



## Ontario updates noise guideline to harmonize approvals and land use planning decisions

After more than three years, the Ministry of Environment (MOE) has finally released its *Environmental Noise Guideline, Stationary and Transportation Sources – Approval and Planning* (NPC-300). The Guideline, posted to the Environmental Registry on October 21, 2013, ensures that MOE uses a single and harmonized set of noise standards to evaluate ECA applications. The Guideline similarly affects municipalities in land use planning decisions. MOE will also use NPC 300 to evaluate noise complaints under s.14 of the *Environmental Protection Act*.

The update removes inconsistencies between standards that were used in MOE’s approvals process and those that applied to local land use decisions. NPC-300 will facilitate urban intensification while ensuring new residential developments do not push existing industrial and commercial sources of noise out of compliance. Sound level limits will be applied differently in the newly created Class 4 areas. While limits for Class 1, 2 and 3 areas assume open windows in receptor buildings, the limits for a Class 4 area assume mitigation measures at the receptors. These include closed windows and enclosed noise buffer balconies, together with the operation of a ventilation system or central air conditioning, thereby allowing higher ambient noise levels.

In applying for or renewing an MOE approval, the owner of a stationary source will remain responsible for compliance with applicable sound level limits. However, where a site in proximity to a stationary source is in the process of being developed or redeveloped for noise sensitive land uses, the proponent/

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### Monica Lim joins Willms & Shier as Director of Marketing and Business Development

Monica will be working with us to strengthen and enhance our marketing and business development strategy. She will also lead our firm’s in-house Professional Development program. Monica brings previous experience in legal services marketing and business development and as a corporate lawyer in private practice and in-house. Monica has also acted as a senior policy advisor at Environment Canada. You can reach Monica at 416-862-4843 or at [mLim@willmsshier.com](mailto:mLim@willmsshier.com).

developer of the noise sensitive land use is responsible for ensuring compliance with the applicable sound level limits.

Meeting the sound level limits may require that noise control measures be undertaken by the property developer, the stationary source, or a combination of both. The Ministry says that mitigation must be the responsibility of the developer of the sensitive use and should be done in “a reciprocal, legally-binding and supportive manner.” Since there is no legal framework, many stakeholders have questioned how municipalities could compel developers and source owners to work together, especially if the parties were not inclined to cooperate.

For a detailed discussion of the new NPC, see “Ontario expands noise control options” in the April 2011 issue of our newsletter.

### There are several revisions to the Guideline since we saw it last

MOE made a number of changes to NPC-300 in response to the comments it received when the Draft Guideline was last posted to the Environmental Registry in November 2010 (and during follow-up consultation sessions with various stakeholders). These amendments include

- ◆ clarifying certain technical definitions, including “auxiliary transportation facility,” “background sound level,” “enclosed noise buffer balcony,” “exclusion limit,” “noise control measure,” “noise sensitive land use,” “point of reception,” and “predictable worst case”
- ◆ adding new definitions for a number of terms, including “acoustic barrier,” “agreement for noise mitigation,” “layover site,” and noise sensitive commercial and institutional purpose buildings
- ◆ clarifying and adding additional guidance for the new Class 4 area concept. Such areas may be classified solely at the discretion of the land use planning authority to facilitate new development while protecting existing stationary sources
- ◆ removing the proposed Class 5 area that was designed to address situations where background noise levels are dominated by existing rail and air traffic. Instead, the definition of “background sound level” was revised to include the contribution of noise from rail traffic
- ◆ adding information about how the NPC-300 will be implemented now that the final decision notice has been posted. Applications for Ministry approvals submitted prior October 21, 2013 may be assessed under the new Guideline at the request of the applicant.

If you have questions about the new Guideline and how it may affect an existing or future approval, please call John Georgakopoulos at 416-862-4826 or at [jgeorgakopoulos@willmsshier.com](mailto:jgeorgakopoulos@willmsshier.com). We can also help guide you through the noise-related standards and other environmental considerations that arise during the land use planning process.

