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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

ENVIRONMENT PROTECTION AMENDMENT REGULATION 2015 (No 1)

SL2015-28

EXPLANATORY STATEMENT

**Circulated with the authority of
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Minister for the Environment, Climate Change and Water**

Environment Protection Amendment Regulation 2015 (No 1)

Outline

Terms

The following terms are used in this Explanatory Statement.

- ***Environment Protection Act*** means the *Environment Protection Act 1997*.
- ***EPA*** means the Environment Protection Authority appointed under section 11 of the Act.
- ***amendment regulation*** means the *Environment Protection Amendment Regulation 2015 (No 1)* that is the subject of this explanatory statement.
- ***regulation*** means the *Environment Protection Regulation 2005* made under the Act as existing prior to the making of amendments under the amendment regulation.

Legislative Background

The dictionary to the Act defines “pollutant” as meaning

- a gas, liquid or solid; or
- dust, fumes, odour or smoke; or
- an organism (whether alive or dead), including a virus and a prion; or
- energy, including heat, noise or radioactivity, or light or other electromagnetic radiation; or
- anything prescribed; or
- a combination of 1 or more of the things described in paragraphs (a) to (e);

that, when discharged, emitted, deposited or disturbed, may cause environmental harm.

“Noise” is a pollutant under paragraph (d) of the above dictionary definition.

Section 5 of the Act deems a pollutant indicated in (a) to (e) of the Dictionary definition to cause environmental harm if the measure of the pollutant entering the environment exceeds the prescribed measure in the regulation, or the pollutant entering the environment is prescribed in the regulation.

Section 22(1) of the Act requires a person to take “the steps that are practicable and reasonable to prevent or minimise environmental harm or environmental nuisance caused, or likely to be caused, by an activity conducted by the person”.

The Act does not apply in relation to noise made by a train, a Commonwealth jurisdiction aircraft within the meaning of the *Air Services Act 1995* (Cth), a person using only his or her body, or an animal, or a motor vehicle being driven on a road (section 8 of the Act).

Noise is regulated under Division 3.2 of Part 3 of the regulation. The regulation includes certain noise standards (s24) for different specified noise zones (s23). Making noise that exceeds the level set in the noise standard for the relevant noise zone is deemed to cause environmental harm (refer s5 of the Act and ss24, 25 of the regulation). It is an offence under s39 of the regulation to make noise that causes environmental harm.

The regulation provides for exceptions to section 25 of the regulation and related provisions deeming specified noise levels to be pollution causing environmental harm. The exceptions are as follows:

1. Noise is not taken to cause environmental harm in an affected place if the noise is emitted in the course of protecting life or property (section 26 of the regulation);
2. Noise is not taken to cause environmental harm in an affected place if the noise is emitted in the course of preventing, minimising or remedying another environmental harm (section 27 of the regulation);
3. Noise is not taken to cause environmental harm in an affected place if the noise is emitted in the course of conducting an activity for which an approval is in force under the Act (section 28 of the regulation); and
4. Noise is not taken to cause environmental harm in an affected place if it is noise mentioned in schedule 2, table 2.3, column 2 and the conditions (if any) mentioned in column 3 for the noise are met (section 29 of the regulation).

Table 2.3 in the regulation provides a list of 21 prescribed situations in which noise regulation is specifically exempted under section 29, ranging from noise emitted in the course of primary production, to building work. Conditions may be attached to these situations, such as periods of time during daylight hours and certain days when noise is permitted.

These include an exemption to the effect that noise emitted in the course of constructing or maintaining a “major road” is deemed to be noise that does not exceed the noise standards. “Major road” is defined in section 2.2 of Part 2.3 of Schedule 2 to the regulation as “an area identified in the territory plan as being in the transport zone.” For example, Northbourne Avenue is a major road.

Purpose of amendment regulation

The purpose of the amendment regulation is to make the regulation of noise from the construction and maintenance of railways, light rail and dedicated bus ways consistent with the existing regulation of noise from the construction and maintenance of major roads.

One of the principal objectives of the Act is to “achieve effective integration of environmental, economic and social considerations in decision-making processes” (section 3C(1)(d)). Consistent with this principal objective, section 29 and schedule 2, table 2.3 exempts the construction and maintenance of “major roads” from relevant noise standards. This existing exemption reflects the public importance of such infrastructure and the need for its construction and maintenance to proceed with priority under governance arrangements that can be tailored to the particular circumstances for the major project with a view to ensuring that the project can proceed in a timely, appropriate manner. It also allows for maintenance at times when this activity could be practically and safely undertaken.

The exemption is consistent with the fact that the default noise standards may not be appropriate or practical to the construction and maintenance of such major transport infrastructure projects given their importance to the community; their priority and their operation as major transport routes, as they are significant to the environmental, economic and social development

of the Territory; as well as the public expense, complexity and timing of their construction and maintenance. For example, it may be necessary to permit some construction noise to occur at night contrary to existing noise standards so as to minimise disruption of general traffic around the relevant area during the day and also to ensure that the project can be completed as quickly as possible to ensure minimal disruption overall, timely completion and reduction of public expense due to delay.

The existing exemption in the regulation around “major road” does not include transport infrastructure of like importance including railways, light rail and dedicated busways. While it is arguable that the construction of these along a major road might be covered by the regulation, this amendment is to make the regulation more consistent and clear.

