

**CITATION:** Niagara Escarpment Commission v. The Joint Board, 2013 ONSC 2497  
**DIVISIONAL COURT FILE NO.:** 535/12  
**DATE:** 20130710

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**DIVISIONAL COURT**  
**SWINTON, POMERANCE AND LEDERER JJ.**

<b>BETWEEN:</b>	)	
	)	
NIAGARA ESCARPMENT	)	
COMMISSION	)	<i>Lise Favreau, Judie Im and Demetrius</i>
	)	<i>Kappos, for the Applicant</i>
Applicant	)	
	)	
<b>– and –</b>	)	
	)	
THE JOINT BOARD, established under the	)	
<i>Consolidated Hearings Act</i> , WALKER	)	<i>J. Thomas Curry, Mary Bull, Ian McLeod</i>
AGGREGATES INC., THE	)	<i>and Rory Gillis, for the Respondent Walker</i>
CORPORATION OF THE COUNTY OF	)	<i>Aggregates Inc.</i>
SIMCOE, THE CORPORATION OF THE	)	
TOWNSHIP OF CLEARVIEW,	)	<i>Ian Rowe, for the Respondents County of</i>
CLEARVIEW COMMUNITY	)	<i>Simcoe and Township of Clearview</i>
COALITION INCORPORATED and	)	
EMILIA FRANKS	)	<i>John B. Laskin and Molly Reynolds, for the</i>
	)	<i>Respondent Clearview Community Coalition</i>
Respondents	)	<i>Incorporated</i>
	)	
	)	
	)	<b>HEARD at Toronto: April 25, 2013</b>

**Swinton J.:**

**Overview**

[1] The Niagara Escarpment Commission (“the applicant” or “NEC”) has brought an application for judicial review of a decision of the Joint Board established under the *Consolidated Hearings Act*, R.S.O. 1990, c. C.29 (“CHA”) dated June 17, 2012. The Joint Board granted conditional approval to the respondent Walker Aggregates Inc. (“Walker”) to develop a quarry in the Township of Clearview on land that falls within the Niagara Escarpment Plan area.

[2] NEC argues that the majority of the Joint Board reached an unreasonable decision because it failed to properly apply the Niagara Escarpment Plan in determining Walker's appeal and made an improper delegation to the Minister of Natural Resources to approve the Adaptive Management Plan.

[3] For the reasons that follow, I would dismiss the application, as the Joint Board made no legal error and reached a decision that is within the range of reasonable outcomes.

### **Factual Background**

[4] For many decades, Walker operated a quarry near the town of Duntroon in the Township of Clearview. As the quarry was nearing depletion, Walker planned to develop a new quarry on a 149.7 hectare site that is on the north side of Simcoe County Road 91, across from the existing quarry. The site is on the Niagara Escarpment about 400 metres from the brow of the Escarpment. It is within a rural area, composed of woodlands and agricultural fields.

[5] The Niagara Escarpment is a unique ecological area that has been recognized as a UNESCO World Biosphere Reserve. Development in the area is controlled by the Niagara Escarpment Plan ("NEP"), which will be described in detail below.

[6] Walker applied for approval to operate the new quarry on May 13, 2005. The licence it sought was to cover 76.7 hectares and would allow extraction of aggregate on 64.8 hectares. The proposal was to remove 41.4 million tonnes of Amabel dolostone in three phases of extraction.

[7] In order to operate the quarry, Walker required several approvals: an amendment to the Official Plan of the Township of Clearview pursuant to the *Planning Act*, R.S.O. 1990, c. P.13; an amendment to the NEP pursuant to the *Niagara Escarpment Planning and Development Act*, R.S.O. 1990, c. N.2 ("*NEPDA*") to designate the area as a Mineral Resource Extraction Area; Niagara Escarpment Development Permits pursuant to the *NEPDA*; and a Category 2, Class A Licence to permit a quarry below the water table pursuant to the *Aggregate Resources Act*, R.S.O. 1990, c. A.8 ("*ARA*").

[8] NEC refused Walker's request for approval of an amendment to the NEP and for development permits for a quarry within the NEP area. Walker then launched an appeal. It sought a consolidated hearing pursuant to the *Consolidated Hearings Act* ("*CHA*"). The *CHA* applies to "undertakings" when more than one hearing is required or may be required under statutes listed in the Schedule to the *CHA* or as prescribed pursuant to s. 2 of that legislation. Walker would be required to obtain not only approval of an amendment to the NEP, but also an official plan amendment and a licence to operate a quarry under the *ARA*. Hearings would be required for each of these approvals. The *NEPDA* and the *Planning Act* are listed in the Schedule to the *CHA*, and the *ARA* is prescribed for the purposes of s. 2.

[9] The Joint Board appointed to hear the appeal was composed of two members of the Ontario Municipal Board ("OMB") and a vice-chair of the Environmental Review Tribunal ("ERT"). The Joint Board heard evidence over 139 days from 36 expert witnesses, as well as a number of lay witnesses.

[10] Walker's proposal was supported by the Township of Clearview, the County of Simcoe and the County of Grey. Clearview and Simcoe had entered into settlement agreements with Walker that provided benefits, such as road improvements and conservation easements, beyond what was required by legislation. The proposed quarry is a significant project for the local community, as it will create a number of jobs and contribute millions of dollars to the local economy.

