December 3, 2022

Land Use Policy, Environmental Policy Branch
40 St. Clair Ave West, 10th floor
Toronto, ON M4V 1M2

**RE: Excess Soil Regulation – Proposed Amendments**
**ERO Posting 019-6240**
**Comments submitted by LDS Consultants Inc.**

LDS Consultants Inc. is a consulting firm offering environmental engineering and consultation services. As representatives of our firm, it is extremely frustrating that the Ministry of Environment has not taken the opportunity provided by the Implementation Pause to consider and implement changes to address comments made on the previous related ERO Posting *(Implementation Pause of Excess Soil Requirements in Effect January 1, 2022 – ERO 019-5203).* We have first-hand experience with this Regulation, and our QPs have spent a great deal of time trying to find the balance between adhering to regulatory requirements, and using a common-sense approach which can still serve all parties involved in our projects. It should be noted that our perspective comes from providing QP services to developers and contractors; with experience working with Project Leaders; and, with contractors who are responsible for handling and managing excess soils generated from Project Areas.

The implementation pause provided an opportunity for the Ministry to propose effective changes to the Regulation. Instead, this time has been squandered, with meager (and woefully inadequate) amendments being proposed. The voices of developers, contractors and municipalities have been largely ignored; or, at best, selectively regarded. It appears that no effort has been made to reach out and fully understand the concerns of these stakeholders, who are the most impacted by the Regulation. These stakeholders and their projects face significant cost impacts and project delays in implementing the regulatory requirements.

There have been no modifications or amendments related to linear infrastructure projects, typically led by municipalities and local governments. Construction-savvy QPs are expected to find work-arounds and get creative in interpreting Project Areas within the project limits, to ensure that the requirements of the Excess Soils Regulation are implemented in a reasonable manner. For those QPs with less experience, or those who may be less invested in the needs of their clients, strict adherence to the preparation of planning documents, minimum sampling frequencies, testing parameters and lack of flexibility in making the soil management planning documents practical and usable for the contractors working on the projects can have significant project cost implications.

The Regulation should allow QPs with project-specific knowledge to have the flexibility to provide practical, efficient, and cost-effective solutions to managing excess soils. The government has issued the 'Rules for Soil Management' document to accompany the Regulation, which is intended to provide an explanation of, and additional detail to supplement the Regulation and its requirements. These documents are still so onerous to most end-users, that various construction-related industry associations have recognized and fulfilled the need to prepare plain language guidance materials. The ministry's online training sessions have run on a limited basis, with limited capacity for participants. In our experience, these sessions often have waiting lists, which would suggest that their efforts to assist in educating stakeholders on the regulatory requirements have not adequately met the needs of the development and construction industry. It is no wonder that stakeholders remain skeptical about the Ministry's stated commitment to continue to work collaboratively to ensure that the Regulation is implemented effectively.

As written, the Regulation treats potential soil impacts the same as actual impacts, by specifying a minimum sampling frequency, and a comprehensive scope of testing parameters. The work in preparing the APU, including identifying potentially contaminating activities (PCAs) and areas of potential concern (APECs), is undermined by the rigorous analytical parameters prescribed by the Regulation. It also ignores the important process of due diligence work which is often completed in advance of the start of construction, by limiting grandfathering, and having only a passing regard for previous work which has been undertaken at a site. The proposed amendments do nothing to address this issue.

In the past year, we have seen that CALA-accredited laboratories struggle to maintain standard turn-around times, due to the increased volume of testing which is being carried out as a result of the regulatory requirements. Like many other industries, growing their capacity and finding qualified and certified staff has been a challenge in the post-COVID environment. Laboratories have a limited and finite capacity for testing. If capacity is forced to increase to meet industry needs with the full roll-out of the Regulation, what guarantee do Project Leaders, contractors and QPs have that the quality and standards of the lab testing procedures will be maintained, and that delays will not be persistent and pervasive? How does this risk get managed or addressed? Should the construction stakeholders expect relaxed certification rules and requirements to increase testing capacity? Again, contractors take the brunt by being subject to additional costs for increasing lab capacity (capital costs for more equipment and training qualified staff), driving up construction costs which carry over to the Project Leaders.

