Niagara Escarpment Commission

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Commission de l'escarpement du Niagara

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July 17, 2012

Ms. Tamara Pomanski
Clerk pro tem
Standing Committee on General Government
Room 1405, Whitney Block
Queen's Park
Toronto, ON M7A 1A2

Dear Ms. Pomanski:

Re: Review of the Aggregate Resources Act

The Niagara Escarpment Commission

The Niagara Escarpment Commission (NEC) was established in 1973 with the enactment of the *Niagara Escarpment Planning and Development Act* (NEPDA) in response to public concern about the need to protect the Niagara Escarpment. The first Niagara Escarpment Plan (NEP) was approved in 1985 making it Canada's first large scale environmental land use plan. The Niagara Escarpment Plan Area was designated a World Biosphere by UNESCO in 1990, recognising the unique landscape, ecology, recreational opportunity, provincial plan and governance through the NEC to achieve protection of the natural environment within this landscape by limiting development and providing permanent protection through the policies of the NEP.

The NEP does not permit new licensed aggregate extraction as of right. Instead, it allows the submission of applications for amendments to the NEP to permit a licensed mineral aggregate extraction on the Niagara Escarpment only within one designation, the Escarpment Rural Area which amounts to 27.51% of the total Plan Area. There are 64 licensed sites currently located within the NEP Area occupying 3335.55 hectares (8242.32 acres) and 3 NEP amendment applications pending for aggregate extraction on approximately 137 hectares (572 acres) of additional land.

ARA and NEPDA

Under Section 24(3) of the NEPDA, no approvals can be granted by any ministry or public agency until a Development Permit has been issued. The approval for a pit or quarry also requires a license under the A*ggregate Resources Act* (ARA) and quite often municipal approvals under the *Planning Act.* If a pit or quarry is approved under these statutes, often there are still other approvals necessary under other Provincial legislation including the *Ontario Water Resources Act and Environmental Protection Act.*

The significant amount of NEC staff time spent reviewing NEP Amendment and Development Permit Applications for aggregate developments are a testament not only to the complexity of the technical review but also to the separate, parallel and sequential approvals process. Consultation with other stakeholders including municipalities, Conservation Authorities, the Ministry of Natural Resources (MNR) and the concerned public can take place through joint agency technical reviews at the request of municipalities but this process is not provided for in the statutes and is not always available.

Input from the MNR on natural heritage matters, particularly provincially significant wetlands and endangered species is necessary for the effective review of proposals. These matters relate to the approvals under the NEPDA and the *Planning Act*, (the Land Use Approvals) which are required to be consistent with the Provincial Policy Statement.

The MNR has separate responsibility for the issuances of licences under the ARA. The scope of this process, could overlap considerably with the land use approvals referred to above. In practice, detailed evaluation of environmental impacts is done by agencies acting in relation to the request for Land Use Approvals, such as the NEC, Conservation Authorities and municipalities. The MNR input on natural heritage (e.g. Species at Risk) is a standard aspect of these approvals.

By contrast, the MNR's role under the ARA tends to focus on technical and operational requirements and best practices. Rarely does the MNR take a position on the appropriateness of the land use itself in the process. Further the ARA does not make provision for the MNR to provide input to other agencies on purely licensing matters as part of their legislated approval process.

The ARA prohibits the issuance of a license in the absence of the Land Use Approvals to permit the development of a pit or quarry. The NEP Amendment and Development Permit and *Planning Act* applications initially must be dealt with before a license can be issued, (though they may be combined in a consolidated Joint Board Hearing if specific regulation is passed to provide for it).

The foregoing can lead to a situation where the NEC, other agencies and stakeholders are without technical advice on matters related to licensing and/or natural heritage pertaining to the planning applications that are being assessed and that are a precondition to the issuance of the license under the ARA.

This was acknowledged in the June 2010 comments of the Aggregate Resources Advisory Committee (ARAC), including representatives of the NEC, municipalities, environmental groups, Ontario planners, the aggregate industry and academics on the State of the Aggregate Resource in Ontario Study (SAROS, February 2010). This Committee recommended that the Government:

> "Rationalize the existing regulatory framework to remove duplication and overlap while promoting confidence and trust among stakeholders and members of the public in the approval process."[1]

In recommending a "Strategic Roadmap for Aggregate Resources", ARAC also supported a:

> "Collaborative approach between provincial ministries, industry, stakeholders and communities".[2]

This is crucial to informed decision-making, yet the current process does not promote allowing the MNR staff to provide their input at the planning decision stage, potentially leaving gaps in technical information and policy advice at a critical point in the review of aggregate applications.

