

December 17, 2014

Atif Durrani
Senior Policy Advisor
Land and Water Policy Branch
Ministry of the Environment and Climate Change
135 St Clair Ave W., 6th Floor
Toronto, Ontario M4V1P5

*Laura Bowman
Barrister & Solicitor
Centre For Green Cities
401- 550 Bayview Ave.
Toronto, Ontario M4W 3X8
Phone: 416-368-7533 x 522
Fax: 416-363-2746
lbowman@ecojustice.ca*

Sent by email to: Atif.Durrani2@ontario.ca

Attention: Atif Durrani

Re: MOECC policy review of contaminated soils

We represent Earthroots Coalition in the MOECC's review of contaminated soil policy in Ontario. Please accept the attached comments sent on behalf of Ecojustice and Earthroots.

Sincerely,



Laura Bowman
Barrister and Solicitor

Submission of Earthroots Coalition dated December 17, 2014 (8 pages)



Submission on EBR Review of Soil Policy

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Introduction

Ecojustice is a non-profit charitable organization dedicated to defending Canadians' right to a healthy environment. Our mission is to protect and restore the Canadian environment through the law. We have been retained to represent Earthroots Coalition (**Earthroots**) in the Ministry of Environment and Climate Change (**MOECC**) 2014-2015 review of contaminated soil policy in Ontario.

Earthroots is a grassroots conservation organization dedicated to the preservation of wilderness, wildlife and watersheds in Canada, with a focus on Ontario. Earthroots is a strong advocate and agitator for wilderness preservation in Ontario, combining grassroots campaign strategies with effective research and educational programs. Since 1986, Earthroots has used its grassroots expertise to organize, educate and mobilize the public, conduct successful media events, carry out wilderness research projects, and ensure proper forest management planning.

Background

In 2010, Earthroots became aware of a significant gap in environmental protection. Millions of tonnes of excess, unregulated, commercial fill are being dumped in depressions, wetlands, old gravel pits, on farmers' fields, and at aerodromes. An unknown but significant amount of this soil is contaminated with petroleum, heavy metals, and other toxins. Farmland, wetlands, groundwater systems, as well as our food and water security are threatened.

The movement and dumping of soil has been identified by Earthroots and the Save the Oak Ridges Moraine Coalition as a major threat to the Oak Ridges Moraine given that commercial fill falls under a piecemeal suite of provincial guidelines, regulations and statutes, and municipal by-laws. The potential for contamination of the Moraine's aquifers through the dumping of commercial fill makes this a key issue in our campaign on the upcoming review of the Oak Ridges Moraine Conservation Plan and Greenbelt Plan.

Recent accomplishments of Earthroots in dealing with this issue include:

- Strong media attention to the dirty fill issue.
- Strong allegiances with a range of stakeholders in the community and industry.

- Earthroots met with the Minister's senior policy advisors, as well as the Premier's office on this issue.
- Earthroots is using the momentum of the media coverage to advocate for provincial regulation on this issue.
- Earthroots has participated as a stakeholder in two different processes lead by the MOECC: the preparation of the Best Management Practices for Soil Management, and the EBR review which was instigated by the request the need to establish a new, comprehensive, province-wide policy to address the growing problem of compromised soil.
- Earthroots played a key role in the establishment of the Ontario Soil Regulation Task Force (**ORSTF**), a coalition of community groups and citizens. One of the main objectives of the ORSTF is to lobby for a Clean Soil Act.

Summary

Earthroots is dissatisfied with the approach that the MOECC is taking to the regulation of waste soils. The policy impedes the lawful re-use of appropriate soils and fails to demonstrate to Ontarians that the movement, storage and disposal of waste soils is safe for people or the environment.

Recommendations

The MOECC should immediately:

- Prepare draft exemption regulations and/or a Clean Soil Act for defining soils that are suitable for re-use; and
- Implement compliance and enforcement policies for Part V of the EPA (waste) as well as s.9 of the EPA (air) for the movement, storage and disposal of waste soils not subject to any exemption.