### New Noise standard rolls four documents into one

NPC-300 updates and consolidates three former guidelines and an MOE criteria document

- ◆ *Sound Level Limits for Stationary Sources in Class 1 and 2 Areas (Urban)* (NPC 205)
- ◆ *Sound Level Limits for Stationary Sources in Class 3 Areas (Rural)* (NPC-232)
- ◆ *Noise Assessment Criteria in Land Use Planning* (LU-131)
- ◆ *Noise Assessment Criteria in Land Use Planning: Requirements, Procedures and Implementation.*

NPC-300 does not apply to wind turbine facilities, which are covered by the *Noise Guideline for Wind Farms* (PIBS 4709e), or to landfill operations (PIBS 7792e).

## Ontario's new Long-Term Energy Plan emphasizes conservation, demand management and renewables

Ontario has released its 2013 Long-Term Energy Plan, *Achieving Balance*, which focuses on conservation, demand management and renewables to meet the province's energy needs. It also envisions a reduction in projected cost increases by \$16 billion in the near term (2013-2017) and \$70 billion to 2030. While rates are expected to rise significantly, the new Plan will not raise costs as dramatically as anticipated in the 2010 version. Industrial consumers can expect to pay \$3 million less than expected over the next five years and \$11 million less to 2030.

By 2025, nearly half of Ontario's installed generating capacity will come from renewable sources. To achieve "balance" in the energy sector, Ontario will

- ◆ implement conservation programs and standards to offset most growth in electricity demand over the next 20 years. Ontario will take a "conservation first" stance with energy agencies and the Ontario Energy Board
- ◆ expand Demand Response programs to help achieve a 10% reduction in peak demand by 2025
- ◆ extend the phase-in of wind, solar and bio-energy for three more years, with 10,700 megawatts online by 2021
- ◆ increase the province's hydroelectric portfolio to 9,300 megawatts by 2025
- ◆ develop a new competitive procurement process with the Ontario Power Authority for future renewable projects larger than 500 kilowatts, which will consider local needs and Aboriginal community participation
- ◆ make new financing tools available to consumers starting in 2015, including programs to incent energy efficient retrofits to residential properties
- ◆ move ahead with nuclear refurbishment at both Darlington and Bruce Generating Stations beginning in 2016. However, Ontario will not proceed with the construction of two new reactors at Darlington. Nuclear's share of Ontario's energy production will drop from 59% in 2013 to 42% in 2025
- ◆ encourage First Nation and Métis participation in transmission and renewable energy projects.

## Ottawa finalizes EA regulations and shortens list of activities subject to federal assessment

Ottawa has finalized the list of physical activities subject to the revamped *Canadian Environmental Assessment Act, 2012*. As anticipated, the federal government has significantly shortened the list of designated activities and raised the thresholds for a number of activities still subject to the Act. *Amendments to the Regulations Designating Physical Activities* (SOR/2013-186) were published in the *Canada Gazette Part II* on November 6, 2013. They came into force on October 24, 2013.

### LTEP encourages Aboriginal participation in future energy projects

Ontario says it is committed to ensuring First Nation and Métis communities are involved in future energy projects. The new **Aboriginal Transmission Fund**, to be introduced in early 2014, is intended to help communities fully assess the economic and long-term benefits associated with proposed transmission partnerships.

Ontario will also work with Hydro One to expand training and skills development initiatives for Aboriginal peoples looking to work in the transmission and distribution sector. It will also ask Hydro's existing college consortium to focus on Aboriginal opportunities related to trades and technicians.

Finally, the province says it is making the connection of some 25 remote northwestern First Nation communities to the electricity grid a "priority." To this end, the Ontario Power Authority has released a draft **Remote Community Connection Plan** and is consulting with effected communities to update and finalize the plan by the end of the year.

In drafting the amendments, the government's primary intention was to ensure that federal EA requirements would be focused on those major projects "that have the greatest potential for significant adverse environmental effects in areas of federal jurisdiction" (see "Ottawa rewrites list of projects subject to federal environmental assessment" in the June 2013 issue of our newsletter).

