

August 6, 2021

Hon. David Piccini, Minister
Ministry of the Environment, Conservation and Parks
College Park 5th Flr, 777 Bay St,
Toronto, ON
M7A 2J3

Copy to: Hon. Steve Clark, Minister
Ministry of Municipal Affairs and Housing
College Park 17th Flr, 777 Bay St,
Toronto, ON
M7A 2J3

RE: ERO POSTING 019-2785
COMMENTS ON DRAFT *LAND USE COMPATIBILITY GUIDELINE* ISSUED BY THE
ONTARIO MINISTRY OF THE ENVIRONMENT, CONSERVATION AND PARKS

Dear Sir,

On May 4, 2021, the Ontario Ministry Of The Environment, Conservation And Parks (“MECP”) issued a Draft *Land Use Compatibility Guideline* (“the Draft Guideline”) on the Environmental Registry of Ontario website (<https://ero.ontario.ca/notice/019-2785>).

The Draft Guideline is intended for use by “Planning Authorities” (including Municipalities, the Ontario Land Tribunal, and Ministerial Zoning Orders), developers and consultants in land use planning assessments, and to replace the former “D-Series” Guidelines D-1, D-2 (Sewage Treatment), D-4 (Landfills), and D-6 (Industry).

The requirements in the Draft Guideline differ from the previous D-Series requirements in important ways and will add significant new assessment requirements for development in general and significant new hurdles for redevelopment, infill and brownfield developments as well as transitions to mixed uses with no apparent benefit. It adds new requirements for “Demonstration of Need” studies at later portions of the Planning process, such as Site Plan Approval and Minor Variances, which mean that zoning by itself is no longer sufficient to ensure that a particular use is permitted. It seems clear that this will adversely affect redevelopment, infilling and transitions to mixed use in metropolitan areas, contrary to the goals of the Places to Grow Act and the concepts of ‘live, work, play’ neighborhoods. It is also expected there will be impacts on municipal engagement and investment as well as increased burden to industry.

Our specific comments on and concerns with the new guidelines follow.

Purpose of the New Guideline

Section 1.1 of the Guideline states that “The primary purpose of the Guideline is to support the implementation of the Provincial Policy Statement, 2020 (PPS)”. Policy 1.2.6.2 of the 2020 PPS introduced

the concepts of “avoidance” and “demonstration of need”:

“1.2.6 Land Use Compatibility

1.2.6.1 Major facilities and sensitive land uses shall be planned and developed to avoid, or if avoidance is not possible, minimize and mitigate any potential adverse effects from odour, noise and other contaminants, minimize risk to public health and safety, and to ensure the long-term operational and economic viability of major facilities in accordance with provincial guidelines, standards and procedures.

1.2.6.2 Where avoidance is not possible in accordance with policy 1.2.6.1, planning authorities shall protect the long-term viability of existing or planned industrial, manufacturing or other uses that are vulnerable to encroachment by ensuring that the planning and development of proposed adjacent sensitive land uses are only permitted if the following are demonstrated in accordance with provincial guidelines, standards and procedures:

- a) there is an identified need for the proposed use;
- b) alternative locations for the proposed use have been evaluated and there are no reasonable alternative locations;
- c) adverse effects to the proposed sensitive land use are minimized and mitigated; and
- d) potential impacts to industrial, manufacturing or other uses are minimized and mitigated.”

The Planning Act and its subsequent policies, regulations, and guidelines are under the authority of the Ministry of Municipal Affairs and Housing (“MMAH”). The MECP is not the MMAH. It is inappropriate for the MECP to issue guidance documents on interpretation of the MMAH’s policies, including new assessment requirements, just as it would be for the MMAH to issue guidance on how to conduct an air quality study. These new MECP requirements are outside of the MECP’s bailiwick and area of expertise.

