

ENVIRONMENTAL LAW

RSC FILING IS NOW MANDATORY IN ONTARIO

Brownfields requirements effective October 1, 2005 impose new duties on property owners and municipal staff who review and issue building permits.

These requirements complete the phase-in of the Brownfields legislation introduced in 2001. These requirements are principally implemented by Part XV.1 of the *Environmental Protection Act* and its Record of Site Condition regulation O. Reg. 153/04.

FAQ Re Mandatory RSC Filing

- ◆ What is a Record of Site Condition (RSC)?
- ◆ What changes of property use require filing of an RSC?
- ◆ Is an old RSC valid? Can it be filed?
- ◆ What is filed on the Environmental Site Registry, and who can file RSCs and Notices?
- ◆ What will municipal officials require as satisfactory evidence that an RSC has been filed on the ESR?

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NOT JUST BROWNFIELDS!

Contaminated sites are found in small, rural communities as well as larger urban communities. Even agricultural land is sometimes contaminated by pesticides, leaking storage tanks, vehicle repairs and past disposal of hazardous wastes.

While the term "Brownfields" is usually applied to abandoned or underutilized urban properties, nearly every Ontario community has former gas stations, garages, dry cleaning establishments or fuel and heating oil dispensing sites.

Ontario's environmental law and land use planning framework now requires municipalities to integrate contaminated site remediation into their planning and building activities.

The Provincial Policy Statement says:
3.2.2 Contaminated sites shall be remediated as necessary prior to any activity on the site associated with the proposed use such that there will be no adverse effects.

- ◆ What is a Certificate of Property Use (CPU) and what kind of restrictions can it contain?
- ◆ When will municipal officials refuse to issue a building permit?

Changes of Property Use

Whenever a property owner applies for a building permit in connection with a change to a more sensitive property use, the owner has to publicly file a Record of Site Condition (RSC). The RSC must be signed by a "qualified person" and must certify that the property is clean enough for the intended use. The RSC must be filed on the Environmental Site Registry (ESR) on the MOE web site. (The ESR is different and unrelated to the

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WHAT IS A RECORD OF SITE CONDITION (RSC)?

A Record of Site Condition (RSC) is the document prescribed by law that certifies the extent of environmental site assessment, remediation and state of contamination of a property. In order to complete and file an RSC on the MOE's Brownfields Environmental Site Registry, a "qualified person" (defined in the regulation) must certify that the property has been properly assessed and shown to meet the soil and groundwater standards appropriate for the new use for the property. Contents of the RSC are set out in the *Environmental Protection Act* and in the Records of Site Condition regulation O. Reg. 153/04.

EPA section 168.4 (2) requires that an RSC contain the following information:

1. A description of the property.
2. The name of the person filing the RSC and the names of any other owners of the property.
3. The type of property use for which the record is filed.
4. Which standards prescribed by the regulations were applied for the purpose of the RSC.
5. A description of any soil removals or other action taken to reduce the concentration of contaminants on, in or under the property.
6. For each contaminant for which sampling and analysis has been performed, the maximum known concentration of the contaminant on, in or under the property as of the certification date.
7. A statement indicating whether a Certificate of Property Use has been issued in respect of the property.
8. A list of all reports relied on by qualified persons in making the certifications.
9. Such other certifications, information and documents as are prescribed by the regulations.

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Environmental Bill of Rights (EBR) registry, also on the MOE website.)

The mandatory RSC provisions apply to an actual change in property use, not a change of zoning. However, some municipalities have developed their own policies and procedures to require filing of RSCs as conditions of planning approvals, long before the building permit application stage.

Municipalities Must Enforce

Municipalities are responsible for enforcing the new requirements. The Chief Building Official must refuse to issue a building permit without a filed RSC. In addition, the CBO cannot issue a permit that contravenes restrictions on property use or construction in a Certificate of Property Use (CPU).

What is a Certificate of Property Use?

A CPU is an MOE document issued where the clean-up of a property is based on a risk assessment, rather than full treatment or removal of contamination.

