



PLANNING AND DEVELOPMENT SERVICES DEPARTMENT

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MEMO

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TO:

FROM: Ezio Nadalin, Planner
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RE: Mandatory Records of Site Condition Under Brownfields
Legislation

1. Background

The Brownfields Statute Law Amendment Act, 2001 received Royal Assent on November 2, 2001, it amended several pieces of provincial legislation, including the Education Act, the Municipal Act, the Municipal Tax Sales Act and others. Implementation of the legislation has been phased in over the past few years. With final implementation coming into force and effect on October 1, 2005. The amendments to the Environmental Protection Act (EPA) have had direct implications for municipalities and the building inspection and planning departments that serve them.

2. The Amendments

The October 1, 2005, amendments added two sections to the EPA. In addition, Parts 4 and 10 of the EPA's associated Regulation 153/04 came into force on that date. Finally, amendments to Building Code Regulation 403/97 made these new provisions applicable law under the Ontario Building Code.

To summarize the amendments, the new EPA provisions and regulations :

1. Require the filing of a Record of Site Condition (RSC) to the Brownfields Environmental Site Registry before a property use can change from an industrial, commercial or community use to a residential, institutional, parkland or agricultural use.
2. Restrict construction of a building before filing an RSC, if the building will be used in connection with a specified change of property.
3. Prohibit the issuance of a building permit if it is in relation to a use of the property or construction of a building that is restricted by a Certificate of Property Use.

3. What is a Record of Site Condition, and What Does it Involve?

An RSC is basically an assessment of the condition of a particular site, which is posted on Ontario's Environmental Site Registry. Part XV.1 of the Environmental Protection Act (EPA) has been added by the brownfields legislation in order to set out the requirements for the assessment and clean-up of a property and the filing of the RSC on the Environmental Site Registry.

Under Part XV.1, a property owner may file an RSC on the Registry if the applicable standards are met for soil, groundwater and sediment. An initial assessment (a Phase I environmental site assessment) is required "to determine the likelihood that contaminants have affected the property". A Phase I ESA must include a records review, and site visit, interviews, an evaluation of the information from these activities, the preparation of a written report and submission of the report to the client (the property owner). A Phase I ESA does not include physical sampling and analysis of the property. Phase I ESA's must be conducted by "qualified persons" (see next section).

A Phase II ESA is conducted "to determine the location and concentration of one or more contaminants in the natural environment". It is required for the purpose of filing an RSC for some types of proposed changes of property use as set out in Section 27 of O. Reg. 153/04. Under that section, a Phase II ESA is required if the property is used, or has ever been used, for an industrial use or for certain commercial uses as specified in the Regulation. Those commercial uses include auto garages, bulk liquid dispensing facilities, gas stations or dry cleaning establishments.

A Phase II ESA is also required when the "qualified person" is of the opinion that a Phase II is necessary. This would typically happen as a result of a Phase I indicating that there may be contaminants on the property.

Phase II ESA's must include planning and conducting a site investigation, interpreting and evaluating the information from the investigation, the preparation of a written report and submission of the report to the client (the property owner). The Phase II must include soil sampling and analysis. Sampling and analysis of groundwater and sediment, if any, is to be done if considered appropriate by the qualified person conducting the Phase II ESA.

4. What is a "Qualified Person"?

As noted earlier, the EPA requires a "qualified person" to undertake certain activities related to the filing of an RSC, including conducting or supervising a Phase I or II ESA. These activities and the filing of an RSC demonstrate that a property previously found to have contamination, or suspected of having contamination, now meets the applicable standards. Table 1 shows what types of professional persons and designations may undertake various activities under the EPA as "qualified persons".

Table 1: Designation Requirements

Designation	Activity		
	Phase I ESA and Related RSC	Phase II ESA and Related RSC, <u>no</u> Risk Assessment	Phase II ESA and Related RSC, <u>with</u> Risk Assessment
Professional Engineer	x	x	x
Professional Geoscientist	x	x	x
Chartered Chemist	x	x	
Professional Agrologist	x	x	
Applied Science Technologist	x		
Certified Engineering Technologist	x		
Architectural Technologist	x		

Source: "Records of Site Condition – A Guide on Site Assessment, the Cleanup of Brownfields Sites and the Filing of Records of Site Condition", MOEE, October 2004

5. Implications for Building Inspections

New sections of the EPA are now linked to the Building Code Act by requiring that an RSC be filed before construction, if the building will be used in connection with a regulated change of use. A building permit cannot be issued in relation to a regulated change in property use until an RSC is filed for that property. Ministry guidelines suggest that a building official must ask for proof that an RSC has been filed in the Environmental Site Registry before issuing the permit. This proof can take the form of the acknowledgement letter that is sent to the property owner by the Ministry once the owner has filed the RSC in the Registry. The building official can also search the Registry website to verify if the RSC has been filed to it.