Specific changes to the ARA would help to clarify the relationship between the MNR and the NEC and allow for the exchange of technical information. At present, there are a number of areas in the ARA where notice is provided to municipalities but there is no requirement to notify the NEC, the agency that makes the first decision on an aggregate application within the area of the NEP. Receiving notices would enable the NEC to assess whether changes to a licence or site plan are consistent with the relevant decisions under the NEPDA. The recommended changes to the legislation as outlined below could assist with this situation and also assist applicants in understanding the NEP Development Permit Application process where it applies in place of municipal zoning.

Recommendations:

- Make it mandatory for the MNR to provide comments on the Niagara Escarpment applications and municipal planning applications on matters related to both licensing and natural heritage under the PPS and the *Endangered Species Act* prior to making a decision on a license application;
- Allow for concurrent rather than sequential decision-making on aggregate applications;
- Change Part I, 3(f) to read, "advise ministries, the Niagara Escarpment Commission and municipalities on planning matters related to aggregate";
- Change Part I, 3(l) to read, "consult with ministries, the Niagara Escarpment Commission, municipalities and agencies";
- Change Part I, 10 to add a new subsection 10(a), "An applicant for a licence must furnish information satisfactory to the Minister describing the Niagara Escarpment Plan designations applicable to the site and adjacent lands";
- In Part II, Section 12.(1)(c) – add the NEC as agency whose comments should be considered in the assessment of a licence application;
- Change Part II, 12.2, 13.(3), 16.(5) to add the Niagara Escarpment Commission as an agency that would receive notice of the approval of or change to a licence or site plan;

[1] Aggregate Resource Advisory Committee, "Consensus Recommendations to the Minister of Natural Resources", June 2010, p. 4.
[2] Ibid, p. 5

- Change Part II, 15.1(2) to add the Niagara Escarpment Commission as an agency that would receive copies of the annual compliance reports;
- Change Part IX, 66 to add a new subsection (7), "A requirement for a Development Permit imposed under subsection 24.(1) of the *Niagara Escarpment Planning and Development Act* does apply to a site for which a licence or permit has been issued under this Act and such licence or permit must comply with that Development Permit" as this would be consistent with the requirement for pits under Part III, Section 27.(3) of the ARA;
- Change Part IX, 73 to add a new subsection 73(a)," A licence or wayside permit does not prevail over a Development Permit issued under the *Niagara Escarpment Planning and Development Act"* to reinforce the understanding that the Development Permit system within the NEP applies in the absence of municipal zoning.

Resource Management

One of the Purposes of the ARA is "to provide for the management of the aggregate resources of Ontario". A province wide strategy for identifying aggregate resources, that could be suitable for extraction, building on the information in the SAROS reports, should be pursued in consultation with the stakeholders that participated in the study, including the NEC, as a means to identify areas where aggregate extraction would have the least environmental impact and to develop strategies to minimise the demand for aggregate.

Recommendation:

That the Minister should act on the recommendations of the SAROS to initiate the preparation of a provincial strategy for aggregate resources involving the stakeholders from the Aggregate Resource Advisory Committee and Technical Expert Panel.

Quarrying near the Escarpment

The ARA establishes a setback from the "natural edge of the Niagara escarpment" and gives the Minister the authority to determine the natural edge. This determination is typically done only in consultation with the Ministry of Northern Development and Mines and not with the NEC. The NEC has long established policies and practices for determining the edge of the Escarpment as well as the toe and slope and it should be considered the primary authority at first instance on this fundamental matter.

Recommendation:

Change Part IX, 72.3(3) of the ARA to read, "For the purposes of subsection (1) or (2), the natural edge of the Niagara Escarpment is the natural edge determined by the Minister after receiving the recommendation of the Niagara Escarpment Commission".

Application standards

As applications for planning approvals and licenses become more complex, it is important that a high standard of technical information is provided in support of these applications. Changes to the ARA would support the requirements for complete applications and clarify the expected standard of information.

One of the significant impacts of aggregate extraction is the change to the landscape on and adjacent to a pit or quarry. Licence applications should include an assessment of the visual impact and how, if possible, to mitigate it.

