Environmental Review Tribunal

Case No: 13-116

ML Ready Mix Concrete Inc. v. Director,
Ministry of the Environment

In the matter of an appeal by ML Ready Mix Concrete Inc. filed October 4, 2013, for a hearing before the Environmental Review Tribunal pursuant to section 139 of the *Environmental Protection Act,* R.S.O. 1990, c. E.19, as amended, with respect to Environmental Compliance Approval No. 3356-94GS58 issued by the Director, Ministry of the Environment, on September 19, 2013 under section 20.3 of the *Environmental Protection Act*, approving the operation of a concrete batching facility located at Plan 339 OR BLK C Pt Lots 7, 19 and 20, RP 66R20057 Parts 1 to 6, 8, municipally known as 1 to 29 Judson Street, Toronto, Ontario;

In the matter of a motion by the appellant for a stay of Conditions 1(1) and 10.1(2) of the Environmental Compliance Approval, held by telephone conference call on November 1 and 14, 2013, January 8 and 31, 2014, March 14 and 21, 2014, and at 655 Bay Street, Toronto, on December 20, 2013, and March 4, 2014;

In the matter of a preliminary hearing commenced on December 20, 2013, at 655 Bay Street, Toronto, and continued by telephone conference call on January 8 and 31, 2014; and

In the matter of a proposed withdrawal of the appeal pursuant to a proposed settlement and a hearing held on March 4, 2014, at 655 Bay Street, Toronto.

Before: Alan D. Levy, Member

Appearances:

John Alati	-	Counsel for the Appellant, ML Ready Mix Concrete Inc.
Isabelle O'Connor	-	Counsel for the Director, Ministry of the Environment
David Cortellessa	-	Presenter, on his own behalf
Dan Irwin	-	Presenter, on his own behalf (until March 4, 2014)
JoAnne McKeown	-	Presenter, on her own behalf

Angelo Mormile	-	Presenter, on his own behalf (until March 4, 2014)
Sam Piscione	-	Presenter, on his own behalf

Dated this **20th** day of **June, 2014.**

REASONS FOR DECISION

Background

[1] This matter involves continuing conflicts arising out of the operation of a batch cement plant located across the street from an urban residential community. The municipal address of the plant is 29 Judson Street, in the City of Toronto (the "Site"). This type of facility receives and stores the various ingredients used in cement, and then mixes and loads them onsite into delivery trucks in accordance with the specific type of cement ordered for each construction project.

[2] The operator of the plant, ML Ready Mix Concrete Inc. (the "Appellant"), appealed to the Tribunal pursuant to the *Environmental Protection Act* ("*EPA"*) from some of the provisions in Environmental Compliance Approval ("ECA") No. 3356-94GS58, issued on September 19, 2013, by Ian Greason, a Director in the Ministry of the Environment ("MOE"). As explained in more detail below, the provisions of the ECA contested by the Appellant (at least initially) involve hours of operation, reception of public complaints, and the height which should be required for a new noise barrier or wall to be installed along the north side of the Site.

[3] The owner of the property is Remicorp Industries Inc., a company which is associated with the Appellant. It purchased the property in 2002. The Appellant commenced its batch cement operations in August 2007. The original application to the MOE for an approval was submitted in 2008. The application which led to the issuance of the ECA was submitted in 2012.

[4] The presenters are nearby residential neighbours who are strongly opposed to the location of the Appellant's business in their community due to the negative impacts they have been experiencing as a result of the plant's operations. They also maintain that the problems caused by the Appellant's operations are exacerbated by the manner in which it conducts business.

[5] After the Notice of Appeal was filed, the Appellant brought a motion for a stay of some of the provisions of the ECA. The progress and outcome of that motion is discussed in more detail below.

[6] A preliminary hearing was convened by the Tribunal on December 20, 2013. The parties, the Appellant and Director, were represented by counsel. The City of

Toronto was represented there by counsel, but did not seek to participate in the proceedings other than as an observer. City legal staff continued in the role of observer during the appeal process and through to, and including, the hearing on March 4, 2014.

[7] Presenter status was requested by David Cortellessa, Dan Irwin, JoAnne McKeown, Angelo Mormile and Sam Piscione pursuant to Rule 69 of the Tribunal's *Rules of Practice*. They attended in person and were self-represented. All of these individuals reside very close to the Site and identified various negative impacts this facility is having on them and other residents. In the words of Rule 69, they have a very direct "connection to the subject matter of the proceeding or issues in dispute." There was no objection to these requests and I found that their status requests were entirely appropriate. Accordingly, presenter status was granted to them.

[8] However, the parties did express concern about the scope of some of the issues and information identified by the presenters, as they extend beyond the matters which were raised by the Appellant in its Notice of Appeal. I indicated that this subject would be addressed further during the preliminary hearing process. The presenters' concerns are discussed later in this decision.

[9] The presenters were encouraged by me to communicate directly with the parties' counsel and MOE staff regarding their need for additional information, explanation and access to relevant documentation. The presenters appeared to be inexperienced with Tribunal appeals and procedures, and I suggested they inform themselves about the Tribunal's *Rules of Practice*, past decisions and other information available on the Tribunal's website. An opportunity for informal exchange with counsel and MOE staff was provided to the presenters in my absence during and at the end of the preliminary hearing on December 20, 2013, and at the end of the telephone conference call ("TCC") on January 8, 2014.

[10] As the presenters indicated that they had not received any legal or engineering assistance with regard to this appeal, I recommended that they consider seeking professional advice, both legal and technical, as soon as possible to help them prepare and participate in the appeal process more effectively.

[11] At this stage, settlement negotiations were ongoing between the Appellant and the Director with respect to the stay motion and issues under appeal. Two of the three issues (hours of operation and after-hours reception of complaints) had now been resolved. Nevertheless, the parties requested that March 4 and 5, 2014 be reserved for

the hearing, if required. There was no objection to these dates by the presenters. I advised that mediation services would be provided by the Tribunal if requested by the parties.

[12] The preliminary hearing was adjourned to a TCC on January 8, 2014, to monitor progress with negotiations. In that TCC, counsel advised that the third and final remaining issue (height of noise barrier) had been tentatively resolved pending their agreement on the contents of a draft stay order, and their preparation of Minutes of Settlement ("MOS"). Four of the presenters made additional submissions and raised questions at that time.

[13] The matter was adjourned to another TCC on January 31, 2014, to allow more time for completion of settlement documentation. Due to an apparent misunderstanding about the schedule, none of the presenters attended this TCC. A draft stay order prepared and approved by the parties was circulated to the presenters and filed with the Tribunal on January 17, 2014.

[14] At the second TCC on January 31, 2014, counsel advised that the executed (signed) version of the MOS would be circulated soon to the presenters and filed with the Tribunal. They also indicated that at the settlement hearing on March 4, 2014, the parties would attend with technical advisors in order to present and explain the settlement, and respond to questions. The parties would seek approval of the MOS from the Tribunal pursuant to Rule 201 (see below), and the presenters would be invited to make further submissions at that time.

[15] The executed MOS was subsequently filed with the Tribunal and circulated to the presenters. It is attached hereto as Appendix A.

[16] At the outset of the hearing on March 4, 2014, Messrs. Irwin and Mormile advised the Tribunal of their respective requests to withdraw as presenters. There was no objection to these requests and they were granted. The remaining three presenters actively participated in the hearing which concluded that afternoon. With the Appellant's consent, the Director requested that a stay order be issued on or before March 19, 2014.

[17] At the conclusion of the hearing on March 4, 2014, my decision was reserved with respect to both the stay motion and review of the MOS under Rule 201, and the proceeding was adjourned. Regarding the request for a stay, two subsequent TCCs

were convened and orders staying Condition 1(1) of the ECA were issued without reasons by the Tribunal on March 11 and 17, 2014.

Issues

1. The issue decided in the orders of the Tribunal issued on March 11 and March 17, 2014, and for which reasons are provided in this decision, is whether to grant a stay of Condition 1(1) of the ECA.

2. The second issue is whether the terms of the parties' settlement agreement (MOS) should be accepted, the ECA amended, and the appeal proceedings dismissed pursuant to Rule 201.