The above existing exemption should, as a matter of logical consistency, apply to other major transport infrastructure of similar significance. Specifically the exemption should also apply to dedicated bus way, railway and light rail. This issue of consistency also arises from the fact that it is anticipated that all such infrastructure will be built along major roads and transport corridors in any event. It is illogical to exempt major road construction but not construction of additional transport infrastructure along the same route such as light rail.

The above inconsistency was highlighted with the advent of the Capital Metro Light Rail Project (the light rail project). In terms of this project it is desirable for this inconsistency to be addressed before the construction of the light rail begins in early 2016. The amendment regulation is to rectify this inconsistency.

For consistency, the amending regulation seeks to ensure the noise exemptions of section 29 and schedule 2 of the EP Regulation can apply also to the construction of all likely forms of major transport infrastructure such as railways, light rail and dedicated bus ways.

The amending regulation is consistent with and contributes to the ACT Government's commitment to expedite the construction of the major transport infrastructure, including the light rail project.

The amendment regulation addresses the inconsistency noted above by amending Schedule 2, Part 2.3, Item 16 of the regulation to extend the definition to include not just major roads, but also a dedicated bus way, a railway, or a light rail.

For example, the amendment regulation will in particular allow the construction of the light rail project to proceed without the requirement to comply with the existing noise standards and associated prescribed noise levels and time periods under the Act and regulation. It will also allow for light rail to be maintained without having to comply with these standards.

This does not mean that the light rail project (or other major transport corridor infrastructure projects) will be able to proceed without any restrictions. There are other mechanisms for regulating noise including the potential for noise restrictions to be included in the conditions of any development approval granted for the construction and maintenance of the light rail and included in relevant procurement contracts. Proposed noise emission standards and governance framework for the light rail, including management of noise from its operation, are canvassed in the draft Environmental Impact Statement Capital Metro Light Rail – Stage 1 (released for public comment on 20 June 2015).

In addition, it should be noted that section 22(1) of the Act will continue to apply notwithstanding the proposed regulation. Section 22(1) requires a person to “take the steps that are practicable and reasonable to prevent or minimise environmental harm or environmental nuisance caused or likely to be caused, by an activity conducted by that person”. It is suggested that compliance with relevant conditions in the development approval for noise emissions would potentially be an indication of compliance with this duty subject to assessment, whereas failure to comply could result in a breach of

this duty. The existing ability of the EPA to respond to such a notification with compliance measures as required will also remain.

Human rights analysis

The Amendment Regulation has been reviewed in relation to the *Human Rights Act 2004*.

In a broad sense, the potential human rights impacts of the amendment regulation, if any, are limited because the amendment regulation does not in itself diminish any rights of review or create any new offences or liabilities.

Conceivably the amendment regulation might be considered to enliven the Human Right 11 Protection of the family and children and the Human Right 12 Privacy and reputation to the extent that the amendment regulation might result in noise levels in excess of the existing standards in the regulation with impacts on family or life at home.

It is considered that to the extent that the measures in the amendment regulation might be said to impact on the abovementioned human rights, the measures are nonetheless proportionate and appropriate taking into account the factors noted in section 28 of the Human Rights Act. Section 28 of the Human Rights Act provides as follows:

28 Human rights may be limited

- (1) Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.
- (2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
 - (a) the nature of the right affected;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relationship between the limitation and its purpose;
 - (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

Specifically, the measures in the amendment regulation are the only practical means for achieving the significant objective of establishing a more consistent and appropriate framework for the regulation of noise from the construction of transport corridors as noted above.

The impact of the measures are limited because the amendment regulation does not mean an absence of oversight of noise levels but rather creates the possibility of alternative, more flexible forms of oversight through, for example, development approval conditions under the Planning and Development Act. In addition, as noted above, there will be continued general oversight by the EPA. For example, the EPA will continue to be able to issue a stop work notice if the EPA considers that noise levels are such that they constitute environmental harm notwithstanding that the specific noise standards do not apply. People will continue to be able to notify the EPA of concerns in this regard.

The impacts of the measures are acceptable given the benefits of the amendment regulation in establishing a more consistent and appropriate framework for the regulation of noise from the construction of major public infrastructure in transport corridors as noted above.

Outline of specific provisions of the amendment regulation

Clause 1 – Name of regulation

This clause names the amendment regulation as the *Environment Protection Amendment Regulation 2015 (No 1)*.

Clause 2 – Commencement

This clause provides that the amendment regulation commences on the day after its notification day.

Clause 3 – Legislation amended

This clause states that the amendment regulation amends the *Environment Protection Regulation 2005*.

Clause 4 – Schedule 2, section 2.2 (1), new definition of *light rail*

This clause inserts a definition of “light rail” for the purposes of section 2.2 of Schedule 2 of the regulation. The new definition is required because of the use of the term “light rail” because of the amendment to item 16, column 2, Part 2.3, Schedule 2 in clause 5. The new definition includes a number of specific features such as “supports for tracks and catenaries” to make it immediately clear that these are part of the term “light rail”.

Clause 5 – Schedule 2, Part 2.3, item 16, column 2

This clause inserts new words into Schedule 2, Part 2.3, item 16, column 2. The effect of the new wording is to extend the current exemption from the existing noise standards for the construction and maintenance of “major roads” so that it also includes dedicated bus ways, railways and light rail. This means that noise in excess of the relevant standards from the construction or maintenance of dedicated bus ways, railways and light rail will not automatically be deemed to be noise causing environmental harm for the purposes of section 5 of the Act and sections 24, 25 of the regulation.

Clause 6 – Dictionary, new definition of *light rail*

This clause inserts a new definition of “light rail” into the dictionary to the regulation consistent with clause 4.