Recommendation:

- In Part II, Section 7(5), Licences – change "may be refused" to "shall be refused" so that an applicant must be required to provide additional information to the Minister in support of a license application.
- In Part II, Section 9.(1), Reports – the report identified in this section should refer to the matters identified in Section 12 of the ARA which are the important considerations in the review of an aggregate application.
- In Part II, Section 12.(1), add the effect of the proposed pit or quarry on habitat of species at risk including the regulated habitat of endangered species, significant wildlife habitat and natural heritage systems and any possible effects on the visual and scenic resources and the natural and cultural landscape on the site and adjacent lands.
- In Part III, Section 26, wayside pits – replace "any proposed aesthetic improvements to the landscape with "any possible effects on the visual and scenic resources and the natural and cultural landscape on the site and adjacent lands".
- In Part III, Section 27.(4) – define "environmental sensitivity" and/or include examples such as ESA's, ANSI's, PSW, Significant Wildlife Habitat, wellhead protection areas.

Fees

The ARA currently provides for the authority to charge application fees. The fees do not extend to allowing the agencies that comment on license applications to charge fees against the proponent of the application for recovering the cost of providing the review and commenting function. A regulation listing the agencies that are circulated for comment could provide a formal structure for that review and provide the basis to allow those agencies to charge fees for their technical expertise or that of any peer review consultants they retain to provide additional expertise on the complex studies that are submitted as part of license applications.

Recommendation:

That the Minister consider a regulation to formalise the list of agencies that must be circulated as part of the review of a license application and to establish a tariff of fees, including agency and peer review fees, to offset the cost of the technical review of the application and ensure the appropriate level of expert review.

Adaptive Management Plans and Financial Security

A relatively new approach to the consideration of some aggregate applications on the Niagara Escarpment and elsewhere involves the use of "Adaptive Management".

> With its emphasis on adjusting methods based on systematic monitoring of ongoing results, adaptive management recognizes the inherent uncertainty that complicates natural resource management efforts and offers a strategy for filling information gaps.[3]

[3]Doremus, Holly et al, "Making Good Use of Adaptive Management", Centre for Progressive Reform, Washington, DC, 2011, p. 1

New applications for large-scale aggregate development are being submitted to the MNR supported by Adaptive Management Plans (AMP) which propose to monitor the impacts of extraction and address them through agreed upon actions which can involve the suspension of an aggregate license if there is variance from predicted impacts.

The complexity of monitoring and of mitigation measures being proposed to address environmental impacts, is considerable under current proposals, particularly on water resources and their dependent natural heritage features such as wetlands, some endangered species, headwaters and fisheries. This complexity is reflected in the nature of the AMP documents being submitted by aggregate proponents. As a result, significant expertise would be required for the MNR to effectively oversee the operation of aggregate operations under these current proposals.

The concept of Adaptive Management is not addressed in any current legislation. Although the approach is promoted in the MNR Strategic Plan[4], it is not legislative requirement and without a reference to the concept in the ARA, the NEC remains concerned that enforcement of the principles of an AMP could be ineffective and therefore, not an appropriate basis for considering approval of an aggregate application.

A significant difficulty with the approach is the considerable resources and expertise necessary to review and oversee the engineering and environmental monitoring provided for in these AMP documents.

A further difficulty is that the ongoing financial implications of these complex operations are considerable. Some examples of the kinds of works are perpetual pumping of waste water into surface water features, grouting, re-injection of ground water and surface water diversions. The need for financial security has been acknowledged in several approval decisions. However, there is no established statutory regime for the implementation of these arrangements, nor is there provision for them to be required where the proponent does not agree to provide them. They may not be effectively imposed on an unwilling proponent as a condition of approval.

If such complex and environmentally risky proposals are to be entertained, the ARA should contain the authority to impose the posting of financial security as a condition of approval and the mechanism to achieve it and the imposition of review and oversight costs on aggregate proponents and operators.

In the absence of more comprehensive regulatory provisions to address highly engineered extraction operations, such sites should not receive approval.

Recommendation:

- In Section 12.(1) of the ARA, Matters to be considered by the Minister, introduce the concept of Adaptive Management in subsection (a) as follows:

(a) the effect of the operation of a pit or quarry on the environment *and the proposed methods for mitigating those effects including consideration of adaptive management* [italics added]

[4] Ministry of Natural Resources, "Our Sustainable Future: A Renewed Call to Action", Ontario, p. 6.