Relevant Rule

[18] Rule 201 of the Tribunal's *Rules of Practice* states as follows:

> Where there has been a proposed withdrawal of an appeal as part of a settlement agreement not objected to by any Party that alters the decision under appeal, the Tribunal shall review the settlement agreement and consider whether the agreement is consistent with the purpose and provisions of the relevant legislation and whether the agreement is in the public interest. The Tribunal shall also consider the interests of Participants and Presenters. After consideration of the above factors, the Tribunal may decide to continue with the Hearing or issue a decision dismissing the proceeding.

Discussion, Analysis and Findings

[19] From my review of the documents and submissions, including the interests of the presenters, all of which are detailed below, approval of the settlement reflected in the MOS is appropriate. However, as a result of the problems and concerns described by the presenters, I concluded that it was important to include in these reasons a discussion which was far more comprehensive than would otherwise be the case.

[20] All of the presenters, including those that withdrew at the outset of the hearing, live close to the Site and the sensitive receptors identified in the "Acoustic Assessment Report in Support of an Environmental Compliance Approval (Noise) in Accordance with NPC-300" prepared by SS Wilson Associates (one of the Appellant's technical consulting firms) and dated November 29, 2013 (the "Report"). MOE Publication NPC-300 is entitled "Environmental Noise Guideline, Stationary and Transportation Sources – Approval and Planning."

[21] From what I have read and heard by way of submissions, I am left with no doubt that the presenters have been harshly and unreasonably affected for a long period of time by aspects of the Appellant's operations.

[22] In the following sections of this decision the stay motion, three issues under appeal (hours of operation, complaint procedure and size of noise barrier), parties' settlement agreement, concerns of the presenters and the positions of the parties, are discussed in detail. Sound and noise may be used interchangeably in these reasons, but the term 'noise' is defined in NPC-300 as "unwanted sound."

[23] First, some additional information about the Appellant's facility, its operations, and the noise problem, is provided here by way of further background. Most of it is derived from the Report. The following excerpt is from section 2 on pp. 3-4 of the Report:

> 2.1…The plant operates one front end loader, receives/dispatches several ready mix trucks and receives up to one cement powder truck and up to five aggregate trucks in one hour.
>
> 2.2 The ready mix plant incorporates equipment to deliver the ingredients of ready mix concrete to the trucks, as well as pollution control equipment, within its enclosed facility. The facility consists of one permanent cement plant, garages/sheds, a truck storage area and a sand and gravel stockpile storage area. The plant receives up to one cement powder truck every hour (daytime) which unloads bulk cement powder into the plant through a pump embedded on the truck; the bulk cement truck can take an hour to unload bulk cement into the plant. The second operation is the receiving, loading and dispatching of ready mix trucks at a rate of up to 12 trucks per hour (daytime). Thirdly, the plant operates one front end loader to load sand and gravel into the feed bins located on the east side of the plant. Finally, the plant receives the aggregates, dumped very close to the area where the front end loader feeds them into the plant, at a rate of up to five trucks per hour (daytime).
>
> 2.3 The sources of noise within the facility are classified as both significant and insignificant sources of noise. The significant noise sources addressed in this study include the following:
>
> - Front End Loader
> - Ready Mix Trucks (moving, idling, loading and revving)
> - Aggregate Trucks (moving, idling and unloading)
> - Cement Powder Truck (moving, idling and unloading)
>
> There is a dust collector fan in a room on top of the loading area of the plant. A vent opening is present in the wall. Acoustic absorption is already installed in the room housing the fan; however, the sound levels of this fan have been measured and are included in this study. A pressure relief blow-off occurs intermittently at the top of the loading silo; this is impulsive noise and has also been measured and an analysis is also included in this report. …

> 2.6 The stockpiles for aggregates are located on the east side of the plant, in the area where they are dumped and the front end loader works to tidy them and load them into the plant.

[24] Other sources of significant noise documented in the Report and referred to by the presenters are the banging of truck tailgates and the sound of a mallet hitting the tank onboard cement powder tanker trucks.

[25] The Report identifies four particular residential locations as the most important points of sound reception; they are referred to as sensitive receptors. The following excerpt is from section 4.1 on p.9 of the Report:

> The worst case (i.e. the closest and most exposed) points of reception are residences as follows:
>
> R1: A raised two storey semi-detached home located at 3 Harold Street (with upper storey windows facing the plant).
>
> R2: A raised bungalow located at 28 Judson Street.
>
> R3: An apartment tower located at 340 Royal York Road.
>
> R4: A raised two storey house at the corner of Royal York Road and Cavell Avenue.
>
> Because the plant already has tall walls built around it, the worst-case exposure points on the receptors are the tops of the uppermost windows (estimated at 5.5 meters for R1 and R4, 3 meters for R2 and 48 meters for R3 – the top floor).

[26] The Report concluded that the Appellant's operations do not comply with MOE sound level criteria, and that noise controls are therefore required. These controls are summarized in section 8.2 at p.73 of the Report:

> It is recommended that the noise controls indicated in Section 5.0 be implemented. This includes increasing the heights of the walls on the north side of the plant, adding acoustical absorption to several of the inside surfaces of the plant, using a stand-alone blower in an enclosure for the unloading of bulk cement powder, implementing a no-idling policy on site and implementing a policy of only low rpm drum turning while trucks are revving and moving on the site. Tailgate slamming is prohibited and mallet striking of tanker trailers is to be limited.

[27] The proposed noise controls described briefly above are discussed in far greater detail in section 5 ("Mitigation Measures Summary") at pp. 65-67 of the Report.

Stay Motion

[28] At a preliminary TCC with the parties' counsel on November 1, 2013, to discuss directions for the Appellant's motion to stay Conditions 1(1) and 10.1(2), a schedule was adopted including a follow-up procedural TCC on November 14, 2013, deadlines for filing of Appellant's motion material and Director's response, and December 18, 2013, as the date for argument of the motion.

[29] On December 6, 2013, counsel advised that the parties had reached an agreement regarding the stay and that the motion date could be cancelled. They planned to address the proposed stay at the preliminary hearing on December 20, 2013.

[30] At the preliminary hearing counsel filed a draft stay order which they had prepared, but indicated that their negotiations were still ongoing. At the TCC on January 8, 2014, counsel advised that a revised draft stay order was under consideration and should be finalized soon. It was subsequently circulated to the presenters and filed with the Tribunal on January 17, 2014.

[31] At the TCC on January 31, 2014, counsel advised that a comprehensive MOS had been executed the day prior, and agreed with the suggestion that a stay order would not be required prior to the hearing. At the end of the hearing on March 4, 2014, Ms. O'Connor advised that the Director required a stay to be ordered before March 19, 2014. That date is the deadline in the ECA and draft stay order for the Appellant to build a new noise barrier at the Site. I reserved with respect to my determination of the stay motion.

[32] On March 11, 2014, the Tribunal issued an order to stay condition 1(1) of the ECA as it pertains to the construction of a 9.5 metre ("m") barrier (approximately 31 feet). Ms. O'Connor subsequently advised the Tribunal of the Director's concern that the order did not specify that the stay is conditional on construction by the Appellant of a 6.5 m (approximately 21 feet) noise barrier by March 19, 2014. A TCC was convened on very short notice for March 14, 2014, to hear from the parties and presenters with respect to this concern.

[33] This TCC was attended by counsel and the Director. No objection was raised on behalf of the Appellant to the Director's request. I indicated my concern about requiring the Appellant on an interim basis, in the form of a stay order, to construct a new noise barrier when the very matter under reserve is whether or not this ought to be approved

as a final resolution of the appeal. In other words, would the practical effect of including this on an interim basis be to inhibit or foreclose the option of rejecting it when determining soon after the result of the hearing on the Rule 201 proposed settlement?

[34] Submissions were made by the parties on this point. Ms. O'Connor maintained that the Director would not have agreed to a stay if the above-noted condition had not been included. Mr. Alati conceded that without the condition the Appellant would not be strictly bound to build the new noise barrier, even though it had agreed with the MOE that it would do so. Both counsel agreed that making the stay conditional, on a consent basis, would not be construed by either party as fettering the Tribunal's discretion when making a final determination with respect to the MOS.

[35] I reserved to consider the parties' submissions on this issue, and a further TCC was scheduled for March 21, 2014.

