Office of Consolidated Hearings

Case No.: 08-094

Walker Aggregates Inc.

In the matter of an application by Walker Aggregates Inc. filed October 15, 2008 for a Hearing before a Joint Board pursuant to section 3 of the *Consolidated Hearings Act*, R.S.O. 1990, c. C.29, as amended, regarding a proposal to proceed with an undertaking, namely an expansion of Walker's existing "Duntroon Quarry" for the purpose of extracting aggregate material located on Lot 25 and Part of Lot 26, Concession XII, and Part of Lot 25, Concession XI, in the Township of Clearview, County of Simcoe, Ontario; and

In the matter of a Hearing commencing on May 3, 2010 in Creemore, Ontario.

Before:		Chris Conti, Panel Chair John Peter Atcheson, Panel Member Robert V. Wright, Panel Member
Appearances:		
D. Wayne Fairbrother, Mary Bull, Corey Estrela and S. Ellsworth	-	Counsel for Walker Aggregates Inc.
Ian Rowe	-	Counsel for Township of Clearview
Demetrius Kappos, Orlando DaSilva and M. Golarz (Student-at-law)	-	Counsel for the Niagara Escarpment Commission
Marshall Green and Sherri Elliott	-	Counsel for the County of Simcoe and the County of Grey
David Donnelly and Lia Magi	-	Representatives for the Clearview Community Coalition
Emelia Franks	-	Other Party, on her own behalf

Dated this **18th day** of **June, 2012.**

Reasons for Decision

Introduction

This is the Decision for a Hearing of the Joint Board, composed of two Members of the Ontario Municipal Board and a Vice-Chair of the Environmental Review Tribunal, to consider applications to permit the development of a quarry on the north side of Simcoe County Road 91 in Clearview Township.

The Joint Board heard evidence for 139 days over the course of 39 weeks from 36 expert witnesses, seven lay witnesses and numerous Participants. From the evidence it is clear that the proposed quarry is a highly significant project for the local community which will create jobs and contribute millions of dollars to the local economy. Also clear are the legitimate concerns of the Niagara Escarpment Commission ("NEC"), the members of the Clearview Community Coalition ("CCC") and others about the need to protect the features of the Niagara Escarpment and to maintain the way of life of those residing in the area.

In making its decision, the Joint Board must weigh the benefits that the proposal will provide against any potential impacts. Among the essential tasks of the Joint Board, through examination of the evidence, are to determine if the development of the quarry will pollute or negatively impact wells and streams in the area, if wetlands will be impaired and wildlife harmed, if woodlands or significant plants will be destroyed and if the lives of area citizens will be unduly disrupted. These factors must be viewed in the context of the location of the proposal within the Niagara Escarpment, an irreplaceable natural, cultural and aesthetic feature of Ontario which has been recognized as a World Biosphere Reserve by the United Nations Educational Scientific and Cultural Organization (UNESCO) and is protected through a provincial plan.

These factors and others that the Joint Board must consider find expression in the various statutes and planning documents which have jurisdiction over the proposal and which govern the application and approval process. The statutory and policy requirements for the proposal are discussed in greater detail in this Decision.

Walker Aggregates Inc. ("Proponent") has applied to develop and operate the quarry on the north side of Simcoe County Road 91 in Lot 25 and Part Lot 26, Concession 12, and Part of Lot 25, Concession 11 in the Township of Clearview. The Proponent has operated the Duntroon Quarry on the south side of County Road 91 since the 1960s, but the aggregate material is nearly depleted. The intent of developing the proposed

quarry is to continue the supply of aggregate materials to surrounding communities which will maintain jobs in the local area associated with the operation.

The Proponent applied for approval of the quarry on May 13, 2005, and when approval was not granted filed the appeal in October of 2008. The following approvals are required for the proposed quarry expansion and are the subject of this appeal:

1. An Amendment to the Township of Clearview Official Plan pursuant to the *Planning Act*,
2. An Amendment to the Niagara Escarpment Plan ("NEP") pursuant to the *Niagara Escarpment Planning and Development Act ("NEPDA")*,
3. Niagara Escarpment Development Permits pursuant to the *NEPDA,*
4. A Category 2, Class A License to permit a quarry below water table pursuant to the *Aggregate Resources Act ("ARA").*

The proposal is advanced by the Proponent and, based upon settlement agreements that were entered into prior to the commencement of the Hearing, is supported by the Township of Clearview and the County of Simcoe. Based upon a later agreement the County of Grey also supports the proposal. All three municipalities were Parties at the beginning of this Hearing. Three Parties oppose the proposal. They are the NEC which refused the amendment application to the NEP, the CCC, an incorporated group mainly composed of area citizens, and Ms Emilia Franks.

Three other groups, the Grey Sauble Conservation Authority ("GSCA"), the Nottawasaga Valley Conservation Authority ("NVCA") and the Blue Mountain Watershed Trust are Participants in the appeal who oppose the applications in whole or in part.

Numerous other individuals were granted Participant status in the appeal and made submissions either supporting or opposing the proposal. Their concerns are discussed later in the Decision.

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? The Joint Board answers these critical questions in this Decision.

This appeal requires the resolution of sometimes conflicting fundamental objectives in the applicable planning regime which promote the protection and development of valuable aggregate resources while at the same time require the protection of the Niagara Escarpment, a significant environmental feature, which is protected through a provincial plan, approved pursuant to the *NEPDA*. The Joint Board must determine if the proposal can find harmony among these sometimes competing objectives or if the conflicts are too great in this case to allow the proposal to proceed.

The Board heard extensive evidence during the course of the Hearing. In addition substantial written argument was filed by the Parties accompanied by numerous authorities. A list of witnesses is attached to this Decision as Appendix B. The Joint Board's key findings based on the evidence are included in each section of this Decision where appropriate.

In considering the merits of the proposal, the Joint Board notes that the following points, which were raised through the evidence, have significantly influenced the Joint Board's findings as discussed in the remainder of this Decision:

1. The proposal represents the continuation of a long established land use in the area in view of the existing quarry owned by the Proponent located directly opposite the site on the south side of County Road 91, which has been operating for over 40 years without significant negative impacts to surrounding uses,
2. The many years of data collected from the existing quarry provides valuable information that assisted the various expert witnesses and the Joint Board with the assessment of the potential impacts of the proposed quarry,
3. The current proposal has been studied for over nine years through an iterative planning and review process,
4. The Proponent has entered into agreements with the Clearview Township and Simcoe County which provide substantial benefits to these Municipalities above and beyond those authorized by the statutory framework of the *ARA*, the *Planning Act,* and the *Municipal Act*,
5. Both the Township and County support the proposal and the Township has advised the Joint Board that "the quarry expansion will make a significant contribution to the economic well being of the Township, County and areas beyond" (Clearview Township Argument, p. 1),
6. Simcoe County Road 91 is an established haul route that has served the existing quarry for over forty years as the primary haul route,

7. The proposed quarry will continue to use County Road 91 as the primary haul route as required through an agreement that has been entered into with the Proponent and the Municipalities which addresses truck traffic, required road improvements, safety enhancements and hours of operation,
8. The proposal has been designed to minimize environmental impacts in part through on-going adaptive management measures, and
9. The Ministry of Natural Resources ("MNR") and the Ministry of the Environment ("MOE") have not objected to the proposal.

In consideration of the above factors, and the extensive evidence which addresses potential impacts on the environment and the features of the Niagara Escarpment, the Joint Board finds that the proposal, as amended by the direction set out in this Decision can be undertaken in a manner that is consistent with the requirements of the *NEPDA*, NEP and the 2005 Provincial Policy Statement ("PPS"), and complies with the requirements of the relevant Official Plans, the *Planning Act* and the *ARA*, The Joint Board's reasons for coming to this conclusion are set out in the remainder of this Decision.

As should be apparent from the above, the proximity of the proposal to the existing quarry and evidence related to the existing quarry's performance have significantly influenced the Joint Board's Decision. While the CCC placed some emphasis on the view that this proposal constitutes a new quarry and not an expansion, the Joint Board sees no need to make a specific finding on this point. The proposal has undergone a rigorous review, the extent of which has not been diminished by proximity to the existing quarry. However, the positive history of the existing quarry, the lack of its negative impact on the use of water supplies, the continued presence of natural heritage features in close proximity, and the proposed continued use of the established haul route were all factors in the Joint Board's support of the proposal.

It should be noted that the Proponent's application for a Niagara Escarpment Development Permit in part proposes the use of the equipment at the existing quarry location to process material from the new quarry until space is available in Phase 1 of the proposed quarry to accommodate this function. At that time the equipment will be removed and the final material would be extracted from the existing quarry, and the existing quarry would be rehabilitated and its license surrendered.

Counsel for the NEC raised a concern as set out in materials filed as Exhibit 29 that the Notice of the Undertaking required by the *Consolidated Hearings Act ("CHA")* may not describe and deal properly with the use of the existing quarry area to process material

from the proposed new quarry area. The Joint Board on September 2, 2010 heard submissions on the matter and made a determination on September 27, 2010 as set out in Appendix C to this Decision. The substance of that Decision was to amend the Notice of Undertaking and to require a NEC Development Permit for the use of the existing processing equipment located in the existing quarry to process material from the proposed new quarry on an interim basis. The Joint Board determined the changes to the Notice of Undertaking as set out in Appendix C together with the revised planning documents filed at that time, being Exhibits 124, 125, 126,127 and 130, to be minor requiring no further notice.

Overview of the Proposal

The proposed quarry site is within a rural area, on lands primarily comprised of agricultural fields and woodlands. The site consists of 149.7 hectares (ha.) of land owned by the Proponent in Lots 25 and 26, Concession 12 and Lot 25, Concession 11, Clearview. Within that area the license has been requested to cover 76.7 ha. with extraction proposed on 64.8 ha.

The site is bounded on the south by Simcoe County Road 91 and on the west by Grey Road 31. The existing quarry is on the south side of County Road 91 directly opposite the proposed site.

Rural lands on the west side of Grey County Road 31 are subject to another quarry proposal known as the MAQ quarry. To the north and east of the proposed quarry site are rural residential uses and some limited agriculture.

Nottawasaga Sideroad 26/27 is located north of the site in an east/west alignment and abuts some of the lands owned by the Proponent north of the proposed excavation area.

Both the proposed quarry site and the location of the existing quarry are within the area of the *NEP*. The brow of the Escarpment is located more than 400 metres to the east and northeast of the site.

The Proponent intends to remove approximately 41.4 million tonnes of Amabel dolostone from the extraction area. The dolostone is considered suitable for use in making high quality aggregate products.

The proposal involves three phases of extraction. The first phase is located primarily in an agricultural field adjacent to County Road 91. The second phase is west of Phase 1, extending to Grey Road 31 and has two sub-phases, 2A and 2B. Phase 2B has been delineated because it contains a number of Butternut trees, identified as an endangered

species under the *Endangered Species Act ("ESA")*. Specific provisions in the Site Plan apply to Phase 2B, which will permit extraction if the appropriate provisions of the *ESA* can be satisfied. Phase 3 occupies the north-central and northeastern part of the extraction area.

Extraction is generally proposed to take place in a radial pattern along the perimeter of each phase, gradually progressing from south to north. A limit of 2.5 million tonnes annually can be removed, although it is expected that 1.5 million tonnes will be removed in a typical year. Using an annual extraction rate of 1.5 million tonnes, the proposed quarry will operate for 28 years.

Rehabilitation measures include planting along slopes, creation of a wetland in the northwest corner, reforestation of lands to the north and east of the quarry and of lands off site, and the creation of a quarry lake. The lake will occupy 54.5 ha. comprising the majority of the extraction area, and it is expected to fill with water over approximately 30 years.

Mitigation of potential impacts and monitoring of various features and parameters is proposed, much of it within the context of an Adaptive Management Plan ("AMP"). The intent of the AMP is to allow for adjustment of mitigation measures and to implement contingency measures, if required, depending upon the results of on-going monitoring during the duration of the quarry license.

Statutory and Policy Tests

The essential decision for the Joint Board is to determine if the Proponent has fulfilled its obligation to comply with the statutory and policy tests set out in the legislation and planning documents. While the Joint Board has carefully considered all of the evidence and submissions provided in this appeal, the critical evidence necessary to determine whether these tests have been met is the focus of this Decision.

It is clear to the Joint Board that the tests that must be considered in evaluating the applications are enunciated mainly through the policy directions of *NEPDA*, NEP and the PPS. Section 4.9 of the PPS gives provincial plans, and therefore the policies of the NEP, priority over the PPS to the extent of any conflict. A conflict exists between two statutes or policies only where there is an impossibility of dual compliance. That is complying with one policy would make it impossible to comply with the other. In considering the relevant policies of the NEP and the PPS, the Joint Board has not identified any instances where it is not possible to comply with the policies of both documents. While the NEP is the senior provincial planning policy document governing

the subject property and is in place to implement the purpose and objectives of the *NEPDA,* it is clear to the Joint Board the proposal must comply with the requirements of both the NEP and PPS.

The *Planning Act* establishes a policy regime which requires an assessment and balancing of concerns and interests when reviewing planning applications. Through the NEP, as a provincial plan some priority has been given to the protection of the area of the Niagara Escarpment within the NEP as expressed through the its provisions and land use designations. However, the balancing inherent in dealing with applications must still take place. As noted elsewhere in this Decision, the NEP does not prohibit new development, but development must be compatible with the purpose of the NEP and with the natural environment. The economic and social benefits that may accrue to communities from development proposals are legitimate considerations to weigh against potential impacts on environmental features and individuals as long as the provisions of the NEP are maintained. Of course the provisions of the PPS and other relevant planning documents must be maintained as well.

It is also clear to the Joint Board from the evidence that the local planning documents (the County and Township Official Plans) are complementary and consistent with the Provincial policy directions of the NEP and the PPS and any differences in wording are found to be minor and are not in conflict with the overall directions of the NEP or the PPS. It is clear from the testimony of the planning witnesses that the NEP and PPS are the premier planning documents. Most of the planning witnesses proffered that the Provincial Greenbelt Plan defers to the NEP policies in this particular case. It is the Joint Board's finding that there is nothing in the proposed application that would impact the Greenbelt Plan, the optimum route of the Bruce Trail is not impacted by the proposal, and any changes to Sideroad 26/27 and the one or two current on road parking spaces that might currently exists is nominal and can be effectively considered and mitigated when this road is reconstructed.