[11] Three parties opposed the proposal: NEC, Clearview Community Coalition Incorporated ("CCC"), and one individual. Neither the Minister of Natural Resources nor the Minister of the Environment opposed the proposal.

### **The Legislative Framework**

#### ***The Niagara Escarpment Planning and Development Act***

[12] Section 2 of the *NEPDA* sets out the purpose of the legislation:

The purpose of this Act is to provide for the maintenance of the Niagara Escarpment and land in its vicinity substantially as a continuous natural environment, and to ensure only such development occurs as is compatible with that natural environment.

[13] The *NEPDA* provides for a Niagara Escarpment plan, which is defined in s. 1 as a "plan, policy and program ... designed to promote the optimum economic, social, environmental and physical condition of the Area ..." The plan's objectives are set out in s. 8, and any amendment to the plan must also take these objectives into account. Section 8 states:

The objectives of the Niagara Escarpment Plan are, and the objectives to be sought in the consideration of amendments to the Plan shall be, in the Niagara Escarpment Planning Area,

- (a) to protect unique ecologic and historic areas;
- (b) to maintain and enhance the quality and character of natural streams and water supplies;
- (c) to provide adequate opportunities for outdoor recreation;
- (d) to maintain and enhance the open landscape character of the Niagara Escarpment in so far as possible, by such means as compatible farming or forestry and by preserving the natural scenery;
- (e) to ensure that all new development is compatible with the purpose of this Act as expressed in section 2;
- (f) to provide for adequate public access to the Niagara Escarpment; and
- (g) to support municipalities within the Niagara Escarpment Planning Area in their exercise of the planning functions conferred upon them by the *Planning Act*.

[14] Section 9 sets out the contents of the NEP, stating that the NEP may contain policies for the economic, social and physical development of the area in respect of a number of matters

including the general location of industry and commerce, as well as policies designed to ensure compatibility of development by the private sector” (s. 9(a) and (e)).

[15] The *NEPDA* also sets out a process for amendments to the NEP (see ss. 7 and 10). Subsection 6.1(2.1) requires a proposed amendment to the NEP to include a “statement of the justification for the amendment”, with supporting research material, reports and plans.

[16] Section 24 of the Act requires development permits for development in an area of development control, unless the development is exempt under the regulations.

### *The Niagara Escarpment Plan*

[17] The NEP is a comprehensive document, originally approved in 1985 and revised in 1990 and 1999. The introduction states that the NEP “serves as a framework of objectives and policies to strike a balance between development, preservation and the enjoyment” of the Escarpment. The NEP then sets out the purpose and objectives found in ss. 2 and 8 of the *NEPDA* above.

[18] There are three parts to the NEP: Land Use Policies, Development Criteria and The Niagara Escarpment Parks and Open Space System.

[19] Part One, Land Use Policies, identifies seven land use designations: Escarpment Natural Area, Escarpment Protection Area, Escarpment Rural Area, Minor Urban Centre, Urban Area, Escarpment Recreation Area, and Mineral Resource Extraction Area. The first two designations – Escarpment Natural Area and Escarpment Protection Area – are most restrictive of permissible uses, as they are employed to protect more ecologically sensitive areas. For example, Escarpment Natural Areas contain important plant and animal habitats, geological features and cultural heritage features, and the policy aims to maintain these natural areas.

[20] The site of the proposed quarry is on land designated as Escarpment Rural Area. This designation is described in s. 1.5 of the NEP as applying to areas that “provide a buffer to the more ecologically sensitive areas of the Escarpment” (NEP, p. 17). The NEP sets out five objectives for this designation:

1. To maintain scenic values of lands in the vicinity of the Escarpment.
2. To maintain the open landscape character by encouraging the conservation of the traditional cultural landscape and cultural heritage features.
3. To encourage agriculture and forestry and to provide for compatible rural land uses.
4. To provide a buffer for the more ecologically sensitive areas of the Escarpment.
5. To provide for the designation of new Mineral Resource Extraction Areas which can be accommodated by an amendment to the Niagara Escarpment Plan.

[21] Permitted uses in this area include new licensed pits or quarries producing more than 20,000 tonnes annually, provided there is an amendment to the NEP. The NEP contains specific development policies that must be considered in the evaluation of applications for an amendment to the NEP to re-designate an Escarpment Rural Area to Mineral Resource Extraction Area. The policy states that “the following matters will be considered” (NEP, p. 21):

a) Protection of the natural and cultural environment, namely:

- i) Groundwater and surface systems on a watershed basis;
- ii) Habitat of endangered (regulated), endangered (not regulated), rare, special concern and threatened species;
- iii) Adjacent Escarpment Protection and Escarpment Natural Areas;
- ...
- vi) Provincially significant wetlands ...

b) Opportunities for achieving the objectives of section 8 of the *Niagara Escarpment Planning and Development Act* through the final rehabilitation of the site;

c) Maintenance and enhancement of the quality and character of natural systems, water supplies, including fish habitat; and

d) Capability of the land for agricultural uses and its potential for rehabilitation for agricultural uses.

