



New Brownfields Legislation for Ontario

Passing of Bill 56: The Brownfields Statute Law Amendment Act and the New Record of Site Condition Regulation Come into Force October 1, 2004

The Brownfields Statute Law Amendment Act of 2001 was previously tabled by the Ministry of Municipal Affairs and Housing as Brownfields Bill 56 ([click here](#) for Brownfields Act infosheet PDF 400Kb).

Bill 56 received approval by the Legislative Assembly and resulted in the promulgation of Ontario Regulation 153/04, the Record of Site Condition Regulation, which sets out the technical requirements for conducting Environmental Site Assessments, Site Remediations and Risk Assessments. Most of the regulation comes into force as of October 1, 2004, with minor exceptions. The full regulation document can be reviewed [here](#).

What are the implications of the Brownfields legislation to stakeholders?

The general intent of the legislation is to facilitate the cleanup, redevelopment and transfer of Brownfields, or real estate with a history of contamination. In this respect, the regulation goes a long way to providing a legal framework for technical assessment and remediation (cleanup) of contaminated sites.

The implications to financial lenders are summarized in an article from **Gowlings LLP - [What's in it for Lenders?](#)** (in PDF). Essentially, Bill 56 contains provisions which would provide limited protection from environmental liability to Mortgage Lenders and Property Owners, if a Record of Site Condition is completed and acknowledged by the Ministry of the Environment (MOE). The Record of Site Condition (RSC) is an affidavit from the Owner and his environmental professional stating that the soils and groundwater underlying the property meet with the applicable MOE cleanup standards consistent with the use of that property (agricultural/residential or commercial/industrial). The RSC then becomes a public document posted on the MOE's Environmental Bill of Rights (EBR) registry website.

Secondly, the Record of Site Condition Regulation is a regulation as opposed to a guideline, which will place emphasis on code requirements and raise questions about how the investigations are conducted vis-à-vis the regulatory requirements. For instance, it references the Canadian Standards Association protocols CSA Z768 and Z769 for conducting Phase I and II Environmental Site Assessments.

One of the key requirements of that regulation is that 'Qualified Persons' (QP's) as defined by the code be required to undertake or supervise, and sign off each phase of assessment and remediation. For example, licensed professional engineers and geoscientists are required to sign off on remediation projects. The QP's are required to carry environmental errors and omissions liability insurance of at least \$ 1 Million to protect their Clients.

The Record of Site Condition Regulation references a new technical document entitled *Soil, Ground Water and Sediment Standards for Use Under Part XV.1 of the Environmental Protection Act*. These standards will replace the *Guideline for Use at Contaminated Sites in Ontario (1996)*.

In particular, the cleanup guidelines for total petroleum hydrocarbons (TPH) have been replaced by risk-based standards developed through the MOE's TPH Working Group. The new standards are also known as the Canada Wide Standards for TPH. Under these standards, analyses for petroleum hydrocarbons have been broken down into four sub-classes, F1, F2, F3 and F4, based on fractionation. These classes encompass a range of petroleum hydrocarbons from naphtha through gasoline, diesel, and heavy oil, with four different standards for each of the 4 classes depending upon the length of the carbon chain, viz. C6-C10, C10-C16, C16-C34 and greater than C34. A primer document on petroleum hydrocarbons is provided on our website.

It is believed that cleanup of sites contaminated with petroleum hydrocarbons will generally be facilitated for sites situated in areas of potable groundwater, since the previous guideline for TPH alone was rather restrictive for such situations. On the other hand, for sites in non-potable groundwater situations, the cleanups may become somewhat costlier as these standards are tightened.

Finally, the *Record of Site Condition Regulation* calls for special issues relating to cleanup of petroleum hydrocarbons, as highlighted by the following section entitled 'Meeting Petroleum Hydrocarbon standards' from the regulation:

49. (1) A property does not meet an applicable site condition standard in relation to a petroleum hydrocarbon unless the qualified person has determined that there is no evidence of free product, including but not limited to, any visible petroleum hydrocarbon film or sheen present in the ground water or surface water or in any ground water or surface water samples.

49. (2) A property does not meet an applicable potable ground water site condition standard unless the qualified person has determined that the ground water is free from objectionable petroleum hydrocarbon odour and taste.

One thing not likely to change under the new legislation is protection for polluting parties. The courts have generally upheld the 'polluter pays' principal in several decisions, and this will likely continue under the new legislation.

In conclusion...

The new Brownfields legislation will be of interest to most stakeholders and will offer flexibility and incentives for property owners and developers to cleanup and develop contaminated land at reduced costs, with provisions for working with regulators and municipalities on using tax breaks and initiatives to finance projects. It will also provide a rigid framework and place additional burdens on professionals conducting site assessments and cleanups. This will eventually provide for more accountability and scrutiny, and help raise professional operating standards for firms and QP's involved in providing such services.