It is clear that the NEP and the PPS are the primary Provincial planning policy documents and that the Township of Clearview's and the County of Simcoe's Official Plans must be consistent with the NEP where their jurisdictions overlap. The Joint Board after considering these documents and the testimony of the various planning witnesses concludes that the primacy of the NEP and PPS are not supplanted by the Municipal Official Plans in any way shape or form and as such the pertinent policy tests are found within these Provincial documents.

The policy tests are discussed further below in relation to the required approvals.

Niagara Escarpment Plan

The NEP was approved in accordance with the *NEPDA*. Section 2 of that Act sets out its purpose which 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." Section 6.1 of the *NEPDA* sets out the process to amend the NEP.

The proposed quarry requires an NEP amendment to change the designation of the proposed extraction area from Escarpment Rural to Mineral Resource Extraction, and special policies are required to permit water management and mitigation activities on portions of the site that are designated Escarpment Protection Area and Escarpment Rural Area.

In addition development permits are required to allow the extraction and also to permit on a temporary basis the continued operation of an aggregate processing facility on the existing quarry site until sufficient area is available to locate the facility on the proposed site.

Section 1.2.1 of the NEP (Exhibit 43, Book 1, Tab 3) identifies three provisions which the Parties agree must be fulfilled to allow Plan Amendments. Through these provisions the onus is on the Proponent to demonstrate; that with any proposed changes to land use policies and designations the purpose and objectives of the NEP and *NEPDA* will still be met, that the proposed amendment is justified, and that the proposed amendment and its expected impact "will not adversely affect the purpose and objectives of the *NEPDA"* which are incorporated into the NEP.

The purpose and objectives of the NEP, stated at the beginning of the Plan, are as follows:

> The purpose of this Plan 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.

The objectives of the Plan are:

1. To protect unique ecologic and historic areas;
2. To maintain and enhance the quality and character of natural streams and water supplies;
3. To provide adequate opportunities for outdoor recreation;
4. 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;

5. To ensure that all new development is compatible with the purpose of the Plan;
6. To provide for adequate public access to the Niagara Escarpment; and
7. To support municipalities within the Niagara Escarpment Planning Area in their exercise of the planning functions conferred upon them by the *Planning Act*.

From the above it is clear that the NEP is an environmentally focused plan. However, there is no intent in the NEP to prohibit new development. Development is allowed but only that which is compatible with the natural environment. The Proponent must demonstrate this compatibility.

Mineral resource extraction is a use that is contemplated within the NEP area. Through the policies of the NEP, plan amendments may be permitted to allow new aggregate extraction operations only in areas designated Escarpment Rural. The objectives of the Escarpment Rural Area designation are set out in section 1.5 of the NEP as follows:

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 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 NEP.

It is important to note that objective #5 above specifically provides for the designation of new Mineral Resource Extraction Areas. Unlike many Official Plans, the NEP does not designate or identify areas of potential mineral resource extraction. The areas designated Mineral Resource Extraction in the NEP identify only locations of existing operations, and the manner in which the Plan allows for the development of new mineral extraction uses is through objective #5.

In the Joint Board's opinion, the inclusion of an objective in the Escarpment Rural Area designation of the NEP is an expression of the importance of providing for new Mineral Resource Extraction Areas within the NEP area where appropriate. The NEP could have included a simple policy whereby new Mineral Resource Extraction areas could be considered through plan amendments, but this provision is incorporated into the NEP as an objective in section 1.5. The intent of planning objectives is generally that they should be achieved through implementation of the provisions of the plan. There are no

other objectives in the seven land use designation sections of the NEP which state that a different type of land use may be permitted through a plan amendment. The inclusion of this objective in section 1.5 reveals the intent of the NEP to provide for appropriate new Mineral Extraction operations in areas designated as Escarpment Rural, where the requirements for amending the NEP can be met. As noted earlier, only within the Escarpment Rural Area designation of the NEP is consideration of a re-designation to Mineral Resource Extraction permitted.

In addition to meeting the requirements of section 1.2.1, the NEC contends that onus is on the Proponent to demonstrate that the proposal meets all objectives of the NEP (Exhibit 43, Book 1, Tab 3, p. 296) as well as all objectives of the Escarpment Rural Area designation and all of the Development Criteria in section 2 of the Plan.

The Proponent questions whether it is necessary to meet all of the objectives for the Escarpment Rural Designation and contends that the main policy considerations are the Development Policies for Mineral Extraction contained in section 1.5 and the development criteria for Mineral Resources in section 2.11.

The Joint Board has reviewed the submissions and finds that the onus is on the Proponent to meet all relevant objectives, policies and development criteria, not only the policies for Mineral Extraction in section 1.5 and the Development Criteria in section 2.11. The NEP does not appear to limit the application of development criteria to only those identified for specific types of development. However, not all development criteria apply in every case. For example, the development criteria in section 2.4, Lot Creation, would not apply to proposals where new lots are not being created and section 2.5 would not apply unless new development could affect steep slopes and ravines. From a review of the NEP, it is obvious that some policies and development criteria are clearly not relevant to the proposal and do not need to be addressed through the application.

Also, the Joint Board finds no basis in the evidence for favouring some objectives over other legitimate objectives of the Plan. For example, the NEC suggested that the Proponent is not meeting objective #3 for the Escarpment Rural Area designation because the proposed extraction area will remove forest and agricultural lands. However, the Joint Board does not believe the intent of this section is necessarily to encourage forestry and agriculture to the exclusion of new mineral resource extraction operations, which are contemplated and can be accommodated by amendment to the NEP in accordance with objective #5. The Joint Board expects that forestry and agricultural uses would characterize many potential quarry sites within the NEP area. The quality and importance of these uses must be weighed when considering the desirability of mineral extraction on the same lands. If through consideration of the

provisions of the NEP it is determined that agricultural and forestry uses should have priority, then it may not be appropriate to allow a mineral resource extraction operation which would significantly affect those uses. However, if through the provisions of the NEP it is determined that a mineral resource extraction operation can be accommodated and the purpose and objective of the NEP will be maintained, then the Joint Board interprets the objectives of the section 1.5 as permitting some disruption of these uses to allow quarrying, at least as an interim use. In other words objectives 1 to 4 of section 1.5 cannot be interpreted and applied in a way that amounts to a *de facto* prohibition against objective 5.

Natural heritage issues are a significant part of this appeal. However, the NEP provides little direction about how to satisfy its provisions related to natural heritage areas. The policies and objectives of the NEP relating to natural heritage resources and the Escarpment environment provide general direction and use terms such as “protection” of these areas, “minimizing the impact”, and “preserve as much as possible”. There is little definitive guidance in the NEP regarding what constitutes protection, when impact is not minimized, and the amount of area that needs to be preserved. Many of these areas find higher levels of protection in other land use designations contained within the NEP.

Clearer direction is provided in the PPS. Section 2.1.3 of the PPS prohibits development and site alteration in significant habitat of endangered and threatened species, significant wetlands in that part of the province which includes the subject area, and significant coastal wetlands. This policy is straightforward and prohibitive. There can be no development or site alteration in the noted types of areas.

However, section 2.1.4 of the PPS is more permissive. Development and site alteration may be permitted in areas containing specified types of natural heritage features provided it is demonstrated that there will be no negative impact on the natural heritage features or their ecological functions. The term “negative impact” for the natural heritage features on and in proximity to a site is defined as, “…degradation that threatens the health and integrity of the natural features or ecological functions for which an area is identified due to single, multiple or successive development or site alteration activities” (Exhibit 37, Vol. 1, Tab 7, p. 225). The relevant provisions of the NEP do not prohibit development in those types of natural heritage features covered by section 2.1.4 of the PPS and they provide little guidance about the extent of these areas that can be disturbed, or more importantly the way to evaluate the significance of potential impacts. The PPS provides such guidance. The PPS does not prohibit all impacts on features or functions. However, impacts which meet the PPS definition of

negative impact are prohibited, that is those which are substantial enough to threaten the health and integrity of the feature or its ecological function.

The Joint Board finds that in some cases the PPS imposes a somewhat more rigorous planning policy regime than the NEP but in the Joint Board's findings these differences do not create any irreconcilable conflicts or inconsistencies between the polices of the NEP and the PPS.

The Joint Board finds that the Natural Heritage policies in the PPS do not conflict with the policies of the NEP. There is no impossibility of dual compliance. The relevant policies of the PPS simply give more specific direction that can be used to implement the relevant sections of the NEP.

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. The Joint Board finds that in meeting the PPS tests, that the provisions in the NEP regarding natural heritage will also generally be met. The Board finds that the no negative impact test is the determinative test for the protection of most of the natural features that may be impacted by the proposal.

The PPS through section 2.1.6 requires that the no negative impact test be applied to adjacent lands to natural heritage features as well as the area of the feature. The extent of adjacent lands is guided by the provisions of the Natural Heritage Reference Manual (Exhibit 37, Vol. 2, Tab 24), a document produced by the Province to assist in the implementation of the PPS Natural Heritage policies.

Water features are addressed in a number of sections of the NEP including objective #2 and section 2.6. The PPS addresses water features through section 2.2. The Joint Board finds that there is consistency between the provisions of both documents. The provisions require the protection of the quantity and quality of water resources and water supplies. There is no prohibition against the use of water resources and water supplies. The NEP policies recognize the need for proposals to meet the requirements of MNR, MOE, and the Conservation Authorities.

The NEP objective #2 refers to maintaining and enhancing the quality and character of natural streams and water supplies. There has been some debate at this Hearing about the significance of the term "maintain and enhance", with the NEC witnesses suggesting that it places a higher burden of protection on the Proponent. However, the objectives of the NEP are enunciated through the specific policies and development criteria.

These policies require the protection of water resources and the evaluation of potential negative impacts. Section 2.6 of the NEP, entitled, “New Development Affecting Water Resources”, indicates that the objective is to ensure that new development “will have minimum individual and cumulative effect on water quality and quantity” (Exhibit 43, Book 1, Tab 3, p. 349). As noted in the Proponent’s reply argument, section 2.6 recognizes that stream diversions may be permitted in some circumstances. These policies recognize that some change may be acceptable. There are no policies that require the retention of every linear metre of every stream and watercourse in their existing condition and that require absolutely no change to any water supply. The Joint Board finds that the NEP assigns no such prohibition or added level of protection through the term “maintain and enhance” as it relates to water resources and water supplies.

The test with regard to water resources and water supplies for both the NEP and the PPS is to ensure they are protected and, as referenced in section 2.2.1 of the PPS, to minimize negative impacts. Section 2.2.2 of the PPS also requires that development and site alteration should be restricted near sensitive water and ground water features and that these hydrologic features should be protected, improved, or restored.

The Joint Board notes that policy 1(c) in the NEP’s Development Policies for Mineral Extraction requires the “maintenance and enhancement of the quality and character of natural systems, water supplies,. …” (Exhibit 43, Book 1, Tab 3, p. 316). Similarly, as discussed above with regard to water resources and water supplies, the Board assigns no special significance or added level of protection through use of the terms “maintenance” and “enhancement”. They are not defined terms in the NEP. Furthermore, even if there were some added significance to these terms, policy 1(c) requires the maintenance and enhancement of the “quality and character” of natural systems. The Joint Board sees no prohibition through this policy against some minor or temporary change to natural systems which can be determined to be acceptable and where impacts can be appropriately mitigated. As noted above, in the Joint Board’s opinion the more definitive tests with regard to natural systems are provided by the PPS.

Precautionary Principle

The CCC and the NEC referenced the Precautionary Principle as a key consideration that should guide the Joint Board’s decision. They note that through the Decision *114957 Canada Ltee (Spraytech, Societe d’arrosage) v. Hudson (Town)* [2001] 2 S.C.R. 241 the Supreme Court of Canada has recognized the precautionary principle as a

tenet of international law which has been incorporated into Canadian law. The above Decision quotes the definition of the precautionary principle from the Bergen Ministerial Declaration on Sustainable Development (1990) as follows:

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

The Proponent does not dispute the relevance of the precautionary principle, but maintains that it has many permutations and it is not a standard by which to measure the applications. The Proponent contends that while it is a principle of international law, the precautionary principle has been incorporated in statutes in various ways and the Joint Board should be more concerned about the relevant specific statutory and policy requirements for the proposal. The Proponent also contends that the AMP, which is further discussed later in this Decision, by addressing results based mitigation, is an example of how the proposal applies the precautionary principle.

The CCC and the NEC contend that the precautionary principle applies directly to the proposal. Furthermore, they maintain that the MNR Statement of Environmental Values ("SEV") must be considered by the Joint Board in its Decision and that the SEV contains a restatement of the precautionary principle. Designated Provincial Ministries are obligated through the *Environmental Bill of Rights* to prepare a SEV and implement it through their policies and everyday operations. Therefore, the CCC and the NEC contend that the Joint Board must ensure that its decision is consistent with the precautionary principle.

The Joint Board recognizes the precautionary principle as an important consideration in its decision. However, the Joint Board agrees with the Proponent that there is no single version of the precautionary principle and it can be applied in many ways.

The evidence has established that the MNR SEV applies directly to the proposal. The Joint Board agrees with the NEC's submission as established in *Lafarge Canada Inc. v. Ontario*, [2008] O.J. No. 2460 (Div. Crt.) that the intent is not just to reflect SEV in policy, it must be applied by the MNR and now through this appeal by the Joint Board, in making decisions on individual applications.

The clause in the MNR's SEV that relates to the precautionary principle is as follows:

> As our understanding of the way the natural world works and how our actions affect it is often incomplete, MNR staff should exercise caution and special concern for natural values in the face of such uncertainty.

(Exhibit 48, Tab 2H).

Based upon the above considerations, when reviewing the potential impact of the proposal on natural heritage features and functions, the Joint Board finds that it is obligated to consider the precautionary principle as stated in the MNR SEV. The above statement may not go as far as some interpretations of the precautionary principle. However, the Joint Board finds that it captures essential elements and the general intent of the precautionary principle referenced in the Supreme Court of Canada Decision noted above in that the SEV requires placing some priority on the protection of natural features, even when there is not absolute certainty regarding if, or in what manner, they may be affected by human actions.

Particularly in view of the environmental focus of the NEP, the Joint Board in making this decision will "exercise caution and special concern for natural values" in the face of uncertainty. The Joint Board after considering the evidence is satisfied that the MNR has followed its SEV in reviewing and commenting upon this proposal.