[22] Section 1.9 deals with Mineral Resource Extraction Areas. The designation includes pits and quarries licensed under the *ARA*. The objectives of this policy include:

1. To designate licensed Mineral Resource Extraction Areas.
2. To minimize the impact of mineral extraction operations on the Escarpment environment.
3. To provide areas where new pits and quarries may be established.
4. To ensure that after uses and rehabilitation are compatible with the applicable Plan designation, the surrounding environment and existing uses.
5. To encourage, where possible, the rehabilitated after uses of pits and quarries to be integrated into the Niagara Escarpment Parks and Open Space System.

[23] Section 1.2.1 of the Plan requires a proponent who seeks to amend the NEP to show the rationale or justification for the amendment and to demonstrate that the proposed amendment and expected impacts will not adversely affect the purposes or objectives of the *NEPDA* and the NEP and will be consistent with other relevant provincial policies.

[24] Even if an applicant succeeds in obtaining an amendment to the NEP to operate a quarry, it must also obtain a development permit. The criteria for development permits are set out in detail in Part 2 of the NEP. The introduction states in s. 2.1 that the development criteria are to be applied to all development in the area of the NEP in conjunction with other policies in the NEP.

[25] Of particular importance in the present case are the following criteria: s. 2.6, new development affecting water resources; s. 2.7, new development in wooded areas; s. 2.8, wildlife habitat; s. 2.9, forest management; and s. 2.11, mineral resources. For example, s. 2.11 states that extractive operations, such as a quarry and haul routes, shall not conflict with the following criteria: "a) The protection of sensitive ecological, geological, historic and archaeological sites or areas" (NEP, p. 67).

[26] "Protection" is defined in the NEP as "ensuring that human activities are not allowed to occur which will result in the unacceptable degradation of the quality of an environment" (NEP, p. 127).

### *The Provincial Policy Statement*

[27] The Provincial Policy Statement ("PPS") was issued under the authority of s. 3 of the *Planning Act* in 2005. It applies province-wide and is intended to protect public health, safety and the quality of the natural environment while providing for appropriate development. Where there is conflict between the PPS and the NEP, the NEP takes precedence (PPS, s. 4.9; NEP, s. 2.1).

[28] Section 2 of the PPS contains policies related to natural heritage. Section 2.1.3 prohibits development and site alteration in certain areas - for example, in "significant habitat of endangered species and threatened species".

[29] Section 2.1.4 allows development and site alteration in certain other protected areas, such as significant wildlife habitat or significant areas of natural and scientific interest, only if "it has been demonstrated that there will be no negative impacts on the natural features or their ecological features." "Negative impacts" are defined as "degradation that threatens the health and integrity of the natural features or ecological functions for which an area is identified due to a single, multiple or successive development or site alteration activities" (PPS, p. 33).

[30] Section 2.5 of the PPS deals with Mineral Aggregate Resources. Section 2.5.2.2 states that extraction "shall be undertaken in a manner which minimizes social and environmental impacts."

### *The Aggregate Resources Act*

[31] Section 7 of the *ARA* requires a person to hold a licence in order to operate a quarry on private land in designated areas. On receiving an application for a licence, the Minister of Natural Resources has the discretion to refer the application for a hearing by the OMB to determine if the licence should be issued. Otherwise, the Minister decides whether to issue a licence.

[32] Subsection 12(1) of the *ARA* sets out the criteria to be considered in awarding a licence for a quarry. They include the effect of the operation on the environment and on nearby communities, effects on ground and surface water resources, the main haulage routes, and the suitability of the rehabilitation plans for the site.

## **The Decision of the Joint Board**

### ***The Majority Reasons***

[33] A majority of the Joint Board determined that conditional approval should be given to a modified proposal for the operation of the quarry. In coming to that decision, the majority found that the proposal, as amended, could be undertaken in a manner consistent with the requirements of the *NEPDA*, the *NEP*, and the *PPS*, and it would comply with the relevant Official Plans, the *Planning Act*, and the *ARA* (Reasons, p. 5). In reaching that decision, the majority set out several factors that influenced it, including the following:

- the positive history of the existing quarry,
- the lack of negative impact on the use of water supplies from the existing quarry,
- the continued presence of natural heritage features in close proximity, and
- the proposed continued use of the established haul route.

[34] The majority reasons begin with an introduction and overview. The “fundamental dispute” in the appeal is framed as follows (Reasons, p. 3):

The fundamental dispute in the appeal is whether the development of a quarry at the site can be accomplished while maintaining the requirements of the applicable planning documents and above-noted statutes. Will the quarry cause significant harm to the environmental features of the site and area, will it cause undue disruption in the lives of local residents and to local communities, and will the purpose, objectives and policies of the relevant statutes and planning documents be maintained?

[35] The majority described the governing statutory and policy tests. It identified the *NEP* as the “senior provincial planning policy document” governing the property (Reasons, p. 7), but held that the proposal must comply with both the *NEP* and the *PPS*. The majority also noted that no conflicts had been identified between the *NEP* and the *PPS* that made it impossible to comply with the policies of both documents (Reasons, p. 7).

[36] The majority noted that the determination of an appeal like the one before it required a balancing of concerns and interests (Reasons, pp. 16-17). However, the development had to be compatible with the purpose of the *NEP*, which had given “some priority” to protecting the Niagara Escarpment. It noted that the *NEP* does not prohibit new development. However, “development must be compatible with the purpose of the *NEP* and with the natural environment”, as well as the *PPS* and other relevant planning documents (Reasons, p. 8).