Some of the activities dropped from the regulations include groundwater extraction facilities, heavy oil and oil sands processing facilities, pipelines (other than offshore pipelines) and electrical transmission lines that are not regulated by the National Energy Board (NEB), potash mines and other industrial mineral mines, and a long list of industrial facilities (including pulp and paper mills, smelters, tanneries and chemical manufacturers).

Several activities have been added to the list, including diamond and apatite mines, railway yards, international and interprovincial bridges and tunnels, offshore exploratory wells, and expansions to oil sands mines. The capacity thresholds for rare earth mines and NEB-regulated pipelines have been lowered.

The Minister also has the authority to designate a specific project that includes physical activities not in the regulations. In the first year that *CEAA 2012* was in force, proponents initiated only 29 environmental assessments.

#### **Final version contains several additional amendments**

A number of environment groups had recommended that in-situ oil sands projects, offshore oil and gas exploration and seismic testing, electrical transmission lines, hydraulic fracturing operations and the transportation of radioactive wastes be added to the list of designated activities. There were also concerns about the thresholds set for certain activities. Meanwhile, industry representatives had called for the removal of stone quarries and gravel pits as well as higher thresholds for gas-fired generating stations. Based in part on these comments, the final list included a number of changes to the draft amendments posted in April of this year for public comment (see sidebar).

The amended regulations do not apply if an assessment of the project has already been commenced or completed by a provincial government or body, a body established under a land claims agreement or legislation that relates to the self-government for Aboriginal peoples, the Canadian Nuclear Safety Commission or the National Energy Board. The transition provision does not apply to the processes of other federal authorities.

#### **Amendments to federal *Fisheries Act* streamline section 35 authorizations for projects that harm fisheries**

Far-reaching amendments to the federal *Fisheries Act* tabled in Bill C-38 came into effect on November 25, 2013. Proponents that received a *Fisheries Act* authorization prior to November 25, 2013 have until Feb. 24, 2014 to request a review of their existing authorization to confirm whether they should remain unchanged, amended or cancelled.

#### **Ottawa makes some final changes to designated EA activities**

- ◆ the threshold for stone quarries and sand and gravel pits has been increased from a production capacity of 1 million tonnes per year to 3.5 million tonnes per year
- ◆ offshore exploratory drilling only applies to exploratory wells that are part of the first drilling program proposed in one or more exploration licence areas
- ◆ offshore oil or gas production facilities specify which types of facilities are covered (i.e., an offshore floating or fixed platform, vessel or artificial island that is used for the production of oil or gas)
- ◆ offshore pipelines exclude "flowlines" to ensure that the entry only covers major projects
- ◆ a number of editorial changes were made to conform with the terminology generally employed in a designated sector.

The amendments refocus the Act from habitat protection onto commercial, recreational and Aboriginal fisheries. The amendments also streamline the authorizations required for work that would cause “serious harm to fish” (i.e., the death of fish or any permanent alteration to, or destruction of, fish habitat). According to its new *Fisheries Protection Policy*, Fisheries and Oceans Canada interprets “serious harm to fish” as

- ◆ the death of fish
- ◆ a permanent alteration to fish habitat of a spatial scale, duration or intensity that limits or diminishes the ability of fish to use such habitats as spawning grounds, or as nursery, rearing, or food supply areas, or as a migration corridor, or any other area in order to carry out one or more of their life processes
- ◆ the destruction of fish habitat of a spatial scale, duration, or intensity that fish can no longer rely upon such habitats for use as spawning grounds, or as nursery, rearing, or food supply areas, or as a migration corridor, or any other area in order to carry out one or more of their life processes.