Issues With New Areas of Influence and Minimum Separation Distances

The guideline supplies new Areas of Influence (AOIs) and Minimum Separation Distances (MSDs). AOIs are now defined as an area where “adverse effects on surrounding sensitive land uses have a *moderate* likelihood of occurring” [emphasis added], whereas previously they were defined as area where an impact may be experienced. Similar to the previous D-Series of guidelines, detailed Compatibility Studies are required where sensitive land uses are proposed within an AOI of an industry; or where a sensitive land use exists within the AOI of a new or expanded industrial use. As a new definition, “avoidance” is only met if the sensitive use is outside of all applicable AOIs in a given area.

MSDs are defined as the “recommended minimum distance from a major facility within which adverse effects to a sensitive land use are highly likely to occur”. The guideline further states that “Planning authorities should not allow sensitive land uses within the MSD.” However, this is a recommendation, and development within the MSD is allowed, subject to a Demonstration of Needs Study. Issues with Demonstration of Needs studies are discussed in detail below.

There are now 5 categories of industries, rather than the 3 in the existing Guideline D-6 document. No rationale is provided for the increased number of categories, and as only 3 different MSDs are provided, the additional complication appears to be superfluous.

The AOI and MSD distances are in the vast majority of cases significantly larger than those in the D-Series guidelines, with AOIs for “Class 5 Heavy” industries extending out to 2 km (up from the 1 km in Guideline D-6), with a corresponding MSD of 500 m (up from 300 m). The increased separation distances are said to have been developed from the MECP’s records of complaints; however, this information has not been provided.

Given the increased AOI distances, any development project within a metropolitan area are therefore

unlikely to “avoid” a major industry. Therefore, the number of Compatibility Studies, and the number of industries which will need to be considered in a Compatibility Study will dramatically increase, affecting the timing and cost of studies.

The approach of basing AOIs and MSDs only on complaint history is fundamentally flawed. The majority of industries follow best practices and operate in conformance with industry standards and MECP requirements. These industries rarely or never receive complaints. In our experience, complaints and adverse impacts typically occur where a) the industry is an industrial “bad actor”, who is not following best practices, has not designed or is not operating their facility appropriately, or; b) in the case of properly designed and operated facility, where an expected process upset or equipment breakdown has occurred, which is usually quickly remedied.

In either case, basing separation distances and long-term planning decisions on bad actors and single/infrequent events is inappropriate.

The New AOIs and MSDs are Inconsistent with Industry Experience

As indicated above, the greatly increased AOIs and MSDs are inconsistent with industry experience. In SLR staff’s collective experience, we have never identified an adverse effect from noise, dust or odour at distances of 2 km from any “Class 5” industrial facility. It is difficult to imagine an industry or situation where “adverse effects on surrounding sensitive land uses have a moderate likelihood of occurring” 2000 m away.

The New AOIs and MSDs are Inconsistent With the MECP EASR Regulations

Ontario has recently instituted the Environmental Activity and Sector Registry (“EASR”) regulations. Under the EASR regulations, more than 80% of industrial and commercial uses are allowed to follow a “self assessment and registration” approach to evaluating potential environmental impacts from their operations. Assessments are conducted by professional engineer experts retained by the industry, to ensure that the applicable Provincial air quality, noise and vibration regulations, standards, guidelines and policies are met. This has reduced red tape, provided certainty to industry, allowed for faster changes to industrial operations, and allowed MECP approvals staff to concentrate their efforts on major industrial emitters.

AOIs and MSDs do not play a part in the EASR process. A review of SLR’s clients with EASRs and a screening level review of EASRs listed in the MECP Access Environment website shows that the majority of industries with EASR registrations have existing sensitive receptors within the Minimum Separation Distances listed in the new guideline. This is evidence that the AOIs and MSDs in the new guideline are unrealistic. As the AOI and MDS requirements also apply to new industrial expansions, this creates a situation of conflicting guidance from the MECP on the potential for industrial impacts. On one hand, the MECP is saying that these types of industries do not need direct MECP oversight and review, and that an EASR self-assessment is appropriate; on the other side, with this new guideline they are saying that these industries are highly likely to cause adverse effects. Which is it?

