

NPC-300 quiets concerns over urban redevelopment **Ontario expands noise control options**

The Ministry of the Environment has updated, rewritten and consolidated three of its primary noise guidelines into the draft NPC-300 document. The new noise limits will be incorporated into Certificates of Approval and Environmental Compliance Approvals for “existing, planned, new, expanded, or modified” industrial plants, commercial operations and auxiliary transport facilities. They will also be used to evaluate noise complaints under Section 14 of the *Environmental Protection Act*, and guide municipal planning and zoning decisions on proposals for noise sensitive uses.

NPC-300 also offers new mitigation options, amends the sound level limits, and provides detailed definitions for a number of new terms and concepts. The limits will not apply to construction, road or rail transportation corridors, gas stations, residential air conditioning and a number of other sources, including agricultural operations addressed through the *Farming and Food Production Protection Act, 1998*. As a result of the revisions, the proposed guideline is certainly better organized and easier to interpret than the existing set of three.

The results of this difficult and ambitious exercise were posted on the Environmental Registry by MOE back on November 16, 2010. The deadline for comments on the draft guideline, since retitled *Environmental Noise Guideline: Stationary and Transportation Sources*, closed on January 15, 2011. While many stakeholders supported the Ministry in both its intent and approach, the posting prompted a flood of procedural improvements and technical recommendations from the engineering, consulting and legal communities, municipalities, industry representatives and interested individuals.

Phase in of new requirements

Based in part on the comments received, a revised draft was prepared and distributed in early April 2011. Following a series of stakeholder workshops held during April, MOE is now moving to complete the consolidated noise guideline, incorporate any final changes, and “make it publically available as soon as we possibly can.” Following the posting of a final decision, the rollout of the new guideline will include a number of orientation and education sessions.

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Willms & Shier and Osgoode Hall Law School host first environmental moot court

“Long overdue!” and “A tremendous success!” are just two of many very positive comments made by participating lawyers, judges and students about Canada’s first national moot court competition devoted to environmental law. Held February 19, 2011, at the Ontario Court of Appeal in Toronto, the moot attracted eight teams of law students from across the country.

The students argued one of the most fundamental and

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How will NPC-300 be implemented? All new applications for MOE approvals submitted after the guideline's publication date will be assessed in accordance with NPC-300. Applications submitted prior to this date will be assessed under the previously applicable guidelines unless an applicant requests in writing that a project be assessed under NPC-300. In such cases, MOE may require additional supporting documentation to complete the assessment.

Promoting urban infilling and redevelopment

In order that strict noise criteria don't derail future brownfield redevelopment and urban intensification projects, the earlier Registry posting had proposed two new classes of noise sensitive land uses. In the interests of clarity, the revised draft has combined these into a single classification. The redefined Class 4 Area would apply to an area or specific site – which would otherwise be defined as an urban Class 1 or semi-urban Class 2 Area – that is slated for new noise sensitive land use(s), which are not yet built, and is situated in proximity to existing, legitimately established stationary source(s) of noise. The designation must be confirmed formally by the local land use planning authority.

In a departure from the previous draft, areas with existing noise sensitive land use(s) that are classified as Class 1, 2 or 3 could not be reclassified as a Class 4 Area. The intention is that stationary sources currently in compliance should never be forced to meet tougher noise limits to accommodate a new, noise sensitive land use development. The only exception permitted could arise if the existing noise sensitive land uses were to be completely "replaced, redeveloped or rebuilt." In such circumstances, a municipality could opt to redesignate a Class 1 or 2 Area (but not a Class 3 Area) as Class 4.

The Ministry has added a new class of "noise sensitive land uses" which could include residences, hospitals, schools, nursing homes, places of worship and so on. The proponents of such projects must work with nearby owners of stationary source of sound and local planning authorities to implement the appropriate siting and design, construction, buffering, source mitigation and other noise control measures. The Ministry's stated objective is "to avoid problems in a proactive manner through input into the land use planning process."

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" (although not under the auspices of the EPA). Many stakeholders questioned how municipalities could compel developers and source owners to work together, especially if the parties were not inclined to cooperate.

In applying for or renewing an MOE approval, it will remain the responsibility of the owner of a stationary source to comply with the 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, it is

What does NPC-300 do?