[36] On March 17, 2014, another order was issued by the Tribunal amending the first order by making the stay conditional on the Appellant fulfilling all of the interim steps agreed upon by the parties. Those steps are set out in paragraph 2 of Appendix A to that order, and are reproduced below:

> 2) An acoustic barrier, used as a noise control measure along the entire length of the north side of the facility, in place of the existing wall, shall be fully installed by March 19, 2014. The acoustic barrier shall meet the requirements of NPC-300, including, but not limited to:
>
> a. having sufficient height to break the line-of-sight between all noise sources at the site and the points of reception that would rely on barrier attenuation to achieve compliance;
>
> b. having a minimum surface density (i.e. face weight) of 20 kg/m^2; and
>
> c. being structurally sound, appropriately designed to withstand wind and snow load, and constructed without cracks or surface gaps. Any gaps under the barrier that are necessary for drainage purposes should be minimized and localized, so that the acoustical performance of the barrier is maintained.

[37] The second order also confirmed the parties' concurrence that it would not be construed as restricting the scope of the Tribunal's determination to be made under Rule 201. At the TCC on March 21, 2014, submissions were received from the parties and the two presenters who attended, namely Messrs. Piscione and Cortellessa. Counsel advised that construction of the new barrier wall had been completed, as required.

[38] My decision to grant the orders issued on March 11 and 17, 2014, was based on the evidence filed and counsels' joint submission that the stay would be reasonable, appropriate, and not barred by s. 143 of the *EPA*. I was also mindful of the requirements of Rule 110.

[39] Pursuant to s. 143(2), a stay is not permitted if it involves an order to monitor, record and report, or an order issued under s. 168.8, 168.14 or 168.20 of the *EPA*. Pursuant to s. 143(3), a stay should not be granted if it can result in danger to human health and safety, impair the environment, or risk injury or damage to property, plants or animals.

[40] The effect of the two stay orders was to require the installation of a 6.5 m noise barrier on an interim basis until the final disposition of the appeal. The parties jointly submitted, based on acoustical evidence, that a barrier of this type, size and location would ensure that the Appellant's facility would likely operate in compliance with daytime sound level limits required by the MOE. As such, I was satisfied that granting these orders on an interim basis will likely reduce the off-site impact of noise from the facility, and is not barred by the application of s. 143 of the *EPA*.

Settlement and Withdrawal of Appeal

[41] As indicated above, the parties negotiated a settlement of all issues raised by the Appellant and executed the MOS to document their agreement (Appendix A). It was circulated to all presenters and filed with the Tribunal one month before the March 4, 2014 hearing. At the hearing the parties requested approval of the MOS and termination of the appeal by the Tribunal pursuant to Rule 201.

[42] As discussed at the TCC on January 31, 2014, technical personnel were asked to attend the hearing to answer any questions and provide explanations, as required. From the Appellant's noise consulting firm, SS Wilson Associates, Hazem Gidamy (engineer) and Anthony Martella (senior acoustic analyst) were in attendance at the hearing on March 4, 2014, along with counsel. From the MOE, in addition to the Director, Pierre Godbout (senior noise review engineer), Jeff McKerrall (senior air review engineer) and Michael Wilson (senior environmental officer) attended with counsel. Submissions were received from the parties and presenters, and my decision was reserved.

[43] The documentation filed with the Tribunal and considered by me in relation to the Rule 201 motion included, among other things, the following:

- Acoustic Assessment Report, SS Wilson Associates (November 29, 2013);
- correspondence and email with the MOE referred to in the Report and supplied by the Appellant's counsel;
- the Appellant's stay motion brief (November 29, 2013);
- letter to the Appellant from the MOE Director (December 20, 2013);
- revised draft stay order filed on behalf of the parties (January 17, 2014); and
- Minutes of Settlement (January 30, 2014) reproduced as Appendix A.

[44] I also reviewed and considered NPC-300, which was referenced in the Notice of Appeal and Acoustic Assessment Report. It is dated August 2013 but Appellant's counsel submitted that it was not implemented by the MOE until October 2013.

[45] The three issues under appeal are addressed in separate sections below. As noted previously, however, the presenters have referred during the appeal process to many other concerns, allegations and developments. These other matters are summarized below:

- incompatibility of a cement batch facility located directly beside a residential community;
- frequent violations by the Appellant of municipal by-laws, ECA requirements, and MOE guidelines and procedures;
- many unanswered calls for help with site-related concerns;
- quality of life and health concerns of residents related to impacts from the Appellant's operations;
- material storage and other activities of the Appellant at a nearby property, 145 Judson Street, without proper zoning and approvals;
- spills of gravel from trucks on Judson Street related to the Appellant's operations;

- the Appellant's lack of proper, routine maintenance and clean-up of the road surface on Judson Street;
- harmful effect on neighbours' lawns and gardens from wash water (used to clean road surface) mixed with chemicals in loads which have spilled from site-related trucks;
- the Appellant's operations continuing beyond permissible hours;
- lack of enforcement, prosecutions and/or other sanctions by the City, MOE or any other agency in response to infractions related to the Appellant's operations;
- excessive volume of traffic on Judson Street caused by large, noisy trucks travelling to/from the Site;
- traffic congestion and hazards due to site-related truck activity;
- noise, air emissions and obstruction resulting from idling trucks parked on Judson Street awaiting access to the Site;
- insufficient emission controls and fugitive dust containment measures resulting in high level of dust/dirt from the Appellant's operations settling onto neighbours' properties;
- various buildings and structures constructed at the Site without appropriate permits;
- unlawful erection of green tin fences on-site by the Appellant;
- trucks exiting from the Site and violating the municipal prohibition on left turns onto Judson Street;
- need for a video surveillance camera to record activity at the Site's entrance/exit gate;
- proceedings at municipal council meetings in relation to the Appellant's operations;

- ongoing efforts by the City to restrict or eliminate the Appellant's operations at the Site;
- unhelpful, inappropriate or no response from the Appellant's staff to telephone complaints from community members; and
- need for an accountable and verifiable process to confirm receipt and action taken regarding complaints made about the Appellant's operations.

[46] Mr. Alati responded to many of these points in his submissions, in addition to his general concern that they go beyond the mandate of the Tribunal in this appeal. Among other things he indicated as follows:

- The use of the Site for a batch cement production facility is lawful.
- The City has not ordered the Appellant to close or move its business.
- The Appellant has spent upwards of a million dollars since 2007 in order to have its operations comply with regulatory requirements.
- The Appellant has made additional changes to its operations to comply with the ECA since its issuance in September 2013.
- The Site, located next to one of Canada's major rail line corridors, was not established within an otherwise quiet neighbourhood.
- There are six buildings at the Site which he characterized as legal non-conforming uses.
- No site plan has been required for this facility by the City.
- The issue of building permits is being dealt with by the City.
- Fugitive dust control is an issue dealt with by the ECA, which requires the Appellant to employ best practices in its operations. These provisions were not appealed to the Tribunal by his client.
- Enforcement of traffic flow is outside of the purview of the Tribunal.

- The traffic problem on Judson Street has improved since the City imposed new traffic restrictions and posted related signage.

- Residents are entitled to contact municipal by-law enforcement officials directly with their concerns about violations.

- The City has contacted the Appellant about traffic complaints lodged by residents.

- Photographs displayed by the presenters during the hearing were undated, and likely pre-date the ECA and new traffic restrictions.

- The other property referred to by the presenters (145 Judson Street) is regulated by the City.

- That use of that property is not subject to the ECA, and nor is it an issue in this appeal.

[47] Ms. O'Connor also made submissions with regard to the above-noted range of concerns to provide the Director's perspective. Her comments included the following points:

- MOE staff has been dealing with issues related to this facility for years.

- Although the operation's impacts have created a difficult situation, the MOE is using the regulatory tools available to it.

- MOE staff has received complaints in the past about the Appellant's operations. Continuing problems can be reported to people such as Provincial Officer Wilson, who was present during the hearing.

- The MOE has taken steps to control problems with the Appellant's operations, such as requiring the Appellant to apply for and maintain an ECA.

- With respect to enforcement, the Site was visited by MOE staff several times during the Fall of 2013, and offence notices and tickets have been issued.

- MOE will continue to take steps if violations continue.

- The ECA requires the development of a Best Management Practices Plan for controlling fugitive dust emissions. It must incorporate measures to minimize dust emissions from the Site. The Director has just requested the Appellant to provide the MOE with another plan.