Demonstration of Need Studies

A “Demonstration of Need Study” is required under the Draft Guideline if any form of mitigation (either source or receptor-based) is required as a result of the Compatibility Study. Given the increased MSD distances, Demonstration of Needs Studies will likely be required for the vast majority of developments within metropolitan areas.

This is a brand-new requirement with no parallel in the previous guidelines or policies, which is discussed in detail in Section 2.8 of the Draft Guideline. The requirements are all related to planning matters, not technical assessment matters, and thus would appear to be outside of the MECP’s mandate and area of responsibility.

These assessments are only required for sensitive use development projects, and not for industrial projects. The Draft Guideline states that "... the planning authority must only permit the proposal if they are satisfied that there is an identified need and sound planning rationale for the proposed use in that location, and that alternative locations or areas for the proposed use have been evaluated **and there are no reasonable alternative locations or areas**" [emphasis added].

From the Draft Guideline, the Demonstration of Need Study requirements include the following:

"The demonstration of need should include the following:

1. Demonstrate that there is a need for the proposed use in that particular location. This includes answering the following questions:
 - a. Do policies and objectives in the planning authority's applicable planning documents (such as OPs) and relevant provincial policies and plans (e.g. PPS, A Place to Grow) support locating the use in the proposed location? For example, consider policies/objectives related to complete communities, housing diversification, and community amenities.
 - b. Are there demographic considerations, such as expected land supply, housing strategy, and forecasted growth or growth targets in population or employment, that would support the use in the proposed location?
 - c. How will the proposed use, in its proposed location, support the community or other existing uses in the area? For example, does it provide necessities for daily living, including an appropriate mix of jobs, local stores, and services, a full range of housing and transportation options and public service facilities?
 - d. Are there community amenities and infrastructure (i.e. transportation, servicing) available to support the use?
 - e. Is the proposed use to be located within a designated strategic growth area which by nature should include multiple types of uses, such as an MTSA (within the Greater Golden Horseshoe growth plan area) or nodes and corridors generally?
2. Identify other locations in the municipality that have been designated and zoned specifically for this use and explain why they have not been chosen for the proposed use.
3. Provide a list of at least two alternative locations that have been considered outside of the major facility's AOI and for each, discuss whether they would be appropriate for this use as compared to the preferred location. This discussion should address the same questions presented in #1a-e.
4. Identify other potential uses for this particular site that would not be considered incompatible and explain why they have not been chosen for the proposed location.
5. The conclusion of the demonstration of the need should discuss why the proposed use in the proposed location is the best option, having considered the answers to the questions presented in #1a-e."

Items 1a to 1e include information typically found in a Planning Justification Report. However, under items 2 to 5, planning and compatibility issues for at least two additional sites, which may have to be several kilometres away ("outside of outside of the major facility's AOI") would also need to be fully assessed. It appears that the scope of required planning studies will dramatically increase as a result of the proposed Draft Guideline, affecting the timing and cost of studies. Furthermore, in many cases, a landowner contemplating development may only have one option, as only one property is under ownership. In this case, an evaluation of alternatives is impossible.

Use of AOIs and MSDs in Triggering Determination of Needs Studies is Inconsistent With the PPS.

Section 1.2.6.2 of the PPS, which introduces the concept of “Demonstration of Need” states the following:

1.2.6.2 Where avoidance is not possible in accordance with policy 1.2.6.1, planning authorities shall protect the long-term viability of existing or planned industrial, manufacturing or other uses that are vulnerable to encroachment by ensuring that the planning and development of proposed **adjacent sensitive land uses** are only permitted if the following are demonstrated in accordance with provincial guidelines, standards and procedures... [emphasis added].

“Adjacent” is defined in the Oxford English Dictionary as “next to or adjoining something else”. It is certainly not something 2 km away. Thus the Draft Guideline is inconsistent with the clear language of the PPS.