Township of Clearview Official Plan

The Township of Clearview Official Plan incorporates the designations and provisions of the NEP for the NEP plan area. The designations in and around the quarry site in the Clearview Official Plan are the same as in the NEP, with the proposed license area designated as Escarpment Rural Area.

The proposal requires an amendment to the Clearview Official Plan to re-designate the proposed license area to Mineral Resource Extraction Area together with special policies to allow for quarry water management, reforestation plans, and other mitigation measures within lands designated Escarpment Protection Area and Escarpment Natural Area, as set out in the proposed Township Official Plan Amendment found at Exhibit 37, Vol. 3, Tab 54, p. 2666 and revised at Exhibit 125.

The onus and tests for the Clearview Township Official Plan amendment are the same as those enunciated above for the NEP.

Aggregate Resources Act

The main tests for the proposal under the *ARA* are set out in section 12 as follows:

> In considering whether a license should be issued or refused, the Minister or the Board, as the case may be, shall have regard to,
>
> (a) the effect of the operation of the pit or quarry on the environment;

(b) the effect of the operation of the pit or quarry on nearby communities;

(c) any comments provided by a municipality in which the site is located;

(d) the suitability of the progressive rehabilitation and final rehabilitation plans for the site;

(e) any possible effects on ground and surface water resources;

(f) any possible effects of the operation of the pit or quarry on agricultural resources;

(g) any planning and land use considerations;

(h) the main haulage routes and proposed truck traffic to and from the site;

(i) the quality and quantity of the aggregate on the site;

(j) the applicant's history of compliance with this *Act* and the regulations, if a licence or permit has previously been issued to the applicant under this *Act* or a predecessor of this *Act*; and

(k) such other matters as are considered appropriate."

The onus is on the Proponent to satisfy the Minister, and now the Joint Board, with regard to the above matters.

Additional Planning Requirements

The County of Simcoe Official Plan designates the proposed license area as "Greenland and Rural and Agriculture" and Schedule 5.1 "Land Use Designations" depicts the location of the NEP Boundary. No amendments were required by the County or proposed by the Proponent to the County of Simcoe Official Plan. The tests under the municipal planning documents are similar to those required by the PPS and the NEP.

Any additional requirements of the relevant planning documents are discussed in the remainder of this Decision.

Planning Considerations

While the NEP has an environmental focus, the Joint Board finds that it is not a one dimensional planning document. The NEP contemplates balance between competing land use policy objectives when it comes to the consideration of a quarry within this part of the NEP Area and in particular within areas designated Escarpment Rural Area.

The purpose of the NEP is twofold:

> FIRSTLY, to maintain "…the Niagara Escarpment and land in its vicinity substantially as a continuous natural environment", and

> SECONDLY, "… to ensure only such development occurs as is compatible with that natural environment." (Emphasis added)

Words such as "substantially" and "compatible" are concepts open to interpretation, are not absolute terms, and go to the diversity of uses found within the NEP Area and the requirement to find an appropriate balance between competing Purposes and Objectives. There is no compelling evidence before the Joint Board that the proposed application would offend the first Purpose of the NEP, as in this area the Niagara Escarpment and lands in its vicinity will be maintained as a substantially natural environment and there will be no break in the continuous natural environment resulting from this application. This is clearly shown on Exhibits 314 and 315. Nor is there any compelling evidence that a quarry use cannot be compatible with the natural environment. In this regard the Joint Board would note that a number of pits and quarries have been permitted in closer proximity to the Brow of the Niagara Escarpment and have been deemed to be compatible both as an interim use and with rehabilitation as an appropriate after land uses.

The NEC contends that the proposal does not meet the Purpose of the NEP. The Joint Board does not agree.

The uncontradicted evidence is that the Escarpment Rural Area designation has been on the subject lands since the inception of the NEP without change and that a quarry can be considered as an appropriate use for these lands subject to a NEP amendment.

As noted earlier in this Decision, the issue for the Joint Board is, within the provisions of the relevant statutes and planning documents, determining the appropriate balance between the environmental, economic and social benefits to the Provincial and local economies of mining this aggregate resource and the environmental, economic and social benefits of protecting unchanged the features of the Niagara Escarpment found on the entire site and the environmental, economic and social benefits that flow from them to society.

This balancing of these competing public interests goes to the heart of the matters the Joint Board must decide in this case, and has framed the positions of the various opposing parties in this Hearing.

The Joint Board notes in this case that there is a plethora of planning policy regimes in place (the County and Township Official Plans, the NEP, the PPS, The Green Belt Plan) purporting some planning policy jurisdiction over the NEP Area. While, this maybe bureaucratically satisfying it does nothing to assist in a clear understanding of the importance of the NEP. Perhaps the goals and objectives of the NEP would be better

served if in the local planning policy documents they merely referenced and deferred to the policy directions of the NEP. The attempts to mimic the NEP in local planning documents are confusing and provide little added planning value to the general public. The resultant conflicting planning policy interpretations as demonstrated at this Hearing can provide little comfort or planning certainty to anyone.

The Joint Board during the course of this Hearing heard conflicting opinion evidence from six well qualified professional planners regarding the interpretations to be applied to the various provincial and local planning documents having some policy jurisdiction over the subject proposal. The differences in the local planning documents due to subtle word variations and interpretations proffered by the planning experts are in many ways counterproductive to good planning. One must wonder how individuals could ever find their way correctly through this planning policy morass when six well qualified professional planners with many years of experience found so many areas of disagreement with respect to the meaning of these local planning policy documents. When well qualified professional planners testify that some of the applicable planning policies are befuddling and not clear, there is room for improvement. Good planning policy should be clear and concise so that citizen, approval authorities, and planning professionals can clearly understand their purpose and meaning. The minor contradictions found in the multiple planning policy documents in no small part have contributed to this very lengthy Hearing and offer little guidance to the overriding planning policies found in the NEP and the PPS.

In making these comments, the Joint Board has not even taken into consideration the requirements of the *ARA* or the MNR and the MOE legislated mandates and their published guidelines as they may relate to quarries and matters associated with those mandates.

The responsibility for the planning of the Niagara Escarpment Area clearly falls to the NEC as reflected through the NEP. The confusion that results from the overlaying of local Official Plans within the NEP area is not helpful.

It is clear from the evidence of the NEC's expert planning witness, Kathyrn Pounder, that the NEC's review of the subject applications followed an iterative planning approach with the applications being modified to respond to legitimate concerns raised by the various commenting and approval agencies. This iterative planning approach has continued up to and during the Hearing. In the end, the various commenting agencies and some of the approval authorities have taken differing positions regarding the matters now before the Joint Board and as a result developed different strategies to ensure that their perceived interests and concerns are maintained.

The tests for an Amendment to the NEP and the policy guidelines for an amendment are set out in Part 1.2 and require that the amendment maintain the purpose and objectives of the NEP, that the amendment be justified and that impacts from the amendment do not adversely affect the purpose and objectives of the *NEPDA*.

The NEC contends that the applications meet none of the requirements for an amendment as set out in Section 1.2 of the NEP.

The NEC maintains that the NEP Amendment has not been properly justified as required in the "Tests for Justification" found in the "Niagara Escarpment Plan Amendment Guidelines" (Exhibit 48, Tab 2A, p. 3) which states:

> That the proposed amendment is in the public interest and there is a need to accommodate the proposed use within the Plan given the availability of alternatives both within and outside the NEP, within the market area where the proposed use maybe located.

The MAQ and Melancthon quarry proposals and the existing Osprey quarry licensed area are considered by the NEC as possible alternatives that are outside of the NEP area.

In the cross-examination of Ms Pounder, Exhibit 304 was raised, which is an NEC staff report setting out a protocol with the MNR and Minutes of the NEC dated April 15, 2010. The protocol acknowledges that a supply and demand analysis, together with a consideration of alternative sites, is not a requirement of the planning justification required by the NEC. The MNR, in a letter dated November 17, 2006 (Exhibit 37, Vol. 13, Tab 146), confirmed that there is a need for the aggregate as had been their practice with the NEC in the past and its staff advised that in their opinion the requirements of Section 2.5.2.1 of the PPS were met.

It is the Joint Board's conclusion from a careful review of the NEP that there is no specific policy in the NEP that would be in conflict to override Section 2.5.2.1 of the PPS which states:

> 2.5.2.1 As much of the *mineral aggregate resources* as is realistically possible shall be made available as close to markets as possible.
>
> Demonstration of need for *mineral aggregate resources*, including any type of supply/demand analysis, shall not be required, notwithstanding the availability, designation or licensing for extraction of *mineral aggregate resources* locally or elsewhere."

The Joint Board finds that Section 2.5.2.1 of the PPS applies as there is no specific or more rigorous policy in the NEP that would be in conflict with this policy of the PPS, nor does the Joint Board accept that mere proposals that have no approvals such as the

MAQ or Melancthon applications constitute meaningful alternatives that should be considered.

It is also clear from the evidence that previous Hearing Officers and the Provincial Cabinet have rejected the policy that alternative locations for aggregate supply should form part of the justification for a NEP amendment.

This Joint Board concludes that our colleagues in the Decision, *Dufferin Aggregates, a Division of St. Lawrence Cement Inc., Case 03-086*, 2005 (Exhibit 66, p. 16) were correct when they said:

> the Board agrees with the argument of Counsel for the proponent that to require a study regarding whether the existence of alternative supplies of aggregate outside the NEP area are available, would be a *de facto* prohibition on large pits or quarries. This was not the intent of the Hearing Officer's or Cabinet's decision in 1994 or the intent of the NEP today.

The Joint Board would also conclude that the other tests for an amendment as set out in Part 1.2 of the NEP are the precise matters to be determined by this Decision and that need for or the availability of alternative aggregate sites close to market do not need to be considered.

The Joint Board will now turn to consider the NEP's objectives.

With respect to NEP objective #1 noted earlier in this Decision, the Joint Board accepts the evidence of the Proponent's expert planning witness, Mr. Clarkson, and the Ministry of Tourism, Culture and Sport, that there will be no significant loss of cultural heritage features resulting from the loss of the farm buildings on the site and that proper documentation of these features is sufficient as set out in the Site Plan Notes (Exhibit 378). With regard to the need to protect unique ecologic areas, the Joint Board notes that there is no definition of these areas in the NEP and there are no policies that specifically refer to this term. There is some dispute among the Parties whether some of the natural heritage features in the subject area should be classified as unique ecologic areas. In the absence of a definition or NEP policy, the Joint Board will not make a specific finding about which features should properly be classified as unique ecologic areas. The Joint Board notes, however, that the direction in this objective is that these areas be protected. The requirements of this objective are addressed in the Joint Board's findings regarding natural heritage features which are discussed later in this Decision.

The NEC contends that objective #2 cannot be met because of the loss of the SW2A and SW2B stream system in the southwest corner of the property and because of perceived negative impacts on the watershed system in the immediate area.

The Joint Board as set out in other parts of this Decision is satisfied that during the now proposed Phase 3 part of the extraction that a portion of this stream system on the site can be removed without any negative impacts and that impacts on watersheds have been appropriately addressed. The proposed measures and enhancements will meet objective #2 of the NEP.

With regard to objective #3, the evidence is that the proposal does not strongly offend this objective.

The NEC acknowledges that the site is not categorized as prime agricultural lands and that their loss was of no concern to the Ontario Ministry of Agriculture, Food and Rural Affairs. However, the NEC contends that maintaining the agricultural use would be preferred to the proposed quarry use in keeping with objective #4. The Joint Board, after considering the all of the testimony, finds that the removal of the agricultural use does not offend the PPS and would be consistent with a full and fair reading of objectives #4 and #5 of the NEP.

With regard to objective #5, the Joint Board deals with the issue of the Purpose of the NEP, the issue of the Open Landscape Character, and the determination of the meaning of the word “compatible” in other parts of this Decision. Based on those determinations the Joint Board is satisfied that objective #5 of the NEP is met.

The Joint Board in its discussion of the testimony of the NEC’s visual and site assessment expert witness, Ms Laflamme, elsewhere in this decision, and the road settlement agreements is satisfied that objective #6 is met.

The Joint Board is also satisfied that objective #7 of the NEP will be met by the proposed amendment. The Joint Board is cognizant of the substantial benefits to the Township of Clearview and County of Simcoe that will flow from development of the quarry and the settlement agreements. These include millions of dollars for required road improvements, the protection of sensitive Escarpment features through conservation easements, and funding for the purchase of environmentally sensitive lands and for tree planting. The intent of objective #7 of the NEP is to support municipalities in the exercise of their *Planning* Act functions. This does not mean that the NEP defers to *Planning Act* considerations, but simply that the determinations under the *Planning Act* are legitimate considerations in fulfilling the objectives of the NEP. The Township of Clearview and County of Simcoe in this case have determined that, in

part based upon the benefits that will accrue from the settlement agreements, that the proposal is good planning and meets the requirements of the *Planning Act*. These are all significant factors in the Joint Board's evaluation in relation to subsection 2.1 of the *Planning Act* which requires the Board to have regard for the decisions of municipal council.

The NEC contends that the proposal must meet all of the objectives of the Escarpment Rural Area Designation and the Development Policies for Mineral Extraction as well as the applicable Development Criteria found in Part 2 of the NEP.

The objectives of the Escarpment Rural Area designation are noted earlier in this Decision. It is the Joint Board's finding that the five objectives set out in section 1.5 of the Escarpment Rural Area designation are separate and distinct and should not be construed as in conflict with one another. Furthermore, there is no evidence that one objective should trump another or that for one objective to succeed at a particular location that a loss or modification of another objective cannot be considered. Clearly the long standing NEP policy has been to continue to consider quarry applications through the NEP amendment process and to find a balance between the competing objectives of this section of the NEP and the other competing public interest needs for this aggregate resource. The Joint Board finds that there is no other reasonable interpretation of the NEP.

As noted earlier, although the Joint Board agrees that while all objectives and development criteria apply, not all objectives or development criteria are relevant to every application and it is reasonable that objectives can be met to varying degrees. With regard to objective #4, it is acknowledged that Escarpment Rural Areas are established to provide buffers to the more ecologically sensitive areas. However, it is likely that any development of the Escarpment Rural lands would reduce the buffers. The test for the Joint Board is to ensure that buffers are appropriate and ecologically sensitive areas are protected which would meet the intent of objective #4. This matter is dealt with elsewhere in this Decision in the review of the proposal in relation to natural heritage features.