The draft exemption regulations should:

- Be transparent by setting clear and coherent, publicly available and understandable standards for determining excess soils and fill that are suitable for re-use including volume;
- Clarify which soils and fill material must be handled in waste management facilities;
- Provide for the safe, regulated creation of soil storage sites, soil remediation sites and soil banks; and
- Regulate erosion, aquatic health, drinking water, traffic, noise, vibration, dust and air quality issues related to soil management facilities.

MOECC should develop a strategy for the long-term management and disposal of contaminated soil waste and mixed waste. MOECC should also develop a plan to discourage unnecessary excavation of brownfields sites and encourage other options such as onsite remediation or containment.

Submissions

How did we get here

In 2001 the Ontario Government revised the province's brownfield law and policy regime with the enactment of the *Brownfield Statute Law Amendment Act, 2001* (**Brownfields Act**). The purpose of the Brownfields Act was to encourage redevelopment of brownfield lands in Ontario by providing: clear site assessment and remediation requirements; environmental liability protection for those involved in brownfield redevelopment; and planning and financial tools to facilitate the brownfield redevelopment process.

In 2004, and then later in 2011, the Record of Site Condition regulation (O. Reg. 153/04, the **Brownfields Regulation**), under the *Environmental Protection Act (EPA)*, came into force. A Record of Site Condition (**RSC**) is a document prepared by a "qualified person" (**QP**) and filed with the MOE to certify that a property has been assessed and meets the soil and groundwater standards applicable to the proposed use of the property.

The MOE's policy has been focused on encouraging re-development of brownfield sites. The standards for cleanup are so stringent under the 2011 Brownfields Regulation that many Brownfield sites must be entirely excavated in order to qualify for an RSC. Other pressures including insurance and municipal parking requirements for brownfield redevelopments encourage complete site excavation. Increasingly, municipalities require an RSC from developers as a mandatory requirement before re-zoning brownfield sites. The RSC process was originally envisioned as voluntary-only, to be used by those sites at a greater risk of liability. However, it is now effectively mandatory for a wide range of sites, including sites with well-contained, non-migrating material that could be safe for some types of redevelopment.

The key challenge underlying brownfield law and policy-making is the need to strike a balance: eliminating obstacles to brownfield projects, while still protecting the environment and the broader public interest.

The goal of the MOECC to redevelop contaminated urban areas in the Brownfields Regulations are laudable attempts to control sprawl and revitalize communities. However, very little attention was paid by the MOE and now the MOECC regarding how excavated material from brownfields sites should be managed. Nothing in the Brownfields Regulations purported to regulate the transport of the material from the site or its final destination. Complete site excavation is now becoming the norm, and this must be better addressed.

It is our submission that this is a fatal flaw in Ontario's overall brownfields policy. Ontario needs to grapple with this flaw in a comprehensive manner by utilizing clear, transparent, enforceable standards, and by taking strong measures to discourage site excavation where it is not the best way to protect the public or the environment.

Contaminated material is waste

Soils that contain hazardous or waste materials under the EPA are required by law in Ontario to be managed as waste and disposed of at an approved waste management facility under Part V of the EPA and the General Waste Management Regulation. While the Brownfields Regulations appear to define these materials as soils, the EPA and the General Waste Management Regulation almost universally defines them as waste. Waste must be handled in accordance with Part V of the EPA. In this context, the only commonly available exemption in the General Waste Management regulation is for “inert fill”, which is very narrowly defined such that very few materials from brownfields sites, if any, qualify for this exemption.

Particularly challenging is the definition in Regulation 347 of “inert fill”, which is defined as waste but exempted from waste site regulation under Part V of the EPA. This definition is so narrow that it arguably excludes all living soil. In aggregate rehabilitation sites, the importation of inert fill is allowed if it meets the standards in Table 1 of the document *Soil, Ground Water and Sediment Standards for Use under Part XV.1 of the Environmental Protection Act*. Essentially, this approach takes the cleanup standards under the Brownfields Regulation and applies it awkwardly to rehabilitation sites. Table 1 standards are very strict and difficult to measure in many cases, particularly for mixed soils. They were not designed for rehabilitation or land application but rather for applying for an RSC in an existing contaminated site. Moreover, it isn't clear if these soils are suitable for uses other than quarry rehabilitation.