The new *Applications for Authorization Regulation* (SOR/2013-191), which also came into force November 25, describes the information that must be submitted by a proponent seeking an authorization, and requires that a Canadian financial institution provide an irrevocable letter of credit to cover the costs of implementing the required “offsetting plan.” Upon submission of an application, Fisheries and Oceans Canada has 60 days to determine its completeness and another 90 days to either issue or refuse the authorization. An abridged application and approval process applies to emergency circumstances.

In preparation for the impending changes, Fisheries and Ocean Canada has published a new *Fisheries Protection Policy*, an accompanying operational approach for implementing the *Fisheries Act* changes, and transitional guidance for existing and new authorizations. These are available through the department’s website at [www.dfo-mpo.gc.ca/habitat/changes-changements/index-eng.htm](http://www.dfo-mpo.gc.ca/habitat/changes-changements/index-eng.htm)

## MOE freezes waste diversion fees for off-road tires

In response to widespread complaints by manufacturers, dealers and consumers, Ontario has frozen the so-called “eco-fees” that are used to finance the diversion of off-the-road (OTR) tires from disposal.

The move supports the government’s planned replacement of its current waste diversion approach with the new directions set out in its proposed *Waste Reduction Act, 2013*. Bill 91, which is currently undergoing Second Reading debate in the Ontario Legislature, will make individual packaging and producers responsible for the end-of-life management of their products.

### Focus of Fisheries Act narrowed

The fisheries protection provisions of the *Fisheries Act* have been narrowed to focus on the “sustainability and ongoing productivity of commercial, recreational and Aboriginal fisheries.” In issuing authorizations or making regulations, the Minister must take into account the following four factors

1. the contribution of the relevant fish to the ongoing productivity of commercial, recreational or Aboriginal fisheries
2. fisheries management objectives
3. whether there are measures and standards to avoid, mitigate or offset serious harm to fish that are part of a commercial, recreational or Aboriginal fishery
4. the public interest.

On April 1, 2013, Ontario Tire Stewardship imposed new fees that ranged as high as \$1,311 for OTR tires in the top weight class (over 1,200 kg). Fees for typical agriculture tires jumped from \$15 to \$353. The previous fees had been capped at \$250 and most were well under \$100. While these higher fees will remain in effect, they cannot be raised further until Waste Diversion Ontario (WDO) reports back on the future of the OTR diversion program.

On November 29, the Ministry of the Environment amended O. Reg. 84/03 (*Used Tires*) under the *Waste Diversion Act, 2002* to cap OTR fees at “2013 rates or lower” for the coming year. The Minister has also ordered WDO to report back no later than September 12, 2014 on the findings and recommendations of a multi-stakeholder advisory committee that will investigate cost-effective options for the reuse, recycling and diversion of OTR tires. WDO’s final report must also address “fairness in the marketplace,” consumer concerns over the design, operation, governance and costs of the OTR portion of the Used Tires Program, and enhanced consumer involvement in decision-making.

## Special Fracking Update

### NEB needs more data to assess fracking in NWT and Nunavut

The National Energy Board (NEB) wants detailed information from energy companies in order to assess “the unique aspects” of future hydraulic fracturing activities in the Northwest Territories and Nunavut.

The *Filing Requirements for Onshore Drilling Operations Involving Hydraulic Fracturing* (NE23-175/2013E) sets out the information applicants must now submit with an application for an Operating Authorization (OA) issued under the *Canada Oil and Gas Operations Act*. In order to conduct its environmental assessment of proposals, the NEB requires information on project development, potential impacts to the environment, potential impacts from accidents and malfunctions, consultation with Aboriginal groups and the public, socio-economic impacts arising from environmental impacts and mitigation measures used to protect the environment. The Board can request any additional information it needs to assess an application, or may waive certain

filing requirements if they are not relevant to the work applied for or activities. Additional data may also be required with each subsequent application for an approval, such as a Well Approval or Formation Flow Test Approval. The Filing Requirements, which took effect in September, are available online at [www.neb-one.gc.ca/](http://www.neb-one.gc.ca/)

### Newfoundland halts fracking permits until review completed

On November 4, the Minister of Natural Resources for Newfoundland and Labrador announced that the province will not be accepting applications for onshore and onshore-to-offshore petroleum exploration using hydraulic fracturing.

