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Ontario's Excess Soils Regulation: *What You Need to Know and How to Prepare*

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Meet your Expert Panel



D. Grant Walsom
B.A.Sc., P.Eng., QP
Partner
XCG Consulting Ltd.



Annik Forristal
Partner- Construction Group
McMillan LLP



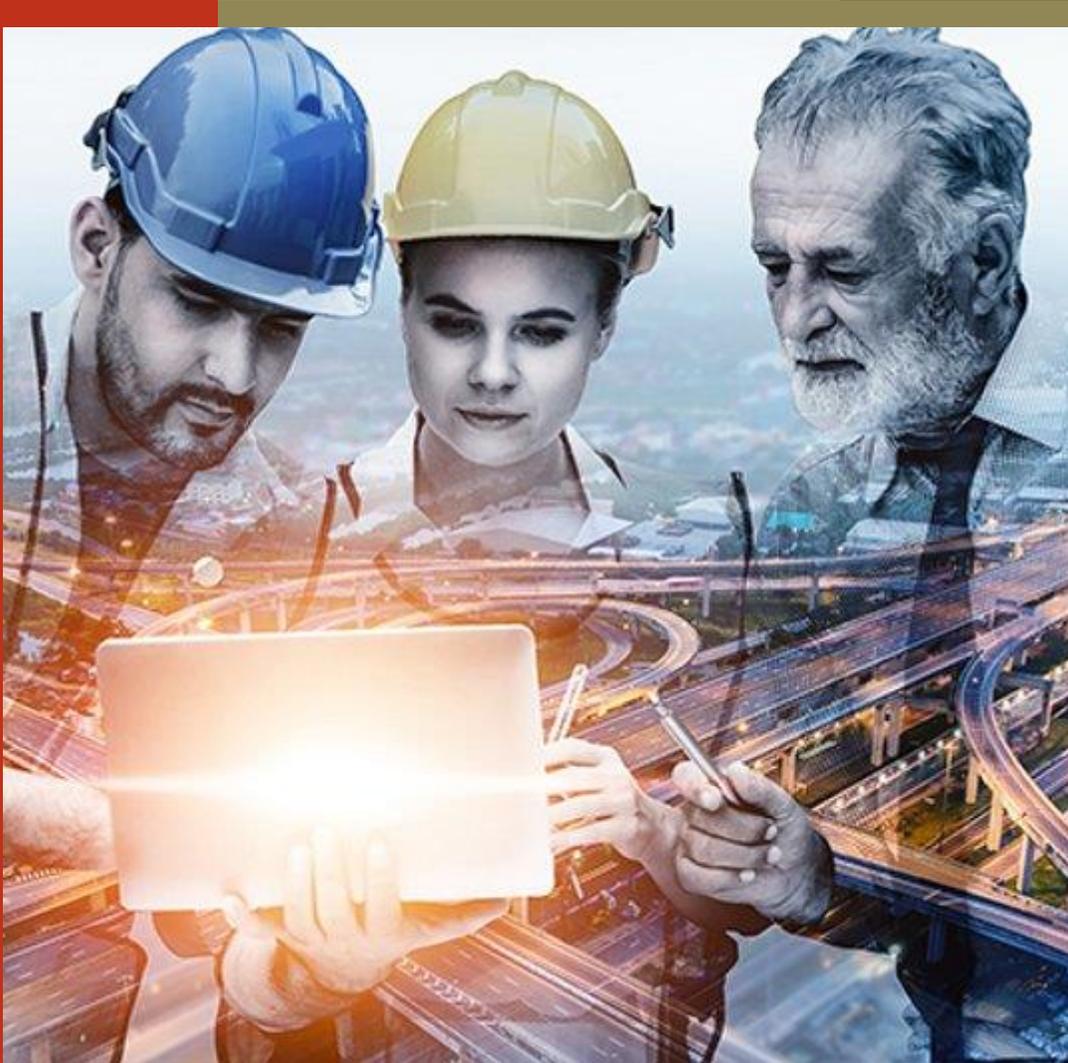
Sabina Taylor
CRM, CIP | Vice President
Hugh Wood Canada Ltd.