Clearly when one proposes to move from one land use designation to another, the tests must be those set out for an Amendment in the NEP.

The NEP requires in considering an Amendment from Escarpment Rural Area to Mineral Resources Extraction Area, that the Proposal comply with the Development Policies for Mineral Extraction in section 1.5, which states in part:

1. In evaluating applications for amendment to the NEP to redesignate Escarpment Rural Area to Mineral Resource Extraction Area, the following matters will be considered:
   a) Protection of the natural and cultural environment, namely:
      i) Groundwater and surface water 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;
      iv) Adjacent Rural Area natural features;
      v) Existing and optimum routes of the Bruce Trail;
      vi) Provincially significant wetlands;
      vii) Provincially significant ANSIs; and
      viii) Significant cultural heritage features
   b) Opportunities for achieving the objectives of Section 8 of the *NEPDA* 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.

This section of the NEP, while somewhat more detailed in its construction in the Joint Board's findings, parallels the guidelines for an Amendment as set out in Part 1.2 quoted earlier in this Decision and it sets out in a rather clear fashion the tests and obligations a proponent must meet if an NEP Amendment to Mineral Resource Extraction Area is to be permitted.

The NEC contends that the proposal does not meet the requirements noted above. It is the Joint Board's finding that the Proponent has properly considered the above provisions and has submitted appropriate documentation in support of the Amendment application and has followed the Processing Guide documented and referred to in Part 3 of this Section of the NEP (Exhibit 43, Book 1, Tab 3, p. 317).

The Joint Board is also satisfied that the Rehabilitation Plan can in the future be integrated in conformity with the Escarpment Rural, Protection or Natural Area designations of the NEP as have other quarries in other parts of the Niagara Escarpment Area as documented in Appendix 1 to the NEP.

It is the Joint Board finding that at a prima facia level an understanding of the proposed Adaptive Management Plan ("AMP"), as well as the proposed NEP Amendment, the NEP Development Permits, the *ARA* license conditions and Site Plans and Site Plan

Notes, and their implementation are integral to a full understanding and determination of whether the quarry land use should be permitted in the first instance. The subsequent finalization of these documents is then an implementation matter. This is consistent with most planning considerations and approvals processes.

The Joint Board for the reasons contained in other parts of this Decision is satisfied that objectives #1 to #4 of the Escarpment Rural Area Designation have not been offended by the Proponent's application for an NEP Amendment to Mineral Resource Extraction Area.

It is the Joint Board's finding in this case that the Proponent's revised application has achieved the appropriate balance between these two equally important policy objectives and that the revised proposal is in the public interest, represents good planning within the policy framework in place and should be approved subject to the changes being directed by the Joint Board. The Joint Board in this regard is satisfied that the local Municipalities and the Provincial Ministries have had appropriate regard for the policy directions of the PPS, the NEP, and the local Municipal Official Plans and have found the appropriate balance of the public interest consistent with good planning required by these planning policy documents.

Further, the Joint Board prefers the evidence of the Proponent's expert planning witness Mr. Clarkson, the expert planning witnesses for the Township, Mr. Wynia, and Mr. Uram and the expert planning witness for Simcoe County, Ms Suggitt. The Joint Board finds no consistency issues with the NEP and the Municipal Official Plans that would trump the primacy of the NEP and the PPS. The Joint Board, after considering the planning evidence, prefers the evidence of Mr. Wynia that the proposal does not offend any policies of the Township's Official Plan; subject to the directions of the Joint Board elsewhere in this Decision that a modification is required to the Township Official Plan Amendment to implement the Road Settlement Agreements as set out in this Decision.

The Joint Board finds that the studies and works conducted by the Proponent are sufficient to meet the County's Official Plan Greenbelt policy tests. For the reasons set out in this Decision, no County Official Plan Amendment is required to consummate the Road Settlement Agreements (see the Joint Board determinations with respect to the Road Settlement Agreements and the County and Township Official Plan Amendments).

In making its Decision, the Joint Board is mindful of subsection 2.1 of the *Planning Act* which requires the Board to have regard for any decision of Council or an approval authority and any information Council or the approval authority had before it.

The Joint Board in having regard to the decisions of the Local Councils, the NEC and the Provincial Ministries having jurisdiction over certain aspects of the appeals has carefully considered the varied positions put forward by these bodies and the testimony of those who oppose the proposal. The Joint Board in doing so must consider the decision of the approving authorities but is also obligated to bring its own determination based upon the evidence before us.

The Joint Board finds nothing in the new evidence presented at the Hearing that would lead it to the position that any of the material should have been referred back to the respective approval authorities for reconsideration. Nor was any such request made by any of the Parties during the course of this Hearing.

Evidence of the Participants

The Joint Board received oral and written evidence from 33 Participants, many of whom are residents of the local area. They raised a number of issues and expressed a variety of opinions both in support of and in opposition to the proposal.

In order to provide greater opportunity for concerned members of the community to provide evidence, the Joint Board scheduled the afternoon and evening of November 23, 2010, which continued during the day on November 24, 2010 to hear Participants and receive their submissions. The names of these Participants and the written statements received during this session are set out at Exhibit 177.

The testimony of other Participants was incorporated into the regular schedule of the Hearing. This includes evidence of the Blue Mountain Watershed Trust (Exhibits 249A and B), the GSCA (Exhibit 243) and the NVCA (Exhibits 250, 251, 252, 253). It should be noted that K. Hill, Counsel for the NVCA, led the examination of the witnesses that testified on behalf of the NVCA and attended the relevant portion of the Hearing.

In addition, the CCC called several lay witnesses who were also Participants in the Hearing. Their witness statements are set out at Exhibit 235.

The concerns raised by the Participants are dealt with in the context of the discussion of issues in the other sections of this Decision. However, in order to provide some perspective on the matters raised directly to the Joint Board by members of the community, a brief summary is provided below.

Submissions Supporting the Proposal

Some individuals provided the opinion that the Proponent is a good operator who responded to concerns in a timely fashion and acts proactively to resolve issues of residents.

Those residents living closest to the existing quarry confirmed that they have had no difficulty with the existing quarry operations and anticipated having no difficulty with the proposed quarry. None of the residents in proximity to the existing quarry expressed any concerns regarding the quantity or quality of the water in their wells that they would attribute to the operations of the existing quarry.

The Proponent's employees expressed concerns about the loss of jobs if the proposal is not approved and the existing quarry closes, and the ancillary negative economic impacts on the surrounding community. Concerns were also expressed by local business owners and business leaders about the economic impacts on the local community that could result from the Proponent having to close its operations at Duntroon. Furthermore, a representative of the Collingwood Chamber of Commerce indicated that the Chamber supports the quarry application as it provides good jobs in the community that is currently suffering from job losses.

The Joint Board heard that the Proponent has demonstrated that it is a good corporate citizen. The Proponent provides its own private enforcement of its truck rules in order to mitigate noise and safety issues along the haul route.

The opinion was proffered that the Proponent's existing operation does not affect the real estate values in the area. Also, it was suggested that the proposed closing of a portion of Simcoe County Road 91 would reduce traffic safety issues along this haul route and represents a positive approach to the traffic issues.

The Joint Board heard the opinion that the revised *ARA* license, its Site Plans and Site Plan Notes, the AMP, the NEP Amendment, the Niagara Escarpment Development Permits, the Settlement Agreements with the Municipalities, and the Township of Clearview Official Plan Amendment represent good planning and will ensure that the natural environment in the area of the quarry is protected.

Submissions Opposing the Proposal

The Joint Board heard the opinion that the quarry land use is not consistent or compatible with the objectives of the *NEPDA* and the NEP to maintain and enhance the Niagara Escarpment Area. Some Participants questioned the process followed by the

Municipalities with respect to the various settlement agreements maintaining that it was not an open and transparent process and that there was a lack of public consultation in the settlement process.

The Joint Board heard that the closing of Simcoe County Road 91 has not been justified. In addition, the proposed Sideroad 26/27 alternative to Simcoe County Road 91 will not be safe and will result in a negative response time for emergency measure vehicles and school buses. Furthermore, the Joint Board heard that the settlement agreements reached by the Municipalities are not enforceable and that the Road Settlement Agreements are not in the public interest.

Some residents opined that the noise and fumes from quarry trucks using the haul route will be unacceptable, and that the haul route will not be safe, especially in the area of Duntroon from a health and safety viewpoint, and that the haul route is not consistent with Section 1.1.1(c) of the PPS.

The opinion was expressed that the Haul route and the proposed changes to the road network resulting from the Road Settlement Agreements should be subject to the full Municipal Environment Assessment Process.

The Joint Board heard that the proposed quarry expansion would negatively impact the growing local tourism industry and is not compatible with the tourism industry in this area. It could stigmatize real estate values in the area. In addition, the proposal does not represent sustainable development within the Niagara Escarpment Area and there are suitable areas of the Amabel Dolostone in the immediate area that are outside of the NEP.

Some residents expressed concern that the proposed start up times are too early and are not in keeping with current practice, and that the quarry should not be open on Saturday except for specific emergencies. There is concern that on-site operational noise has not been properly reviewed with respect to impacts on the Bruce Trail and the startle impacts on wildlife in the area. Furthermore, the Joint Board heard that the noise consultants have not properly evaluated or predicted worst case conditions of onsite quarry noise particularly at receptor R5 (Bell property) and that the Site Plan Notes with respect to noise mitigation are not acceptable.

Concern was expressed about the Reforestation Plans of Stantec, that they may be optimistic and that the wrong species of trees may have been selected. There was also concern about the enforceability of the AMP and that it does not respect the precautionary principle. It was also suggested that the AMP should be reproduced in the NEC Development Permit.

The lack of status and participation of the MNR and the MOE at the Hearing was questioned. Concern was expressed about the lack of understanding of impact of the proposed quarry on surface and ground water features.

Furthermore, the Joint Board heard that the Proponent's proposal does not meet the objective of the UNESCO as a World Biosphere Reserve as set out at Exhibit 131, which states that a Biosphere Reserve is intended to fulfill three basic functions (a conservation function, a development function and a logistic function) which are complementing and mutually reinforcing.

The Joint Board has taken the concerns of the participants into account in its deliberations and in the assessment of the evidence.

Settlement Agreements

As noted above, the support of the proposal by the Township of Clearview and Simcoe County is based on two Settlement Agreements entered into with the Proponent.

The essence of the Road Settlement Agreement (Exhibit 37 Vol. 15, Tab 245) is that if the proposal is approved a portion of the proposed quarry haul route, that is the section of Simcoe County Road 91 from Grey County Road 31 to a location just west of the intersection of Simcoe County Roads 91 and 124, would be transferred to the Township of Clearview and deemed a Township Road. The portion of Simcoe County Road 91 from Grey County Road 31 in front of the lands owned by the Proponent would be closed and transferred to the Proponent upon the completion of upgrades to Concession Road 10 and Side Road 26/27.

The portion of Simcoe County Road 91 from Concession Road 10 westward to the Proponent's property would be maintained as a local access road. The portion of former Simcoe County Road 91 from Concession Road 10 eastward to just west of the Duntroon intersection with County Road 124 would be improved to a Township Collector road standard and would continue to be used as the major haul route from the proposed quarry. The settlement among other things calls for the Proponent to assist in the upgrading of the Concession Road 10 and some of the side roads to the north of the proposed quarry, and to contribute to the Township of Clearview's street tree planting program. The agreement also limits the maximum number of trucks leaving the proposed quarry and using the haul route (Simcoe County Road 91) to a maximum of 500 outbound trucks per day.

The Township Settlement Agreement (Exhibit 37, Vol. 15, Tab 244) which takes effect upon approval of the proposal, places a number of obligations on the Proponent. These

include finalization of the AMP to the satisfaction of the Township, the successful implementation of ecologically based habitat rehabilitation, financial contribution by the Proponent for the purchase of ecologically important lands and for the planting of additional trees, the placement of conservation easements over certain lands in favour of the Township, and other matters. These provide significant benefits to the public.

During the course of this Hearing it was alleged that the settlement agreements reached between the Proponent and the local Municipalities were not properly vetted in a public forum, did not constitute a transparent process, and did not represent the public interest. The Joint Board after considering all of the material and evidence submitted in this regard confirms its finding made during the course of the Hearing that there is no evidence that the Municipalities have acted in any way that would lead the Joint Board to seek to alter or to have little regard for the settlements reached by the various Municipal Councils with the Proponent.

The Joint Board is cognizant of Section 2 of the *Planning Act* which requires that the Joint Board shall have regard for matters of Provincial interest. Subsection 2.(n) further states that in considering planning matter regards should be had to;

> 2.(n) The resolution of planning conflicts involving public and private interests.

The Municipal Councils, in arriving at their various settlements with the Proponent, were clearly following this requirement of the *Planning Act,* and, in the Joint Board's finding acted in accordance with the directions set out in the *Municipal Act* regarding the conducting of public business and when Municipal Councils may go in camera. The question for the Joint Board is whether the settlements reached represent good planning and are in the public interest which will be discussed later in this Decision when the Joint Board considers the planning merits of the various settlement agreements in relation to the planning instruments.

It was alleged by some of the witnesses for the CCC that the Municipal Councils were not in possession of all of the facts when they made their settlement decisions. It is the Joint Board's finding after considering all of the evidence and submissions that the Municipal Councils were in possession of and understood the conflicting positions of the various parties. They were attempting to reach settlements that were in the public interest and to resolve as many as possible of the conflicting views regarding health, public safety, the need for the proposal, and the protection of the environment. The evidence is that the Councils in arriving at their decisions were attempting to balance

the varying and often conflicting needs of their communities. That is the precise job for which they were elected.

It was also alleged by the CCC and the NEC that in arriving at the settlement decisions the coordination requirements of Section 1.2 of the PPS were not met.

It is clear to the Joint Board after considering the evidence, including that of Mr. Wynia who was involved in the settlement process, that there were ongoing discussions between the various municipal governments about the project and the Road Settlement Agreements. While the Municipality of Grey Highlands ultimately had concerns about the closing of County Road 91, these concerns do not constitute a lack of consultation or coordination as set out in the PPS. There is no compelling evidence that the Road Settlement Agreements reached amongst the Municipalities breached any of the provisions of the *Municipal Act* or the PPS. Nor is there any compelling evidence that the applications now before the Joint Board and the other documentations and comments leading up to this Hearing were not conducted in an open and transparent manner. It is clear to the Joint Board, after reviewing all of the evidence, that the various positions of the Parties were well known to the local Municipal Councils.