The moratorium will allow the province to undertake “a balanced review” of the regulations, rules and guidelines covering fracking in other jurisdictions, as well as complete the technical work necessary to fully assess the geological impact of fracking in western Newfoundland. Earlier this year, Shoal Point Energy and Black Spruce Exploration applied for several exploration licences for the extensive Green Point oil-in-shale play on the province’s west coast. The play borders Gros Morne National Park. Plans to begin fracking operations near the UNESCO World Heritage Site have triggered local and international protest. Following the internal review, the province will launch public consultations to ensure residents have an opportunity to comment before any decision is made. The Minister says that the government’s “first and main consideration when exploring an economic development opportunity is the health and safety of our people and protection of the environment.” While supporting the public review, Black Spruce Exploration says it still plans on drilling three to five conventional wells, which do not require fracking, on the Port au Port Peninsula south of the park in 2014.

### New Brunswick supports responsible exploration and development of shale gas

Despite widespread and at times violent protest against hydraulic fracturing in New Brunswick, the government is pushing ahead with plans to develop the province’s shale gas resources. In the province’s November 5

Speech from the Throne, Lieutenant-Governor Graydon Nicholas said, “Responsible resource development will protect the rights and interests of future generations while at the same time improving the quality of life for all New Brunswickers, including First Nations ... As you may recall, your government has done a great deal of work towards making sure that our natural resources – and, in particular, our natural gas potential – are identified to determine whether there is potential for economic benefits in the future ... Backed by the strongest rules for industry, introduced in February, as well as an action-oriented Oil and Natural Gas Blueprint for New Brunswick, introduced in May, your government will continue on the course of responsible exploration and development.”

In related news, SWN Resources Canada has resumed its seismic testing of shale gas reserves along Highway 11 in Kent County, N.B. The target of Aboriginal roadblocks, public demonstrations, vandalism and a police crackdown, the company obtained a 14-day injunction on November 22 to keep protesters at least 20 metres away from the side of roads where the company is working and 250 metres away from the front or back of its trucks. The company is back in Court seeking an extension of the injunction and has filed a lawsuit in the New Brunswick Court of Queen's Bench against several of the protesters.

Meanwhile, Elsipogtog First Nation sought an injunction suspending SWN's shale gas exploration, stating that the Crown had failed to fulfill the duty to consult concerning the permits, and that the Applicant's Aboriginal rights and Treaty rights are being violated. The Applicant sought an injunction to prevent clashes between and among the parties and “outside radical elements”. The Court declined to issue the injunction stating that it was odd for the Applicant to request an injunction due to the risk of violent protests. Justice Judy Clendening stated that the Band's claims would have to be carefully considered at trial.

### **NEB asks industry to post fracking data online**

On November 27, the National Energy Board (NEB) announced it would soon request companies regulated under the *Canada Oil and Gas Operations Act* to publicly disclose information on the practices and fluids used in hydraulic fracturing operations.

Companies will be asked to post the information on the [Fracfocus.ca](http://Fracfocus.ca) website 30 days after completing a fracking operation. The website, a project of the B.C. Oil & Gas Commission, allows Canadian jurisdictions to upload fracking data provided to them by industry. It is based on a companion site, [FracFocus.org](http://FracFocus.org), which provides similar information south of the border. The NEB's full participation, confirmed in a recent agreement with Commission (as well as the U.S.-based Ground Water Protection Council and Interstate Oil and Gas Compact Commission), will become effective once the necessary website updates have been completed in early 2014.

### **Company files NAFTA notice to sue for Quebec fracking ban**

On September 6, 2013, Lone Pine Resources Inc. served a Notice of Arbitration on the Government of Canada regarding Quebec's “arbitrary, capricious and illegal revocation” of the company's permits to mine for shale gas under the St. Lawrence River. With headquarters in Calgary but incorporated in Delaware, Lone Pine is attempting to invoke the dispute settlement provisions of the North American Free Trade Agreement (NAFTA), seeking an estimated \$250 million in compensation plus costs.