Jeffrey Lee
P. Eng., EP. Environmental
Engineer Transportation &
Engineering
Town of Oakville



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Agenda

- ▶ Excess Soil Management in Ontario
 - ▶ O.Reg. 406/19: A QPs View
 - ▶ A Legal Perspective on Excess Soils
 - ▶ Excess Soils and Risk Management
- ▶ Question & Answer Session



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Excess Soil Management in Ontario

O. Reg. 406/19: A QPs View

Presented by:

D. Grant Walsom, B.A.Sc., P.Eng., QP

Partner

XCG Consulting Ltd.

Excess Soil Regulation and Rules

- ▶ Evolution of activities and hot-development markets in southern Ontario
- ▶ Poor management of soil and misrepresentation for quick \$
- ▶ The “old way”
- ▶ Moving problems from one place to another - innocent parties

“**inert fill**” means earth or rock fill or waste of a similar nature that contains no putrescible materials or soluble or decomposable chemical substances; **O. Reg. 347**

July 1, 2020 – “but does not include excess soil”

“**soil**” means, 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; **O. Reg. 153/04**

“**excess soil**” means soil, or soil mixed with rock, that has been excavated as part of a project and removed from the project area for the project; **O. Reg. 406/19**



Why?

Purpose:

- ▶ Protect Human Health and the Environment from inappropriate relocation of excess soil, and
- ▶ Enhance opportunities for **beneficial reuse** of excess soil and **reduce GHGs** associated with movement.
geotechnical properties may dictate the beneficial reuse

Objective:

- ▶ Reducing Soil Disposal at Landfill, reduced GHGs
perhaps ... need to increase demand and site options



Waste Rules

Excess Soil is Waste ... unless ...

- ▶ Directly transported to a reuse site, a Class 1 soil management site, a Class 2 soil management site or a local waste transfer facility
- ▶ If the owner or operator of the reuse site is the project leader for the excess soil site, and consented in writing
- ▶ Soil is dry and remains dry until final placement at the reuse site or if not dry soil, or if not dry, instrument authorizes depositing non-dry soil



Takeaways



Consultants/QPs

1. Read the Regulation and Rules Document
2. Read the Regulation and Rules Document
3. **Rinse and Repeat**
4. Take Opportunities to discuss, learn from others, webinars, conferences etc. - become experts
5. Be advocates with your clients and for your clients
6. Good reports ... no shortcuts



Municipal Engineers

1. Read the Regulation and Rules Document
2. Read the Regulation and Rules Document
3. **Rinse and Repeat**
4. Decide on your project model that works best for you (QP-PL, QP-C, combination) - legal team advice
5. Early Characterization/proper → leads to better bids
6. Don't accept less than the "Regulatory Standard"



Reports

- ▶ **Understand that report(s) prepared are not just for the person who commissioned them**
 - ▶ Contractors, other QPs, Reuse Sites → all base their decisions upon the information
 - ▶ Report reliance statements ... understand that the purpose is for others to review/base decisions
 - ▶ Good illustrations for reviewers to understand, identify zones/depths, Standards are met/fail, delineate where possible
- ▶ All this costs more unfortunately ... but may save effort later



Background Resources

- ▶ **ES&E Article (Al Durand; May/June 2014)**

http://soil.com/news/files-news/Handling_excess_soil-how_we_got_to_where_we_are_and_where_things_are_going.pdf

- ▶ **MECP Made-in-Ontario Environment Plan**

<https://www.ontario.ca/page/made-in-ontario-environment-plan>

- ▶ **MECP Regulatory Package and Resources**

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

- ▶ **ONEIA Best Practices Documents, Presentations**

<https://www.oneia.ca/excess-soil>

- ▶ **OSPE Pits and Quarries**

<https://ospe.on.ca/excess-soil-reports/>

- ▶ **Qualified Persons Community of Ontario**

<https://qpco.ca/>

- ▶ **RPRA Excess Soil Registry (required after Jan 1, 2022)**

<https://rpca.ca/excess-soil-registry/>



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A Legal Perspective on Excess Soils

Presented by:
Annik Forristal
Partner- Construction Group
McMillan LLP

Disclaimer: Not a legal opinion, nor confirmation from Ontario Ministry of Environment, Conservation and Parks