[37] The majority understood that Walker needed both an amendment to the NEP and development permits (Reasons, p. 9). It stated that the onus was on the proponent, Walker, to show that the new development was compatible with the natural environment (Reasons, p. 10).

[38] The majority found that the NEP provided “little direction” or “little definitive guidance” on how to satisfy the provisions relating to “natural heritage areas.” It concluded that “clearer direction” was found in the PPS, and it applied the “no negative impacts test” for natural heritage features set out in s. 2.1.4 of the PPS. It viewed this PPS test as a more “rigorous” test for natural heritage features than anything set out in the NEP and concluded that if the development could meet the PPS tests, it would also meet the NEP provisions regarding natural heritage (Reasons, pp. 12-13; 40). The majority also held that it was bound to apply the precautionary principle as stated in the Ministry of Natural Resources Statement of Environmental Values (Reasons, p. 16).

[39] The majority then gave detailed consideration to Walker’s proposal. It rejected NEC’s argument that the proposal does not meet the purpose of the NEP or its objectives. With regard to the need to protect “unique ecologic areas” (a term in the objectives of the NEP), it found that there was no definition of the term and no specific policies related thereto in the NEP. It chose to address this objective in its findings regarding specific natural heritage features (Reasons, pp. 21, 40). These included the Rob Roy 2 Wetland, amphibian habitat located within that wetland, the habitat of 29 Butternut trees (an endangered species), the habitat of American Hart’s Tongue Fern (a species of concern), and a significant woodland in the extraction area.

[40] The majority also found that the objectives in s. 1.5 of the Escarpment Rural Designation Area were met, and that the proposal would comply with the Development Policies for Mineral Extraction in s. 1.5.

[41] From pp. 21 to 115 of the reasons, the majority examined in detail the 62 issues raised before the Joint Board and the evidence relating thereto and made findings respecting those issues. For example, the majority found that the 32.8 hectares of woodland that would be removed under the proposal was “significant woodland”; however, the woodland on the site was part of a “large contiguous significant woodland” spanning north and northeast of the proposed quarry (Reasons, p. 57). The majority considered the impact on this greater area in applying the “no negative impacts” test, rather than the impact on the quarry site in isolation. It found the loss of the 32.8 hectares would only be temporary because of reforestation plans on the site and nearby property and ultimately concluded that the loss “does not threaten the health and integrity of the forest or its function and therefore is not a negative impact” (Reasons, p. 58). The majority also revised the phasing of the project to permit ongoing evaluation of the re-establishment of the woodland.

[42] Regarding the issue of noise caused by the proposed haul route of the quarry, the majority concluded that Walker’s noise consultants appropriately modelled the haul route sound level consistently with industry practice. In doing so, the majority rejected CCC’s evidence because that evidence did not reflect the existing noise condition found in the area. Walker’s expert had measured noise against the current sound (which already took into account the sound caused by the existing quarry), while CCC had argued the sound level should be measured against a “null condition” (the sound level without the existing quarry) since that quarry was being shut down.



[43] The majority imposed a number of conditions and limitations on the quarry expansion in order to ensure the protection of the natural environment in accordance with the applicable legislation and policies. It reduced the size of the proposed operation and, as mentioned, it altered the phasing of the expansion to allow more time for mitigation of the impacts on the forest.

[44] Walker had put forward a draft Adaptive Management Plan ("AMP") to be part of the licence conditions under the *ARA*. An AMP is intended "to allow for adjustment of mitigation measures and to implement contingency measures, if required, depending on the results of on-going monitoring during the duration of the quarry license" (Reasons, p. 7). The majority made certain modifications to the AMP and directed the final AMP "substantially in the form presented at the Hearing" be a condition of the licence (Reasons, p. 86). However, it directed that the Minister of Natural Resources approve the final AMP document and third party agreements securing the AMP requirements and forward it to the Joint Board before the final order would be issued, with the final AMP being a condition of the *ARA* licence.

### *The Dissenting Reasons*

[45] The dissent found that the majority failed to apply the tests of the *NEPDA* and *NEP* and instead erroneously applied the *PPS* and the *Planning Act*. It found that Walker had not met its onus to demonstrate the quarry proposal met the purpose and objectives of the *NEPDA* and *NEP*, nor was the proposal "justified" or consistent with the Greenbelt Plan or the *PPS*. It also found the proposal did not satisfy s. 1.5, the Escarpment Rural Area Development Policies for Mineral Extraction.

[46] The dissent made completely different factual findings from those made by the majority on every significant issue. It found the proposed quarry site was at the centre of an intricate array of natural features and systems that, together, amounted to a "unique ecologic area". It found the removal of natural features (including the woodlands) was not vindicated by reforestation in other areas (the "net gain" approach adopted by the majority).

[47] The dissent accepted CCC's argument that the true null condition baseline for measuring quarry haul noise was missing from Walker's noise analysis. In contrast to the majority, it would have assessed noise against the baseline of the community without the existence of the closing quarry.

[48] The dissent also found that the Minister of Natural Resources does not have jurisdiction to finalize the AMP document, as directed by the majority.

