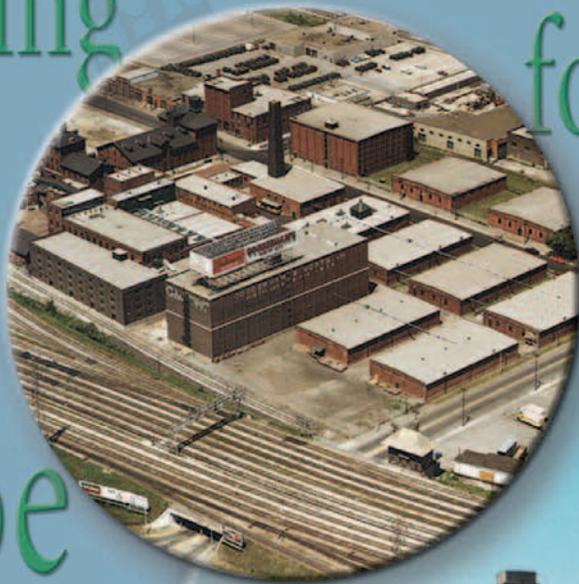


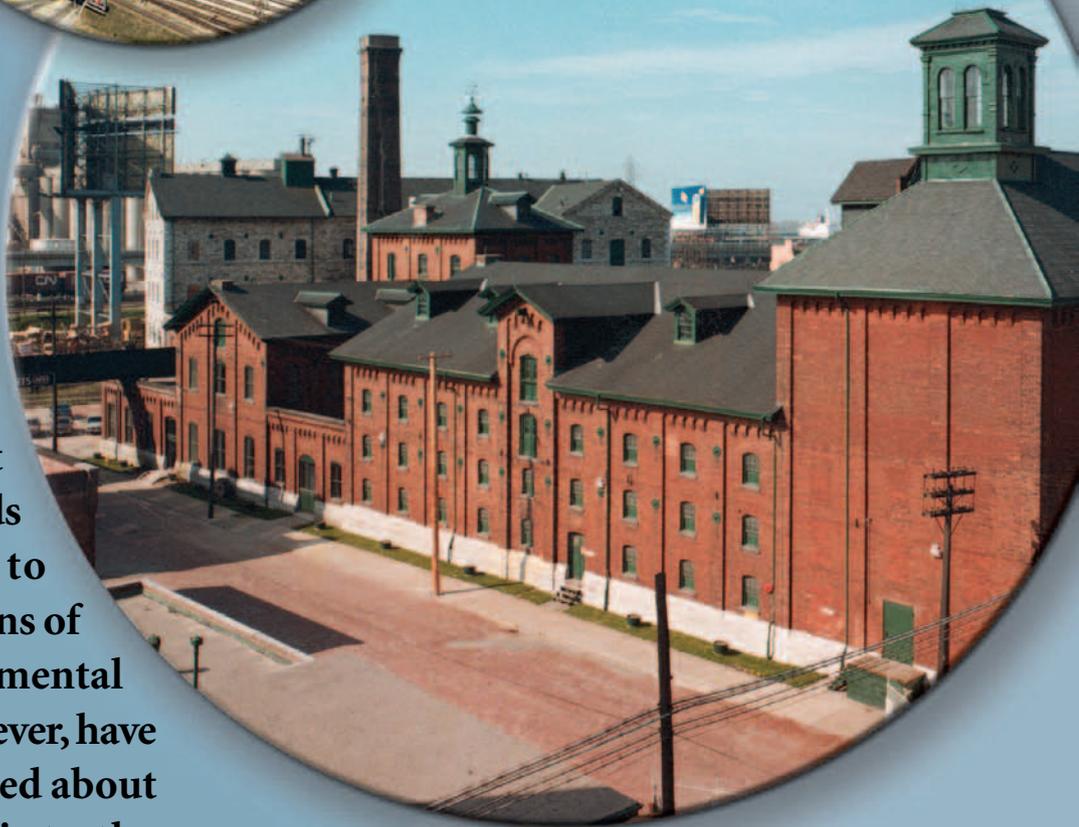
# Brownfields: waiting

for the  
other

shoe  
to fall?



An uneasy calm seems to prevail in the wake of the Ontario environment ministry's Brownfields legislation. Efforts to establish qualifications of those doing environmental site assessments, however, have some P.Engs concerned about another incursion into the regulator's domain. How real are the fears?