While the precise details of the settlements may not have been disclosed to the public, the fact that the Municipal Councils were going to be considering such matters was an open secret. The Joint Board would note that members of the CCC including Ms Grier in a letter to County Council (Exhibit 274), Mr. Gillham and Mr. Corner in their deputations, expressed their concerns prior to Council making a determination on the Road Settlement Agreements. It is equally clear to the Joint Board from our review of the evidence that while members of the CCC may not have had a copy of the settlement agreement prior to Council approval, they had an uncanny understanding of the substance of the proposed settlement agreements. Furthermore, there is no evidence that the public meetings required under the *Planning Act* were not held. It is also clear from the evidence that the NEC and its Public Interest Advisory Committee held proper public meetings in arriving at their respective determinations of the applications before them.

The balancing of public and private interests is a fundamental requirement of the *Planning Act*. The determination of and the balancing of public and private interests originally vests with, and is the obligation of the Municipal Council and the other approval authorities (e.g. the NEC) and upon appeal, vests with this Joint Board. It does not reside with private individuals, corporations, or local interest groups. The determination of the public interest with respect to planning matters is not a popularity

contest but must instead be based upon sound planning principles and approved planning policies at both the Provincial and local levels.

Issues

The Issues List adopted by the Joint Board that accompanied the Procedural Order for this Hearing included 62 separate items. The evidence regarding all of these issues has been carefully considered.

The Joint Board's findings for the purpose of clarity have been arranged by topics to assist the reader in understanding the Decision, as opposed to the numerical recitals of clause numbers from the Issues List (Exhibit 16, Schedule "B"). All 62 issues on the Issues List, while they may not be mentioned specifically, are considered in the context of the topics discussed below as are the concerns raised in the Participants' evidence.

Hydrogeology and Karst

Hydrogeological and karst considerations are fundamental to this appeal. Below water table quarries have significant potential to impact water supply to local wells and to effect flows and levels in nearby streams, water bodies, and wetlands. Other significant natural heritage features adjacent to the site may also be vulnerable to a lowered water table. Protection of these water and natural heritage features is provided through the provisions of the *ARA*, the NEP, provincial planning policy regimes, and the requirements of the local planning documents governing the area. The Joint Board must be satisfied that appropriate hydrogeological and karst investigations have been undertaken to satisfy these requirements and to meet the tests which have been enunciated earlier in the Decision.

A number of wells and springs are located within the potential impact zone of the quarry, and many springs emerge from the escarpment to the east and northeast. Other water features located in the immediate vicinity include the SW 2 watercourse located at the southwest corner of the site, portions of the provincially significant Rob Roy wetland complex including Rob Roy #2, which is located immediately north of the western part of the extraction area, and two small wetlands known as ANSI A and ANSI B. Furthermore, the site is located at the headwaters of the watersheds of the Beaver River, the Pretty River and the Batteaux Creek, all of which could be impacted by changes in drainage patterns and groundwater flow.

Mr. Hims and Mr. Ruttan characterized the hydrogeology of the area on behalf of the Proponent by using records from existing wells and through a network of monitoring wells on and adjacent to the site. Surface water flows were also determined in nearby

watercourses. Relevant data was input into a MODFLOW model for the area in order to predict impacts of the proposed quarry on groundwater and surface water features. The model was also run with appropriate modifications, including the use of the LAK 3 package, to simulate the filling of quarry lakes for both the existing and proposed quarry. In addition to considering the impacts of the proposal, the model also considered the potential cumulative impacts of proposal and the MAQ quarry.

Karst features in the area were characterized on behalf of the Proponent by Dr. Worthington and Mr. Buck. Karst features are formed when water acts to dissolve limestone bedrock creating holes which eventually form conduits and fractures through which groundwater moves. Dr. Worthington and Mr. Buck studied an area two kilometres to the north and two kilometres to the south of the site for karst features. They found various features in the area including sinking streams and sink holes on top of the escarpment and springs that discharge below the escarpment brow. The hydrogeological and karst studies identified 74 springs that discharge from the Amabel aquifer below the Escarpment Brow.

Based upon their analysis, Dr. Worthington and Mr. Buck concluded that the karst topography has formed numerous small conduits which act as an “equivalent porous medium”. There was little evidence of larger conduits or fractures in the study area. These conclusions were used to inform the hydrogeological modeling and characterization of the area.

The Proponent’s hydrogeological and karst experts concluded from their studies that the area has been appropriately characterized to be able to accurately predict the impacts of the proposed quarry. While the level of the water table will be impacted during quarry operations, there will be no impairment in the use of any wells, impacts on water features can be mitigated through actions which are proposed during the quarry operation, and the quarry lakes will establish water levels to provide adequate supply to the significant water features after quarry operations cease.

The Proponent’s hydrogeological studies were peer reviewed on behalf of the NEC by Mr. Neville. The NEC also had a peer review prepared by Mr. Cowell, a karst expert.

All of these experts appeared as witnesses at the Hearing. In addition, Mr. Ruland provided expert hydrogeological evidence on behalf of Ms Franks and Mr. Switzer provided expert hydrogeological evidence on behalf of the NVCA.

Mr. Neville, Mr. Cowell and Mr. Ruland raised a number of concerns including the following:

1. The MODFLOW model cannot predict impacts on individual wells and springs and therefore should not be relied upon,
2. Greater characterization of the hydrogeology and karst features of the area is required,
3. Greater characterization of the high "K" zone north of Rob Roy 2 is required,
4. The characterization of karst features as an equivalent porous medium may not be accurate and there may be a greater number of large conduits and fractures in the licensed area, and
5. The impacts of the quarry on the ground and surface water supply to the wetlands in the area will be substantial and are not well understood.

The conclusion of the experts testifying on behalf of the opposing Parties is that the hydrogeology and karst studies carried out by the Proponent have failed to demonstrate that there will be no significant negative impacts on water features, springs and wells. Therefore, the proposal should not be approved.

After considering all of the submissions and testimony, the Joint Board has come to the conclusion that the characterization and modeling of the hydrogeological (Exhibit 37, Vol. 5, Tab 57) and karst features (Exhibit 37,Vol.8, Tab 64, p. 6172) has been carried out in a satisfactory manner. The Joint Board's conclusions with respect to the modeling were substantiated by the candour of Mr. Neville who acknowledged under cross examination that:

> Our review of the model predictions suggests that the proposed extension quarry will not have any extensive negative impacts on local water resources. This is consistent with the data collected during the development of the existing quarry. In our opinion the potential impacts of the proposed extension can be managed effectively.

In conjunction with mitigative measures and contingencies provided through the Site Plan Notes and the AMP, sufficient evidence has been provided to ensure that the ground water resources, the dependant water features, the springs and water supplies will be protected during and after the operation of the proposed quarry. The evidence is sufficient to allow the Joint Board to make a determination on the appropriateness of the proposed quarry land use as required by the *ARA*, the PPS, the NEP, and the other applicable planning documents.

The Joint Board heard no compelling evidence from the expert witnesses or the Participants that any of the domestic water supplies in the area will be negatively impacted by the proposal, with the exception of the Kekanovich well which is on the MAQ property and will be eliminated if that proposal proceeds. The Proponent's evidence is that, if required, new wells could be developed on the site into the Amabel aquifer to maintain the quantity and quality of the existing domestic water supply.

Mr. Hims and Mr. Ruttan acknowledged that the model only predicts impacts on groups of springs and wells, but their evidence demonstrates that impacts would generally be in the range of seasonal variations and there would be no impairment in the use of any water supply. Mr. Hims freely admitted that there had been and would be a drawdown at the Carmarthen Lake Farm well to the south, but that there was no evidence that the capacity of this well had been affected by the existing quarry, and, as the existing quarry lake begins to fill, the impacts on this well are expected to diminish.

The Joint Board also takes some comfort from the fact that no significant negative impacts to existing domestic water supply, adjacent wetlands, seeps, springs, or streams have been documented as a result of the existing quarry, which has been in existence for many years and is located within the same rock formation immediately south of Simcoe County Road 91. As noted earlier, the many years of data and analysis from the existing quarry has provided valuable information for the expert witnesses and the Joint Board.

Based upon the evidence, the Joint Board is confident that potential impacts on wells and springs have been adequately assessed and that proposed mechanisms will appropriately mitigate any negative impacts that may arise.

Mr. Cowell and Mr. Ruland expressed concern that inadequate characterization of the high-"K" zone (Exhibit 56, Slide 151) to the northwest of the extraction area might result in unexpected quarry impacts, particularly on the Rob Roy wetland complex west of Grey County 31 and north of the MAQ proposal. Mr. Ruland testified that on a site visit to the MAQ property on October 5, 2010, he observed karst features in some of the Rob Roy wetland complexes as set out in his supplementary witness statement, and that in his opinion, these could be related to the high "K" zone being modelled by the Proponent's consultants. He opined that the Proponent's proposal should not be approved pending further work on the MAQ property to determine if there was a relationship with the karst features he observed. Mr. Cowell expressed similar concerns during his testimony.

Mr. Hims and Dr. Worthington, in their reply evidence, made it quite clear that they were aware of the hydrogeological and karst features in the Rob Roy 3 wetland and the other parts of this wetland complex west of Grey County Road 31. It is instructive to note that as far back as September 2008, the experts had been together on a site visit to the MAQ property and had observed some of the karst features on this site (Exhibit 375, Photo 22, dated September 9, 2008).

Dr. Worthington, in his reply evidence, does not accept the proposition put forward by Mr. Cowell that water from the Rob Roy wetland complex west of Grey Road 31 finds its way into the Pretty River watershed. He believes from his observation of stream flows and his understanding of the overburden soils to the west that the Rob Roy 3 wetland complex drains to the Beaver River watershed.

Both Mr. Hims and Dr. Worthington believe that the Proponent's quarry proposal will have no negative impacts on the Rob Roy wetlands west of County Road 31.

However, Mr. Hims indicated that out of an abundance of caution, his client is prepared to install a monitoring nest in the Rob Roy 3 complex west of Grey County Road 31 and if necessary will pump water to the Rob Roy 3 area to maintain the hydroperiods and vernal ponds found in this wetland. He testified that his client has an agreement with MAQ to undertake these works whether or not the MAQ application is approved and that the addition of new monitoring locations and the monitoring frequency for these new locations is included in the revised Site Plan Notes (Exhibit 378). Monitoring frequency for the new nest in Rob Roy 3 was subsequently addressed to include weekly monitoring as shown on Exhibit 387 (revised page 17). The Joint Board is satisfied that this additional wording to the Site Plan Notes corrects any potential monitoring shortfall and will direct that this monitoring be included in the final Site Plan Notes.

Dr. Worthington and Mr. Buck maintained that since no large springs were observed to the east coming from the either the Amabel or Manitoulin formations that the hydraulic gradient in the high-"K" zone is to the west and as such, the total flows to the Escarpment springs were explained predominantly by percolation recharge from the lands east of the groundwater divide as shown on Exhibit 56, Slide 152 and east of the high-"K" zone. It was their opinion that the high-"K" zone would not impact the Escarpment springs to the east.

Dr. Worthington maintained that in his opinion from a karst perspective, there would be no negative impacts from the Walker proposal on the Rob Roy Provincially Significant Wetland ("PSW") west of Grey Road 31 that could not be mitigated if required by the

pumping of quarry water into the Rob Roy 2 wetland or directly to the Rob Roy 3 wetland at the SW3 culvert location.

Mr. Hims in reply testified that his client had an agreement with the owners of the MAQ lands to monitor flows at Rob Roy 3 and had agreed to pump water to this location if it was determined that the Duntroon quarry was impacting ground or surface water flows to this wetland.

Mr. Cowell also raised concerns that the water levels in the proposed lakes at the existing quarry and the proposed quarry may not reach the elevations required to naturally supply the Rob Roy 6, Rob Roy 2 and ANSI A and B wetlands due to proximity to the high-“K” zone. He maintained this position under cross-examination even when presented with an elevation survey of the perimeter limits of the existing quarry (Exhibit 172), and the Rehabilitation Plans for the proposed quarry (Exhibit 105, now Exhibit 379).

The Joint Board heard that if, as Mr. Cowell fears, significant karst featured are encountered during extraction, appropriate measures such as grouting and earth buttresses can be undertaken to mitigate impacts and to ensure that the quarry lakes reach the design elevation.

Based upon these considerations, the Joint Board concludes that the high-“K” zone has been appropriately characterized, that features that may be impacted will be monitored and effective mitigation measures will be implemented if necessary.

The Proponent’s hydrogeological evidence predicts substantial groundwater drawdown underneath some significant water features. In particular, during the full development of the quarry, the water table under Rob Roy 2 is expected to be reduced by nine metres, and if the MAQ quarry proceeds, the combined effect will drop the groundwater level by 18 metres under Rob Roy 2. Mr. Hims and Mr. Charlton maintain that the low permeability of the surface soils under Rob Roy 2 is the main factor controlling water levels in the wetland. However, they acknowledge that to maintain existing hydroperiods into Rob Roy 2 and ANSI A and B wetlands that quarry water will need to be discharged into these areas to supplement natural flow.

Mr. Ruland, in his testimony, opined that there was insufficient data to determine the porosity or connectivity of the soils in the wetlands near the site. He submitted calculations contending that there would be both vertical and horizontal movement of ground water through these soils. He maintains that the requirements to maintain the hydroperiods of these wetlands are not understood. Mr. Hims did additional calculations to determine the leakage through the soils in the wetlands and freely

admitted that there would be some leakage through these soils, particularly during the drawdown period, that this was well understood, and that there was sufficient water to be pumped from the quarry to mitigate these losses and to maintain the hydroperiods and vernal ponds in the abutting wetlands.

The Joint Board accepts the evidence of Mr. Hims and Mr. Charlton that the overburden in the area of the Rob Roy 2 is some six metres thick and displays a low vertical conductivity, and that the Rob Roy 2 wetland is maintained to a large extent by surface water flows and if required the wetland could be maintained by pumping quarry water to this site. There is no dispute among the experts that the surface drainage area supporting the Rob Roy 2 wetland will be reduced by approximately 32% as a result of the proposed quarry and that some water in the wetlands will be lost as a result of the groundwater drawdown. The conflicting testimony is whether this impact can be mitigated by pumping quarry water to these wetlands to maintain their vernal ponds and hydroperiods.