- also require that the information submitted in support of a licence include an evaluation of the impact on natural heritage including significant wildlife habitat and significant woodlands
- include the effect of the pit or quarry and related/accessory uses on the environment and means to avoid or mitigate such impacts
- include within the discussion of planning and land use considerations, visual impact and effect on heritage, cultural or archaeological resources
- include within the discussion of effect on ground and surface water, wetlands and wellhead protection areas and fish and wildlife habitat

- In Part IX, Section 62, record keeping there should include a requirement to retain and report results of monitoring reports on impact and mitigation as required by the AMP or conditions of the licence.

- Compliance with the license should include maintaining monitoring results within acceptable limits. Impacts requiring mitigation should give rise to an obligation to take certain steps to mitigate impacts, failure of which should be regarded as non-compliance with AMP in appropriate circumstances. The filing of reports alone should not be regarded as sufficient for compliance. Appropriate provisions should be drafted to provide a framework for the provision of financial security.

Rehabilitation

It is a policy of the NEP that rehabilitation of licensed sites be progressive as extraction proceeds, (NEP Part 2.11.5). The ARA, Part VI, Section 48.(1) requires progressive and final rehabilitation on all licensed sites. However, SAROS Paper #6, Rehabilitation evaluated the progress towards progressive rehabilitation of 50 licensed sites and found that 58% had some progressive rehabilitation but 40% had not initiated any progressive rehabilitation.[5] The authors of the Paper made a number of recommendations with respect to improving the current situation to achieve more timely and higher quality rehabilitation and take advantage of best practices through a collaborative exercise involving provincial and municipal governments, the industry and non-governmental organisations. The NEC would support opportunities to develop new and better standards for rehabilitation.

Recommendation:

- Using the authority under Part I, Section 3.(2)(a)(i) of the ARA, the Minister should initiate research into the rehabilitation of pits and quarries building on the knowledge gained from SAROS Paper #6 by engaging the NEC, provincial ministries, municipalities, TOARC and non-governmental organisations in a collaborative exercise, similar to the Technical Expert Panel on SAROS to develop new policies and standards for the rehabilitation of licensed sites.

Time limits on licenses

The ARA does not limit the term of an aggregate license. The pit or quarry can operate indefinitely, well beyond the renewal term of the NEP (every 10 years) or a municipal

[5] Skelton Brumwell & Associates Inc., Savanta Inc., "SAROS Paper 6:Rehabilitation", Queen's Printer for Ontario, December 11, 2009, p. 5.

Official Plan (every 5 years). While it is understood that to some extent, the life of a pit or quarry depends on the market demand for the product, allowing indefinite licenses does not support the completion of a license and progressive rehabilitation and is not consistent with the concept of an interim use. The NEC experience has also been that sometimes unrelated industrial uses establish themselves in a worked our or almost worked out pit or quarry as a matter of convenience for the landowner. License time limits would help prevent this activity.

Recommendation:

- The ARA should be revised to require the imposition of time limits on licenses of not longer than 10 years at a time. At the end of the license term, the operator would be required to provide a report to the MNR thoroughly documenting its adherence to license conditions and demonstrating progress on extraction and rehabilitation and land use compatibility with the local community. License extensions could be considered based on the operator's success at demonstrating a good performance record.

Hearings

As new aggregate licence applications are often contentious, they are frequently referred to hearings. Presently, a regulation must be made by the Ministry of the Environment to allow a Joint Board to hear matters under the ARA, the *Planning Act*, and the NEPDA. This adds considerable time to an already lengthy process.

Recommendation:

- Change Part I, Section 11.(7) to allow one hearing for all related applications including the NEPDA.
- An amendment to regulations under the *Consolidated Hearings Act* could be made to add the ARA to the scheduled statutes under that Act.

We appreciate this opportunity to provide the Committee with our comments and would be pleased to engage in further discussions over possible revisions to the legislation.

Due to the deadline for submissions, these comments have been prepared by NEC staff and will be considered by the NEC at their meeting on July 19, 2012. We will forward a copy of the Commission's response to the staff comments as soon as possible.

Yours truly,

For: Dana Richardson
Assistant Deputy Minister

cc. Niagara Escarpment Commission
MNR, MMAH, Municipalities and Conservation Authorities in Plan Area
OSSGA