The regulatory process also pits QPs against QPs. Rather than promoting a collaborative effort, QPs working for contractors are judged by their peers (working for municipalities and developers), when they take an approach which leans towards making planning documents more useful and easier to understand for the end-users who are actually handling excess soils. Ultimately, it is the contractor's QP who is identified as the responsible party on the Soil Registry; however, when the approach of multiple QPs (representing various parties to a contract) is not aligned, this QP does not often have full discretion in their scoping and presentation of data, when changes are put forward by other QPs representing other parties. The enforcement of cumbersome reporting requirements, technical nomenclature and convoluted discussion can overwhelm the end-users, making those documents impractical for use in the field, and forcing contractors to take on more risk and greater costs than the Project Leaders. This is <u>not</u> a balanced approach, and breeds caution and confusion, rather than collaboration. This is a particular issue when contract documents are prepared in advance of any soil characterization work being completed, with few provisions to allow flexibility in managing the actual soil conditions encountered on project sites.

Further, the Regulation forces QPs to forego efficiencies in reporting, by separating out the planning documents, rather than utilizing a more practical approach where planning reports are combined into an Excess Soil Management Implementation Plan, containing relevant elements of all of the Planning Documents (APU, SAP, SCR and ESDAR). An example of the onerous reporting requirements, is the preparation of the APU, which under the Regulation requires exhaustive research and documentation which has marginal impact in identifying contaminants of potential concern, beyond the minimum parameter list. A due-diligence approach to the APU (i.e., following the general requirements of the CSA Standard Z768-01 [R2022]) could yield similar results without the additional cost and effort of adhering to the O.Reg. 153/04 reporting procedures. The findings of the APU are not balanced with the prescribed minimum sampling frequency or testing parameters.

The Ministry is trying to sell an exemption for low-risk sites as something 'new', by tacking on the clarification that in addition to the planning documents not being required, registration on the soil registry and soil haulage records are not required. Project areas within residential and agricultural areas are already exempt from the planning document requirements. There are some nuanced changes in the language of this proposed amendment; however, it is clear that commercial sites are also left out of this 'new' exemption. There are many redevelopment projects on lands which have had commercial use and are not considered Enhanced Investigation Project Areas, which are still subject to the onerous requirements of the Regulation. This is particularly relevant in urban centres which have commercial sites considered low-risk by a qualified QP; but, the Regulation leaves very little room for a common-sense approach to be utilized in assessing and characterizing excess soils. Since ultimately, the QP takes on the responsibility of assessing the sites they are working on, has there ever been any consideration to modifying or expanding the QP's declaration (as outlined in Section 6 of the Regulation) to provide an attestation that confirms that the land-use at a project site is considered low-risk, and that in their opinion as a QP, the regulatory exemption should apply?

The Regulatory Impact Statement in the ERO Posting explicitly states that, "*The proposed amendments would not provide additional compliance costs to developers, municipalities, infrastructure companies or others, as they would reduce or provide flexibility in relation to requirements that are already in the Excess Soil Regulation."* Although this statement may be true for the specific amendments which are proposed, there are secondary compliance costs associated with the need to increase capacity in analytical testing labs, lost efficiencies, the preparation of various planning documents (APU, SAP, SCR and ESDAR), and increased risk to the contractors who are responsible for the actual handling of the excess soils. These all have direct cost implications to the construction industry, and the cost for financing reconstruction, rehabilitation and new development projects which have been conveniently overlooked.

There is a disconnect in pushing this Regulation and its flawed implementation strategy forward, and the mandate of the current government to promote growth in the housing supply, which in turn requires growth in infrastructure and servicing capacity. By implementing the Regulation in its current form, and with the limited amendments which have been proposed, the government appears to be working against its own mandate.

If the intent of the government is to promote the responsible use and management of excess soils, it could be better handled by incorporating the technical knowledge and work experience of QPs with construction experience, and who understand the importance in having a practical approach to manage excess soils in a reasonable and responsible manner.

Respectfully Submitted,

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