Legal Perspective on Excess Soils

- ▶ Address excess soil early in design and planning stages of project to avoid unexpected costs and delays by:
 - ▶ Identifying the Project Leader to manage and take responsibility for excess soil at the project site;
 - ❑ “project leader” means, in respect of a project, the person or persons who are **ultimately responsible** for making decisions relating to the planning and implementation of the project
 - ❑ Can be more than one person
 - ❑ As the “Owner” you are likely the “Project Leader” and cannot contract out of this role
 - ▶ Engaging a Qualified Person early to assist with excess soil quality assessment; and
 - ▶ Considering how the responsibilities of the Project Leader and Qualified Person will be allocated between the project parties



Responsibilities of Qualified Person (“QP”)

- ▶ QP is required to prepare (or supervise the preparation of) the following in accordance with the Soil Rules for designated projects (starting in January 1, 2022):

Assessment of past uses of the project area (similar to a Phase I ESA)

Sampling and analysis plan

Soil characterization report

Excess soil destination assessment report

- ▶ This will include sampling the soil at the project site to determine its environmental condition and what generic or site specific standards will apply to excess soil from the site under the Regulation
 - ▣ identify (area and depth) of soil that will become excess soil (subject to which standards) and what soil will be treated as waste
- ▶ If new information arises making the above documents inaccurate, the Project Leader must ensure the QP is made aware and all necessary amendments made



Project Leader Responsibilities

- ▶ Project Leader is responsible for any excess soil removed from the project area, whether or not soil management is contracted out to a third party
- ▶ Project Leader's responsibilities include:
 - ❑ Developing procedures and training protocols for the management of excess soil by any employees or contractors involved in the project
 - Must include procedure for dealing with soil that may be affected by the discharge of a contaminant → stopping excavation work until impacted soil and impacted area is identified and segregated from other excavated soil
 - ❑ Filing of notice in registry and updating such information (after January 1, 2022)
 - ❑ Coordination and undertaking of soil sampling prior to transport
 - ❑ Arranging for temporary storage when required in compliance with the Regulation
 - ❑ Identifying appropriate reuse sites and ensuring reuse sites compliant with the Regulation
 - Reuse site also has liability to ensure use of excess soil in compliance with laws
 - ❑ Creating tracking system for movement and deposit of excess soil as well as recordkeeping requirements (comes into effect January 1, 2022)
 - ❑ Transport of excess soil to reuse site including scheduling of same and arrangement of temporary storage if/as required



Contract Implications

- ▶ Expressly address the parties' respective soil management obligations in your contract
 - ❑ Make soil management policy a contract document when possible
 - ❑ Expressly identify which obligations are being delegated to whom and where coordination and communication between parties is required
 - ❑ Consider consequences/remedies in the event of delays (e.g., to soil testing and transport)
- ▶ Blanket obligations to “remove waste products in accordance with applicable laws” likely insufficient
- ▶ Where Regulations come into force under existing contracts, may need to address cost and schedule implications by Change Order



Regulatory Liability vs. Contractual Liability

- ▶ Project Leader is responsible for compliance with Excess Soil Regulation and will therefore be liable for any non-compliance and related regulatory orders or offences
- ▶ **Cannot contract out of regulatory liability**
 - ❑ Project Leader cannot exclude, limit or alter their liability through contract or other arrangements with third party contractors or consultants
 - ❑ Non-compliance can result in administrative penalties, orders, quasi-criminal charges, fines
- ▶ **BUT** can still allocate responsibilities and liability to engineers, consultants and contractors in civil contracts
 - ❑ Indemnity for regulatory and/or civil liability costs
 - ❑ Insurance requirements or other backstops





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Excess Soils and Risk Management

Presented by:
Sabina Taylor, CRM, CIP
Vice President
Hugh Wood Canada Ltd.

