

## 2010 Update to Ontario Brownfields Regulation

In early 2010, the Ministry of the Environment (MOE) released its amendment to Ontario's Brownfields Regulation 153/04 - the Record of Site Condition. The amendment was issued in the form of a new regulation, O.Reg. 511/09 - Amendments to Record of Site Condition Part XV.1 of the Act, under the *Environmental Protection Act*. Such regulations aim to facilitate development of Brownfields properties.

The Reg. 511/09 amendment makes sweeping changes to Reg. 153/04, as highlighted below:

- Strengthened soil and groundwater site condition standards, including updated standards for numerous contaminants and new standards for several contaminants (new standards will be enforced on July 1, 2011)
- The introduction of specific and more rigorous requirements for conducting Phase I and Phase II environmental site assessments which will replace the previously used standards by the Canadian Standards Association (most changes related to these assessments will be enforced on July 1, 2011 or at a later date).
- The introduction of modified generic risk assessment, a streamlined process using an approved MOE computer software to modify generic site condition standards for the purpose of filing RSCs (most changes related to modified generic risk assessments will be enforced on July 1, 2011).

In particular, the MOE has revised limits for approximately 120 contaminants - of which, allowable limits for some two-thirds of the chemicals are stricter than before, and have been relaxed for others.

A detailed overview of the amendments to O. Reg. 153/04 is available on the Environmental Registry; EBR Registry Number 010-4642, at the link:

<http://www.ebr.gov.on.ca/ERS-WEB-External/displaynoticecontent.do?noticeId=MTA0NTcw&statusId=MTU2NjE4#>

## Why has the MOE Amended its Regulation?

According to MOE personnel we have met with, there are several reasons why the MOE has decided to amend its regulations:

1. Advancements in scientific research have revealed more information about the toxicity of certain chemicals. Such advancements behoove the authorities to make accommodation for continued protection to human health and the environment from exposure to such chemicals. Therefore, the need to amend the previously legislated limits on the contaminant levels.
2. Under the previous regime, the quickest way to achieve compliance for a Brownfield with soil contamination was to dig up the contaminated soils and to dispatch them to a landfill. This resulted in large volumes of soils being land-filled, which was not consistent with the MOE's waste diversion policies. Under the new regime, it may be cost prohibitive to dispatch the even larger volumes that might result from stricter standards, and therefore, according to common wisdom, more proponents would lean towards the Risk Assessment (RA) option in achieving compliance.
3. With stricter control on the Records of Site Condition (RSCs) process, the MOE wanted stakeholders to develop necessary confidence, making it easier to develop Brownfield sites. Properly completed RSCs would not only provide the MOE and the public with accurate disclosure of the contaminant levels at a property, but would make it easier for lenders mortgage the property, recognizing the limited protection from MOE control orders and liability that an RSC could offer.

## What are the Implications of the New Regulation to Stakeholders?

There are several implications of the new regulations to stakeholders of Brownfields properties that have to do property transfers, financing and development.

From a property vendor or purchaser's standpoint, it will generally be more difficult to get a clean bill on a Brownfield property they are trying to list. For instance, a Phase II ESA will more likely conclude that the site is contaminated when the chemistry data from laboratory analyses on soils and groundwater samples are compared with the new standard limits. And cleanup or remediation of such properties will again be complicated by the stricter compliance limits. For example, the new petroleum hydrocarbon standards for groundwater are much stricter than before, as there are lower allowable limits on petroleum hydrocarbons even for non-potable groundwater situations. And sometimes, remediation down to such standards can be cost prohibitive. So the only recourse in such situations for the deal to proceed would be a Risk Assessment (RA), process which can be onerous due to the rigorous level of supporting studies required and for the process to make its way through the MOE review process.