[49] The dissent would have dismissed the appeal, but before doing so, it would have given Walker the opportunity to make further submissions for a smaller quarry in a specified location on the site that would not impact the woodland in issue.

### **The Issues in this Application**

[50] *NEC* argues that the majority made significant errors of law that cumulatively result in an unreasonable decision. Specifically, the majority failed to properly apply the tests for making amendments to the *NEP*, which led it to permit the deforestation of a large tract of significant

woodland as part of the approval. Three particular errors were identified: the reversal of the onus on the proponent to demonstrate that the development of the quarry meets the purpose and objectives of the NEP; the failure to give meaning or consideration to key terms of the *NEPDA* and the NEP; and the application of a “net gain” approach in considering the impact of the project on the woodlands.

[51] NEC also argues that the majority erred in delegating the finalization and final approval of the AMP to the Minister of Natural Resources. This is said to be an impermissible delegation and a denial of procedural fairness.

[52] CCC supports NEC in this application for judicial review, but raises a further ground for finding that the majority decision was unreasonable. It argues that the majority erred in adopting a methodology to assess noise impacts that failed to use a “null condition” as a baseline. In other words, the majority should have considered the difference between the noise levels of the proposed quarry and the noise levels if the existing quarry was no longer operating.

[53] Walker, supported by Clearview and Simcoe, argues that the majority directed itself to the proper considerations and fairly and reasonably applied the legislative and policy requirements to the facts as it found them. The majority placed the onus on Walker and found the onus had been met. Its decision that the quarry should be permitted was reasonable and consistent with provincial legislation and policy.

#### **The Standard of Review**

[54] All the parties accept that the standard of review is reasonableness with respect to the issues relating to the application of the plans and relevant legislation such as the *NEPDA*, the *ARA* and the *Planning Act*. The Joint Board was applying statutes and plans with which its members had particular familiarity because of their respective appointments to the OMB and the ERT. As well, the Joint Board is a specialized tribunal whose members have expertise in the areas of planning, environmental issues and the application of the *ARA*.

[55] On the issue of delegation, NEC argues that the standard of review is correctness, as the issue is said to raise a true question of jurisdiction or, alternatively, it raises a legal question of general importance with respect to which the Joint Board has no expertise.

[56] Walker takes the position, supported by Clearview and Simcoe, that the standard of review on this issue is reasonableness. I agree. The Supreme Court of Canada has stated that “true issues of jurisdiction” are rare. Indeed, there is a presumption that the reasonableness standard of review applies when an administrative tribunal is applying its home statute (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654 at paras. 30 and 39).

[57] The decision of the majority to withhold the final order pending the finalization of the AMP is not a true question of jurisdiction. Rather, the Joint Board was making a decision about appropriate steps to be taken prior to the finalization of the licence. That is a matter within its jurisdiction. Therefore, this aspect of the decision is subject to review on a standard of reasonableness as well.

## Analysis

### *Reversal of the Onus*

[58] The onus was on Walker to demonstrate that the development of the quarry met the objectives and purposes of the NEP. NEC submits that the majority effectively reversed the onus, pointing to a number of places in the reasons where the majority states there was “no compelling evidence” to show the harms alleged by the NEC (for example, pp. 18 and 62 of the Reasons).

[59] I disagree. The majority knew the onus was on Walker, as there are a number of places in the majority reasons stating that the onus is on the proponent to demonstrate compatibility between the project and the NEP (see, for example, pp. 9, 10, 11, 20, 22, 28, 35 and 43). Therefore, the majority correctly stated that the onus was on Walker and kept the onus in mind as it proceeded with the analysis of the issues.

[60] Moreover, the majority did not “effectively” reverse the onus and place it on the NEC. When the majority states that there is no compelling evidence of particular harms, a fair reading of the statement is that NEC’s evidence has failed to rebut the evidence led by Walker (see, for example, p. 18 and p. 83 of the Reasons). Therefore, I would not give effect to this ground of review.

### *Failure to Consider the NEP*

[61] NEC argues that the majority applied the incorrect test in determining whether there should be an amendment to the NEP and whether development permits should be issued. More particularly, NEC argues that the majority failed to interpret and apply the three part test for amending the NEP and erroneously chose to apply the “no negative impacts” test in the PPS. NEC also submits that the majority largely ignored the special legislative significance given to the NEP and “refused to give any meaning to the purpose and objectives of the NEP” (Applicant’s Factum, para. 63).

[62] As well, NEC argues that the majority failed to give effect to important terms in the NEP such as “protection”, “maintenance and enhancement”, “preservation” and “unique ecologic heritage.” NEC argues that the majority should have considered the NEP separately from the PPS and then, after determining whether there should be an amendment to the NEP, considered the issue of development permits.

[63] The majority set out the correct test for an amendment to the NEP, found in s. 1.2.1 of the Plan (Reasons, p. 9). The majority clearly understood that the three part amendment test in s. 1.2.1 of the NEP applied to the application to amend the NEP. As well, it acknowledged the special emphasis on environmental considerations in the NEP, describing the NEP as “an environmentally focused plan” (Reasons, p. 10). However, it also properly pointed out that the NEP does permit development, including quarries, if the development is “compatible with the natural environment”, as set out in the purpose of the NEP. Indeed, the majority noted that the objectives of the Escarpment Rural Area designation include as number 5, “to provide for designation of new Mineral Resource Extraction Areas which can be accommodated by an amendment to the NEP.”

