

Our Ontario O.Reg. 406/19 Filter - Part 1 - Does it apply and does a s.8 Notice have to be filed?

1. Is soil, or soil mixed with rock, to be removed from a “Project Area”? does a [s.2](#) exemption apply?

No? The Reg. Does Not Apply

Unless a [s. 2](#) exemption applies, any soil or soil mixed with rock which is removed from a *project area* is defined as “*excess soil*” and is deemed to be a “waste” unless and until the conditions set out in [s.3\(2\)](#) are met (see over).

Note: the definitions of “*soil*”, “*project*” and “*project area*” are intentionally broad:

s.1: “**soil**” means “unconsolidated naturally occurring mineral particles and other naturally occurring materials 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” and includes “liquid” soil (which has a slump of more than 150 millimetres as per O.Reg 347);

s.1: “**project**” is broadly defined to include “any form of development or site alteration”, virtually any type of construction and the removal of liquid soil from a “surface water body”;

s. 1: “**project area**” means a “property or adjoining property on which the project is carried out”.

Caution: above grade design, on-site soil re-use options and efficient excavation methods (such as hyrdovac and trenching) might be explored to eliminate or reduce excess soils. Other applicable laws continue to apply, however, including the *Building Code Act*, the *Environmental Protection Act* (inc. O.Reg. 347), the *Planning Act*, the *Aggregates Act*, local municipal site-alteration by-laws and other site-specific instruments.

Site-alteration by-laws and other site-specific instruments are potentially very significant.

In some cases, as per [s.4](#), they will trump O. Reg. 406/19 as regards the quantity and quality of soils that may be placed at a re-use site.

Caution: A municipality’s authority to pass a site-alteration by-law also goes well beyond the scope of O.Reg 406/19:

they can prohibit or regulate the placement of fill, the removal of topsoil, the altering of grades and the rehabilitation of a project site, even where O.Reg. 406/19 would otherwise allow the activity. These have been [recently updated by dozens of Ontario municipalities](#) and can vary widely.

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2. Does a [s. 8\(2\)](#) exemption apply?

Yes? The requirement to file a Notice with the Registry under [s. 8\(1\)](#) of O.Reg. 406/19 does not apply

Note: A Notice filed under s. 8(1) kickstarts the intensive assessment, reporting, materials tracking and record keeping requirements of O.Reg. 406/19.

Pursuant to s.8(2), however, no Notice needs to be filed:

- where the circumstances set out in [Schedule 2](#) of the Regulation apply; or
- where a *project leader* entered into a contract for the management of excess soil from the project prior to January 1, 2022.

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If excess soil is to be generated and no s. 2 or s. 8(2) exemption applies:

O.Reg 406/19 applies and the *Project Leader* must file a Notice with the [Excess Soil Registry](#) which contains the [Schedule 1](#) information and which kickstarts intensive assessment, reporting, materials tracking and record keeping requirements (see over).

Caution: where a s.2. or s.8(2) exemption applies, significant time and money can be saved. A failure to identify an exemption can lead to increased costs and claims. Similarly, if a site-specific instrument applies but is not accounted for as part of the planning process, delays, claims and increased costs can arise.

Important questions to be addressed: Who is responsible to determine if exemptions or site-specific instruments apply? When will the determination be made?

Prudence dictates: that the responsibility for, and timing of, these determinations be understood and set out in the Contract Documents.

Prudence also dictates: if an exemption is known to apply, that this also be set out in the Contract Documents.

Our Ontario O.Reg. 406/19 Filter - Part 2 - After a s.8 Notice is Filed with the Registry

the “**project leader**” shall ensure that a Notice is filed in the [Excess Soil Registry](#)

setting out the information required by [Schedule 1](#) of the Regulation, which includes a **declaration** that (among other things) she/he/it will:

- “**develop and apply all necessary procedures to ensure that all necessary steps are taken to ensure that this Regulation is complied with**” and
- “**ensure that excess soil from the project area will be disposed of in compliance with this Regulation**”.

Caution: there can be more than 1 **project leader** (which is defined as):

“the person or persons who are ultimately responsible for making decisions relating to the planning and implementation of the project”.

Determining who will file the Notice and take on the responsibility to ensure the Regulation is followed is **critical** to sound planning and cost control.

Prudence dictates that identifying of who is responsible to file the Notice be done early and set out in the Contract Documents to avoid confusion and delay.

Note: [in some circumstances](#) excess soils can be removed from site before a Notice is filed with the Registry

Steps which the Project Leader who files the Notice must ensure are taken: (1) assessments, testing and reporting by a Qualified Person

Subject to certain exceptions (set out at [s.11\(2\)](#), [12\(3\)](#) and [s.14](#)), a **qualified person** (as defined under O.Reg 153/04) must be retained prepare and/or oversee and update the following, in accordance with the [Rules For Soil Management and Excess Soil Quality Standards](#), (the “Soil Rules”):

- a [s. 11](#) **assessment of past uses** of the project area, (unless a phase one ESA under O.Reg 153/04 has already been prepared),
- a [s. 12](#) **sampling and analysis plan**, a [s. 13](#) **excess soil destination report** and a [s.15](#) report of any “**immediate conditions**” encountered.

Caution: the requisite assessment, sampling, analysis and technical reporting will take **time and money**. Practically, much of it will have to occur pre-excavation.

Prudence dictates that QP(s) are lined up and retained *early* and that sufficient time and money for this steps is allowed for.

Steps which the Project Leader who files the Notice must ensure are taken: (2) disposing of excess soils in compliance with the Regulation

Subject to limited exceptions, excess soils must be assessed and processed (if necessary), so that they will no longer be waste, and then deposited for (no more than) a beneficial purpose at a *suitable* reuse site. Prior to final placement, they may at times be stored and/or processed and managed, on-or off-site.

A “[Beneficial Reuse Assessment Tool](#)” is available to assist in determining a use for the soils and disposal at a landfill will not be allowed come January 1, 2025.

The entire process, from excavation through storage, processing, transport and placement, is governed by the Regulation and the [Soil Rules](#):

- [s.3\(2\)](#) establishes the conditions that must be met for excess soils to no longer be waste, while [s.16](#) requires a tracking system and [s. 28](#) requires records retention;
- [s. 23](#) governs excavation, [s.24](#) governs storage, [ss.17](#) and [18](#) govern transport, [s.20](#) governs the BRAT tool, [s. 21](#) addresses off-site soil management and processing, [s.22](#) governs placement at landfills or dumps, [s.25](#) governs processing at a waste transfer facility; and
- the [Soil Rules](#) impose further, more detailed requirements in relation to all of the above. They also set out the standards that are to be applied (with some exceptions) in determining what soils can be placed where, and in what quantities, for a beneficial purpose.

Caution: The project leader who files the Notice accordingly assumes *a lot* of responsibility.

Significantly the responsibilities can be assigned to others in Contract. Confusion and contractual gaps will lead to delays, claims and costs.

Prudence accordingly dictates that who is responsible for which of these steps be set out clearly in the Contract Documents.

Caution: Demand may exceed supply for QPs, storage, processing and reuse sites. If excavated soils have nowhere to go, there will be delays and potential claims.

Prudence accordingly also dictates that QPs and storage, processing and reuse sites/disposal sites be lined up and retained *early*.