From a financial institution's standpoint, this will again become very challenging and could be a deal breaker. Not all institutions are comfortable with an RA, and understandably so, because a lender is considering a mortgage default scenario whereby the property could be re-listed under a Power of Sale. The fact that an RA has been conducted on property implies, to an extent, that the site has some contamination associated with it, such that it cannot meet the MOE's generic standards. This fact imparts a certain perception of problems or "stigma" to the property which can make it less attractive to prospective purchasers. As such, it may not realize full market value if listed under a Power of Sale, and consequently, lenders are wary of the problems they may face in trying to recover on the outstanding balance of their mortgage. Therefore, many lenders refuse to place a mortgage on Brownfield properties.

There are other implications from a financial institution's perspective. For instance, properties that were previously deemed to have met the MOE's generic standards under Ontario Regulation 153/04 may now not comply with the new standards. Although the new standards will come into effect July 1, 2011, the lenders have to make present day decisions on whether to place a mortgage on a property or not.

So a number of lenders are advising their consultants to use the new standards for comparing analytical data already, so that they do not face unpleasant surprises when the new standards come into force. Some financial transactions may not proceed as a result of negative findings of Phase II ESAs resulting from using the new standards.

One of the foreseeable problems lenders will face with existing mortgages is when the Phase I or Phase II ESAs have to be updated. This is because standards such as CSA Z768-01 and CSAZ769-00 state that such studies be updated on annual or bi-annual basis. So, if a site was previously assessed as compliant with the MOE standards, it may not necessarily meet the new standards. However, since the mortgage has already been placed on the property, the lender would be hard-pressed to make additional demands of the Borrower to bring the site into compliance with the new standards. But it would become increasingly difficult for them to justify the situation to their corporate underwriters. So, some kind of compromise may have to be worked out, such as the Borrower undertaking a contaminant monitoring program. Again, this would impose challenges for the account manager in monitoring the loan, and for the Borrower to continually fund such monitoring programs.

Finally, there are implications for others such as Owners of aggregate quarries. Such Owners are required to submit analytical results for their source material showing compliance with the Table 1 background standards to qualify as “inert fill”. However, since the new standards are stricter, such source sites find it difficult to meet the standards, which the MOE will not be revising in the near future. Discussions between Owners of such sites and the authorities have resulted in compromise agreements under which Table 2 standards could be used to assess their material instead of Table 1.

### **What are the Benefits of the New Regulations?**

Based on the foregoing discussions, it would appear that the new regulations are going to complicate life in general. However, there are some benefits that can be realized from the new regulations.

1. There are stricter and more standardized ways of conducting Phase I and II ESAs, which should make for more consistent findings to be reported by any consultants undertaking such work.
2. Regulated limits for some contaminants, such as the dry-cleaning solvent tetrachloroethylene or perchloroethylene (PCE), have been relaxed. This should make it easier for such sites to be cleaned up and achieve compliance.
3. The RA process is being streamlined, and standardized such that it will be possible to do the risk calculations online by data input directly into software produced by the MOE. This will result in shortened timeframes for technical review by the MOE knowing that only the input data and assumptions require vetting - the calculations being standardized.
4. In particular, the Tier 2, or Modified Ecological RA process will gain popularity. Some proponents may elect to proceed with a transaction, after simply using the MOE's Tier 2 software to assess a site, without actually proceeding to a formal RA through the MOE. This is because they will realize that even though a property they are considering it has contaminants at levels exceeding the MOE's generic standards, the site might nevertheless meet the Tier 2 standards, and is therefore deemed "risk assessable". In fact, some lenders may also adopt this approach, by having consultants input the data gathered from the Phase II ESAs into the MOE's Tier 2 software and make a judgment call on whether the site can be classified as "risk assessable". This might be sufficient for them to proceed with the mortgage deal.
5. RSCs will gain increasing acceptance and use in the Brownfield community. For instance, legal counsel for stakeholders will routinely search the MOE Brownfields for filed RSCs, which could provide needed confidence to purchasers and financial institutions to perform the transactions.

## CONCLUSION

Only time will tell whether the new standards will be successful in achieving the primary objective of facilitating the development of Brownfields sites.