[64] NEC also argues that the majority failed to give appropriate consideration to the language of the NEP. In fact, the majority did consider the language of the NEP, but found that the NEP gave little direction in relation to natural heritage features, which formed a significant part of the appeal before the Joint Board. The majority was of the view that the objectives and policies of the NEP contained broad statements that gave little direction. For example, among the matters to be considered in evaluating an application for amendment to re-designate Escarpment Rural Area to Mineral Resource Extraction Area, is the "protection of the natural and cultural environment", followed by a list of features such as groundwater and surface water systems and habitat of endangered, threatened and rare species. Another consideration is the "maintenance and enhancement of the quality and character of natural systems, water supplies, including fish habitat" (NEP, p. 21). "Protection" is defined as "ensuring that human activities are not allowed to occur which will result in the unacceptable degradation of the quality of an environment."

[65] Among the development permit criteria are objectives such as the preservation "as much as possible" of wooded areas (s. 2.7), or development shall be designed to "minimize the impacts upon wildlife habitat" (s. 2.8).

[66] The majority found that "clearer direction" is provided by the PPS (Reasons, p. 12). Therefore, it chose to apply the "no negative impacts" test from s. 2.1.4 of the PPS when considering natural heritage features. The majority concluded that the "no negative impacts" test from the PPS is more specific than the NEP policy requirement of "protection", which establishes a threshold of "unacceptable degradation."

[67] Most importantly, the majority found that there was no conflict between the NEP and the PPS. Had there been a conflict, the NEP would take priority. The test used for finding a conflict was the "dual compliance test": does compliance with one of the plans preclude compliance with the other? The majority did not identify any instance where it was not possible to comply with the policies of both documents.

[68] NEC concedes that the PPS should be considered in assessing a proposed development, but takes the position that the *NEPDA* and NEP are the primary sources of policy to assess the development proposal. However, both the PPS and the NEP apply, unless there is an irreconcilable conflict.

[69] I note that in the argument of this application for judicial review, NEC has failed to identify any conflict between the NEP and the PPS, nor has it shown that there would have been a different outcome if the approach suggested by it had been adopted because the NEP is more stringent than the PPS. Indeed, it appears that NEC accepted that both the PPS and the NEP applied without conflict at the hearing before the Joint Board, because the majority stated (Reasons, p. 13):

All parties recognize the need for the proposal to meet the no negative impact test of the PPS, which was addressed in the evidence of the natural heritage experts called by the NEC and CCC. These witnesses did not establish in their evidence that any additional tests are required through the NEP to protect natural heritage features.

[70] Again at p. 40 the Reasons, the majority stated,

The importance of the PPS tests was at least implicitly acknowledged through the evidence of the natural heritage witnesses for the NEC and CCC because their submissions were heavily weighted toward addressing the requirements of the PPS tests.

The majority concluded that “in meeting the PPS tests, that the provisions in the NEP regarding natural heritage will also generally be met” (Reasons, p. 13). The majority was satisfied that the evidence of the parties and participants supporting Walker’s proposal met the more definitive and rigorous tests in the PPS and, as well, the tests and requirements in the NEP. I see no error by the majority in using the “no negative impacts” test and in proceeding as it did.

[71] In the present application, NEC argued further that the majority failed to consider the terms “maintain and enhance” in objectives 2 and 4 of the NEP. These objectives deal with maintaining and enhancing the quality and character of natural streams and water supplies, as well as the open landscape character of the Escarpment in so far as possible, by such means as compatible farming or forestry and by preserving the natural scenery.

[72] The majority considered the impact of the quarry on a stream system and on the watershed system, concluding that proposed measures and enhancements met objective 2 (Reasons, p. 22). The majority considered NEC’s argument that “maintain and enhance” put a higher burden on the proponent and concluded that “maintain and enhance” did not prohibit any change to the water supply (Reasons, pp. 13-14). Moreover, the majority stated that even if there were added significance to those terms, policy 1(c) of the Development Policies for Mineral Extraction required the maintenance and enhancement of the quality and character of natural systems. That did not prohibit minor or temporary changes to natural systems which are found to be acceptable and where impacts can be mitigated (Reasons, p. 14).

[73] I note that the same wording “maintain and enhance the quality and character of natural streams and water supplies” is also used in objective 2. I am satisfied that the majority did consider the terms “maintain and enhance” and adopted a reasonable approach to determining whether the objectives of the NEP were met.

[74] NEC also argues that the majority acted unreasonably in failing to decide whether the site was a “unique ecologic area”, as mentioned in objective 1 of the NEP.

[75] As that term is not defined in the NEP, the majority chose not to “make a specific finding about which features should be classified as unique ecologic areas” (Reasons, p. 21). Rather, it determined that objective 1 in the NEP, the protection of such areas, should be addressed through an analysis of the impact of the proposal on identified features of the site, including the water resources, the wildlife, endangered species and the woodland. It carefully considered whether each of these ecological features was adequately protected, using the no negative impacts test and assessing the evidence in detail. The majority also concluded that “[t]he requirements of the NEP to protect unique ecologic areas and the NEP’s policy direction related to those areas are addressed through the submissions regarding the more rigorous PPS tests for natural heritage features” (Reasons, p. 40).