1. Defines the requirements and criteria used by MOE when issuing approvals for noise from stationary sources, such as industrial & commercial establishments and auxiliary transportation facilities. Approval instruments include Certificates of Approval under s.9 of the *EPA*, Renewable Energy Approvals under s. 47.3, and Environmental Compliance Approvals issued under Part II.1 of the Act, as well as certain provisions of the *Environmental Assessment Act*.
2. Provides advice, sound level criteria and guidance to land use planning approval authorities, including municipalities, planning boards or other ministries and agencies, that can be applied to land use planning decisions.
3. Provides sound level limits used to determine the potential for adverse effects of noise-related incidents reported to MOE, in violation of section 14 of the *EPA*.
4. Provides sound level limits that may be incorporated into municipal noise control by-laws, or that may be applied under the provisions of the *Aggregate Resources Act*, primarily by the Ministry of Natural Resources in licensing activities.

the responsibility of the proponent/developer of the noise sensitive land use to ensure compliance with the applicable sound level limits.

According to NPC-300, “communication and cooperation between the proponent of the noise sensitive land use and the stationary source owner are desirable and highly encouraged” when crafting a noise control strategy.

“A cooperative effort on the part of the developer and the stationary source owner is desirable for both parties. For the developer, cooperation often results in more economical noise control measures. For the owner of the stationary source, cooperation will ensure input to the design of the proposed sensitive development.” (NPC-300)

The implementation and maintenance of any stationary source noise control measures should be set out a tri-party agreement between the developer of the noise sensitive land use, the land use planning authority and the owner(s) of the stationary source(s). Any such agreement should be registered on title with an appropriate warning clause to notify prospective purchasers. It must also be submitted to MOE by the stationary source owner(s) when applying for an MOE approval, and would be incorporated into any subsequent approval.

MOE says that it won't be playing a mediation role in noise-related planning and development disputes. MOE says that it has no authority under the *Planning Act* and is not in a position to regulate the local land use planning and development process on a case-by-case basis. The suggested process set out in the NPC-300 document – a process that is by no means prescriptive, the Ministry insists – is designed in the hope that every new residential development built in proximity to an existing stationary source won't automatically be appealed to the Ontario Municipal Board by its industrial neighbours. However, MOE is “by no means confident that we've got it right,” and are looking for further guidance and feedback on the issue.

ENB balconies provide noise buffering

To encourage redevelopment in Class 1 and 2 areas, proponents of noise sensitive land uses near existing stationary sources will be allowed additional noise buffering options. Traditionally, the plane of a (presumably) open window is used for assessing point of reception (POR) noise levels in Class 1, 2 and 3 land areas. However, for Class 4 areas, it will be permissible to utilize air conditioning systems (with closed windows) as an acceptable mitigation option in assessing noise levels.

Proponents of noise sensitive projects are also offered a new mitigation tool – the enclosed noise buffer (ENB) that could be applied to the exterior of a building over windows opening into noise-sensitive rooms. A kind of enclosed balcony/sunroom hybrid, the ENB balcony could be no less than one and no more than two metres deep, must remain unfinished on the interior, and may not be air conditioned or heated. It would serve to buffer one or more windows on a noise sensitive building.

Many critics had complained such architectural features were technically impractical. The revised version of the noise guideline would restrict their use to

NPC-300 updates and consolidates three existing noise-related guidelines issued by the Ministry of the Environment:

1. NPC-205 — *Sound Level Limits for Stationary Sources in Class 1 & 2 Areas (Urban)*, dated October 1995
2. NPC-232 — *Sound Level Limits for Stationary Sources in Class 3 Areas (Rural)*, dated October 1995
3. LU-131 — *Noise Assessment Criteria in Land Use Planning*, dated October 1997

Comparison of Current and Proposed One-Hour Equivalent Sound Levels (L_{eq} , dBA)

Time of Day	Class 1 Areas			Class 2 Areas			Class 3 Areas			Class 4 Areas		
	Current ¹	Proposed ³		Current ¹	Proposed ³		Current ²	Proposed ³		Current	Proposed ³	
		Out door ⁴	Win-dow ⁵		Out door ⁴	Win-dow ⁵		Out door ⁴	Win-dow ⁵		Out door ⁴	Win-dow ⁵
0700 -1900	50	50	50	50	50	50	45	45	45	n.a.	55	60
1900 -2300	47	50	50	45	45	50	40	40	40	n.a.	55	60
2300 -0700	45	—	45	45	—	45	40	—	40	n.a.	—	55