Timing of Studies

The D-Series of guidelines only applied when a change in land use was proposed, that is to say during Official Plan Amendments (“OPAs”) or Zoning By-law Amendments (“ZBAs”). While the text of the Draft Guideline is inconsistent, the requirements of the new Draft Guideline would appear apply to all Planning Act approvals including:

- Official Plan (OP) and OP amendments (OPAs);
- Secondary plans;
- Community planning permit systems;
- Zoning by-laws (ZB) and zoning by-law amendments (ZBAs);
- Plans of subdivision or condominium;
- Consents;
- Minor variances; and
- Site plan control and other planning approvals.

Under the Draft Guideline as written, a full assessment, including requirements for Demonstration of Need Studies, would be required for every approval. This places an unfair burden on development.

Under the Planning Act, Municipalities determine the appropriateness of the location of land uses through their Official Plans and Zoning By-laws. Under the Draft Guideline, the zoning of a property alone would no longer be sufficient to determine if development could occur. If a proposed sensitive land use is within an MSD of an industry, even though the appropriateness of a land use might have been established at the OP and ZB stage, at Site Plan Approval a Demonstration of Needs Assessment would still need to be completed. This creates a highly duplicative approach, adding uncertainty, potentially adversely affecting land values and the ability to develop.

Similarly, a requirement to conduct a Demonstration of Needs Assessment as part of a Minor Variance application to a Zoning By-law is illogical. A Minor Variance is meant to be just that – a *minor* change to a particular zoning requirement, and not a fundamental change to a land use, which would require a full ZBA. As an example, if an existing house is located within an MSD of an industry, and the owner wished to add a 1 storey extension to their house and needed a Minor Variance to do so, under the Draft Guidelines that owner would need conduct a Demonstration of Needs study to show that residential uses are appropriate, at their existing residence.

Cumulative Impact Assessment

In general, with the exception of certain air quality contaminants in certain geographical areas (Sarnia and Hamilton), the MECP does not require cumulative impacts assessments, looking at total concentrations from multiple sources. The Draft Guideline states that “the planning authority can also, at their discretion, undertake or require broader studies outside of a site-specific study, such as regional or cumulative impact modeling. This could be appropriate if there are multiple existing major facilities or multiple proposals for potentially incompatible development in a regional area, and the planning authority may want to assess

impacts on an area-wide scale.”

SLR agrees that regional or cumulative impact assessments, where warranted by the nature of the contaminants or by the nature of the sources, may be appropriate. However, leaving these requirements for such studies up to Municipalities is not appropriate, given the total lack of MECP guidance and air quality standards. This will again create confusion and uncertainty.

Transportation Sources

The definition of “major facility” in the Draft Guideline includes transportation corridors such as roadways and railways, which implies that impacts from these sources must be assessed. While impacts from such sources have always been part of environmental noise and vibration assessments, air quality impacts have typically not been assessed for individual developments, as transportation air quality impacts are generally more appropriately examined and addressed on a regional basis.¹

Transportation-related air quality contaminants include items such as fine particulates (PM₁₀ and PM_{2.5}). In most metropolitan area existing ambient background concentrations of these contaminants already exceed interim MECP standards and guidelines, which would imply that no development would be acceptable in a metropolitan area from an air quality perspective.

No specific air quality guidelines, assessment techniques, or acceptable mitigation measures are provided in the Draft Guideline. The Draft Guideline states that Environmental Assessments (“EAs”) which may (or may not) have been completed for the roadways or railway projects should be reviewed but then goes on to say such information may not be relied upon.

Mitigation

Section 3 of the Draft Guideline discusses mitigation measures. The document introduces uncertainty around receptor-based mitigation measures for dust and odour. Examples of receptor-based air quality measures are provided, including:

- protection of indoor air quality through centralized heating/air conditioning systems with air intake appropriately located away from odour sources;
- individual heating/air conditioning systems associated with each residential unit equipped with carbon filters; and
- locating air intakes well above grade.