[76] In my view, the majority made no legal error in the way it applied the plans and legislation, and it reached a reasonable conclusion when it determined that the purposes and objectives of the NEP were met. It made changes that it felt necessary to protect natural heritage features. For example, it increased the buffer between the Rob Roy 2 wetlands and the proposed extraction area. It changed the phasing of the development from the phases set out in the site plan, so that Phase 3 occurred before Phase 2, and Phase 1 was altered so that it did not take in any part of the significant woodland. This was designed to provide more time for the reforested area to mature, so as to provide proper habitat for adult amphibian wildlife. The majority also decided that the American Hart's Tongue Fern colony should remain outside the licensed area and should be protected through conditions in the site plan and the provisions for monitoring in the AMP.

[77] The problem with the NEC's approach to the majority decision is that it carves out passages from the majority reasons and urges the Court to view them in isolation. That is not a proper approach to review of a tribunal's decision. Rather, the reasons must be read as a whole and in the context of the record (*Newfoundland and Labrador Nurses' Association v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708 at paras. 14-15). When the majority reasons are read as a whole, and the isolated passages are seen in context, it is evident that the majority gave effect to each of the relevant planning documents and the governing legislation.

[78] Finally, NEC argues that the majority erred in assessing the merits of the NEP amendment at the same time that it considered the merits of issuing development permits. NEC submits that a development permit can only be granted if there has been an amendment to the NEP to allow the re-designation of the area for mineral extraction.

[79] However, the submissions by NEC itself mixed the two sets of policies and objectives, as shown, for example, in NEC's comments on Walker's application (see pp. 4, 61 and 126 of Tab 6 of the Application Record). Thus, there was no error by the majority in considering the development criteria when determining whether an amendment to the NEP should be permitted and whether the proposal should be allowed to proceed.

#### *The Net Gain Approach*

[80] The quarry site contains a significant woodland that is part of a larger woodland. The majority approved the removal of approximately 32.8 hectares of woodland on the site. However, Walker is required to plant 8.38 hectares of trees on the licensed site for rehabilitation purposes. As well, it is required to plant trees on other properties it owns in the NEP area (32.61 hectares) and on land adjacent to the NEP area (17.7 hectares). The majority also controlled the staging of the project so as to allow for mitigation by reforesting and monitoring of the efficacy of the reforestation.

[81] NEC's major criticism of the majority decision appears to be the treatment of the woodland on the site. In particular, NEC submits that the provisions of the NEP give greater protection to woodlands than the PPS, relying on s. 2.7, the development criterion relating to new development in wooded areas. That section contains as its only objective to "ensure that new development should preserve *as much as possible* of wooded areas" (emphasis added).

[82] I note that while those words are found in the first paragraph of s. 2.7, the policy also contemplates loss of trees, for it states in paragraph 1 that "disturbance of treed areas should be minimized."

[83] NEC argues that the majority erred in allowing the removal of such a large amount of woodland from the site, having erroneously considered the impact of the proposal on the contiguous forest and having had regard to reforestation efforts on the site and on other neighbouring lands. NEC also argues that the majority erred when it said that s. 2.7 is "more oriented toward traditional and smaller scale developments and is not completely applicable to a quarry proposal" (Reasons, p. 59).

[84] While that sentence is found in the reasons, I note that the majority went on to say that if the section applied, its requirements were met by the protection of trees on adjacent lands and outside the extraction area and through the reforestation plan.

[85] The majority concluded that it should look at the impact of the removal of the trees on the site in the context of the impact of the development on the larger, contiguous forest. It used a "net gain" approach, concluding that "[t]he boundaries of natural features are defined by their ecological characteristics and functions, not by property ownership" (Reasons, p. 58). The majority concluded that there was no negative impact, when one considered the removal of the forest on site in conjunction with the extensive reforestation on lands within and adjacent to the extraction area. It emphasized that habitat was being created in the same forest.

[86] Nevertheless, the majority changed the phasing of the project, as outlined above, in order that there be sufficient time to determine, based on evaluation criteria in the Settlement Agreement, whether subsequent phases should occur (Reasons, p. 60).

[87] That was a reasonable interpretation and application of the NEP and the PPS. If NEC's interpretation of s. 2.7 were correct, it would mean that the assessment of the environmental impact of a development would turn on the property boundaries of the development. The majority reasonably concluded (Reasons, p. 58):

It makes little sense to the Joint Board to confine the limits of a natural heritage feature to property boundaries or that considerations of negative impacts should be similarly limited. The boundaries of natural features are defined by their ecological characteristics and functions, not by property ownership.

### *The Delegation Issue*

[88] The majority required that the ARA licence for the quarry include an AMP, as modified by its decision, and gave conditional approval for the licence under the ARA, with the final order to be issued by the Joint Board only after the Minister of Natural Resources gave approval to the final terms of the AMP in accordance with the Joint Board's directions and after confirmation that Walker had entered into an agreement with a public agency that would hold securities sufficient to ensure the effective implementation and monitoring measures for the lake filling phase as described in the AMP. In its reasons, it described the AMP as "an effective monitoring and long term planning tool to assist the [MNR] in its oversight of the quarry operation, as required by the ARA" (Reasons, p. 83).