**By Michael Mastromatteo**

**F**or legislation designed to create more pleasant municipalities through the revitalization of contaminated industrial and commercial sites, the Ontario environment ministry's *Brownfields Statute Law Amendment Act*, 2001 (formerly Bill 56) and related regulations have created something of a quagmire for Ontario's engineering regulator.

The overall aim of the legislation is to allow lands possibly contaminated by years of industrial use to be cleaned up and redeveloped for residential or more environmentally benign commercial use. The thinking is that Brownfields legislation promotes a healthier environment, creates more residential space, and brings property rendered unproductive due to contamination back to some form of economic vitality.

As the environment ministry puts it on its Brownfields website link, "new legislative and regulatory requirements have been put in place to help encourage the cleanup and redevelopment of Brownfields sites while ensuring the environment is protected. These new requirements establish clear rules for site assessment and cleanup, ensure only qualified people undertake this work, and provide for the filing of a record of site condition for the public registry. Provisions have also been included to reduce the potential liability from orders for property owners who have filed a record of site condition after assessing and cleaning up, if necessary, their property. Provisions have also been included to

Certainly, the cost and liabilities associated with redeveloping Brownfields sites were among the barriers to revitalization referred to by the environment ministry. Municipalities, for example, must contend with liability and insurance issues associated with the redevelopment of potentially contaminated sites. But without clear assurances from professional consultants that Brownfields sites no longer pose any risk to the public, banks and insurers had been reluctant to lend money for the purchase or remediation of these sites. Similarly, developers had been wary of bearing any additional liability and the added cost of redeveloping risky, abandoned properties.

### PEO consultation

PEO has naturally been curious about Brownfields legislation and since 2001 has been working with the environment ministry to determine not only how the bill achieves its policy objectives, but also how it impacts on engineering practice in Ontario. Much of PEO's input focused on examining the qualifications of professionals undertaking contaminated site

in nature, and that engineers, geoscientists, technicians and other specialists can be involved at various levels in making the process work.

A problem arose, however, with the evolution of Regulation 153/04, elements of which came into effect October 1, 2004. The regulation defines the credentials of "Qualified Persons" (QP) permitted to complete environmental site assessments (ESA) and to certify Records of Site

Condition. The regulation also created three levels of QP: Phase I (ESA only) and Phase II (ESA, with no risk assessment) and a second Phase II permitting an ESA with a risk assessment.

While engineers are identified as qualified to conduct site assessments and sign RSCs at all phases, the regulation does not recognize PEO's limited licence holders as qualified to undertake similar action, beyond Phase I. At the same time, the regulation allows some unlicensed practitioners, including applied chartered chemists and professional agrologists, to complete Phase II ESAs (with no attendant risk assessment).

For PEO, the exclusion of limited licence holders as qualified persons (beyond the Phase I level) raises the issue of public protection, especially under a

David DuBois, P.Eng., suggests that PEO should "remain steadfast" in its argument that qualified persons be defined as licensed practitioners.

**A view of Toronto's Gooderham & Worts/Distillery property, before undergoing Brownfields redevelopment (top left), and upon completion as a combined retail, commercial, residential and heritage site (left). The Distillery District redevelopment, with its successful cleanup of contaminants and its revitalization of an economically depressed sector of Toronto's lakefront, can be seen as an example of the benefits of the Ontario environment ministry's Brownfields legislation. For some professional engineers, however, the ministry's Bill 56/Regulation 305 raises significant regulatory concerns.**

Photo courtesy of Lance Alexander, City of Toronto and David Dennis, David Dennis Designs.

reduce the potential liability from orders from municipalities, secured creditors and others who may need to undertake certain investigative or other actions related to Brownfields sites."

assessments and certifying Records of Site Condition (RSC) for the environment ministry.

Very early in the process, PEO agreed that Brownfields work is multi-disciplinary

scenario in which unlicensed practitioners are permitted to undertake aspects of site assessment work. In its initial response to a draft of Regulation 153/04, PEO brought the public safety issue to the table.

“The necessary public accountability to enable certified practitioners to sign Records of Site Condition can only be provided by having their education and experience validated through a regulatory body established by statute in the public interest and accountable to the people of Ontario,” PEO said. “The public accountability of licensed professionals, such as professional engineers and professional geoscientists, is backed by their regulatory bodies’ delegated authority to license and regulate their professional practice on behalf of the government of Ontario. There is no parallel delegated authority imposed by statute on certification bodies.”