Typical Project Structure



Insurance Requirements

- ▶ MUNICIPALITY

- ▶ DEVELOPER

- ▶ OWNER

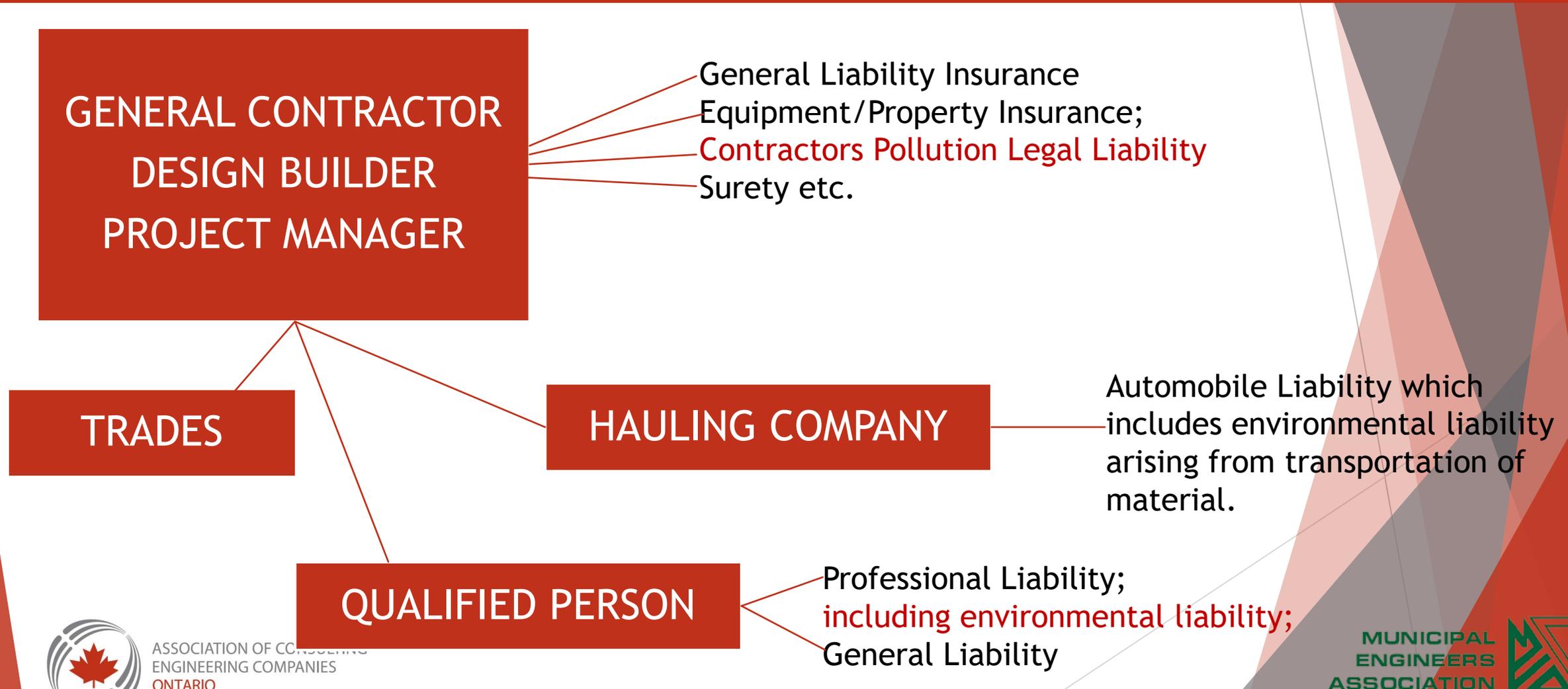
- ▶ General Liability Insurance
- ▶ Property Insurance
- ▶ Environmental Impairment Liability
- ▶ Cyber Insurance
- ▶ Director's & Officers Legal Liability
- ▶ **Contractors Pollution Liability**

- ▶ QUALIFIED PERSON

- ▶ Professional Liability
- ▶ Including environmental liability
- ▶ General Liability
- ▶ Property Insurance
- ▶ Any other required business insurance



Insurance Requirements



Qualified Person

PROFESSIONAL LIABILITY POLICIES INSURE:

Those services that YOU, or anyone for whom YOU are legally liable, are legally qualified to perform for others in YOUR practice as an architect, engineer, interior designer, land surveyor, landscape architect, project manager, construction manager, scientist, environmental consultant or technical consultant.

Due to Canadian Joint & Several Liability legislation, it is imperative that each party carry sufficient insurance limits



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Question & Answer Session

Moderated by:

Bruce G. Matthews

Executive Director

Association of Consulting Engineering Companies | Ontario



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