These techniques are often used for development projects to reduce the potential for adverse effects, including those for transportation-related air pollution and they are listed in the Draft Guideline. However, later sections of the Draft Guideline then go on to state “At-receptor mitigation is not recognized by the Ministry to mitigate odour and dust impacts.”

Ministry Role

As noted in the Draft Guideline, MECP will not review or approve technical studies for Municipalities. This is not different from the current status. However, given the scope of the studies have significantly increased, it is logical to presume that the costs to Municipalities will increase with staff time or peer review costs. Quite

¹ Some Municipalities such as Toronto and Halton Region have begun requesting that an assessment of “Transportation Related Air Pollution” (“TRAP”) be included in some but not all Development applications, depending on the setback to major transportation corridors. The lack of guidelines, assessment techniques, and acceptable mitigation measures already affects these projects. The Draft Guideline seemingly extends this requirement and resulting uncertainty to all development projects in Ontario.

often a municipality will not have the inhouse expertise to review these studies. The need to use outside peer reviewers will further increase costs and review timelines.

Potential Effect on Developers and Municipalities

The effect on Developers and Municipalities are potentially significant:

- Official plans and zoning by-laws may need to be rewritten to address the requirements of the Draft Guideline and the increased AOIs and MSDs. Decades of planning work would need to be redone.
- The guideline recommends that Municipalities create an OP schedule identifying AOIs from known industries in their municipality. However, it is the MECP which holds all the data on ECAs and EASRs. Municipalities would incur significant costs creating and maintaining such databases.
- Compatibility Studies will be required for most projects and for all Planning Act applications, increasing costs for Developers and review time for Municipalities, affecting already overworked staff.
- The zoning of a property alone would no longer be sufficient to determine if a development could occur. It appears that Plans of Subdivision and Site Plan Applications would still be subject to Demonstration of Need Studies, which could deny the development. This would adversely effect land values.

Potential Effects on Industries

Under the Draft Guideline, any industrial expansion which triggers the need for a planning approval, such as a Site Plan Application, would now be required to submit a detailed Compatibility Assessment to the Municipality, even for minor changes to industry. This will significantly increase the duration and cost of the SPA approval process for industrial expansions, adding costs and red tape.

For new or expanding industries in Employment Lands, the much greater (and likely inaccurate) AOIs and MSDs mean that industries will now be subject to increased assessment requirements, adding delays and increasing costs.

Likely Increase in the Number of Land Use Appeals.

All of the increased uncertainty created by the Draft Guideline will undoubtedly result in an increase in the number of Planning Act application appeals to the Ontario Land Tribunal (“OLT”). The OLT appeal process can take several years to complete.

Transition and Next Steps

The MECP intends on finalizing the Draft Guide by Q4 2021 or Q1 2022. The Ministry has not committed to providing an additional draft for review prior to finalizing. There has been no guidance provided on transition to the new requirements. There needs to be a very clear transitioning plan put in place, as to when these guidelines come into effect, to allow municipal, industrial and development sectors to realize current investments and be able to make informed, risk reduced, investment decisions as the guidelines come into effect.

Closing

An update to the MECP D-Series of guidelines is long overdue. However, the proposed Draft Guideline is not what is required. There are fundamental flaws in the approaches and requirements of the Draft Guideline. We would encourage the MECP to restart the process, in a more collaborative manner that seeks input from affected stakeholders prior to issuing drafts. The new guideline should focus on technical air quality, dust, odour, noise, and vibration impacts and the technical requirements for studies that are part of the MECP’s mandate, rather than Planning Act issues which are not.

Yours sincerely,

SLR Consulting (Canada) Ltd.



R. L. Scott Penton, P.Eng.
Principal, Acoustical Specialist
spenton@slrconsulting.com



Nigel Taylor, EP
Principal, Air Quality Specialist
ntaylor@slrconsulting.com