PEO saw the limited licence as a possible solution to the unlicensed practitioner issue and, in turn, wondered why the environment ministry was so quick to reject this option.

Throughout 2004, PEO sought greater explanation from the environment minister as to the exclusion of limited licence holders from all but the first phase of Brownfields remediation efforts.

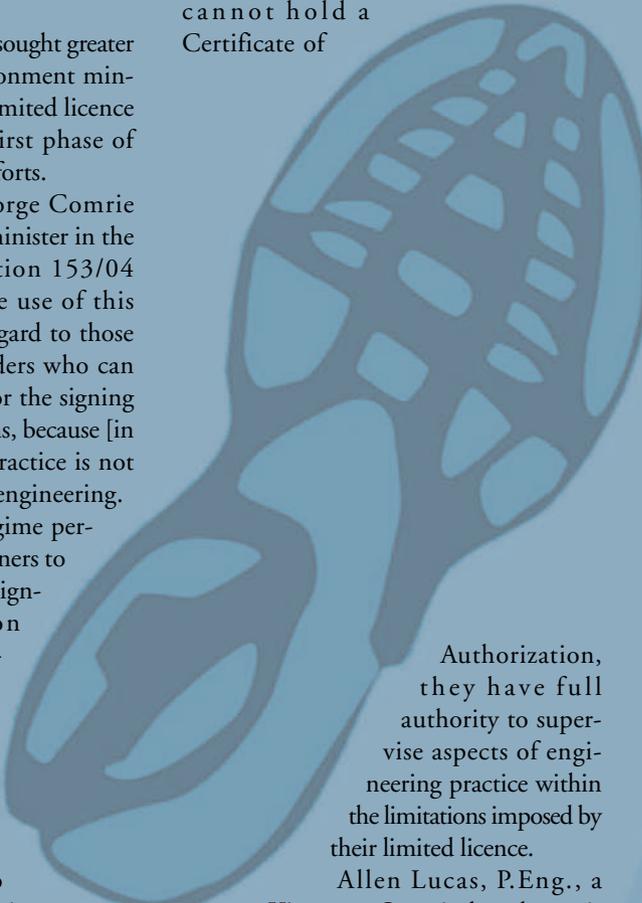
As PEO President George Comrie wrote to the environment minister in the fall, “As written, Regulation 153/04 deprives the public of the use of this accountability vehicle in regard to those of our limited licence holders who can legally take responsibility for the signing of Records of Site Conditions, because [in the ministry’s view] such practice is not recognized as professional engineering. By establishing in law a regime permitting unlicensed practitioners to take responsibility for the signing of RSCs, Regulation 153/04 creates unprecedented regulatory conflict for those individuals who hold PEO limited licences and who practise in this area.”

### Minister’s response

In a November 27 letter to the PEO president, Ontario Environment Minister Leona Dombrowsky explained the omission of limited licence holders from the Phase II QP list as follows: “In a record of site condition, the person certifying that a prop-

erty meets the applicable standards is meant to be the person responsible in a firm for the work that was undertaken. The *Professional Engineers Act* (PEA) requires that the services provided under a certificate of authorization be provided under the supervision and direction of a member of the association. As limited licence holders are not members of the association [under the Act, only P.Engs are members], they cannot supervise in this capacity. As a result, it should not be the limited licence holder that certifies the record of site condition, but a member of the association (a person who holds a licence).”

The environment minister’s response seems to indicate a basic misunderstanding of PEO’s limited licence. Although limited licence holders are not members of PEO and cannot hold a Certificate of



Authorization, they have full authority to supervise aspects of engineering practice within the limitations imposed by their limited licence.

Allen Lucas, P.Eng., a Kingston, Ontario-based practitioner and a member of PEO’s Environment Committee (EVC), suggested that to date, the “qualified person” question has been the thorniest issue between PEO and the environment ministry.

“As far as Brownfields goes, the biggest issue so far has been the ‘What constitutes a qualified person?’” Lucas told *Engineering Dimensions*. “I would point out, from a municipal perspective, the importance of relying on the information provided is essential. With respect to the QP, consider the effects should a municipality rely on someone other than a P.Eng. or a P.Geo. when it comes to certification. There is little or no recourse should the individual merely be a certified engineering technologist (C.E.T.) or scientist. Therefore, municipalities have to have confidence in the information because, if a non-professional provides an opinion, the municipality remains on the hook long after the fact.”