[48] In my view, it is important to understand the presenters' perspective and interests, as well as those of other near-by residents. However, as I indicated during the preliminary hearing, the Tribunal is not empowered to address or resolve matters not raised by the Appellant's appeal from the ECA. In that regard the Tribunal's role in this matter may be far more limited than that of a licensing, zoning or regulatory agency.

[49] At the beginning of his presentation, Mr. Piscione, one of the presenters, advised that he wished to play a 20-minute podcast of a media program involving the Site. Among other things, it included an interview with a local municipal councillor. Mr. Alati objected to the inclusion of this evidence for several reasons, including:

- lack of fairness (it was not provided to the Appellant in advance);
- unacceptable hearsay (no opportunity to cross-examine those individuals participating and speaking during the program);
- potential distortion due to editing of recorded comments;
- possible lack of relevance to issues under appeal;
- a news program does not constitute evidence;
- presenters are not permitted by the Tribunal's *Rules of Practice* to call witnesses.

[50] Ms. O'Connor had not heard this broadcast, and did not know how it would bear on this appeal. She submitted that it would be far better to hear about Mr. Piscione's concerns directly from him.

[51] I expressed concern that allowing the podcast into the record could lead to the need for an adjournment of the hearing to another date in order to enable the parties to investigate statements made during the program. The parties would be entitled to respond with other information, and this could lengthen and extend the hearing. It did not become necessary to make a ruling on this point, as Mr. Piscione advised that he

wished to withdraw his request. In the result, the podcast was not aired or considered further at the hearing.

Hours of Operations

[52] The ECA defines the "Hours of Operation" at the Site as extending from 7 a.m. to 7 p.m. Monday to Friday, and from 9 a.m. to 7 p.m. on Saturdays. The Notice of Appeal alleged that the ECA inappropriately restricted the operating hours and mirrored the Municipal Code, and thereby unfairly prejudiced the Appellant. As a result, it is prevented by the ECA from availing itself of the "built-in application mechanism" (page 5) in the Municipal Code which provides for exemptions to operational time restrictions.

[53] The Notice of Appeal also states that the noise consultant of the Appellant "has advised that in their 30+ years of experience, they have never before seen a similar restriction imposed in an ECA, with the purpose of mirroring a municipal by-law" (page 5).

[54] The draft stay order submitted on behalf of the parties in January 2014, indicates that the parties have settled this issue, and paragraph 4 thereof states as follows:

> If the Appellant is successful in obtaining an exemption from the municipality's by-law that would extend the hours of operation on the property, the Director will consider any application submitted by it to amend the ECA to reflect the municipally approved hours of operation. A revised Acoustic Assessment Report would be required to support such an application.

[55] The Minutes of Settlement (reproduced at Appendix A) does not refer to the above text and does not provide for an amendment to the ECA with respect to this issue.

[56] Mr. Alati submitted that the Appellant is now content with the provision in the ECA related to hours of operation. No amendment to the ECA is required, and he confirmed that this ground of appeal has been withdrawn by the Appellant. Ms. O'Connor concurred and submitted that as hours of operation remain unchanged from the ECA, the result regarding this issue is consistent with the purpose of the *EPA*.

[57] The concern of the presenters is that the hours of operation should not be expanded. Restricting the time in which business activity occurs helps to limit the magnitude of the negative impacts this facility is having on the residential neighbours.

Their submissions focused on breach of the current time restrictions by the Appellant and a lack of enforcement of those restrictions.

Findings

[58] As this ground of appeal has been withdrawn by the Appellant and the ECA has not been altered in this regard, no determination by the Tribunal is required.

Complaint Procedure

[59] Condition 8 of the ECA provides that a "designated representative of the Company shall be available to receive complaints twenty-four (24) hours per day, seven (7) days per week." The Notice of Appeal alleged that this requirement should be "altered to allow for a voice recording and/or e-mail service to receive complaints, especially outside of business hours" (page 6).

[60] The draft stay order submitted on behalf of the parties in January indicates that the parties have settled this issue, and paragraph 4 thereof states that "the parties have agreed that a voicemail service is a sufficient mode to record complaints outside of business hours." During business hours, however, "a live individual is required to receive and record complaints."

[61] Paragraph 3(vi) of the MOS (Appendix A) provides that condition 8 of the ECA is to be amended and will read as follows:

> A designated representative of the Company shall be available to receive complaints during the Hours of Operation and a voicemail service shall be in place to receive complaints outside the Hours of Operation. The contact information for the designated representative of the Company and voicemail service must be clearly provided on a sign(s) at the entrance to the Facility.

[62] Mr. Alati confirmed that the Appellant is content to have a person receive complaints during the hours of operation permitted by the ECA. However, he submitted that it would not be practical to require a person to mind the telephone to receive complaint calls during those hours in which the facility is closed and not operating.

[63] Ms. O'Connor submitted that the 24 hour live complaint service was required by mistake, as the original application for the ECA indicated an intention to operate continuously. Instead the ECA provided for restricted hours and the MOE agrees that the requirement for live complaint response should be matched with the Appellant's

hours of operation. She maintained that the complaint process mandated by the ECA is more detailed and rigorous than that which is typically required elsewhere. As the complaint process will be unchanged during hours of operation, she maintained that the amendment does not constitute a retreat from the ECA, and this outcome is therefore consistent with the purpose of the *EPA*.

[64] The submissions by the presenters with respect to the complaint process focused on unhelpful and antagonistic responses received when calling the Appellant to report a problem, the failure to receive confirmation that complaints have been investigated or reported to the MOE and/or City, and the lack of action to resolve the subject-matter of complaints. Ms. McKeown stated that an email option for reporting complaints would be useful, so that she could maintain a paper trail for each complaint. Mr. Cortellessa indicated that he had requested the MOE to maintain an email process for tracking complaints.

[65] In reply submissions Mr. Alati repeated that the presenters' concerns are focused on enforcement rather than the rules stipulated in the ECA's conditions. He confirmed that complaints about enforcement have been received by authorities. In her reply Ms. O'Connor submitted that local residents may notify staff at the MOE District Office of any problems they are encountering.

Findings

[66] It does not appear that there would be any advantage to having a 24-hour live complaint reception service, and the presenters did not advocate for same. I accept that the inclusion of this requirement in the ECA occurred as a result of a mistake, based on the Appellant's application for approval of a 24-hour/day operation. Accordingly, I find that the change proposed by the parties in the MOS should be approved by the Tribunal. This change is appropriate, and consistent with the purpose and provisions of the *EPA*.

Noise Barrier

[67] Condition 1(1) of the ECA requires the Appellant to implement the "Noise Control Measures" within six months, namely by March 19, 2014. Definition no.18 in the ECA describes these measures as steps to reduce noise emissions from the Site as outlined in the Acoustic Assessment Report (defined by the ECA in definition no.1 as a report prepared by SS Wilson Associates and dated July 3, 2013) and/or the "Noise

Abatement Action Plan." The latter is defined by the ECA in definition no.17 as a noise abatement program prepared by SS Wilson Associates on the same date, and "designed to achieve compliance with the sound level limits set in Publication NPC-205." This document is an MOE guideline entitled "Sound Level Limits for Stationary Sources in Class 1 & 2 Areas (Urban)" and dated October 1995.

[68] It appears that three iterations of the Acoustic Assessment Report by SS Wilson Associates were prepared as new data became available and revisions were required by the MOE. The July 2013 version of the Report had determined that in addition to other sound attenuation measures, a 9.5 m noise barrier along the south side of Judson Street would be required in order to comply with sound limits set out in NPC-205. According to correspondence exchanged between the MOE and Appellant's consultant, the height of the wall (8.5 m) would be increased to 9.5 m as a result of the addition of a canopy at the top which would slant inward at a 45º angle.

[69] Condition 1(2) in the ECA also requires the Appellant to continue to comply with the sound limits set out in NPC-205 after all sound attenuation requirements have been implemented.