There is no definition of “soil” in Regulation 347. There is no exemption for “soil” from the application of waste management provisions of the EPA, nor any other regime to govern its management at a receiving site.

Accordingly, a strict reading of the current law is that it is illegal to stockpile living soil suitable for use in any context without a Part V approval, even if it is only moderately contaminated with negligible amounts of contaminants. This includes agricultural soils that would be suitable for farming some kinds of crops.

Earthroots is of the view that there is likely some material being moved in Ontario that might be suitable for re-use rather than disposal in landfill sites. However, there is no applicable exemption in the EPA. Conversely, there is a lot of material being excavated, particularly from brownfields sites, that is likely not suitable for re-use and that should be disposed of in landfill or other suitable sites.

It is clear that there is currently widespread non-compliance with the waste provisions in Part V of the EPA with respect to soils excavated from brownfields sites. These waste soils are effectively not regulated by the MOECC, which allows excavators to transport and dispose of these materials with no meaningful oversight.

This situation is unacceptable. Earthroots works with many communities who are adversely impacted by various aspects of these dirty fill operations. There are substantial traffic, noise, dust, and erosion issues in addition to the potential contamination of lands and waters. Community members are not only subjected to the stress from the obvious impacts of these operations but also to the stress arising from not knowing what is in the material and whether

it may be harming their health or the environment. At the municipal level, the government may or may not be responsive, and may or may not have suitable fill by-laws or technical expertise to deal with the situation.

It is apparent from spending time in these communities that not only is MOECC not regulating the contaminated material as waste, but the noise, dust, and traffic issues that are regulated under the EPA are also effectively ignored by the Ministry.

Given that this is a straightforward non-compliance situation, the basic expectation of the public is that the MOECC would follow its compliance and enforcement policy to address the problem. This is not happening. Instead, the complaints of the community fall on deaf ears at the MOECC.

The BMP Policy is an unacceptable method to address the problem

To date, the only solution the MOECC has come up with to this problem, a problem that was created by the MOECC's flawed brownfields policy, is the 2014 document *Soil Management – a Guide for Best Management Practices (BMP Policy)*. This document provides that the MOECC “encourages the reuse of excess soil, where appropriate, provided that the use does not have a potential to cause adverse effect on human health and the environment, or impairment of water quality.”

This BMP Policy contradicts Part V of the EPA and the General Waste Management Regulation provisions, which do not require an adverse effect for material to be considered waste. The MOECC uses the BMP Policy to avoid recognizing that excess soils are sometimes highly contaminated waste materials that are not suitable for re-use.

The BMP Policy purports to allow activities for the re-use of soils that are wastes under the EPA. There is no valid regulatory exemption in the General Waste Management Regulation supporting this policy. The BMP Policy is therefore also inconsistent with the MOECC's compliance and enforcement policy.

Encouraging operators to break the law is not an appropriate solution. Earthroots is of the view that if some soil re-use is to be permitted, there should be transparent and enforceable standards for soil re-use that can be demonstrated to protect health and the environment.

The BMP Policy does not contain transparent enforceable standards. Key missing items include but are not limited to:

- No requirement for soil sampling characterization or approved methodology for doing so.
- No public consultation requirements.
- No requirement for originating sites or receiving sites to retain a QP.
- No requirement for a fill management plan.
- No requirements for documenting soil movement, characterization or sampling.
- No site assessment or site impact assessment requirements.

The vast majority of the items in the BMP Policy are voluntary, and contain language such as “should” as well as qualifiers that the BMPs are not always appropriate. The BMP Policy simply does not provide clear or comprehensive standards. This makes it impossible to hold operators accountable for complying with the BMP Policy.

The BMP Policy lacks transparency, reliability or enforceability. Most of the best practices are simply at the discretion of the QP. The same QP system that determined the material must be excavated at the site of origin to qualify for an RSC is certifying that the material is suitable at the receiving site. It is self-evident that if the soil was appropriate for re-use, it would not be excavated or transported from the brownfield site of origin in the first place in order to apply for an RSC. The standards applied by the QP to characterize the soils and prevent adverse effects are unknown, and the QP may not have a sufficient understanding of potential adverse effects to play this role. This system could be marginally improved with better BMP standards and heightened qualifications for QPs, but in the end, the lack of legality, transparency and enforceability inherent in this approach makes it impossible to justify. Earthroots does not support this approach.