Lucas’ question about the reliability of information provided by qualified persons in the case of Brownfields’ environmental and risk assessments calls to mind another possible consequence of Bill 56 and its regulations. Specifically, lending institutions are also attuned to the accuracy and thoroughness of information originating from qualified persons. Two of Canada’s major banks—the Royal Bank of Canada (RBC) and the Canadian Imperial Bank of Commerce (CIBC)—have established environmental risk management divisions to help evaluate the overall worthiness of environment-related loan requests. In some cases, these divisions offer reviews of third-party environmental site assessments to bring more due diligence to any transactions involving Brownfields properties. The Royal Bank has even established prequalified environmental consultants to help in its work of evaluating Brownfields-related loan applications. Credentials to become one of RBC’s prequalified consulting firms include a minimum of three, full-time professionals (P.Engs or P.Geos) with degrees in civil, chemical, environmental or geological engineering, hydrogeology, geology, or environmental science.

Lending institutions appear supportive of the Bill 56/Brownfields legislation mainly for its efforts to clarify environmental assessment expectations and liability concerns.

As an official with CIBC’s environmental risk management team noted in

October 2003, "The provisions of Bill 56, which allow lenders to enter upon premises with the intention of assessing environmental conditions without attracting statutory liability, remain the principal benefit that banks enjoy from this legislation."

### Overall implications

But while lending institutions see some merit in the *Brownfields Statute Law Amendment Act*, the engineering regulator continues to grapple with the overall implications. PEO's Environment Committee, for example, has been asked to report on the regulation's impact, but other than the limited

engineer with Golder Associates of Toronto, recently discussed the Brownfields regulations as a "hot issue" at the PEO Chapters Forum. While praising the general aims of Brownfields legislation for encouraging "engineered solutions" to environmental cleanup and the redevelopment of contaminated or abandoned properties, DuBois pointed to a number of concerns from a regulatory perspective.

He suggested that PEO should "remain steadfast" in its argument that qualified persons be defined as licensed practitioners. He also said the regulator should consider developing practice guidelines specifically devoted

to publicize the benefits of relying on P.Engs for Brownfields restoration efforts.

But not everyone in the engineering community seems as concerned with the ultimate impact of the *Brownfields Statute Law Amendment Act*. Some have suggested that the environment ministry's failure to recognize limited licence holders on the QP list has become more of a problem for regulators than for the overall engineering community, since it can be seen as a devaluation of the PEO limited licence that scientists and technologists cannot do Brownfields work by obtaining one.

Meanwhile, concerns about the quality of information provided by unlicensed practitioners doing Phase I environmental site assessments can be put to rest by P.Engs undertaking normal due diligence. In the event an engineer is uncertain about the work done by an unlicensed practitioner, normal due diligence would require the P.Eng. to check the work until he or she was satisfied it was complete. In any case, Regulation 153/04 requires any subsequent investigation, risk assessment, and remediation work to be done by a professional engineer or professional geoscientist.

PEO has engaged the services of a communications firm to assist with a campaign to educate legislators on PEO's role and the value of the licences it grants, so as to avert future confused initiatives like Regulation 153/04. Although intended primarily to look forward, to ensure future legislation potentially affecting the regulation of professional engineering practice gets it right, rather than seeking to derail legislation already enacted, the campaign will at a minimum shine a spotlight on the value of regulating engineering in the public interest. It will help legislators understand why PEO and its practitioners remain uneasy with any perceived conflicts between the PEA and other government policies.

## Limited Licence

The Ontario environment ministry's *Brownfields Statute Law Amendment Act* has shed some inadvertent light on PEO's limited licence regime. PEO believes its limited licence holders should be recognized as "qualified persons" to certify Records of Site Condition (RSC) under the legislation. The environment ministry's refusal to include limited licensees on the qualified persons list, and its explanation for doing so, seem to indicate a basic misunderstanding of the public protection guarantees that PEO says are upheld by licensed, registered practitioners. As defined, a limited licence holder assumes full responsibility for engineering performed within a clearly specified limitation.

Professional Engineers  
Ontario

Limited Licence

Issued under the Professional Engineers Act (Ontario) to

the category of

licence issue, has yet to note any clearly negative effects.

David DuBois, P.Eng., former member of the EVC and a geo-environmental

ed to Brownfields issues. PEO should seize on the current negotiations with the environment ministry, he said,