The Joint Board has some concern that during the period of quarry operation and lake filling the continued functioning of a PSW will be entirely dependent on human intervention. However, the Joint Board accepts the evidence of Mr. Hims that potential impacts can be mitigated by pumping water to the Rob Roy 2 and ANSI A and B wetlands as set out in the revised the Site Plan Notes (Exhibits 378 and 387). Monitoring of the wetlands is required through the Site Plan Notes, and the AMP. Permissions to take and discharge water to these wetlands will be regulated by the MOE'S Permit To Take Water ("PTTW") and Certificate of Approval processes. The Joint Board is satisfied that these measures are appropriate to protect these wetland features and are consistent with good planning.

The Joint Board has some remaining concern about ensuring that the appropriate amount of flow is directed to the three wetlands from the quarry lake. This matter is addressed later in this Decision.

The Joint Board is satisfied that the revised draft AMP document (Exhibit 37, Vol. 10, Tab 102), as reflected in the revised Site Plan Notes (Exhibit 378), is an appropriate tool for the long term monitoring of the quarry use and for the implementation of mitigative measures to ensure no negative impacts to ground water features, springs, surface water features and the other Natural Heritage Features and functions found in the study area. The testimony of Mr. Neville supported the importance of using the results of on-going monitoring as part of an AMP.

It is the Joint Board's finding that the employment of the AMP, as a long term planning tool as set out in the revised Site Plan Notes, would be consistent with the advice of Mr. Neville, Mr. Wynia, Mr. Switzer of the NVCA, the witnesses for the Proponent and the evidence in correspondence from the Provincial Ministries.

The Joint Board is satisfied that the karst investigations have been well done, the equivalent porous medium characterization is appropriate, and the investigations can be relied upon to assist the "MODFLOW" modeling. The Proponent has identified appropriate measures to deal with larger fractures if they are encountered during extraction. The Joint Board is also satisfied that the cumulative impact analysis that took into consideration the other quarry proposals in the immediate area as requested by Ministries and undertaken by the Proponent's experts are adequate for the purposes of their applications. The Joint Board will leave the detailed characterization of the karst features that might be present on the MAQ site and the impacts of the MAQ proposal as matters to be determined by that application.

The Joint Board is satisfied that the Proponent's team has conducted the appropriate site investigations and analysis with respect the hydrogeology and karst characteristics of their site, including the cumulative impacts associated with the MAQ proposal to establish a prima facia case for the approval of the quarry land use subject to the changes being directed by the Joint Board in this Decision to the *ARA* license conditions and to the final AMP document.

The Joint Board is satisfied that the hydrogeological and karst investigations conducted to date by the Proponent are sufficient to meet the statutory and policy tests, and that negative impacts on water features will be minimized, and the features and the hydrologic functions of the area will be maintained. The hydrogeological and karst evidence is sufficient, subject to the proposal meeting other requirements, to allow approval of the quarry land use on the Proponent's site as modified by this Decision.

The Joint Board wishes to make it clear that in arriving at this conclusion it is making no determination with respect to any aspects of the MAQ proposal.

Natural Heritage

Potential impacts of the proposal on natural heritage features on and adjacent to the site are major considerations in this appeal. In the context of the NEP, many of these issues fall under NEP objective #1, which is "to protect unique ecologic and historic areas". As stated earlier, the term "unique ecologic areas" is not defined in the NEP. Policies in the NEP relate to specific types of natural heritage features including woodlands, wetlands, habitat of endangered species, etc. However, most contain only

general direction for protecting these areas and for assessing impacts. In the Joint Board's determination, the most specific directions for protecting these features and the most rigorous tests are found in the PPS, rather than the NEP. The importance of the PPS tests was at least implicitly acknowledged through the evidence of natural heritage witnesses for the NEC and CCC because their submissions were heavily weighted toward addressing the requirements of the PPS tests.

The Joint Board finds that the evidence is not sufficient to make specific findings about which features should appropriately be classified as "unique ecologic areas" under the NEP. The requirements of the NEP to protect unique ecologic areas and the NEP's policy direction related to these areas are addressed through the submissions regarding the more rigorous PPS tests for natural heritage features. In the majority of cases, the Joint Board's findings relating to the PPS tests also address the related requirements in the NEP, although the NEP provisions may not be specifically referenced. Where there is a need to address specific policies of the NEP apart from PPS requirements, the relevant evidence and findings are provided in the following sections.

Many natural heritage features located on or adjacent to the site could potentially be impacted by the proposed quarry. The Parties agree that the following features located on the quarry site are significant as defined in the PPS:

1. Rob Roy 2 wetland, located beyond the northwest portion of the extraction area,
2. Amphibian habitat located within the Rob Roy 2 wetland,
3. Habitat of 29 Butternut trees, an endangered species, located within the extraction area in phase 2B,
4. Habitat of American Hart's Tongue Fern, listed as a species of concern, located outside of the extraction area on the northern peninsula considered significant wildlife habitat under the PPS,
5. A significant woodland located in part within the extraction area, but which is part of a larger contiguous woodland which extends off the quarry site onto other lands.

Section 2.1.3 of the PPS applies to the Rob Roy 2 wetland and to the habitat of the Butternut trees. Section 2.1.4 applies to the other significant natural heritage features noted above.

The proposed quarry is within the adjacent lands of all the features noted above and it will be located within a portion of the woodland. Section 2.1.6 of the PPS which requires

the evaluation of impacts of the development on adjacent lands applies to all of the features noted above.

The significance of other natural heritage features in the area is not clear from the evidence. ANSI A and B wetlands are located to the north and northeast of the extraction area. These wetlands have not been evaluated under the provincial wetland evaluation system. The Proponent's expert ecologist, Mr. Charlton, acknowledged that if these wetlands were evaluated, they could be classified as provincially significant. If classified as such, they would be afforded the same degree of concern and level of protection as Rob Roy 2 under section 2.1.3 of the PPS.

The Joint Board recognizes the importance of the ANSI A and B wetlands and the need to take appropriate protective actions. However, the Joint Board is obligated to have greater regard for wetlands that have been formally recognized as provincially significant given the protections provided to PSW's in the PPS. Therefore, the Joint Board will give higher priority in its decision to the protection of the Rob Roy wetland complex.

Natural heritage witnesses for the NEC and the CCC contend that Millar Pond should be considered significant wildlife habitat and there was some suggestion that it should be considered a wetland. In addition, the NEC also contends that the interior forest habitat on the site should be considered significant wildlife habitat.

The Joint Board has considered the evidence and finds that the determination regarding the interior forest makes little difference to its consideration of the relevant planning and policy tests. The interior forest is located within the significant woodland which requires protection under section 2.1.4 of the PPS.

With regard to Millar Pond, it is one of the locations on the property where the Western Chorus Frog breeds. The Western Chorus Frog has been identified by the responsible federal authority as a threatened species, but has not been identified as threatened by the responsible provincial authority. The significance of Millar Pond is dealt with later in this Decision.

The presence of Bobolink habitat on the site is also in dispute. The Bobolink was listed as a threatened species during the course of this Hearing and as such merits protection under section 2.1.3 of the PPS. The species was identified in a field in the proposed extraction area during a 2005 survey, but has not been observed on site in subsequent field studies. This matter is dealt with in greater detail later in this Decision.

Wetlands

The only portion of the provincially significant Rob Roy wetland complex located immediately adjacent to the proposed quarry extraction area is Rob Roy 2. Other components of the complex, Rob Roy 3 and Rob Roy 6 are located off-site but could potentially be impacted by hydrological and hydrogeological changes caused by the quarry. Rob Roy 3 is located on the MAQ site and at times receives surface flow from Rob Roy 2. Rob Roy 6 is located to the south of the western section of the proposed quarry and to the west of the existing quarry. The functioning of Rob Roy 6 is dependent on pumping quarry water from the existing quarry, and after that operation ceases, it will be fed by overflow from the future lake from the existing quarry. The evidence demonstrates that the proposal complies with section 2.1.3 of the PPS in that no development or site alteration is proposed within the wetland.

The Proponent is proposing to maintain a 30 metre buffer between the extraction area and the wetland and this separation distance is increased considerably because of the presence of the northern peninsula. The adequacy of the wetland buffer is a matter of dispute among the parties.

After reviewing the evidence, the Joint Board is satisfied that the 30 metres buffer will be sufficient to mitigate any surficial effects of the quarrying operation such as sedimentation and normal edge effects. The Joint Board notes that Table C-1 of the Natural Heritage Reference Manual recommends a minimum 30 metre buffer to deal with increased sedimentation and potential contamination of wetlands and water bodies resulting from aggregate extraction (Exhibit 37, Vol. 2, Tab 24, p. 1846).

However, the Joint Board is concerned that insufficient adjacent land is being set aside to provide for adult stage habitat for the amphibians that breed in Rob Roy 2. Also, as noted earlier, the Joint Board has some concern that the continuation of the wetland function during the quarrying phase will be entirely dependant on pumping activity because of the drawdown of the water table and a 32% reduction in the surface drainage area to Rob Roy 2.

The full development of the quarry will remove all of the forest adjacent to Rob Roy 2 except that which will remain in the 30 metre buffer and except the forest on the northern peninsula. Lands to the north and west of Rob Roy 2 are not forested and to the north the area is not under the Proponent’s control. The forest provides critical habitat for the adult stage of the amphibians that breed in Rob Roy 2.

The natural heritage experts for the NEC and CCC contend that the proposed 30 metre buffer is not adequate. Their evidence is that since the quarry is located in the adjacent

lands of Rob Roy 2, that the PPS requires that the ecological function of the adjacent lands, which includes adult stage habitat for amphibians, must be maintained. They are not confident that the proposed reforestation plan will provide suitable forest habitat at the required time and that the mitigation measures proposed will sustain the vernal ponds and hydroperiods of Rob Roy 2.

Mr. Charlton contends that 30 metres is an appropriate setback and that all ecological functions will be maintained. He also indicated that the reforested area will be managed to attempt to provide suitable amphibian habitat. Mr. Wynia concurs that 30 metres is sufficient and correspondence from MNR indicates that it is satisfied that the setback will not affect the ecological feature and functions of this PSW. Mr. Charlton, in his testimony, provided the Joint Board with other examples where 30 metres had been approved as the appropriate buffer between a PSW and a quarry. The Proponent also notes that in the Decision of another Joint Board Hearing for the Dufferin Milton quarry (Exhibit 66), buffers of less than 30 metres adjacent to provincially significant wetlands had been accepted.

In the relevant evidence provided, there is no real consensus about the forested areas that amphibians are likely to use or about the way that they choose these areas. The evidence indicates that amphibians may have fidelity to their adult life stage habitat and they may use substrate and/or olfactory cues to find their preferred areas (Exhibits 199 and 200).

Mr. Charlton has noted spotted salamanders can use forest habitat quite far from their breeding areas (300 to 600 metres). However, the evidence provided also indicates that some species (spotted salamander and wood frog) are unlikely to cross through open areas to find forest habitat and that amphibians are likely to prefer forest habitat that is contiguous with their breeding habitat (Exhibit 43, Book 7, Tab 11, p. 233 and 234).

The Joint Board also does not have clear evidence with regard to the amount of forest habitat required to provide sufficient adult stage habitat to accommodate the amphibians that breed in Rob Roy 2, and therefore, it is not clear that with development of the quarry the remaining forest in the 30 metre buffer area and in the northern peninsula will be capable of providing the required habitat functions. If sufficient forested buffer area is not provided and if the reforested area is not at an appropriate level of maturity, or if it does not contain the appropriate cues for it to be used by the amphibians, it is the Joint Board's finding that the ecological function of the adjacent land will be impaired by the removal of the forest and this must be considered a negative impact under the PPS. The Joint Board is confident that ultimately the

required forest habitat will be replaced in the proposed reforestation area. However, the timing of when this area will provide the required habitat functions is unclear.

In determining the appropriate size of the buffer the Joint Board is guided by the provisions of the Natural Heritage Reference Manual which recommends that a 120 metre radius from the feature be considered be considered as adjacent lands (Exhibit 37, Vol. 2, Tab 24, p. 1715). The Joint Board recognizes that the area of the adjacent lands is only a recommended study area to determine if ecological functions may be impacted.

However, in view of the evidence and the extent of documented movements of adult amphibians, the Joint Board finds that it is important to maintain the entire 120 metres adjacent land area recommended in the Natural Heritage Reference Manual. In the Joint Board's opinion, this determination will prevent negative impact, it recognizes the importance of maintaining natural heritage features within the NEP area, and it is consistent with the provision in MNR's SEV to use caution in the face of uncertainty. Protecting the entire 120 adjacent land as a buffer will also maintain additional drainage area to Rob Roy 2 that would be otherwise removed through extraction.

It is acknowledged that the NEC prefers maintaining the entire forested area as a buffer. However, the Joint Board notes that Mr. Sorenson of the GSCA, in his testimony, supported maintaining the entire 120 metres adjacent land next to Rob Roy 2 as a buffer.

In order to deal with the concern for maintaining sufficient adjacent upland habitat, the Joint Board is directing that the Site Plan be revised to incorporate a minimum 120 metre buffer between Rob Roy 2 and the proposed extraction area.

The Joint Board is also requiring that the phasing set out in the Site Plan be altered so that Phase 3 is undertaken prior to Phase 2. Also, the Joint Board is directing that the limits of Phase 1 be altered so that it does not take in any part of the significant woodland. This will provide a longer time period for the reforested area to mature which is then more likely to be at a suitable state to provide adult amphibian wildlife habitat. This matter is addressed in greater detail elsewhere in this Decision.

With the changes noted above, the Joint Board finds that the expanded buffer and intended mitigation measures are sufficient to ensure no negative impacts to this Provincially Significant wetland and its features and functions.