1. Taken from Table 205-1, "Minimum Values of One Hour L_{eq} (dBA) or L_{LM} (dBAI) by Time of Day," in NPC-205, *Sound Level Limits for Stationary Sources in Class 1 & 2 Areas (Urban)*
2. Taken from Table 232-1, "Minimum Values of One Hour L_{eq} (dBA) or L_{LM} (dBAI) by Time of Day," in NPC-232, *Sound Level Limits For Stationary Sources In Class 3 Areas (Rural)*
3. Outdoor POR/Exterior Plane of Window (living spaces and sleeping quarters); taken from Tables B-1, "Exclusion Limit Values of One-Hour Equivalent Sound Level (L_{eq} , dBA) Outdoor Points of Reception," and B-2, "Exclusion Limit Values of One-Hour Equivalent Sound Level (L_{eq} , dBA) Exterior Plane of Window," in NPC-300, *Environmental Noise Guideline*, April 2011
4. The outdoor sound level limits for stationary sources apply only to daytime and evening (07:00 – 23:00 hours)
5. For Class 1, 2 and 3 areas, the plane of window limits apply to a window that is assumed to be open. For Class 4 areas, plane of window limits apply to a window that is assumed to be closed.

Exclusion Limit Values for Impulsive Sound Levels (LLM, dBAI)^{1,4}

# of impulses in one-hour period	Class 1 Area		Class 2 Area		Class 3 Area		Class 4 Area	
	Out door ²	Window plane ³	Out door ²	Window plane ³	Out door ²	Window plane ³	Out door ²	Window plane ³
9 or more	50	50/45	50	50/45	45	45/40	55	60/55
7 to 8	55	55/50	55	55/50	50	50/45	60	65/60
5 to 6	60	60/55	60	60/55	55	55/50	65	70/65
4	65	65/60	65	65/60	60	60/55	70	75/70
3	70	70/65	70	70/65	65	65/60	75	80/75
2	75	75/70	75	75/70	70	70/65	80	85/80
1	80	80/75	80	80/75	75	75/70	85	90/85

1. Taken from Tables B-3 and B-4 in NPC-300, *Environmental Noise Guideline*, April 2011
2. Outdoor points of reception between 07:00-23:00
3. Exterior plane of window between 07:00-23:00/23:00-7:00
4. The sound level limits for noise produced by emergency equipment operating in non-emergency situations, such as testing or maintenance of such equipment, are 5 dB greater than the sound level limits applicable to regular stationary sources. No sound level limit applies to emergency equipment operating in emergency situations.

high-rise multi-unit buildings in Class 4 areas and ensure they meet the requirements of the *Ontario Building Code*.

New Points of Reception and emission scenarios will result in potential non-compliance

Revised noise assessment protocols, especially the new definition for the “point of reception,” could create serious compliance problems for both existing and future facilities. Traditionally, approvals under EPA Section 9 were based on a daytime receptor height of 1.5 metres. Raising this to 4.5 m for two-storey buildings (or higher for taller structures) could result in significant changes to noise control requirements ... for existing facilities with a valid C of A.

Stationary sources will now be assessed based on a “predictable worst case impact”, which is defined as the highest levels of impact that will occur at least twice per month for at least one half hour.

It is uncertain if or when existing facilities will have to conform to the new criteria. The Ontario Stone, Sand and Gravel Association (OSSGA) firmly believes that existing licenses designed to comply with the predecessors of NPC-300 should continue in force. According to the OSSGA’s Cynthia Robinson, if the parameters are changed, “this could have significant implications for existing operations.”

In many cases berms or barriers are the only effective noise control options available. “Requiring a 4.5 m receptor height for daytime operations may render mitigation technically, economically or administratively infeasible in existing Class 1, 2 or 3 areas,” says Robinson. “In any event, larger berms will result in a reduced footprint and ultimately the loss of extractable product.”

What changes have been made to NPC-300?

In preparing this second revised version of NPC-300, some definitions have been dropped (Adverse Effect, Class 5 Area, Conveyance, etc.), while others have been added (including Acoustic barrier, Dwelling, Emergency equipment, High-rise multi-unit building, Layover site, Noise sensitive vacant lot, etc.) And many of the rest have been reorganized or amended.

- ◆ Highly intrusive short duration noise, such as caused by an aircraft, subways or streetcar, is normally excluded from the determination of the “Background sound level.” However, such noise may now be considered in accordance with a number of carefully prescribed circumstances.
- ◆ “Layover sites” operated by GO Transit are no longer considered “Auxiliary transportation facilities,” eliminating concerns expressed by MetroLinx that such sites would no longer meet the new sound level limits.
- ◆ The list of acceptable “Noise control measures” is reorganized into lists of physical measures that might be implemented by the noise source, receptor or planning authority.
- ◆ Similarly, the definition of “Stationary source” is subdivided into six categories based on MOE approval requirements and the related sound level limits.
- ◆ Noise assessments of “Vacant lots” has been clarified and restricted to the centre of a one-hectare area on the site that is “consistent with the existing zoning by-law, the typical building pattern in the area and an appropriate or likely future use of the vacant lot.”
- ◆ The four-hour evening “Time Period” (between 19:00 and 23:00 hours) has been restored for stationary sources, but not transportation sources.