[70] The Notice of Appeal raised the following concerns about the MOE's determination of the required height of the noise barrier:

- The Director approved the ECA "in the face of considerable uncertainty" about the proper interpretation of NPC-205 and "the ambient sound level at the Site" (Notice of Appeal, paragraph 3, p.6).
- The ECA failed to mention supplementary information provided to the MOE by the Appellant's noise consultant (paragraph 3, p.6).
- Baseline sound data and the consultant's supplementary information were not properly considered by the Director (paragraph 4, p.6).
- ECA definitions 1 and 17 "are reliant and premised on outdated reports that have subsequently been amended and supplemented, and an incorrect interpretation of NPC-205; in particular, with respect to the definitions of 'ambient sound level' and 'background sound level'" (paragraph 1, pp.2-3).
- The Appellant objects to the Director's "interpretation of key definitions in NPC-205, which have a direct effect on the calculation of the ambient sound

level, and the resultant noise control measures that are appropriate" (paragraph 5(a), p.4).

- The Director failed to adequately consider "information on the baseline conditions of the local environment; in particular, the proximity of the Site to three (3) separate rail services (i.e. GO, VIA and CN), and a train layover site, fuelling stations and major repair centre" (paragraph 3(b), p.3).

- The Appellant disagrees with MOE's interpretation of NPC-205 that "trains and planes must be excluded from the assessment of background sound for the purposes of determining applicable noise limits" (paragraph 1, p.4).

- NPC-205 defines ambient sound level as background sound level, which in turn is defined as excluding highly intrusive noise of short duration caused by sources such as a "train pass-by" (paragraph 2, p.4).

- "Based on the express language of the above definitions, only highly intrusive short duration noise is excluded from the calculation of the ambient sound level, such as that caused by a train pass-by. As such, the Director has misinterpreted the above definition as stating an absolute exclusion of all train and rail noise, no matter its duration or source. Long duration rail noise is not expressly excluded by this definition; nor is rail noise caused by train sources other than short duration pass-bys (e.g. layover site, fuelling stations, repair centre, etc.)" (paragraph 3, pp. 4-5).

- The Appellant alleges that "the science-based precautionary approach requires the Director to consider the unique circumstances surrounding the Site; i.e., the three (3) separate rail services (i.e. GO, VIA and CN), and the train layover site, fuelling stations and major repair centre," because "these operations dramatically affect the ambient sound level on the Site, and a science-based approach mandates that the Director properly consider same" (paragraph 2, p.5).

[71] It does not appear that the term "train pass-by" has been defined in NPC-300 or the Report. It might refer to the portion of double-track used by a single-track system to allow trains to park or pass each other.

[72] The most current version of the Acoustic Assessment Report by SS Wilson Associates (November 29, 2013) was filed with the MOE and formed the basis of the

stay motion brought by the Appellant. A letter from Mr. Gidamy (Principal of SS Wilson Associates) on that date summarized the findings of the revised acoustic study (Exhibit A, affidavit of Mr. Gidamy, in the Appellant's stay motion brief). It noted at the beginning the following change:

> The most significant factor in this revision is that noise generated by nearby rail operations is added to the road traffic noise to result in total ambient sound levels at the significant receptors; the lowest total ambient sound levels in each time period are now the sound level limits. These road and rail sound levels were measured at and around the ready-mix facility from June 18 to June 21, 2013.

[73] As a result, the group of necessary noise controls listed in the July 2013 report was altered in two respects:

- the height of the noise barrier was reduced to 6.5 m ("this is the overall vertical height measured from the side of the ready mix plant and does not require a canopy (angled) section atop it"); and

- during daytime hours (7 a.m. to 7 p.m.) no more than 12 ready-mix trucks per hour can enter, load and leave the Site.

[74] The significance for the Appellant of the reduction in height of the noise barrier is related to cost. Material in the stay motion brief indicated that the estimated cost of construction of a 9.5 m wall would be $739,500.

[75] As noted previously, other attenuation measures identified in the Report include the following:

- sound absorbing material to be installed on interior walls and ceiling of loading bay, and various other surfaces (walls) of the plant;

- fully-enclosed stand-alone blower to be installed in cement powder area;

- no truck idling on site, except while loading and rev/washing;

- trucks on site to move with engines revving at low RPM (revolutions per minute);

- trucks to move at reduced speed on ramp towards plant gate when exiting;

- sound level of pressure relief valve to be mitigated by reduced pressure and/or enclosure;

- a maximum of two mallet strikes per hour on powder truck tanks; and

- no slamming of truck tailgates.

[76] At the opening of the preliminary hearing on December 20, 2013, Mr. Alati submitted that the new Report was based on NPC-300 instead of NPC-205, and still under review by the MOE. He stated that NPC-300, the Ministry's new noise guideline, was implemented in October 2013, and it changes how background (ambient) noise is treated. As a result, the height of the proposed new noise barrier can be reduced from 9.5 m to 6.5 m.

[77] A letter from the MOE dated December 20, 2013, was subsequently filed by the Appellant. In it the Director confirmed that the Appellant's revised acoustic plan is acceptable to the MOE:

> We have reviewed the daytime sound levels in the Acoustic Assessment Report and verified that the proposed acoustic barrier height of 6.5 metres was applied to all sources which have a blocked line-of-sight (barrier attenuation has not been applied to sources higher than 6.5 metres or unshielded sources located at the gate/entrance).
>
> Based on the results of our technical evaluation of the Acoustic Assessment Report findings, we conclude that following the installation of a 6.5 metre high acoustic barrier, the ML Ready Mix Concrete Inc. facility at 29 Judson Street would be capable of operating in compliance with the daytime sound level limits set in NPC-300.
>
> We have not reviewed the evening or nighttime sound levels presented in the Acoustic Assessment Report, since the existing Environmental Compliance Approval does not allow for the facility to operate at these times. However, we did note that the calculations to modify the evening and nighttime sound level limits, due to train by-pass noise, were not conducted in accordance with NPC-300.

[78] The draft stay order filed by the parties in January 2014 and the MOS (Appendix A) confirm the change to a 6.5 m height for the noise barrier. The MOS also confirms the Appellant's commitment to:

- restrict operation of the facility's equipment to the designated hours of operation (7 a.m. to 7 p.m.);

- receive deliveries only during this time period;

- limit deliveries each hour to a maximum of 12 ready-mix trucks, three aggregate trucks and one cement powder tanker truck;
- prohibit the slamming of truck tailgates;
- retain an independent acoustical consultant (not SS Wilson Associates) to conduct a new acoustic audit, including carrying out sound measurements; and
- file the results with the MOE in an Acoustic Audit Report by April 19, 2014.

[79] Mr. Alati submitted that the proposed amendments to the ECA with respect to the noise barrier are consistent with current standards and with the *EPA*. He maintained that the changes are related to the new MOE noise guideline, and noted that Canada's major rail line passes directly through this community. In other words, it is not a quiet neighbourhood. It is in the public interest, he maintained, that the new wall will meet noise standards and be appropriately sized.

[80] On behalf of the Director, Ms. O'Connor submitted that the 9.5 m height requirement would have resulted in a wall that would be intrusive, unaesthetic and cause substantial shading. She maintained that the public interest will be served by the minimum (i.e., shortest) barrier height needed to achieve the necessary degree of noise mitigation. Insofar as the purpose of the *EPA*, the change in sound wall height to 6.5 m ought to be considered as neutral.

[81] In some respects the Director's position differs from that of the Appellant. Ms. O'Connor maintained that the reduction in required barrier height was due to a change in operations. They are now restricted to day time hours (7 a.m. to 7 p.m.) whereas the company's ECA application was based on operations continuing around the clock.

[82] She submitted that although the noise guidelines (both the previous NPC-205 and now the current NPC-300) have specific noise limits, they make allowance for higher limits when there is a large volume of vehicular traffic in the background. In this case, she maintained that noise levels were properly assessed, including a traffic study conducted by SS Wilson Associates, and sound levels at four sensitive residential receptors were calculated for both daytime and nighttime.

[83] According to Ms. O'Connor, under NPC-205 there was a debate about whether train noise should be included in ambient (i.e., background) sound levels. The

Appellant claimed that it should be included in this case but the MOE disagreed. She indicated that NPC-300 does allow for train noise to be included in a modest way. MOE staff reviewed the new acoustic Report, prepared on the basis of NPC-300, for daytime noise levels and found that background levels were the same as those recorded in the July version of the acoustic Report. The limits remained unchanged for the four sensitive receptors. Although the new 6.5 m height is considered adequate for daytime operations, she submitted that a larger 9.5 m barrier would be required if night-time operations were allowed.