It is the Joint Board's findings that the evaluation criteria set out in the Township's Settlement Agreement with respect to the reforestation plans are appropriate tests to ensure that reforestation is progressing in a successful manner, but should be altered to

reflect the changes in phasing being directed by the Joint Board. Through the evaluation criteria, the Township must be satisfied that the reforestation program will establish appropriate upland forest habitat for the amphibians found in the Rob Roy 2 and ANSI A wetland before the final site preparation (removal of trees) and extraction of the Revised Phase 3 is permitted. Enacting these measures to fully mitigate any loss in upland habitat in the longer term is consistent with a full and proper reading of the PPS, the NEP and with the local Municipal Official Plans. This matter is further clarified in the Phasing of Quarry Extraction part of this Decision.

The two wetland areas known as Wetland ANSI A and B as shown on Exhibit 179 are located within the Duntroon Escarpment Forest Life Science ANSI to the northeast of the site. These wetlands have not been evaluated under the provincial wetlands system, although as noted above Mr. Charlton acknowledged that they may qualify as provincially significant if evaluated and considered as part of a wetland complex. Mr. Charlton also acknowledged in his testimony that amphibian breeding habitat in ANSI A would qualify as significant wildlife habitat. The Joint Board heard conflicting testimony with respect to the impacts of the proposed quarry.

In addition the Millar Pond is located in the northeast portion of the extraction area just beyond the southern boundary of the ANSI. The Millar Pond is a man-made feature that has been abandoned and has naturalized over time and it will be removed as part of the extraction and relocated to the north within the area of the ANSI.

Both wetland areas and the Millar Pond support some amphibian breeding habitat.

The best evidence before the Joint Board is that these ANSI A and B wetlands have not been evaluated; and as such would fall within the policy directions and the land use policy designations of the NEP and the local Municipal Official Plans. The Joint Board has concluded that ANSI A and B and Millar Pond should be treated as significant features and afforded the protections under Section 2.1.4 of the PPS.

The NEC and the CCC contend that the proposed 30 metres buffers from ANSI A and B are not sufficient. Their witnesses did not proffer any alternative setback requirements that might be imposed, and in the Joint Board's finding were they not required to do so.

The Joint Board accepts the proposed 30 metre buffer which is consistent with the recommendations of the Natural Heritage Reference Manual to control surficial impacts. In the Joint Board's opinion because these two wetlands have not been classified as provincially significant, the level of concern for their protection is less than for Rob Roy 2 and other provincially significant wetlands. The Joint Board has accepted the pumping of quarry water into Rob Roy 2 as an appropriate mitigative measure to compensate for

potential reduction in water levels because of reduced surface drainage area and reduced groundwater levels. The Joint Board accepts this as an appropriate mitigative measure for ANSI A and B wetlands as well.

Furthermore, the area to the east and north of ANSI A and B wetlands is part of the significant woodland, which will not be removed if the quarry is developed. In the Joint Board's opinion, this forest will continue to provide adult stage habitat for amphibians that breed in ANSI A and B wetlands. Based upon these considerations, the Joint Board finds that setting aside additional adjacent land for amphibian habitat is not required.

The Joint Board heard the concerns of the NEC about the use of the discharge of quarry water into Rob Roy 2 and ANSI A and B as a mitigative measure, but heard no compelling evidence that it will not maintain the function of the wetlands. It is the Joint Board's finding that this mitigation measure is well understood, not complicated and can be applied if required to maintain the ecological feature and functions of this wetland, and further that the triggers and monitoring frequencies set out in the Site Plan Notes and draft AMP are appropriate.

The Joint Board is concerned that discharge structures must be appropriately designed to apportion the proper amount of water to the three wetlands from the quarry lake. The consensus of the engineering evidence on this matter is that water management structures can be designed to allow gravity flow to the three wetlands without the need for mechanical control structures or continual management. Since the functioning of these wetlands may be impaired if sufficient flow from the quarry lake is not provided, the Joint Board is directing that a specific condition be included in the Site Plan that the design of these water control structures be prepared to the satisfaction of MNR and MOE, in consultation with the GSCA and NVCA, prior to extraction commencing. This is a separate but necessary condition from one recommended by the NVCA which addresses discharge to the watersheds in a more general sense. In the Joint Board's opinion, it is necessary to have a separate condition to address quarry lake discharge to the wetlands to ensure that these important features are maintained in the long term.

The Joint Board heard conflicting testimony regarding the status of the Western Chorus Frog which was inventoried in these wetlands. Mr. Charlton noted that while at the federal level, the COSEWIC Committee considers the Great Lakes population to be threatened, the Provincial (COSSARO) Committee's opinion is that it is not a species at risk in Ontario. The provincial COSSARO Committee makes determinations relevant to the *ESA,* and in Mr. Charlton opinion should be relied upon.

The NEC's expert ecologist, Ms Grbinicek, suggested that more weight should be given to the COSEWIC Committee's findings as in many cases the Provincial (COSSARO) Committee will follow the federal recommendations. She admitted under cross-examination that the (COSSARO) Committee had the benefit of the Federal COSEWIC Committee's findings when it made its determination that the "Western Chorus Frog" was not at risk in Ontario.

The determination of the status of Western Chorus Frog is particularly relevant to the Millar Pond as it could impact the proposed relocation. However, the Joint Board is guided by the provincial committee's determination in this case. The definition of threatened species in the PPS refers to species included on the MNR's official species at risk list (Exhibit 37, Vol.1, Tab 7, p. 222). The Board understands that this list is informed by the COSSARO committee and that the Western Chorus frog is not included. Based upon the above considerations, the Joint Board finds that the Western Chorus Frog is not a threatened species in Ontario as determined by the COSSARO committee.

Mr. Featherstone, the ecologist with the NVCA opined that he is satisfied that the Proponent has demonstrated that the Millar Pond can be relocated to the east in a manner that will be fully functional and will provide suitable conditions for amphibian breeding. He indicated that the significant restoration/planting plan should provide optimal habitat conditions for amphibians as well as other wildlife. He also confirmed on questioning from the Joint Board that he was satisfied that the setbacks proposed for ANSI A and B and the forest areas within the NVCA watershed area would mitigate any impacts from the proposed quarry on the Duntroon Escarpment Forest Life Science ANSI.

Ms Pounder opined in her testimony that the seeps supporting the Millar Pond had not been tested; and that the NEP would not allow for the relocation of the Millar Pond as proposed into the ANSI, which is designated Escarpment Natural Area.

After considering the evidence, including the characteristics of Millar Pond which is essentially an abandoned farm pond in an open field, the Joint Board is satisfied that the Millar Pond can be relocated successfully and the habitat can be successfully re-established. The Joint Board finds that the relocation of the pond into the area designated Escarpment Natural is a permitted use under the NEP as wildlife management.

The relocation of the Millar Pond and the replanting set out in the reforestation plan of the Proponent satisfies the test of no negative impact required by the PPS and is

consistent with Section 2.14 of the NEP and the applicable policies of the Municipal Official Plans.

Butternut Trees

Twenty-nine Butternut trees, 23 of which have been determined to be retainable are located in Phase 2B (to be phase 3B through this Decision) of the extraction area. Butternut trees are listed as an endangered species under the *ESA* and are disappearing because they are subject to a disease known as butternut canker. The Proponent, in conjunction with the MNR, the Ministry responsible for the *ESA*, has identified an approach for dealing with the Butternut trees. A 25 metre protective buffer has been established around each of the 23 retainable trees and the Proponent has incorporated conditions into the Site Plan Notes which will prevent the destruction of the trees as long as they are retainable or unless a permit for their removal is issued under the *ESA* and its regulations. To maintain a habitat connection the Proponent is planning to retain a 100 metre wide connection, the exact location of which has not been determined, between the northern peninsula and phase 2B.

The NEC and the CCC contend that it is not appropriate to place an endangered species habitat within the Mineral Extraction Area designation of the NEP. The NEC maintains that the Phase 2B area and 100 metre connection should remain in the Escarpment Rural Area designation of the NEP and be excluded from the *ARA* licensed area. Mr. Usher supports this position, but opined that the Escarpment Natural Area designation is preferred.

The Joint Board notes that the protection of the endangered Butternut trees resides with the MNR and is not dependent upon any land use designations found in the NEP. Whether in the future there are better approaches to protect and enhance the recovery of the Butternut trees is at the discretion of the MNR regardless of what the NEP land use designation is on this particular part of the Walker properties. The Joint Board notes that as part of the reforestation plan the Proponent proposes to plant Butternut trees in more conducive habitat locations. This recovery program would not be in place unless the *ARA* license is sanctioned.

The Joint Board does not ascribe to the very narrow interpretation proffered by Ms Pounder and Mr. Usher of the PPS that no change in land use can be considered when one is considering the habitat of an endangered species. The test set out in section 2.1.3 is:

> *Development* and *site alteration* shall not be permitted in: *significant* habitat of *endangered species* and *threatened species*

and development is defined as: "…the creation of a new lot, a change in land use, or the construction of buildings and structures, requiring approval under the *Planning Act*."

In this case of the Butternut tree area no new lot is being created, nor are any buildings or structures being proposed for this part of the site. There will be a change in land use designation, but the NEC and the CCC have not established in their evidence or arguments that a change in land use as noted in the above definition includes a change in land use designation. The mere changing of a NEP land use designation does not in the Joint Board's finding constitute a change in the specific use of the lands upon which the habitat of the endangered Butternut trees currently exist.

Furthermore, the Joint Board understands that Phase 2B will only be developed if the remaining Butternut trees die or the MNR issues a permit for their removal. In either case the Joint Board finds that Phase 2B would no longer constitute a significant endangered species habitat. The Joint Board notes that the definition of the term "significant" in the PPS related to endangered species habitat refers to the habitat "as approved by the Ontario Ministry of Natural Resources" (Exhibit 37, Vol. 1, Tab 7, p.228). This clause leaves the determination of significant endangered species habitat completely at the discretion of the MNR. The Joint Board concludes that the MNR would not issue a permit for removal of the Butternut trees unless the area were no longer considered to be "significant" endangered species habitat and therefore would not fall under the provisions of section 2.1.3 of the PPS.

The Joint Board in considering the submission with respect to the Butternut trees is satisfied that the provisions set out in the Site Plan Notes are adequate to fulfill the requirements of the relevant planning documents. The Joint Board finds that the approach recommended by the MNR is consistent with the policy directions of section 2.1.3.a of the PPS, the *ESA* and would not be in conflict with the policies of the NEP or the local Municipal Official Plans. It is noted that Mr. Wynia stated that he was satisfied with and relies on the opinions of the MNR and its permitting process to protect this endangered species.

It is not uncommon to find restrictions placed upon developments that limit the full range of uses one might expect to find in a particular land use designation. The Joint Board finds no conflict in applying the Mineral Resource Extraction Area designation of the NEP to the area of the Butternut trees provided this habitat is protected in a manner satisfactory to the MNR and as shown in the revised Site Plan Notes (Exhibit 378). Leaving the habitat of this endangered species designated in the manner proposed by the NEC or the CCC would offer little added protection to this specific habitat of the Butternut trees and could in fact be an impediment to a successful recovery program in this area for this endangered species.

It is the finding of the Joint Board that the 100 metre connection should be defined and included on the Site Plans and in the Site Plan Notes as an integral part of the habitat of this endangered species (Butternut Trees) and should be located in proximity to the American Hart's Tongue Fern colony 1 found in the northern peninsula. The 100 metre connection should be included as part of the current Phase 2B Area. The Joint Board prefers and accepts the position of the MNR, the agency responsible for the *ESA***,** that the setbacks being proposed by the Phase 2B and the 100 metre connection together with the Site Plan Notes set out at Exhibit 378 are appropriate to properly protect the habitat of this occurrence of Butternut trees and are consistent with the directions of Section 2.1.3 a of the PPS and the *ESA* and would not offend the objectives of the NEP or the local Municipal Official Plans.

The Joint Board will direct that the Site Plans and the Site Plan Notes be amended accordingly to include the 100 metre connection as an integral part of the Phase 2B area (Now Phase 3B).

American Hart's Tongue Fern

The evidence before the Joint Board is that colony 1 of the American Hart's Tongue Fern (AHTF) located on the site immediately north of the extraction area may be the largest in the world. Mr. Charlton estimated the colony to contain approximately 10,000 plants and clumps.

This plant has very specific habitat requirements and a very limited range requiring rocky outcrops in areas of limestone bedrock and generally maple-beech forest. The Joint Board heard that the great majority of the population of AHTF is found in Ontario, particularly in the Niagara Escarpment area, but there are also a few locations in the United States where the plant is found in smaller numbers. In spite of the majority of the global population occurring in Ontario, the AHTF is considered provincially rare and a species of conservation concern.

There is no dispute that colony 1 of AHTF is significant wildlife habitat under the PPS and must be protected. It is noted that Mr. Charlton originally wanted to transplant the colony and acknowledged that it should be protected on the northern peninsula only after MNR made this a requirement.

Furthermore, the Joint Board does not accept the proposition put forward by Mr. Charlton that the mere removal of the northern peninsula from the extraction area is sufficient over the life of the quarry to ensure the health of this rare and provincially significant AHTF occurrence. It is the finding of the Joint Board that in order to properly protect the AHTF colony 1 it should be maintained outside of the licensed area, within the Escarpment Rural Designation of the NEP, and should be protected through conditions of the Site Plan and the provisions of the AMP.

The Joint Board does not accept the opinion of the CCC's expert planning witness, Mr. Usher, and Ms Pounder that Site Plan conditions can only be applied to the licensed area. The evidence demonstrates that it is the normal practice of the MNR to apply Site Plan conditions to lands outside of the licensed area. The proposed Site Plan Notes in this case, Exhibit 378, include numerous provisions that apply to lands outside of the licensed area, including note 10 (p.3) which applies to the reforestation area, Natural Environment note 2 (p.22), and many of the notes related to monitoring.

The Joint Board concludes from the testimony presented that, Dr. Reznicek, who appeared on behalf of the CCC and was qualified to give expert evidence about the ecological conservation requirements of AHTF, has the most experience with AHTF of all of the natural heritage witnesses to appear at the Hearing. He testified that this occurrence may be impacted by invasive species and could suffer a decline. The Joint Board firmly believes that this AHTF colony 1 needs to be monitored and that this can be best achieved through the AMP over the long term and that this monitoring would be in the public interest.

It is unfortunate that specific monitoring protocols were not proffered by any of the expert witnesses. However, the Joint Board is satisfied from the evidence of these experts that the establishment of monitoring protocols is feasible and should form part of the Site Plan Notes and AMP document to monitor the health of these plants. This in the Joint Board's finding is important to help understand the science of this specific occurrence of the AHTF and to ensure that it is properly protected throughout the life of the quarry.

