

GUIDE TO O. REG. 153

How does environmental
liability impact you?



An Intro to O. Reg 153/04

Ontario Regulation 153/04 (Amended O. Reg. 269/11) is Ontario's provincial standard for assessment and cleanup of environmentally impacted land. Under O. Reg. 153, land owners can achieve liability protection from future clean up requirements through a Ministry of the Environment acknowledged Record of Site Condition (RSC). In short, following the process described in O. Reg. 153/04 will allow land owners to obtain an RSC, the most common standard of environmental due diligence in Ontario.



O. Reg. 153/04 describes several phases of environmental investigation and reporting;

- **Phase I Environmental Site Assessment (ESA)**
- **Phase II ESA**
- **Phase III ESA, also called a Record of Site Condition (RSC)**

All or some of these phases may be required for obtaining an RSC. An RSC is mandatory for certain property development activities, when development requires a change from a more intensive land use like industrial to a less intensive land use like residential. It may also be useful in other real estate transactions like rezoning, purchase/sale agreements, and financing. Reg. 153 identifies 71 potentially contaminating activities at sites that warrant extensive investigation prior to the approval of a RSC. These include common practices such as dry cleaning operations, automotive repair or maintenance, landfilling, manufacturing, and pesticide use, among others.



Why follow the RSC process?



In the environmental consulting industry, we often hear from clients who did not intend to apply Reg. 153 to their property, but find themselves requiring an RSC for various reasons. Environmental liability affects land owners in different ways.

Some clients find that their property financing is dependent on the site receiving an RSC. In this case, financial institutions are concerned about financing clients because of the environmental liability which may be present at a site. An RSC protects from specific orders regarding sites and can substantially reduce associated liabilities.

Another common issue is that a municipality requires an RSC before they will allow zoning changes to a property. This occurs when a client wants to rezone a property to more sensitive land use (for example, an industrial zoned property which will change to residential). Due to the shift in use, a site is required to meet more stringent criteria, so an RSC is necessary before zoning changes are approved.

Some clients, such as municipalities and private owners, wish to have an RSC in order to protect themselves from specific environmental orders regarding a site. Municipalities may carry properties with an RSC which are in tax arrears (and have not been purchased) for one year without being considered “a person responsible” for the property, which can greatly reduce liabilities to municipalities.

Aside from protection from liability, obtaining Records of Site Condition shows commitment towards a more sustainable future both environmentally and economically. To encourage these positive changes, municipal and provincial governments may provide incentives to their citizens for remediating brownfield properties, particularly when land use changes align with the “Places To Grow” Act. Under Community Improvement Plans, municipalities may provide property tax assistance to offset site remediation costs which may be matched by the provincial government.



What is required in each of the phases?

PHASE I ESA

ACTIVITIES

Requires a non-intrusive historical review of the property, including documentation from government sources, records, aerial photos, interviews in which the owner must disclose all information about the site, and a site walkover by a Qualified Person (QP – generally a professional engineer or professional geologist).

PURPOSE

The Phase I ESA allows the team to identify Areas of Potential Environmental Concern (APECs) and form a comprehensive understanding of the history of the property.

PHASE II ESA

ACTIVITIES

Investigates and substantiates any APECs found in the Phase I ESA through intrusive testing methods, like soil and groundwater sampling. The QP must have access to all parts of the site during the assessment to ensure a valid RSC.

PURPOSE

When a Phase I ESA reveals APECs, a Phase II ESA confirms the environmental condition of the property with physical results. Best accomplished through an iterative process to delineate identified contamination.

PHASE III ESA/RSC

ACTIVITIES

Remediation/Clean-up phase where environmental impacts on the site are removed or mitigated, through a variety of methods. When complete, QP will recommend issuance of an RSC.

PURPOSE

An RSC certifies that the property, to the best of the QP's knowledge, meets applicable environmental criteria.





In July of 2011, the MOE introduced amendments to O. Reg. 153/04 which reduced allowable limits of contaminants in soil and groundwater for most chemicals of concern. This, along with other changes that were part of the amendment, generally means that Phase I and II ESAs created prior to July, 2011, are no longer valid without re-certification by a qualified person. RSCs issued before that date, however, are still valid regardless of when they were filed, as long as they have been acknowledged by the MOE.

Reg. 153 changes also affect the QP requirements for the site, including; they or their employer cannot have a direct interest in the property they are assessing, they must carry liability insurance, and must be registered as a QP with the Ministry of the Environment.

Environmental Consultant Pre-Hire Checklist

If you require an RSC, here are some helpful steps for selecting a QP who will help you bring your site into compliance.

- ✓ Make sure your consultant is a **Qualified Person (QP) as defined by O. Reg. 153/04**
- ✓ Ensure that the **consultant is able to complete any investigations** in accordance with applicable regulations and standards and will provide you with the assurance of this.
- ✓ Be certain your consultant has **the ability to undertake a full complement of risk assessment (RA)** approaches under the regulation including Modified Generic Risk Assessments (MRGA) Tier 2 and 3. While not always required, RAs greatly expand the flexibility of site approaches allowed under the regulation and therefore it is best to keep this option open at the start of a project in case it is required during a later stage.
- ✓ **Does the consultant understand your goals?** See if the consultant is interested in what your priorities for your property are, and is willing to modify project plans in order to try to meet these priorities.
- ✓ A good consultant will consider and **be able to discuss multiple solutions to your problem** while still satisfying the regulatory requirements, and is happy to keep you involved and informed about the process.
- ✓ **Does the consultant communicate well?** Make sure that he or she has assigned you a project manager who you can easily contact with concerns and who will stay with the project until completion.
- ✓ Ask about the technology that the consultant will use in assessing or remediating your property. **Access to innovative technologies that can decrease time on site and lower the cost of your client's site assessments or remedial activities.** One example of this is on-site x-ray fluorescence testing which can detect metals contamination in soil in a matter of minutes, while significantly lowering laboratory costs for your client and expediting field work.
- ✓ Be sure that the consultant has adequate experience. A consultant who has been in the industry for a long period of time **will know how to navigate the amended regulations better than somebody new to the field.** Ask if they have filed an RSC under the amended Regulation. Experienced consultants will also know what remedial strategies work best on which contaminants, bringing your clients contaminated sites within regulatory code, making them fit for the market.



Have More Questions?

If you have additional questions or are interested in learning more about O. Reg 153, feel free to contact one of our expert environmental engineers to discuss your questions, or specific issues with a current site, project, or remediation at 1-888-267-4797.

About AEL Environment

Structured like a corporate contaminated sites group, AEL environment is able to provide all the requisite experience and expertise of a larger firm while maintaining the organizational responsiveness and innovation of a smaller firm. With 12 years of corporate experience and more than 25 years management experience, AEL maintains a dedicated team of engineers, geoscientists, chemists, risk assessors, drafting and IT professionals, and related specialists through existing staffing and contracting arrangements. More information and a full list of services can be found at www.AELenv.com.

