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Submitted via email to: laura.blease@ontario.ca

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**RE: COMMENTS ON IMPLEMENTATION PAUSE OF EXCESS SOIL
REQUIREMENTS IN EFFECT JANUARY 1, 2022 (ERO # 019-5203)**

The Ontario Road Builders' Association (ORBA) is pleased to provide the following written comments in response to the "Proposed Implementation Pause of Excess Soil Requirements in Effect January 1, 2022," as posted on the Environmental Registry of Ontario, ERO # 019-5203.

Formed in 1927, the Ontario Road Builders' Association is proud to represent the road building sector in Ontario. Our members build the majority of provincial and municipal roads, bridges and transportation infrastructure across the province. The road building sector directly and indirectly employs approximately 56,000 workers at peak season and impacts all Ontarians.

Since 2016, ORBA has been rigorously involved in consultations on potential excess soil regulations through the advisory Excess Soils Engagement Group. When O.Reg. 406/19: On-Site and Excess Soil was enacted, ORBA supported the modernization of Ontario's soil management regime. ORBA has hosted The Ministry of Environment, Conservation and Parks on many occasions in the subsequent three years for educational sessions to inform our membership of the regulation and of every subsequent phase as it was implemented.

Our members have expressed some hesitation with regards to the implementation pause, but are generally supportive of any measures that attempt to ease confusion with respect to this regulation. Although contractors have invested significant time and money to become compliant for January 1, 2022, many of the systems and compliance mechanisms remain untested. Some of these systems and resources include consulting on sampling and transportation, hiring additional staff, registering reuse sites, implementing tracking/hauling systems, creating protocols for the assessment and placement of excess soil, and filing notices on the new registry. The pause presents an opportunity for both the industry and the Ministry to make the necessary modifications and tweaks that will help reduce confusion (and the need for future amendments) in the future.

Comments in this letter have been prepared through consultation with all levels of our membership. Above all else, the road building industry needs certainty and consistency in the Ministry's approach to regulating the management of excess soil. Our members have provided their initial observations in order to address some of the unintended consequences experienced thus far when interacting with the excess soil regime:

Project Leader Liability:

ORBA members are concerned by the ambiguity surrounding the role of the project leader. The regulation broadly defines the "Project Leader" as "the person or persons who are ultimately responsible for making decisions relating to the planning and implementation of the project."¹ Although this means that the owner is likely the project leader and thus cannot contract out of this role, it also seems that more than one person may be the project leader (together with the owner). Contractors have been experiencing situations where owners have placed conditions in contracts that any fines received due to contractor means and methods when handling excess soil will be charged to the contractor.

There needs to be a clear delegation of the owner's responsibilities under the Regulation towards the contractor. Many of the duties referenced within the regulation, such as "managing and relocating excess soil generated by a project," could be interpreted to mean either the responsibility of the primary contractor or the owner. The distinction between these entities is crucial, and from a liability perspective puts all parties in a position of significant uncertainty and risk. There needs to be a clear understanding of who is responsible for what aspects of due diligence.

Similarly, these responsibilities need to be delineated prior to contract bid. MECP should provide more education to project leaders in terms of what is required of them—from bid to completion. For example, it is very difficult to bid on a job without knowing the quality of soil. This creates many unknowns including where the soil can be placed/ disposed of, the costs for sampling and analysis, and whether it is necessary to carry the cost of a Qualified Person (QP). The appropriate planning documents, such as the assessment of past uses, and sampling and analysis plan (if required) are needed prior to the job being tendered. If not, an estimator has to decide how to price excess soil without it being categorized and there is a big financial difference between disposing of material at a reuse site, and having to dispose of it at a licensed facility.

Interjurisdictional Interactions with Excess Soil:

Our members are experiencing difficulty transporting soil from one municipality to another, particularly in urban regions that overlap, such as in the GTHA. The transportation of excess soil is a major component of the current phase of the excess soil regulation and there needs to be greater coordination amongst all levels of government. Some municipalities put up

¹ O.Reg. 406/19: On-Site and Excess Soil Management.

barriers to the transportation and deposit of excess soil at receiving sites, and/or municipal receiving sites are not being zoned appropriately.

There is an opportunity for MECP to work with local levels of government, to regulate excess soils on a more regional scale. For example, in many areas of the Ottawa Valley, there are naturally occurring metals which result in the material exceeding Table 1. Good material will have to go to the landfill despite not having been impacted by other contaminating activities. Similarly, in situations where a QP has approved it, pits and quarries should not be restricted to using Table 1 quality soil for placement below the water table. Other soils could be used for the rehabilitation purposes of filling in a pit or a quarry.

Unintended Consequences:

Contractors have observed some unintended consequences of the regulation that do not seem to be in the spirit of responsible excess soil management. For example, under Section 13, contractors are required to prepare an excess soil destination assessment report that states where the soil will be deposited or reused. At the time of the report however, contractors might not have another project ready or know of another project that can support the end use for the soil. Allowing contractors more time to store the soil on their properties (yard, project site, and/or plants and quarries) would give them more of an opportunity to reuse the excess soil on another project, rather than having to dispose of it.

Another example of unintended consequences is the requirement of operators of a soil reuse site (under section 19. (5).2) to obtain all relevant reports and information prior to allowing material to be deposited. If a contractor falls under the section 2 exemption, they are still required to have documentation and sampling results otherwise the reuse site is non-compliant under the regulation. This forces the excavator to either spend thousands on sampling and analysis, or have a QP review the project. More often, the operator of the reuse site will send the excavator away, resulting in a loss of potential revenue. This is also true for small deposits of soil (for a pool), or contractors conducting road maintenance for culverts and ditching—the soil is treated as waste because the sampling and analysis is not built into the maintenance contracts.

Suggested Recommendations:

- Clearly delineate the responsibilities of all parties, including the project leader and receiving sites. Educate these parties on their roles and responsibilities for accepting and managing excess soil, and providing sufficient information at the time of contract tender.
- Remove barriers for soil that is below the water table levels and class 1 so that it may be better used for quarry and pit rehabilitation purposes.
- Allow for excess soil to be stored for longer periods of time on project sites before having an intended reuse.

- Use the pause to release more education materials, including easy to read guides, educational videos etc.

Thank you for the opportunity to provide comments. Please do not hesitate to contact Brianna Puigmarti, Senior Policy Advisor, Policy & Stakeholder Relations Division, at brianna.puigmarti@orba.org.

We are available to answer any questions regarding this submission.