6. Implications for Planning

Changes of property use obviously also come into play in the planning process. The legislation and guidelines are less clear on how to deal with planning applications and the Ministry guideline suggests that municipalities should determine when in the planning process the documentation is required.

In some cases, such as subdivision or consent applications to facilitate a regulated change of use, the Planning Act allows for the municipality to attach conditions of approval. An appropriate condition in a brownfields situation might be that the applicant provides a copy of a filed RSC prior to final approval of the consent or the plan of subdivision.

In other cases, such as the rezoning process, conditions are not authorized by the Planning Act. In those cases, it may be more appropriate to require the filing of the RSC before an application is considered by the municipality. This would help to avoid a situation in which a rezoning was approved by Council and an RSC subsequently was undertaken, only to determine that the proposed change of use was not feasible in the first place because of the nature of the contamination or the expense of the required remediation.

7. Municipal Liability Issues

The legislation includes limitations on liability for municipalities. If a municipality takes certain actions relating to private or non-municipal properties, the municipality or its representative will not, for that reason alone, be considered responsible for the property for purposes of the possible issuance of certain orders concerning its environmental condition. The types of protected municipal actions include:

- Conducting an investigation of a property;
- Ensuring the supply of services;
- Securing the property;
- Ensuring the property is insured;

- Responding to an exceptional circumstance;
- Collecting rents or levies;
- The suppression or prevention of fire;
- The removal, repair or renewal of any building or structure;
- Causing work to be done in relation to a public utility or because of a person's failure to comply with a law, approval, order or agreement; or
- Any action under the *Building Code Act*, the *Fire Protection and Prevention Act*, Part XI of the *Municipal Act*, the *Health Protection and Promotion Act*, the *Snow Roads and Fences Act* and the *Weed Control Act*.

8. What developers should know about recent Brown field Regulation changes

In December 2009, the Ontario Ministry of the Environment adopted a number of changes to the regulation of contaminated (and non-contaminated) sites. Out of the more than 100 pages of Regulation 511/09 at EBR 010-4642, three standout changes are new standards for how clean is clean, new rules for the movement of "clean" surplus soil and stricter standards for the conduct of qualified persons (QP's).

- How clean is clean?

The most important change will be the new standards. The new Soil, Ground Water and Sediment Standards for use under Part XV.1 of the Environmental protection Act, dated July 27, 2009, will officially come into effect on July 1, 2011. These changes will apply more stringent standards, especially as it relates to soils, as new parameters are added, such as total boron, hexane and 1,4 dioxane.

Sites affected with petroleum hydrocarbons will be particularly affected.

- Movement of clean soils

For many years, the MOE has talked about a Materials Management Policy to regulate the movement of "clean" soils from one property to another it would appear that the new rules are introducing such a policy.

When the new Part XII to the regulation comes into force, each stockpile of soil will have to be analyzed. Only soils that have been sampled and proven to meet this new standard may be transported freely. Soils with higher levels of contamination may only be transported to properties that are already contaminated and therefore will always require a Record of Site Condition before conversion to a more sensitive use (s.32 of the Regulation). Reports will be required to document and quantify all movement of soil on and off an RSC property (see new s.27 to 34 of Schedule A).

- How qualified is qualified?

A key theme of the 1996 and 2004 regulatory reforms was that environmental professionals, paid by the property owner, could and should bear the primary

responsibility of documenting the status of contaminated sites. Ministry involvement was drastically reduced and focused on risk assessment. Canadian Standards Association standards were accepted as the regulatory standards for environmental assessments. QP's authorized to sign such documents were gradually limited to professional engineers and professional geoscientists.

To further streamline the system and increase reliability the MOE will enhance the system with the introduction of Reg. 511/09. This Reg. enhances the quality control/audit process for RSC before they are acknowledged by MOE; detailed regulatory standards for the Phase I and Phase II Environmental Site Assessments that must underpin an RSC, replacing the CSA standards; and conflict of interest rules for the QP's who must sign each RSC.

For example, each RSC will now be reviewed by Ministry staff within 30 business days. Some will have a desktop review; others will be reviewed in more detail. Defective RSC's will be rejected; accepted ones will be "acknowledged," and can be relied upon. This process should improve the quality of RSC's.

9. Summary

The overall goal of the Brownfields legislation is to allow for the safe and environmentally-responsible redevelopment of brownfield sites, which will contribute to the related goals of efficient use of land and infrastructure, thereby minimizing the need to expand urban areas into greenfield sites. However, accomplishing this goal will result in longer approval times for building permits and land use changes on properties which are known or possible brownfield sites. In many ways it is not unlike the Nutrient Management legislation and its impacts on the agricultural industry.