Further, the BMP Policy suggests that the MOECC supports adding contaminated waste to sites that already contain contaminated waste without an Environmental Compliance Approval to create a waste site. The BMP Policy, for example, emphasizes existing site conditions and comparing them to new material. This will turn many contaminated sites into *de facto* waste sites. These sites may not be appropriate for the storage of contaminated material. In effect, rural areas that contain contaminated sites will be further contaminated, while urban ones are cleaned up. This will inevitably include existing contaminated sites that have issues with offsite migration or contamination of ground and surface water. Under the BMP Policy, the cleanup of such sites is discouraged in favour of adding more contaminated material from urban areas. This situation is plainly inequitable from an environmental justice perspective as well as from the perspective of preventing adverse effects.

[The BMP Policy is currently being used instead of effective public regulation](#)

Communities deserve transparency and accountability in standards for soil re-use through public regulation. They do not deserve to have a closed-door, mysterious process for *de facto* exemptions at the discretion of a hired QP. That is fundamentally what the BMP Policy is. The standards are unclear, they do not provide an approved method for characterizing the soils, they do not provide transparency about soil standards that are appropriate for re-use in different contexts, nor are they clear about whether all aspects of the BMP must actually be followed. The bottom line is that the BMP Policy purports to allow QPs to authorize the disposal of waste without any lawful authorization.

Surely, the MOECC is not content to be outsourcing its waste management oversight responsibilities to private engineers. Not only is it doing so through the BMP Policy, but it is providing essentially no meaningful guidance to those private engineers regarding what is appropriate. The structure of the BMP Policy is such that it is clearly unenforceable. Communities who are not well served by the BMP, or who are dealing with an operator who does not comply with the BMP will continue to have no recourse.

Operator liability needs to be clarified

The current lack of clarity around fill operator liability is so dire that many waste operators in Ontario appear to be affiliated with organized crime, as no one else wants to handle the material. Operators are also using federally regulated aerodromes to dispose of fill as an attempt at liability protection. This is destroying small municipal airports in Ontario, stretching municipal resources to litigate the applicability of municipal by-laws to aerodromes, and causing major problems in communities by putting environmental protection and health at risk. If the BMP Policy was an effective solution this would not be happening. The BMP Policy is not a regulatory exemption and operators are well aware that what they are doing is still strictly speaking illegal. This too leads to a lack of transparency and public consultation and adds to stress in communities.

There is a better way

If it is the MOECC's policy to encourage re-use of some soils, the General Waste Management Regulation needs to include a clear, transparent and enforceable exemption. This exemption must be based on evidence and apply justifiable and enforceable standards for environmental protection and health. Earthroots would be supportive of such an exemption for some materials. In other cases, soils should be stored at soil banks designed for the purpose of handling contaminated material, and these must be regulated appropriately as waste sites.

The MOECC must be prepared to inspect, oversee, and apply its compliance and enforcement policy to operators who are relying on the exemption or who are storing and remediating soils.

It is clear that there is currently a lack of landfill capacity for storing and managing waste soils. If the MOECC is going to continue with the process it created under the Brownfields Regulation it must have a plan to address this.

In addition to a meaningful effort to create this plan, the MOECC should revisit the RSC process to discourage excavation where it is not needed. Having a clear policy that lowered the existing brownfields standards to encourage re-development without unnecessary excavation is clearly warranted. Onsite remediation and containment need to be further explored and encouraged through the RSC system.

Recommendations

The MOECC should immediately:

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- Implement compliance and enforcement policies for Part V of the EPA (waste) as well as s.9 of the EPA (air) for the movement, storage and disposal of waste soils not subject to any exemption.

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MOECC should develop a strategy for the long-term management and disposal of contaminated soil waste and mixed waste. MOECC should also develop a plan to discourage unnecessary excavation of brownfields sites and encourage other options such as onsite remediation or containment.

Conclusion

Earthroots thanks the MOECC for the opportunity to submit comments. Earthroots is confident that MOECC will come to understand that the current approach is not protecting the environment and that more resources, and a new approach is needed to address these issues.