The CPU is intended to prevent risks to property users from the contamination left on-site. For example, a CPU may prohibit any buildings with basements, or may require ongoing monitoring of groundwater or interior air.

When MOE proposes to issue a CPU, a notice must be posted on the EBR Registry giving the municipality and the public 30 days to comment. Additional consultation may also be required under the EBR (a CPU is a Class II EBR instrument.) This also gives the municipality and the public the right to seek leave to appeal the CPU.

Are Old RSCs Valid?

An old RSC – that is, an RSC that was acknowledged by the MOE under the *1996 Guideline for Use at Contaminated Sites in Ontario*, can be filed on the ESR by way of a Transition Notice. The Transition Notice is deemed to incorporate the RSC, and is deemed to comply with O. Reg. 153/04. The

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WHO IS A “QUALIFIED PERSON”?

Part XV.1 of the *EPA* requires that a “qualified person” undertake certain activities related to the filing of a RSC and O. Reg. 153/04 defines qualified persons based on the certifications they can make or activities they can conduct or supervise.

1. Certify an RSC based on a Phase 1 ESA
2. Certify an RSC based on a Phase 2 ESA
3. Certify an RSC based on a risk assessment accepted by the MOE Director
4. Prepare or supervise a risk assessment.

A property owner should ensure that a qualified person is appropriate to undertake the required activities for a specific property, has the required professional designations (as listed in the table below) or the appropriate education and experience (for those who conduct or supervise risk assessments), and is covered by the required professional liability insurance.

Over the next two years, the MOE says it will develop a certification program including regulated qualifications, accountability mechanisms and registration for QPs.

Professional Designation required to certify an RSC based on:	Phase I ESA	Phase 2 ESA	Phase 2 ESA with Risk Assessment
Professional Engineer			
Professional Geoscientist			
Professional Agrologist			
Chartered Chemist			
Applied Science Technologist			
Certified Engineering Technologist			
Architectural Technologist			

WHAT IS FILED ON THE ENVIRONMENTAL SITE REGISTRY?

The web-based Environmental Site Registry (ESR) permits qualified persons to file RSCs and Transition Notices. It provides public access to those documents and others filed by MOE.

Under the RSC regulation MOE is authorized to post notices of orders and prosecutions related to an RSC property. These orders may affect the validity of the RSC. Municipal staff, purchasers and lenders searching the ESR for an RSC must also check for other notices affecting the RSC property. (There is no provision for the MOE to remove an invalid RSC from the ESR).

Despite filing of an RSC, MOE can make a clean-up order where contamination has moved off-site, where the RSC was based on false or misleading information, where a person has contravened a CPU or s. 18 risk management order or for other ‘reopener’ conditions set out in the EPA or OWRA.

Although ESA reports, risk assessments and other expert reports are listed in the RSC, they are not available on the ESR.

The MOE assumes no liability or responsibility for the accuracy of anything posted on the ESR. Municipal staff, property owners and the public rely on this information at their own risk.

ESR search link:
www.ene.gov.on.ca/environet/BESR/search.htm

WHO CAN SUBMIT AN RSC TO THE REGISTRY?

Only a “Qualified Person” can create and submit a RSC to the ESR. A QP who wants to file an RSC or a Transition Notice on the ESR must first register with the MOE, provide proof of professional qualifications, and obtain a user name and password.

For mor information call:
Environmental Site Registry Office
 2 St. Clair Avenue W., Floor 12A
 Toronto, ON M4V 1L5
 Tel: 416-314-8001
 Toll-free: 1-800-461-6290

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Transition Notice is an electronic form on the ESR that is similar in form to a new RSC.

A Transition Notice is not valid if the old RSC was not based on either a “detailed site assessment” (the 1996 *Guideline* equivalent of a Phase 2 ESA), or an actual Phase 2 ESA, where the property was EVER used for:

- ◆ industrial use;
- ◆ garage use ;
- ◆ bulk liquid storage or dispensing (including a gas station); or
- ◆ operation of dry cleaning equipment.

