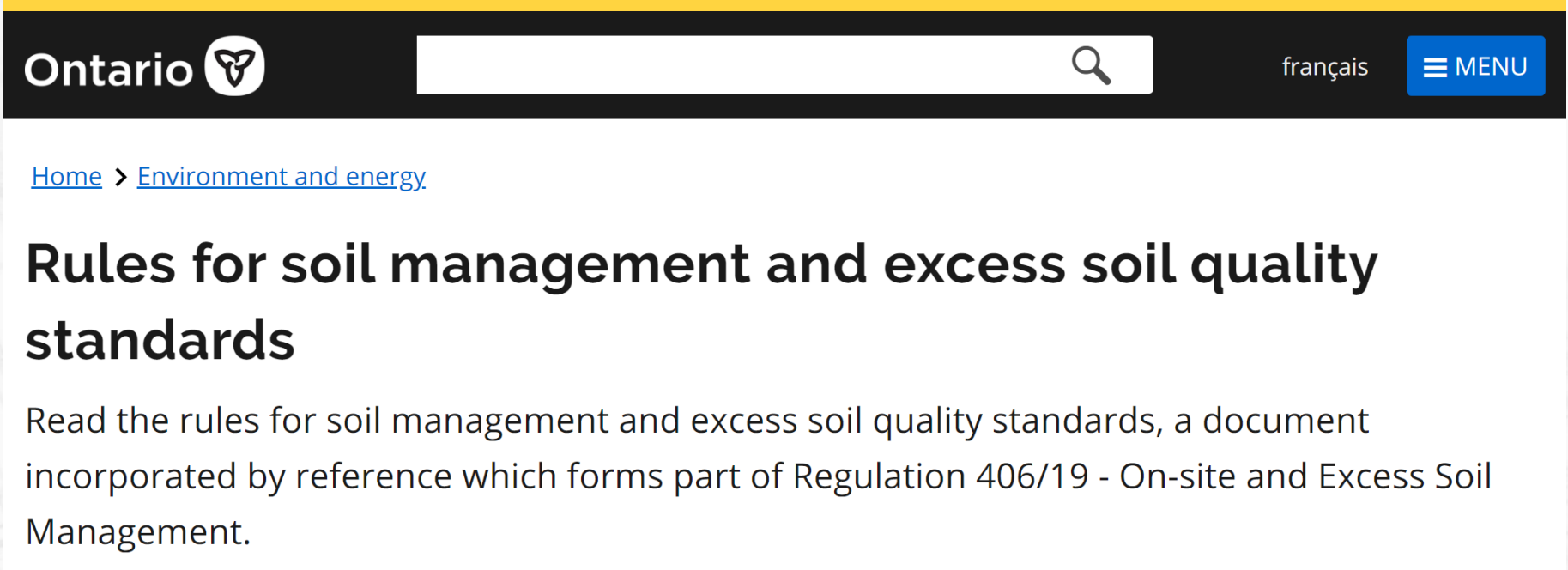
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**Planning,  
practical strategies,  
and questions ...**




# The Need for Planning and Practical Strategies



The screenshot shows the Ontario government website interface. At the top left is the Ontario logo. To its right is a search bar with a magnifying glass icon. Further right is the text "français" and a blue button with a white hamburger menu icon and the text "MENU". Below the navigation bar is a breadcrumb trail: "Home > Environment and energy". The main heading is "Rules for soil management and excess soil quality standards". Below the heading is a paragraph: "Read the rules for soil management and excess soil quality standards, a document incorporated by reference which forms part of Regulation 406/19 - On-site and Excess Soil Management."

<https://www.ontario.ca/page/rules-soil-management-and-excess-soil-quality-standards>

# The Need for Planning and Practical Strategies



The screenshot shows the Ontario government website interface. At the top left is the Ontario logo with the word 'Ontario' next to it. To the right is a search bar with a magnifying glass icon. Further right is a language selector for 'français'. Below the search bar is a breadcrumb trail: 'Home > Environment and energy.' The main heading of the page is 'Management of Excess Soil - A Guide for Best Management Practices'. Below the heading is a short description: 'Best management practices for managing excess soil in a manner that promotes sustainability and protects the natural environment.'

<https://www.ontario.ca/page/management-excess-soil-guide-best-management-practices>

# The Need for Planning and Practical Strategies

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## Canadian Urban Institute municipal by-law language tool

The Canadian Urban Institute's [site alteration by-law language tool](#) provides flexibility for local decision making and site-specific considerations when incorporating best management practices. It provides examples of language and guidance for Ontario municipalities to consider when creating or updating by-laws.

## Fact sheet for importing soil onto agricultural land

The [Importation of Soil onto Agricultural Land](#) fact sheet provides a brief overview of regulatory requirements, best management practices and guidance to help farmers limit impacts to farmland.

<https://www.ontario.ca/page/handling-excess-soil#section-2>