Wind turbine concerns persist

While NPC-300 explicitly excludes noise from wind turbine generators (as well as blasting, landfills or the approval of new or expanded transit corridors), the original EBR posting attracted the attention of a number of wind farm opponents. Some recommended that the POR in a vacant lot or adjoining property be placed at the property’s boundary closest to the stationary source. Others asked that the guideline give greater weight to the health-related impacts of noise (in addition to its nuisance impacts). And many strongly urged the province to extend the scope of the guideline to also address low frequency noise, infrasound, ultrasound, tonality, vibration and so-called “electrical pollution.” All these ‘emissions’ feature prominently in the current

debate over the purported, but as yet unsubstantiated, health impacts of wind turbines.

MOE currently has a project underway to measure, quantify and assess the environmental impact of low frequency noise. Once that work is done, it will begin to incorporate the consideration of low frequency noise into its noise guidelines and regulatory regime.

The Ministry is also planning, at some point in the near future, to update a number of its other noise-related guidelines, including NPC-101 (Technical Definitions), NPC-103 (Procedures), NPC-119 (Blasting), and the Noise Guidelines for Wind Farms. Finally, It is the process of reviewing and revising a number of its 'D' series land use guidelines, as well as its primary and secondary noise screening processes for EPA s.9 applications.

Eco-fees redux

Over the past year, we've written about the false starts and miscues in rolling out the second phase of product stewardship - (remember "eco-fees"?) on certain "hazardous" household products. After cancelling the program last October, the province precipitously promised to pick up the costs of diverting these materials from the municipal waste stream. The final price tag was estimated at somewhere between \$9 and \$18 million. At the same time, the Minister of the Environment has directed Waste Diversion Ontario (WDO) to develop a revised MHSW program for Phase 1 wastes only.

So what's next? After Stewardship Ontario and WDO fumbled the play – in part because of "the inclusion of some products that did not make sense to consumers" – it appears the not-for-profit sector will get the next kick at the can. At the end of March, MOE issued an RFP for a not-for-profit entity capable of funneling \$10.5 million over the next three years to municipalities to cover the eligible costs of managing, recycling and disposing of selected household hazardous waste. The six waste streams targeted for diversion are

- ◆ rechargeable batteries, excluding batteries from vehicles and industrial stationary batteries
- ◆ portable fire extinguishers
- ◆ fluorescent light bulbs and tubes

- ◆ mercury-containing devices, including switches, thermostats, thermometers, barometers and other measuring devices
- ◆ pharmaceuticals
- ◆ sharps and syringes (from residential generators only)

Ineligible municipal costs include those associated with wastes that are not accepted free of charge by municipalities; costs reimbursed from other sources or related to the activities of an industry funding organization; insurance and capital costs; public education and awareness activities; R&D activities; and financial incentives.

The successful not-for-profit entity must also undertake an annual audit of the waste management activities of a representative sample of municipalities, as well as provide information to the public on the progress of municipalities in managing, recycling and disposing of the selected household hazardous wastes.

The deadline for bids is April 26 and the selected applicant will be informed in spring 2011. The funds will start to flow in July 2011 and, subject to the terms and conditions of the Grant Funding Agreement, will continue until March 31, 2014. We'll keep you up—to-date on developments.

A summary of recent postings to the Environmental Registry

On April 13, the Ministry of the Environment posted a series of proposals to implement the **simplified, risk-based environmental approvals process** mandated under Ontario's *Open for Business Act, 2010*. There have also been proposals to introduce plain language guides to explain the **brownfield site assessment** requirements and to amend Regulation 419/05 (**Local Air Quality**).

EBR Registry posting #011-2957 sets forth the **draft minimum requirements for submitting a complete environmental compliance approval application**. Intended to form the basis of a future regulation, these generic requirements will be applied to all project types and will be supplemented by specific technical requirements for each project type (e.g., waste disposal

sites, waste management systems, sewage works, etc.). They will not apply to renewable energy approvals, permits to take water, drinking water systems, or licensing / certification programs for pesticides or well drillers. The proposed regulation will also be supported by companion guidance documents and a “smart” ECA application form. The deadline for comments is May 13, 2011.