[84] Ms. O'Connor emphasized that the Director will soon know whether the sensitive receptors are adequately protected by the new 6.5 m sound barrier in conjunction with other sound mitigation measures, as the ECA requires that an independent audit (by a consultant unrelated to SS Wilson Associates) be conducted and submitted to the MOE by April 19, 2014. If the sound levels at those receptors exceed the allowable limit, the Director can order that changes be made. She gave as an example of this the installation of more sound attenuation.

[85] Summarized below are various questions and concerns raised by presenters regarding this issue, along with some of the responses:

(1) Mr. Cortellessa:

- At the TCC on January 8, 2014, Mr. Cortellessa inquired about the information which was considered in support of the parties' agreement on noise level & fence height. How did the MOE determine that a barrier height would comply with NPC-300? How did NPC-300 change the need for a taller fence (i.e., 9.5 m)? Why was the noise from trains included in ambient sound levels?

- He asked for an independent technical opinion on the results of recent acoustic studies, and the acceptability of a 6.5 m noise barrier pursuant to NPC-300.

- At the hearing, he asked why an acoustic study had not been conducted by an independent consultant. Mr. Alati replied that SS Wilson Associates is an arm's length consultant, and its work/opinion/report with respect to the daytime exposure has been peer reviewed by the MOE.

- Mr. Cortellessa questioned why a noise study had not been undertaken four years ago, since the community has been "destroyed" in the interim.

(2) Mr. Irwin:

- At the TCC on January 8, 2014, Mr. Irwin indicated that he thought the proposed height of the noise barrier would not be sufficient to block noise from the Site.

- He asked about height of the existing fence along Judson Street, and noted that from the window in his house he could see above the fence and directly into the Appellant's yard. In his view the fence was clearly ineffective in intercepting sound and bouncing it back into the Site.

- Mr. Alati responded that parts of the fence were less than 6.5 m in height, and much of the facility's noise is generated from other parts of the yard. As a result, he submitted that the sight-line from Mr. Irwin's window is not necessarily important with respect to the issue of sound control.

- In email circulated on February 27 and March 2, 2014, Mr. Irwin noted commencement of construction of the new sound barrier, and expressed great concern that it would be an enormous eyesore and would shade some properties on Judson Street during some winter months. From that perspective he commented that the 6.5 m height would be better than a taller structure. He requested that his concern about shading be studied.

- An email on March 3, 2014, from Mr. Alati's law student, Matthew Di Vona, indicated that shadow studies conducted on behalf of the Appellant for the area had concluded that there would be no shadow impacts whatsoever on any of the adjacent properties or the properties across the street from the Site, including the home of Mr. Irwin. A copy of these studies was circulated to the presenters.

(3) Mr. Piscione:

- At the preliminary hearing Mr. Piscione submitted that the existing fence was built of corrugated metal in 2003 without municipal approval.

- In an email circulated on February 17, 2014, he expressed concern about negotiations and compromise between the Appellant and MOE. He also referred to recent City by-laws related to relocation of the Appellant's operations

- At the hearing Mr. Piscione submitted that approval of the new sound barrier would allow the Appellant to breach existing rules. He acknowledged that local residents are aware that they do not live "in Rosedale" (i.e., a quiet residential neighbourhood).

- During a subsequent TCC on March 21, 2014, he noted that sight-lines above the top of the fence allow a view of trucks on-site, and questioned whether the new noise barrier will be effective. Ms. O'Connor responded that the independent noise study to be conducted and filed the following month will report on the degree of effectiveness of the mitigation measures, including the new sound barrier.

- Mr. Piscione also expressed concern about whether the independent noise study will be sufficiently thorough, and measure the impact on sensitive receptors. Mr. Alati replied that the independence and other requirements of the audit are specifically dealt with in the ECA.

(4) Ms. McKeown:

- At the preliminary hearing Ms. McKeown, a hospital nurse, indicated that her focus in the appeal would be on the issues of fugitive dust emissions and the complaint process, rather than on noise.

- At the hearing she stated that she resides at "ground zero" and referred to the problems of traffic, dust, noise and the complaint process. In view of the incompatibility of the Appellant's operations and the adjacent residential neighbourhood, she questioned how the approval process could have possibly allowed a cement plant to be established in the midst of this community.

- She supported the larger 9.5 m noise barrier which had been required. She did not think that a height greater than 6.5 m would be a problem for local residents, although she acknowledged Mr. Irwin had indicated otherwise.

[86] It is evident that the concerns expressed by presenters about the appropriate height of the new noise barrier differ. They variously range from supporting the 6.5 m or 9.5 m height, questioning why the MOE changed its decision to support 6.5 m, wanting an independent technical opinion, and doubting the effectiveness of either choice to mitigate the impact of the Appellant's operations.

[87] The appeal focused to some extent on the recent change in MOE's noise guidelines. NPC-205 was replaced by NPC-300 which is dated August 2013. NPC-300 is a 56-page technical document. Section A2 entitled "Implementation by MOE" is a transitional provision, and states as follows at pp. 2-3:

> After its publication date, this guideline will be implemented in approvals issued by the MOE. All new applications for MOE approvals submitted after this guideline is published will be assessed in accordance with this guideline. Applications which were submitted to the MOE before this guideline has been published will be assessed under the previously applicable guidelines: Publication NPC-205 – Sound Level Limits for Stationary Sources in Class 1 and 2 Areas (Urban) and/or Publication NPC-232 – Sound Level Limits for Stationary Sources in Class 3 Areas (Rural). Alternatively, upon receipt of a written request from an applicant, an application for an approval submitted to the MOE prior to the publication date of this new guideline may be assessed under this new guideline. In such circumstances, the MOE may require additional supporting documentation from the applicant in order to complete an assessment under this new guideline.

[88] A "noise sensitive land use" is defined in NPC-300 to include a residential dwelling (page 13). A "noise sensitive space" includes living and sleeping quarters in a residential dwelling.

[89] Part B of NPC-300 deals with "Stationary Sources" and section B5 addresses "Background Sound Levels" as follows (at pp.26-27):

> Background sound levels, defined in Part A, are typically caused by road traffic, except in areas well removed from the activities of people. Sound from existing adjacent stationary sources may be included in the determination of the background One-Hour Equivalent Sound Level (L_{eq}) if such stationary sources of sound have the appropriate approvals and are not under consideration for noise abatement by the municipality or the MOE.
>
> Highly intrusive short duration noise caused by a source such as an aircraft fly-over or a train (including light rail transit, subways and streetcars) pass-by is normally excluded from the determination of the background sound level, subject to exceptions identified in the definition of background sound level in Part A.

> If the background sound level is to be established by means of monitoring, the monitoring should be performed over a minimum period of 48 hours and should be conducted during times when the background sound level is at its lowest level. The lowest hourly L_{eq} value should be selected to represent the background sound level.
>
> In general, the sound level data included in an impact assessment needs to be representative of the background conditions and the predictable worst case noise impact from the stationary source.

[90] The term "background sound level" is defined at length in Part A ("Background") of NPC-300 at pp.6-7. The portion of the definition dealing with exceptions, which are referred to above, is set out below:

> However, under unique/special circumstances, train pass-by noise may be included in the determination of the background sound level in accordance with the following conditions and procedures:
>
> - the contribution of train pass-by sound levels to the background sound level only applies to noise sensitive land uses in Class 1, 2 and 4 areas (not in a Class 3 area);
> - the noise sensitive land uses are located within 300 metres from the nearest track of railway lines carrying a minimum of 40 trains during daytime or 20 trains during nighttime;
> - the equivalent sound level during the daytime [L_{eq} (16)] and nighttime [L_{eq} (8)] due to train pass-bys is determined by means of prediction according to Reference [34] or by other methods/models that are acceptable to MOE;
> - a 10 dBA adjustment is subtracted from the train pass-by day and night equivalent sound levels; and
> - the adjusted train pass-by day and night equivalent sound levels are then logarithmically (on an energy basis) added to the higher of either the background One-Hour Equivalent Sound Level (L_{eq}) or the exclusion limit.

[91] Reference 34 noted above is to the following MOE publication: STEAM, Sound from Trains Environmental Analysis Method, July 1990.

[92] A Class 1 area is defined in NPC-300 at p. A-7 as "an area with an acoustical environment typical of a major population centre, where the background sound level is dominated by the activities of people, usually road traffic, often referred to as 'urban hum.'"