[89] NEC argues that this was an improper sub-delegation to the Minister, not authorized by law, and results in a denial of procedural fairness.

[90] Again, this argument is without merit. The majority did not delegate final approval of the licence to the Minister; nor did it defer this matter to the Minister under s. 5(3) of the *CHA*. It directed that the AMP be finalized "substantially in the form presented at the Hearing", subject to the modifications ordered by the Joint Board (Reasons, p. 86, and 109 - 110). The items left to be completed to the satisfaction of the MNR are monitoring of a fern colony located north of the proposed extraction areas and development of some contingency mitigation triggers and protocols, should they become necessary in the future. The decision to request the Ministry's approval is a sensible one, since the Ministry is responsible for the long-term administration of licences and site plans under the *ARA*.

[91] Nor was there a denial of procedural fairness. There was a full hearing before the Joint Board of all the issues provided for under s. 11 of the *ARA*, and NEC and other interested parties were given a full opportunity to present their views on the AMP.

#### *Haul Route Noise*

[92] CCC argues that the majority's decision with respect to the impact of noise from the haulage route was unreasonable. Section 12 of the *ARA* required the Joint Board to determine the impact of the proposed quarry on the environment and nearby communities. The majority accepted a study by an expert witness that used the current level of noise as a baseline. CCC argues that this was unreasonable, as the Joint Board was required to consider the impact of the noise of the proposed new quarry, taking into account that the existing quarry would soon close. Their expert, John Coulter, had testified that the noise impacts of the quarry should be determined by comparing the noise from the new quarry against a "null condition" in which there was no quarry.

[93] CCC also argues that the majority acted unreasonably by failing to perform a long-term analysis of potential noise impacts, particularly the cumulative effect of multiple quarries on the community.

[94] The majority rejected CCC's proposed approach, finding that Walker's noise consultant, John Emeljanow, had "appropriately modelled the haul route sound level changes consistent with established industry practice" (Reasons, at p. 77). It explicitly rejected Mr. Coulter's approach because the approach did not reflect existing conditions in the area or reflect the current practice of the acoustical industry when considering sound changes.

[95] There is nothing in the *ARA* or the relevant plans that requires noise impacts to be compared with a hypothetical pre-existing state. While CCC invokes principles from the environmental assessment process, the Joint Board was not conducting an environmental assessment.

[96] Given that the haul route had been in use for 40 years, it was acceptable for the majority to use the current noise level as the baseline. The approach was consistent with the Ministry of the Environment's *Landfill Noise Guidelines*, the most applicable provincial policy, which



require an assessment of the effect of traffic noise from the proposed development on the "existing noise environment".

[97] The majority concluded that the haul route with the lowest noise impact was chosen and significant steps had been taken to minimize noise caused by haulage – for example, in the Road Settlement Agreement, where the measures agreed upon included limiting the maximum number of trucks on the route to 500 per day, speed limit reductions, and a limitation on the use of reverse engine brakes.

[98] Nevertheless, to ensure that the noise impacts were minimized, the majority also amended the Operational Site Plan for the quarry to prohibit haulage before 6 A.M. or after 5 P.M. Monday to Friday and prohibited any transport of aggregate on Saturday. There were no such restrictions on the existing quarry operations.


[99] In my view, the majority's assessment of the noise impact along the haul route was grounded in the expert evidence that it accepted and was reasonable in light of the applicable provincial policies and the *ARA*.

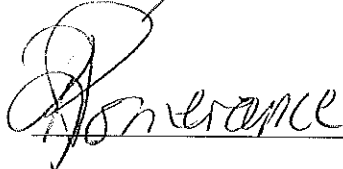
[100] Finally, the majority need not have considered the impact of other trucks from proposed quarries, both because the possible noise impacts would be speculative and because the Road Settlement Agreements prevented any other quarry using Simcoe Road 91 for haulage.

### Conclusion

[101] The decision of the majority of the Joint Board reveals no legal error and is reasonable, given the governing legislation and policies and the evidence before it. Accordingly, the application for judicial review is dismissed.

[102] As agreed by the parties, NEC shall pay costs of \$15,000 to Walker and \$5,000 to the County of Simcoe and Township of Clearview jointly. No costs will be awarded to or against CCC.

  
Swinton J.

  
Pomerance J.

  
Lederer J.

**CITATION:** Niagara Escarpment Commission v. The Joint Board, 2013 ONSC 2497  
**DIVISIONAL COURT FILE NO.:** 535/12  
**DATE:** 20130710

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**DIVISIONAL COURT**  
**SWINTON, POMERANCE AND LEDERER JJ.**

**BETWEEN:**

NIAGARA ESCARPMENT COMMISSION

Applicant

– and –

THE JOINT BOARD, established under the  
*Consolidated Hearings Act*, WALKER AGGREGATES  
INC., THE CORPORATION OF THE COUNTY OF  
SIMCOE, THE CORPORATION OF THE TOWNSHIP  
OF CLEARVIEW, CLEARVIEW COMMUNITY  
COALITION INCORPORATED and EMILIA  
FRANKS

Respondents

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**REASONS FOR JUDGMENT**

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**Swinton J.**

**Released:** July 10, 2013