

MOE AMENDED BROWNFIELD REGULATIONS

On December 29, 2009, the amendments to Ontario Regulation 153/04 were filed, providing for extensive changes to this Brownfield Regulation. The comment period on the draft amendments ended last February and, since that date, the Ministry has been evaluating the numerous comments provided. Everyone with an interest in remediation and contaminated properties has been eagerly anticipating the amendment. That said, the filing came as a surprise, given it was not coupled with the normal press release and explanatory documents.

The amendments are both administrative and substantive. The only amendments that have immediate application are the administrative ones, so there is time to prepare. The more substantive amendments will come into force and effect on three separate dates: July 1, 2010, July 1, 2011 or the later of July 1, 2011 and the date the further amendments to the *Environmental Protection Act* related to records of site conditions come into force.

Substantive Amendments

The amendments that will come into force on July 1, 2010, or later include the following:

- A complete rewrite of the requirements for Phase I and Phase II Environmental Site Assessments (ESA) includes new schedules covering the application, site investigations, review and evaluation of the information, and preparation of the assessment report for each ESA.
- Key changes to Phase II include the requirement to use the conceptual site model developed in accordance with Phase I for the purpose of determining the scope of the investigation. Specific requirements are set out for conducting the site investigation, including the requirement that any contamination exceeding the applicable site condition standard be delineated laterally and vertically. Direction is provided as to the sampling locations and sampling points; collecting, handling, and analyzing samples, selecting samples for analysis; measuring groundwater levels; determining direction of groundwater flow; and documentation of the field investigation. The qualified person will be required to prepare a Phase II conceptual site model of the property. The regulation stipulates what is to be included in the conceptual model. New mandatory requirements for Phase IIs are also included.
- New mandatory requirements are in place for Risk Assessment Reports (Schedule C).

- Revisions are made to what is defined as the “limited scope risk assessment” (Schedule C).
- The Soil, Ground Water and Sediment Standards for Use will be replaced with the version dated July 29, 2009.
- New provisions are introduced regarding soil brought from another property.
- Considerable revisions have been made to the content and submission process for the Record of Site Condition (RSC) (Schedule A).
- The “owner” definition has been expanded to include a beneficial owner.
- Clarification has been provided to the defined terms “commercial uses”, “community uses”, “industrial uses”, “parkland uses” and “residential use”, in order to provide consistency with the Building Code.
- A conflict of interest section has been introduced to prohibit qualified persons from conducting a Phase I and II ESA or completing the RSC if the qualified person or his or her employer holds an interest.
- Reports relied on to file an RSC will be required to be retained and stored for seven years.
- A definition for an “area of natural significance” has been added.
- The scope of properties included, and the site condition standards for environmentally sensitive areas, will now apply not only to properties that are within an area of natural significance or adjacent to an area of natural significance, but also to areas where the property lies within 30 metres of an area of natural significance.
- A definition for “areas of potential environmental concern” has also been added, to provide that it means an area on, in or under a Phase I property where one or more contaminants are potentially present, including past uses and identification of potentially contaminating activities that are occurring or have occurred.
- The use of the Modified Generic Risk Assessment Model (Tier 2 Model) will be permitted, possibly facilitating the filing of an RSC where a risk assessment approach is being used.

- The requirements for a Phase I as specified in Schedule D to O.Reg. 511/09 will come into force. These include the requirement to determine whether or not to view records for properties located within 250 metres from the boundary of the Phase I property. Schedule D specifies the records to be reviewed, who is to be interviewed for the purpose of obtaining information regarding the Phase I property, the questions to be asked during the interviews, the details of the site reconnaissance to be conducted, and the form of the evaluation to be completed by the qualified person. Mandatory requirements for Phase I reports are also in effect.
- A Phase II will be a required condition if, during Phase I, a “potentially contaminating activity” is identified as being conducted or having been conducted on the property. A “potentially contaminating activity” is identified in Table 2 of Schedule D. A Phase II is also required where the property is deemed an “enhanced investigation property” by the new clause 32(1)(b).

Administrative Amendments

The administrative amendments now in effect include the following:

- Section 21 has been replaced and the new section clarifies that, in the case where an RSC has been filed in the Registry for a property certifying that the property meets the applicable stratified site condition standards for prescribed contaminants, subject to any exemptions, the person who owns or occupies or has charge, management or control of the property is required to ensure that the surface and subsurface soil on, in, and under the property continues to meet those standards.
- Section 48 has been amended to clarify that, if two or more samples of soil or sediment are taken from sampling points at the same sampling location at the same depth on an RSC property, compositing of the samples to be analyzed for volatile contaminants will not be permitted for the purpose of establishing an average of the sampling results in order to meet the applicable standards.
- Section 49 has been amended to clarify that, for the purposes of meeting the applicable potable groundwater site condition standards for petroleum hydrocarbons, a qualified person must determine “that there is **no indication** of objectionable petroleum hydrocarbon odour and taste associated with the groundwater....” (emphasis added.)
- A new transition section has been added as section 21.1. This section applies if the following have occurred: (1) the record of site condition, together with the Ministry’s written acknowledgement of the prescribed notice of receipt, is submitted on a date between July 1, 2011 and January

2, 2013; (2) the prescribed notice of receipt, with respect to the RSC, has been given before January 1, 2013; (3) the owner of the property in which an RSC is being submitted has submitted a prescribed notice for filing prior to January 1, 2011; and (4) the owner has received from the Ministry a prescribed written acknowledgement of the notice of receipt.

- Where the above transition section applies, the following current standards will apply to the RSC: the current Soil, Ground Water and Sediment Standards, the Full Depth Generic Site Condition Standards, the Site Condition Standards for Environmentally Sensitive Areas, and the Site Condition Standards for Shallow Soil Property or Water Bodies. The new standards that are created by the amendments will not apply to those situations.

Other Implications

There will be a substantive increase in the costs associated with the requirements for the enhanced Phase I and II ESAs. This will be a concern to property owners. There is over a year for those who will be working their way through the RSC process to become familiar with the new requirements. Although the new standards do not apply for the purpose of filing an RSC on a property at this time, it can be expected that, for commercial transactions, the new standards will be applied.

Published in Municipal World, May 2010.