[93] The November 2013 revised version of the Acoustic Assessment Report prepared by SS Wilson Associates (totaling 364 pages including appendices) states that

this “current revision addresses revised truck counts and a reassessment of the plant in the context of NPC-300” (par. 1.10, p.2). New traffic data was collected, detailed sound measurements (for impulsive and non-impulsive sound) were taken and predicted through modelling, rail corridor activity was observed and recorded, and sound level limits were revised. This has had the “effect of reducing the capacity of the plant at certain times” (par.1.10, p.2).

[94] Table A4 (“Acoustic Assessment Summary Table with Addition of Noise Controls”) in the Report’s conclusion (at pp.73-74) identifies the sound level limits calculated for each of the four sensitive receptors and the impulsive and non-impulsive sound levels which are predicted to reach these points of reception. The predicted daytime sound levels range from 48 to 60 dBA (an A-weighted sound pressure level) and will, according to the Report, comply with the appropriate sound level limits which have been calculated. The sound level limits vary from 50 to 61 dBA.

[95] The role and responsibility of the MOE is described in section A1 of NPC-300, entitled “Purpose.” It includes in part the following statement:

> The [MOE] is responsible for protecting clean and safe air, land and water to ensure healthy communities, ecological protection and sustainable development for present and future generations. The MOE fulfils these responsibilities, in part, by ensuring the sources of emissions to the environment are adequately controlled to prevent the potential for adverse effects. The objective of this guideline is to address the proper control of sources of noise emissions to the environment.

[96] Finally, the guideline provides sound level limits for “stationary sources, such as industrial and commercial establishments and auxiliary transportation facilities” (section A1(1)). Compliance by existing and new stationary sources is required through an ECA issued by the MOE.

Findings

[97] The task of determining the appropriate height for an effective acoustic barrier involves the field of acoustics. This science involves the production, transmission and effects of sound, and includes measuring, modelling and predicting sound levels.

[98] The Appellant’s consultant, SS Wilson Associates, is a firm of consulting engineers with specialized knowledge and long-standing experience in acoustics. The daytime noise assessment and reporting by SS Wilson Associates have been reviewed and approved by MOE technical staff with training and expertise in this field. As a

result, the Director who issued the ECA subsequently confirmed in a letter dated December 23, 2013, that the MOE is satisfied that the installation of a 6.5 m noise barrier along Judson Street will bring the Appellant's operations into compliance with daytime sound level limits set by NPC-300.

[99] I am not aware of any errors in, or questions about, the Ministry's analysis of the Report or in its interpretation or application of NPC-300.

[100] The noise barrier is just one of several sound attenuation measures (listed above) intended to achieve compliance. In order to verify compliance, the ECA requires that an independent acoustic audit be conducted after the new noise barrier has been built. This audit will test whether the package of mitigation measures has been sufficient to contain sound to the level which has been predicted. To use the vernacular, the proof will be in the pudding. If necessary, Ms. O'Connor submitted that the MOE is prepared to order further steps be taken to ensure compliance.

[101] Questions were raised by presenters about the level of independence and quality of the independent audit required by the ECA. Condition 10.1 of the ECA requires that the measurements for the audit must be carried out in accordance with NPC-103 (entitled Model Municipal Noise Control By-Law, Final Report, August 1978, as amended), and the audit report must be prepared in accordance with NPC-233 (entitled Information to be Submitted for Approval of Stationary Sources of Sound, October 1995, as amended). According to the ECA, this condition is intended to ensure that information gathering and reporting for the audit follows the procedures laid down by the Ministry's noise guidelines (item 5, page 9).

[102] Although the Appellant will select and pay the independent auditor, it is my understanding that the MOE will accept only work that is done by a reputable and qualified assessor. In addition, specialized staff at the MOE will be assigned to carefully review the audit report, and to challenge or reject it if it is not done thoroughly, accurately, and in strict compliance with Ministry policies and protocols.

[103] The financial risk of the 6.5 m barrier height being ineffective will fall on the Appellant. If compliance is not achieved the MOE has committed that it will require other changes to be implemented at the Appellant's expense and, presumably, to be verified by more independent audits to be paid for by the Appellant.

[104] Based on the technical documentation which has been filed by, and submissions made on behalf of the parties, the adoption of the 6.5 m height for the noise barrier

appears to me to be appropriate. It is a step in the right direction and will represent an improvement to the status quo. At the same time it will not pre-empt the imposition of more sound attenuation measures and further restrictions on the Appellant's operations, if necessary.

[105] I have also placed great reliance on Ms. O'Connor's submission that although NPC-300 allows for train noise to be included in background in a modest way, MOE staff has determined that daytime ambient sound levels in the current version of the acoustic Report are the same as those recorded in the previous version (July 2013). Moreover, the sound level limits have remained unchanged for the four sensitive receptors.

[106] The Director also submitted that no technical or scientific evidence has been put forward on behalf of the presenters to challenge the extensive data and professional opinions and conclusions relied on by the parties. The presenters did not suggest that they were provided with insufficient time or opportunity to gather and produce this type of material. The appeal was launched five months before the hearing commenced and as noted previously, I recommended to the presenters during the preliminary hearing that they seek out professional advice and assistance to help them prepare.

[107] It appears to me that the questions and concerns expressed by the presenters about the proposed noise barrier were substantially answered and explained by the information supplied during the hearing process and summarized herein. I find that the proposed height of the barrier is appropriate. I also note in passing that nothing in the ECA or MOS restricts the right of the presenters and other residents to directly pursue other legal remedies with respect to the impact of the Appellant's operations, if they so choose.

Conclusion

[108] In my view, the presenters' concerns and objections to the Appellant's operations are worthy of serious attention. In his final submission Mr. Piscione referred to the residents' unresolved seven-year grievance.

[109] The hearing has been a forum in which positions on all sides of this controversy have been aired. It is apparent from information received from the parties and presenters during the course of the appeal process that this continuing land use conflict has attracted the attention of others who did not participate in the hearing, including

community leaders, other residents, staff and customers at the Appellant's facility, municipal government, and the media.

[110] To the extent that this decision will provide a public record of input received during the appeal process and may have value to others who could not attend the hearing, I have attempted to make these reasons as comprehensive as possible.

[111] That said, my immediate task in this appeal is to consider the parties' settlement agreement in the context of the scope of this particular proceeding and the factors listed in Rule 201, reproduced above. They include the purpose and provisions of the *EPA* (including relevant Regulations and MOE policies), the public interest, and the interests of the parties and presenters. According to section 3(1) of the *EPA*, the purpose of this legislation is to provide for the protection and conservation of the natural environment. Natural environment is defined in section 1(1) to include the air, land and water within Ontario.

[112] Contaminants and adverse effects are key terms in the *EPA*. Contaminants are defined to include sound and vibration, among other things. The definition of adverse effects includes a list of factors including harm, material discomfort, adverse effect on human health, impairment of human safety, rendering property unfit for human use, and loss of enjoyment of the normal use of property.

[113] With respect to the three issues under appeal, as discussed above, I have found that:

- the issue of hours of operation has been withdrawn by the Appellant, such that no change will be made to the ECA;
- the change to the complaint procedure, restricting the requirement for live complaint service to operating hours, is appropriate, and not opposed by any of the presenters; and
- the change in height of the noise barrier to 6.5 m is appropriate, and opposed by only one of the presenters.

[114] In light of the circumstances in this case and the factors set out in Rule 201, I have concluded that the parties' settlement, as confirmed in the MOS, is consistent with the purpose and provisions of the *EPA* and is in the public interest. In a general sense

it also supports the interests and concerns put forward by the presenters. On this basis I find that the appeal proceeding should be dismissed at this stage.

[115] Apart from an overarching desire by the presenters to have the Appellant cease altogether its operations at the Site, three overlapping and consistent themes have emerged from their submissions: the ongoing negative impacts caused by this facility, the failure to comply with rules and requirements governing the Site, and the lack of enforcement by government agencies when violations occur.

[116] It is clear to me that the presenters are extremely frustrated with the persistence of these problems. Under the circumstances, what else can be done on a practical level to improve the situation in this neighbourhood at this point?