Environmental Site Registry (ESR) and Liability Protection

The ESR was created in 2004, when the Brownfields liability limitation provisions took effect under Part XV.1 of the *Environmental Protection Act*.

Since then, a property owner who files an RSC on the ESR, and future owners, gain protection from environmental cleanup orders for contamination that was on-site at the time the RSC was certified. The RSC must contain a certification by a qualified person that the property meets the site assessment and clean-up standards appropriate for the new use under the EPA and Records of Site Condition regulation.

However, the protection from orders is limited. There are a number of “reopeners,” for example, the if the RSC contains false or misleading information, or if the contamination has moved off-site after the effective date of the RSC (the “certification date”). In addition, the filing of an RSC offers no protection from civil lawsuits by neighbours.

The legislation provides this limited protection in order to encourage the redevelopment of so-called “brownfield” properties, in accordance with its new Provincial Policy Statement (PPS) issued under the *Planning Act*. Under the Policy, municipalities are required to identify local targets for intensification, including brownfield sites, before expanding into greenfield areas.

As of October 1, 2005, the RSC filing is a mandatory requirement for owners seeking to change the use of any property from industrial, commercial or

community use to institutional, residential, parkland or “agricultural or other” use. These seven property use classifications are defined in the Records of Site Condition regulation (O. Reg. 153/04) and are close but not identical to property use classifications in the Building Code. (See Links to Building Code table on page 4).

O. Reg. 153/04 contains some important deeming provisions. “Unused” property is deemed to have the most recent property use (i.e. abandoned industrial property is deemed to be industrial property). Mixed use properties are deemed to have the most sensitive use. (An unusual exemption in the regulation allows expansion of residential use in a mixed use property with existing residential, without the need for an RSC (even if the mixed use includes industrial).

Other exemptions to the mandatory RSC filing requirement include a change of use from a railway line to a recreational trail, or from a landfill site (approved under Part V of the *EPA*) to another use. CBOs and developers should be aware of the exemption for excavation, shoring or other preparatory work on-site in order to collect the data needed to complete an RSC.

When it is complete, the RSC must be signed by the owner, certified by a consultant who is a “qualified person” (QP) as defined in the Records of Site Condition Regulation and who has registered with the MOE. When the RSC application fee has been paid, the QP uploads the RSC to the ESR.

Clean-up Standards Now Regulated

Regulation 153/04 incorporates MOE soil, groundwater and sediment standards as regulatory standards. These are tied to the proposed property use — industrial, commercial, residential, parkland, etc. — and reflect different approaches to site clean-up.

The supporting technical document, *Soil, Ground Water and Sediment Standards for Use under Part XV.1 of the EPA (March 9, 2004)*, sets out the prescribed contaminants and the applicable site condition standards for those contaminants in a series of six tables. Despite some reorganization, the

ALPHABET SOUP AN ACRONYM GUIDE

CBO	Chief Building Official
CPU	Certificate of Property Use
CSA	Canadian Standards Association
EBR	Environmental Bill of Rights
EPA	Environmental Protection Act
ESA	Environmental Site Assessment
ESR	Environmental Site Registry
MOE	Ministry of the Environment
OBC	Ontario Building Code
PPS	Provincial Policy Statement
PSF	Pre-Submission Form
QP	Qualified Person
RA	Risk Assessment

FOR MORE INFO

Records of Site Condition: A Guide on Site Assessment, the Cleanup of Brownfield Sites and the Filing of Records of Site Condition, dated October 2004, provides property owners, qualified persons, municipalities, building officials, the public and other interested parties with an overview of the new requirements under the *EPA*, other statutes and the associated regulations. The guide can be downloaded from the MOE’s brownfields website at www.ene.gov.on.ca/envision/land/decomm/condition.htm.