Before activities may be registered on the **Environmental Activity and Sector Registry (EASR)**, they must first be prescribed by regulation. EBR Registry posting #011-2869 proposes that the following sectors be allowed to register on the EASR: the automotive body, paint and interior repair and maintenance sector; provision of comfort heating in buildings, and standby power generation equipment in buildings. The proposed regulation defines the specific requirements that would make each activity eligible to register on the EASR, as well as those eligible to register specific operational and/or documentation and record keeping requirements. Although MOE also considered the addition of the printing sector to the list, it has decided to conduct additional analysis and will provide additional details in a future posting.

Consequential amendments to O. Reg. 681/94 (Classification of Proposals for Instruments), under the *Environmental Bill of Rights*, are set forth in EBR Registry posting #011-2776. Existing classifications for proposals for approvals under ss.9, 27 and 31 the *Environment Protection Act* and ss.53 (1) of the *Ontario Water Resources Act* would be revoked, and new proposed Class I and II proposals for instruments and Class II exemptions (for transition purposes) would be added. There are also a number of housekeeping amendments that reflect new terminology in the *EPA* and *OWRA*, correct references to the new harmonized discretionary hearing provisions in those acts, and remove references to sections that have been revoked. The deadline for comments is May 13, 2011.

MOE has also released draft **plain language guides for Phase One and Phase Two Environmental Site Assessments** under O. Reg. 153/04 (Records of Site Condition). While the two guides are targeted specifically at those “qualified persons” conducting ESAs, they would be useful to property owners or anyone interested in brownfield development. Each starts with the basics – What is an RSC? What is an ESA? – and builds from there, following the general ESA requirements of the regulation and Schedule D that must be met in order to submit a RSC for filing. They also cover the regulatory amendments that come into effect July 1, 2011. While the guides do not include detailed methodologies – which remain at the discretion of the QP – the text is augmented with answers to frequently ask questions, example scenarios, and helpful cross references back to the relevant sections of O. Reg. 153/04. The deadline for comments on the MOE’s plain language guides is May 23, 2011.

Finally, proposed **amendments to O. Reg. 419/05 (Air Pollution — Local Air Quality)** make a number of wording changes intended to improve regulatory clarity and certainty. “Altered” standards would become “Site-specific” standards; those standards would remain in effect from a minimum of five to a maximum of ten years (the period of approval for a standard would begin after

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The results, published in *Chambers Global 2011* directory resource, are based on months of in-depth research of legal markets of over 180 countries by U.K.-based legal publisher Chambers & Partners. Chambers says it assesses technical legal ability, professional conduct, client service, commercial astuteness, diligence, commitment, and other qualities most valued by the client. Firms and individuals must be recommended to merit inclusion. The *Financial Post* is the exclusive media partner with Chambers for the unveiling of the 2011 edition.

the phase-in period, which is generally five years); and the renewal process has been simplified (removing the requirement to hold a public meeting) in cases when there is no change to the basis of the original site-specific standard request. Posted April 13th, the deadline for public comment is May 13, 2011.

(Continued from page 1)

controversial issues in environmental law today – quantum of damages for contaminated land. The moot featured the case of *Cousins v. McColl-Frontenac Inc.*, where a property owner sought damages for the contamination of his land by a major oil company.

Queen's University and the University of Toronto advanced to the final round, arguing the championship match before an illustrious panel of Justice Thomas Cromwell of the Supreme Court of Canada, Justices Michael Moldaver and Robert Armstrong of the Ontario Court of Appeal, Justice Katherine van Rensburg of the Ontario Superior Court of Justice, and the former Chair of the Ontario Environmental Review Tribunal, Toby Vigod. Sean Miller, Stephen Ronan and Patrick Stratton of Queen's took home the Willms & Shier Environmental Law Moot Championship trophy. Sean Miller also won the award for First Place Oralist. The U of T and Dalhousie University placed second and third.

The award for Best Appellant's Factum, named for the late Barry Nelson Spiegel of Willms & Shier, was won by U of T's Joanna Kyriazis and Ryan Walker. The award for Best Respondent's Factum, honouring Osgoode professor and environmental law pioneer D. Paul Emond, was won by Dalhousie's Leslie Bateman and Brigid Wilkinson. Distinguished Oralist awards were also presented to Julia Werneburg of the University of Ottawa, Leslie Bateman of Dalhousie, and Queen's Sean Miller and Patrick Stratton.

Founded by Osgoode Hall Law School, in partnership with Willms & Shier Environmental Lawyers LLP, the goal of the competition is to promote awareness of the growing role of environmental issues in contemporary legal practice and public life, while enhancing law students' written and oral advocacy skills. The next Willms & Shier Environmental Law Moot will be held in February 2013.

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