[117] During the hearing I inquired as to whether the establishment of a public/community advisory/liaison committee has been considered in this case. Although they might vary from case to case, such committees typically involve representatives from the plant or facility, local municipality, MOE, community groups and residents. They are normally informational and advisory in nature, rather than decision-making bodies, but can nevertheless provide an ongoing, informal, non-adversarial, collaborative and creative opportunity for stakeholders to routinely meet, share ongoing problems and concerns, and discuss potential solutions.

[118] Ms. O'Connor indicated that this type of committee is not commonly employed with this type of facility. Be that as it may, an example of a community liaison committee established for a small, new bio-energy facility, is documented in *Delaney v. Ontario (Ministry of the Environment)*, [2012] O.E.R.T.D. No. 36.

[119] In view of the history of seemingly unabated conflict involving the Appellant's facility, nearby residents, the City and the MOE, I recommend that the parties consult with the presenters, other residents, community leaders and the City about the establishment of this type of forum. Ideally, it can help all stakeholders tackle and resolve problems consensually before they continue to escalate. From my experience it is never too late to try using an alternative dispute resolution process, especially one which has worked with some success in other communities.

DECISION

[120] Pursuant to Rule 201 the Tribunal hereby orders as follows:

1. The Minutes of Settlement, signed on January 30, 2014, and attached hereto as Appendix A, is approved and incorporated as a term of this decision.

2. The Director is directed to amend Environmental Compliance Approval No. 3356-94GS58, issued September 19, 2013, in accordance with the Minutes of Settlement.

3. The appeal is withdrawn.

4. This proceeding is dismissed.

Minutes of Settlement Accepted
Director Directed to Amend Environmental Compliance Approval
Appeal Withdrawn
Proceeding Dismissed

"Alan D. Levy"

Alan D. Levy, Member

Appendix A – Minutes of Settlement

Appendix A

Minutes of Settlement

ENVIRONMENTAL REVIEW TRIBUNAL

IN THE MATTER OF an appeal by ML Ready Mix Concrete Inc. of the decision of the Director, Ministry of the Environment, under section 20.3 of the *Environmental Protection Act*, R.S.O. 1990, c.E.19, as amended, to issue Environmental Compliance Approval No. 3356-94GS58, issued September 19, 2013, to ML Ready Mix Concrete Inc., for the use and operation of the concrete batching facility located at Plan 339 OR Blk C Pt Lots 7, 19 and 20, RP 66R20057 Parts 1 to 6, 8, municipally known as 1 to 29 Judson Street, Toronto, Ontario.

MINUTES OF SETTLEMENT

WHEREAS on September 19th, 2013 the Director issued Environmental Compliance Approval (Number 3356-94GS58) to ML Ready Mix Concrete Inc. ("Appellant"); and

WHEREAS on October 4th, 2013 the Appellant appealed Definitions 1, 13 and 17 and Conditions 1(3) & (4) and 8, which together required the Appellant to implement the Noise Control Measures set out in the Noise Abatement Action Plan within 6 months of the date of the Approval, to operate the equipment only during the Hours of Operation, to receive deliveries at the Facility only during the Hours of Operation and to limit such deliveries per each hour and to have available a company representative to receive complaints 24 hours a day and 7 days per week.

WHEREAS the Appellant and the Director (the "Parties") have agreed that this appeal should be resolved by way of an Order from the Environmental Review Tribunal approving these Minutes of Agreement between the Parties and dismissing the appeal;

THEREFORE, the Parties agree as follows:

1. These Minutes of Settlement shall constitute a full and final settlement of the appeal.

2. Upon execution of these Minutes of Settlement, an executed copy of the minutes shall be filed with the Environmental Review Tribunal in support of the Appellant's request to withdraw its appeal (ERT Case File No. 13-116), and the Director shall consent to the request to withdraw said appeal.

3. The Appellant shall comply with the Amendment to Environmental Compliance Approval (Number 3356-94GS58) subject to the following amendments:

   (i) The Preamble is amended to read as follows:

   all in accordance with the Application for Approval (Air) submitted by ML Ready Mix Concrete Inc., dated October 30, 2012 and signed by Rene Silva, Quality/ Technical Controller; and the supporting information, including the Emission Summary and Dispersion Modelling Report, submitted by Church & Trought Inc., dated October 31, 2012 and signed by Roxana Ungureanu, including the Acoustic Assessment Report prepared by SS Wilson Associates, dated November 29, 2013 and signed by Hazem Gidamy, and including the Noise Abatement Action Plan prepared by SS Wilson Associates, dated November 29, 2013 and signed by Hazem Gidamy

   (ii) Definition 1 is amended to read as follows:

   "Acoustic Assessment Report" means the report, prepared in accordance with Publication NPC-233 submitted in support of the application, that documents all sources of noise emissions and Noise Control Measures present and proposed at the Facility, prepared by SS Wilson Associates, dated November

29, 2013 and signed by Hazem Gidamy

(iii) Definition 17 is amended to read as follows:

"Noise Abatement Action Plan" means the noise abatement program developed by the Company, submitted to the Director and District Manager and approved by the Director, designed to achieve compliance with the sound level limits set in Publication NPC-300, prepared by SS Wilson Associates, dated November 29, 2013 and signed by Hazem Gidamy

(iv) Definition 20 is revoked and replaced by:

"Publication NPC-300" means the Ministry Publication NPC-300, "Environmental Noise Guideline, Stationary and Transportation Sources – Approval and Planning, Publication NPC-300", August, 2013, as amended.

(v) Condition 1 is amended to read as follows:

The Company shall:

(1) not later than March 19, 2014, implement the Noise Control Measures, as proposed in the Acoustic Assessment Report prepared by SS Wilson Associates, dated November 29, 2013 and signed by Hazem Gidamy, and the Noise Abatement Action Plan prepared by SS Wilson Associates, dated November 29, 2013 and signed by Hazem Gidamy.;

(2) following the implementation of the Noise Control Measures, comply with the limits set out in Publication NPC-300;

(3) only operate the Equipment during the Hours of Operation;

(4) only receive deliveries at the Facility during the Hours of Operation

and shall limit deliveries in accordance with the following:

(a) a maximum of twelve (12) ready-mix trucks per hour;
(b) a maximum of three (3) aggregate trucks per hour;
(c) a maximum of one (1) cement powder tanker truck per hour;

(5) have in place and enforce a policy prohibiting the slamming of truck tailgates at the Facility; and

(6) properly maintain the Noise Control Measures ensuring that they continue to meet the acoustical performance outlined in the Acoustic Assessment Report.

(vi) Condition 8 is amended to read as follows:

A designated representative of the Company shall be available to receive complaints during the Hours of Operation and a voicemail service shall be in place to receive complaints outside the Hours of Operation. The contact information for the designated representative of the Company and voicemail service must be clearly provided on a sign(s) at the entrance to the Facility.

(vii) Condition 10.1 is amended to read as follows:

The Company shall carry out Acoustic Audit measurements on the actual noise emissions due to the operation of the Facility. The Company:

(1) shall carry out Acoustic Audit measurements in accordance with the procedures in Publication NPC-103;

(2) shall submit an Acoustic Audit Report on the results of the Acoustic Audit, prepared by an Independent Acoustical Consultant, in accordance with the requirements of Publication NPC-233, to the District Manager and the Director not later than April 19, 2014

Audit, prepared by an Independent Acoustical Consultant, in accordance with the requirements of Publication NPC-233, to the District Manager and the Director not later than April 19, 2014

4. These Minutes of Settlement may be executed by one or more of the Parties by facsimile transmitted signature, and all Parties agree that the reproduction of any signature on a copy of this Agreement by way of a facsimile device will be treated as though such reproduction is an executed original copy of this Agreement.

5. These Minutes of Settlement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which taken together shall be deemed to constitute one and the same instrument.

IN WITNESS WHEREOF the parties hereto have executed this Agreement effective as of the date first written below.

Renato Silva, President	**Date**
ML Ready Mix Concrete Inc.	
Appellant	
Director, Ministry of the Environment	**Date**
Respondent	

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5. These Minutes of Settlement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which taken together shall be deemed to constitute one and the same instrument.

IN WITNESS WHEREOF the parties hereto have executed this Agreement effective as of the date first written below.

Renato Silva, President	**Date**
ML Ready Mix Concrete Inc.	
Appellant	
	January 30, 2014
Director, Ministry of the Environment	**Date**
Respondent	