MOE is also sponsoring introductory e-learning programs aimed at municipal and MOE staff. Introductions to risk assessment and to mandatory land use requirements are available from www.norcattraining.com/MOE-Elearning.

regulated standards are by-and-large the same as those in the *Guideline*. The main change in standards is the incorporation of the CCME fractions for petroleum hydrocarbons. This requires a more complex suite of testing and more data. Since the CCME fractions are used in other jurisdictions, this was not an onerous change. However, it has created problems for some sites where testing was done under the *Guideline* but no RSC was accepted by the MOE.

The second technical document, *Protocol for Analytical Methods Used in the Assessment of Properties under Part*

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XV.1 of the EPA, also issued March 9, 2004, sets out the analytical methods and quality control protocols for comparing site conditions against the prescribed standards for soil and groundwater, both potable and non-potable. Both documents can be downloaded from MOE's brownfields website at www.ene.gov.on.ca.

Brownfields Law Phased-In Complete

The changes that took effect October 1st completed the roll-out of Ontario's brownfields regime that began almost on November 2, 2002, when the *Brownfield Statute Law Amendment Act* introduced amendments to seven

provincial statutes, including the *Environmental Protection Act*, the *Municipal Act, 2001*, the *Planning Act*, and the *Ontario Water Resources Act*.

The Record of Site Condition Regulation (O. Reg. 153/04), filed June 1, 2005, with two referenced technical documents replaced the *Guideline for Use at Contaminated Sites in Ontario*, issued in 1997. The regulation sets out:

- ◆ statutory definitions for Phase 1 and Phase 2 Environmental Site Assessments;
- ◆ regulatory soil, groundwater and sediment standards for generic and stratified clean-ups;

- ◆ the contents of an RSC and other requirements for filing an RSC on the Environmental Site Registry;
- ◆ definitions of classes of qualified persons and mandatory insurance requirements for QPs;
- ◆ the property use changes that require the filing of an RSC,
- ◆ exemptions from the requirement for filing of an RSC;
- ◆ the requirements for preparing a risk assessment and protocols for laboratory analyses, and the RA Pre-Submission Form;
- ◆ rules concerning who must receive a copy of a CPU and when municipalities must refuse permits.

APPLYING RSC CLASSES TO THE BUILDING CODE

Ontario's brownfields regime is firmly linked to the permit system implemented under the province's *Building Code Act, 1992*. If a new building is to be used in connection with one of the regulated changes in use, an RSC be filed before a permit is issued and construction can start. This means that a building official must ask for proof that a RSC has been filed in the Environmental Site Registry before issuing a building permit for certain property use changes and that permit must reflect any conditions imposed by the MOE through a Certificate of Property Use. The table below links the classes of property uses in O. Reg. 153/04 with the categories of occupancies used in the Code.

FOR INFORMATION ON THE ONTARIO BUILDING CODE

A list of questions and answers on interpretations of the *Ontario Building Code* is maintained on the Ontario Building Code Information web site at www.obc.mah.gov.on.ca/. Detailed advice on the requirements of the Code is provided by the Code Development and Interpretation Section of the Ministry of Municipal Affairs and Housing:

- ◆ by telephone at: 416-585-6666
- ◆ by fax at: 416-585-7531
- ◆ by e-mail at: codeinfo@gov.on.ca

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Link to RSC Definition	Building Code Occupancy Permits
Industrial Use	Group F, Division 1, high hazard industrial occupancies Group F, Division 2, medium hazard industrial occupancies Group F, Division 3, low hazard industrial occupancies
Commercial Use	Group D, business and personal services occupancies Group E, mercantile occupancies
Community Use	Group A, Division 1, assembly occupancies intended for the production and viewing of the performing arts Group A, Division 3, assembly occupancies of the arena type
Institutional Use (includes day-care centres and schools)	Group A, Division 2 (educational)
Commercial Use	Group A, Division 2 (consumption of food or drink)
Residential Use	Group B, Division 1, detention occupancies Group B, Division 2, care and treatment occupancies Group B, Division 3, care occupancies Group C, residential
Parkland Use	Group A, Division 4, assembly occupancies in which occupants are gathered in the open air
Agricultural or other	--

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