In June 2011, Quebec passed Bill 18, *An Act to Limit Oil and Gas Activities*, suspending all permits pertaining to shale gas oil and gas resources beneath the St. Lawrence River upstream of Île d'Anticosti. The company says the move was a “political decision” and a clear violation of NAFTA Chapter Eleven, which protects U.S. investors from the expropriation of investments without a public purpose, due process or the payment of compensation. Lone Pine claims to have invested “millions of dollars and considerable time and resources” between 2006 and 2011 to obtain the necessary shale gas exploration approvals and permits from the Government of Quebec.

Not covered by the original Notice of Arbitration, Quebec has gone even further in its fracking ban by introducing Bill 37, *An Act to Prohibit Certain Shale Natural Gas Exploration and Production Activities*, on May 15, 2013. Bill 37 proposes a moratorium on all shale gas exploration in the St. Lawrence lowlands and will revoke all drilling licences without compensation. While Lone Pine continues to negotiate its claim with federal and

### Meet Willms & Shier legal experts at these upcoming events

Jan. 16 - Jun. 10	<b>CBA NEERLS 2014 Five-Part Webinar Series</b> Regional Updates on Specific Issues In Environmental, Energy and Natural Resources Law: A Practical Webinar Series Presentation	<b>Marc McAree</b> is Chair of this five-part webinar series and moderator at Session 5 (June 10) on “Canada/U.S. Cross-Border & Inter-Canadian Environmental Disputes.”
Jan. 17	<b>Environmental Law for the Construction Industry</b> Ottawa Construction Association	<b>Marc McAree</b> and <b>Charles Birchall</b> will discuss environmental law issues facing contractors and builders, including compliance obligations, how and when governments may take action, and how to stay out of trouble.
Jan. 27	<b>Aboriginal Law and Resource Development</b>	<b>Katherine Koostachin</b> will present “Thinking Beyond the Impact Benefit Agreement - Rethinking Governance and its Role in IBA Implementation.”
Feb. 12	<b>Environmental Law – Pitfalls, Perils &amp; Risk Management</b> Toronto Construction Association	<b>Marc McAree, Charles Birchall, Matt Gardner</b> and <b>Richard Butler</b> will discuss the most pressing environmental law issues facing contractors and builders, including regulatory and civil liability, spills, waste and fill management, and water issues.
Feb. 13	<b>CBA NEERLS 2014 Webinar Series</b>	<b>Julie Abouchar</b> will present “Regional Approaches to Water Across Canada.”
Feb. 19-20	<b>Sites &amp; Spills Conference: Site Remediation &amp; Hazmat Management</b>	<b>John Willms</b> and <b>John Georgakopoulos</b> will present on environmental liability and dealing with environmental consultant blunders. <b>Marc McAree</b> will speak at the luncheon on “Risk Management for Deepening Environmental Liability.”

provincial authorities, the financially troubled firm is now restructuring its operations under the *Companies’ Creditors Arrangement Act*.

### Ecojustice files suit to close loophole in B.C. *Water Act*

Ecojustice filed a lawsuit with the B.C. Supreme Court on November 13 on behalf of Sierra Club B.C. and the Wilderness Committee. The lawsuit challenges a B.C. Oil and Gas Commission practice of granting repeated short-term water use approvals to oil and gas companies for fracking operations.

These approvals, issued under the province’s *Water Act*, are typically used to permit water withdrawals for up to two years for short-term projects such as construction or roadwork. Water usage beyond the two-year limit would require a water licence and the additional oversight such a licence entails. Ecojustice says the Commission is “undermining BC’s water management regime and allowing these companies to dewater northern BC” by repeatedly granting short-term approvals (in some cases) for up to five years. Encana Corporation, one of B.C.’s natural gas players, is also named in the suit.

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