Dr. Reznicek opined that the configuration of the northern peninsula within 50 metres from the quarry face would result in unacceptable wind and edge effects. Due to the

significance of the AHTF colony he believes that no quarry operations should be permitted or in the alternative a 100 meter buffer together with a rounding out or squaring off of the northern peninsula should occur. He could provide no specifics regarding the proposed rounding out or squaring off of the northern peninsula and relies in part with respect to his buffer recommendation on the suggestion found in the Natural Heritage Reference Manual that 100 metres is appropriate to define interior forest areas. He conceded under cross examination that the 100 metres was used to define interior forest for area sensitive birds and that there was no specific literature regarding set backs for this species of AHTF in this type of location.

Mr. Charlton testified that he is satisfied, based upon his review of relevant scientific studies, that the 50 metre buffer would be more than adequate buffer to mitigate potential impacts from microclimate changes and he also maintains that buffers as small as 15 metres can ameliorate microclimate effects (Exhibit 37, Vol.8, Tab 71, p. 6715 to 6719). Mr. Charlton freely admitted that the areas of these studies were not identical to the geographic conditions associated with the AHTF colony 1 occurrence at Duntroon. However he believes these studies can be relied upon in determining the buffers to be imposed.

Dr. Reznicek opined that these studies were not comparable to the locations of the AHTF found on the site and should not be relied upon in this case. He noted that reproduction of the AHTF is dependent on the maintenance of a very specific moisture regime which can be disrupted by changes to the surrounding lands.

The Joint Board has reviewed Figures 6.0 and 7.0 in Exhibit 59, Tab B regarding the location of this AHTF colony 1 occurrence and the requirements for the retention of the Phase 2B area together with a 100 meter connection along the western edge of the northern peninsula.

In view of Dr. Reznicek's evidence regarding the significance of colony 1 of the AHTF on a continental and global scale, the Joint Board has determined that in recognition of the importance of protecting natural heritage features in the NEP area, caution in the face of uncertainty must be exercised in this case. Therefore, the Joint Board is adopting Dr. Reznicek's recommendation that the buffer around colony 1 of the AHTF be expanded to 100 metres. However, the Joint Board does not accept the need for rounding off the edges of the northern peninsula.

The Joint Board acknowledges that Dr. Reznicek raised concerns about potential wind effects that were not well founded and go beyond his area of expertise. The Joint Board is making the determination for a 100 metre buffer, not because of concern about any

specific type of effect, but simply to provide an extra degree of protection to one of the key natural heritage features of the property.

It should be noted that requiring this expanded buffer area for the AHTF colony also protects additional drainage area to the wetlands that would otherwise be lost to the extraction.

Accordingly the Joint Board directs that the AMP document, the Site Plan and the Site Plan Notes be amended to increase the buffer around colony 1 of the American Hart's Tongue Fern to 100 metres and to include protocols for the monitoring of the AHTF colony 1 subject to the concurrence of the MNR. This matter is addressed in the conditions included at the end of this Decision.

Bobolink

The Joint Board, in considering the evidence with respect to the recently added Bobolink to the endangered and threatened species list, prefers the evidence provided on behalf of the Proponent and finds that there is no confirmed significant habitat of Bobolink on the subject property that requires protection under the PPS.

Mr. Hilditch, the Proponent's consultant, and Mr. Risley, the Avian and Mammalian Species at Risk Biologist with the MNR, indicated that at the time of their site investigations no habitat or potential Bobolink habitat existed on the Proponent's lands east of County Road 31. The Joint Board has also considered the testimony of Mr. Bowles who appeared on behalf of the CCC and was qualified as to give expert evidence on field inventories and habitat evaluation, species at risk element occurrences, and wetlands evaluation (Exhibit 183). Mr. Bowles believes the Proponent's field on the east side of County Road 31 as viewed by him on May 31, 2010 would have constituted suitable Bobolink habitat when considered in conjunction with the MAQ fields to the west as set out in Appendix 1, Exhibit 183. Mr. Bowles did not indicate that during any of his site visits to the area that he had ever observed a Bobolink on the Proponent's property. Mr. Bowles in his Supplementary Witness Statement noted that the Proponent's field in question had been ploughed on May 28, 2007 as part of the Archaeological and Cultural Heritage investigations. This action in 2007 by all account of the experts would have made this field unsuitable for Bobolink habitat at that time. Nor is there any compelling testimony that within three years this field could have recovered to become suitable or significant Bobolink habitat beyond the assertion of Mr. Bowles.

The evidence of Mr. Hilditch with respect to preferred Bobolink habitat was that:

> Martin and Gavin (1995) report that in hay fields, significantly higher numbers of Bobolink were found in fields that had been last seeded and ploughed eight years ago or more than in younger fields.

Mr. Hilditch admitted that from his field reconnaissance of the general environs that a number of nearby fields appeared suitable for Bobolink habitat, but that it was important to note that the presence of habitat does not mean that the species is present. The only evidence of the presence of Bobolink on the site is that during the early Stantec survey June 12, 2003 a Bobolink was sighted. However, the Joint Board heard no compelling testimony of any other sightings of this bird on the Proponent's proposal lands since that time.

Mr. Hilditch in his testimony indicated that habitat deemed to be suitable for the Bobolink did not occur within the proposed extraction area, nor was suitable habitat found in the buffer lands outside of the proposed license area. It was his testimony that the rehabilitation and reforestation plans being proposed by the Proponent would not directly affect any suitable Bobolink habitat in the area.

Mr. Hilditch indicated that the Bobolink species appears to be tolerant of various nearby activities as they have been known to nest successfully in proximity to roads, quarries and other industrial uses. He does not anticipate quarry traffic would have any affect on the species and that the species would not be affected by noise dust or vibration from the quarry operation. He indicated that the species is not subject to the "startle effect" as some other bird species. He noted that the closest potentially suitable habitat was some 50 to 85 metres away from the quarry expansion lands and as such indirect impacts would not be expected from the quarry operation. He testified that as set out in the COSSARO report that "the main causes of mortality are associated with the timing of mowing hayfields" and that this is the major threat to the species and not any of the quarry operations.

Mr. Usher put forward the proposition that if an area of the northern field was in the past or could be in the future Bobolink habitat it could fall under section 2.1.4. d) of the PPS as significant wildlife habitat. If one were to accept the proposition put forward by Mr. Usher any corn field capable of being planted as a hay field, and or field left fallow for a number of years could potentially become significant habitat for the Bobolink. The Joint Board does not find that Mr. Usher's construction to be a proper reading of the PPS, or the *ESA* in the case of the Bobolink at this site.

Mr. Clarkson testified in response to the issues raised in the issue lists that due to the lack of currently observed Bobolink habitat on the proposed Proponent's extraction lands and buffer lands that their applications were consistent with the directions found in section 1.5.1.a) (ii) and section 2.8 of the NEP. Mr. Clarkson maintained the same reasoning to conclude that there would be no conformity issues with respect to section 3.7.5 of the Simcoe County Official Plan and section 4.1.2.2 of the Township's Official Plan. The protection of this endangered species habitat is the responsibility of the MNR and does not depend upon local land use designations in either the NEP or the local Municipal Official Plans.

Mr. Clarkson further opined that the science with respect to the Bobolink and its habitat is well known, and that both Mr. Hilditch and Mr. Risley testified that there was no suitable habitat for the Bobolink on the proposed Walker quarry lands and buffer lands and that on this basis there would be no need to apply the "Precautionary Principle" in the case of the Bobolinks to the Proponent's applications.

Counsel for the NEC withdrew the NEC's issues with respect to the Bobolink after hearing the testimony of Mr. Hilditch and Mr. Risley.

The Joint Board accepts and prefers the testimony of Mr. Clarkson, Mr. Hilditch and Mr. Risley with respect to the planning policy issues related to the Bobolink. In addition, there is no compelling evidence that quarry activities as proposed will have any negative impacts on potential Bobolink habitat to the west of Grey County Road # 31, if such exists. and that there is no need for actions beyond the mitigation measures currently required and contained in the revised Site Plan Notes.

If, as members of the CCC allege, that destruction of Bobolink habitat has occurred on the Proponent's lands and that some statute not under consideration in this Hearing has been violated there are other remedies beyond this Joint Board that can be sought.

Significant Woodland

The proposal requires the removal of 32.8 ha. of deciduous woodland (classified as FOD5-1 and FOD6-5) as shown on Figure 4.2, Exhibit 59, Tab A, p.6602 R. All Parties agree that the woodland on the site should be categorized as significant woodland under section 2.1.4 of the PPS. The issue of adult stage amphibian habitat provided by the woodland has been dealt with earlier in this Decision and that discussion will not be repeated here. However, other issues raised in the evidence related to the woodland are discussed below.

Mr. Charlton contends that the woodland on the site has been in part a managed woodland and comprises only a small portion of a large significant woodland that is contiguous and extends for kilometres to the north and south of the site. Ms Grbinicek acknowledges that it is part of a larger contiguous woodland, but she submits that the total size of the woodland unit is considerably smaller (approximately 142 hectares) and the woodland on the site is significant on its own.

Mr. Charlton maintains that the impact on the significant woodland is only temporary which will be fully mitigated by the replanting of some 53.2 hectares of forest on adjacent lands owned by the Proponent as set out in the revised Site Plan Notes and shown on the planting plans (Exhibit 59, Tab B, Plans 6734R, 6735R, 6736R and 6737R). He opined that this reforestation program would result in a larger more diversified, better connected and more highly functional woodlands system that would improve habitat and support all existing ecological functions.

Ms Grbinicek expressed concern about the loss of a number of woodland components and functions. It was her testimony that the size of the woodland to be removed within the context of Clearview Township was significant. She maintains that the loss of between 8.5 to 10 hectares of interior forest on the quarry site together with the loss of some 2.0 ha of interior forest within the Regionally Significant Duntroon Escarpment Forest Life Science ANSI is a significant impact especially to nine area sensitive birds identified by Stantec in their 2010 report (Exhibit 37, Vol. 8, Tab 69, P1119). She believes that the loss of 32.8 hectares of this woodland would disturb the linkages and wildlife corridors on the site and would threaten ecological function.

Mr. Wynia in his testimony noted the differences between the upland and low land forest cover percentage within the Township of Clearview and opined that the determination of significant woodland area based upon political boundaries was not meaningful or helpful in this case. He believes that the forest on this site should be considered in relation to the much larger woodland stretching some 7 to 10 km north and south of the site (Exhibit 59, Tab B, 6612R).

Mr. Bowles adopts the testimony of Ms Grbinicek and opined that the reforestation plan proposed would not maintain the existing wildlife corridors. Nor does he believe that the reforestation plan will re-establish existing habitat for a period of about 60 years. He conceded under cross examination that natural forest regeneration on the Franks property to the east had achieved a closed canopy between 20 to 25 years as shown on Exhibit 43, Book 7, Tab 19, p. 356.

Ms Grbinicek proffered that reforestation, as being proposed, was not a mitigation technique permitted by the NEP and or the PPS. Ms Grbinicek under cross examination conceded that in some cases reforestation could be considered as an appropriate mitigation technique, but that the mitigation would have to be on-site. She proffered that off-site reforestation was not in her opinion an acceptable mitigation measure. It was her opinion that you cannot mitigate the removal of significant ecological features and functions under the NEP.

Through the evidence of Ms Grbinicek it was determined that five of the nine area sensitive bird species she had identified did not have a deciduous forest as their preferred habitat. However three area sensitive birds being the Ovenbird, the Black-throated Blue Warbler, and the Scarlet Tanager were birds listed by Stantec that had a mixed deciduous forest as their preferred habitat (Exhibit 202). In her opinion, according to the Significant Wildlife Habitat Technical Guide (Exhibit 182), this would be sufficient to consider the interior forest on the site as significant.

When considering impacts of the proposal on the significant woodland the Joint Board is cognizant of the PPS definition of negative impact. In order to be considered a negative impact there must be degradation that threatens the health and integrity of a natural heritage feature or ecological functions for which an area is identified. All Parties agree that the significant forest on the site is part of a large contiguous significant woodland. The Joint Board finds that it is the health and integrity of this larger woodland that must be considered in evaluating negative impact. In that context, the loss of forest, interior forest and associated functions only affect a part of the significant woodland. The functions will continue in the portion of the woodland to the north and northeast of the proposed quarry. Furthermore, the loss will be temporary because the reforestation plan will restore the woodland and its functions including interior habitat.

There is nothing in the PPS or the NEP that the Board is aware of that indicates that consideration of negative impacts must be limited to a site. In fact taking this approach would be contrary to the NEC position at the Hearing that consideration must be given to the functioning of the natural features as a system.

The NEC in its argument notes that the PPS definition of significance in regard to woodlands is as follows:

> an area which is ecologically important in terms of features such as species composition, age of trees and stand history; functionally important due to its contribution to the broader landscape because of its location, size or due to the amount of forest cover in the planning area; or economically important due to site quality, species composition, or past management history (emphasis added).

The NEC also notes that the PPS definition of negative impact refers to; "… degradation that threatens the health and integrity of the natural features or ecological functions for which an area is identified" (emphasis added). The NEC contends that the use of the term "an area" in these definitions obligates the Joint Board to consider the woodland on the site as significant apart from consideration of the surrounding area and to evaluate impacts on this woodland apart from the larger contiguous woodland.

The Joint Board does not attach the same degree of import to the use of the term "an area" in the above noted PPS provisions. It makes little sense to the Joint Board to confine the limits of a natural feature to property boundaries or that consideration of negative impacts should be similarly limited. The boundaries of natural features are defined by their ecological characteristics and functions, not by property ownership.

In the context of the larger woodland, the Joint Board finds that the proposed removal of the forest on the site in conjunction with the reforestation that will take place does not threaten the health and integrity of the forest or its function and therefore is not a negative impact. If the reforestation was not proposed and the changes to the forest were to be permanent, then perhaps the Joint Board would reach a different conclusion.

The NEC disputes the suitability of replacing a portion of the woodland as an appropriate measure to be used for mitigating impact in this area. The NEC contends that this is ecological compensation for the woodland to be removed and should not be considered mitigation.

The Joint Board might have some sympathy for this perspective if the reforestation was being proposed in a far removed area, well separated from the woodland from which trees are being removed. However, the proposed reforestation will occur within the same significant woodland from which the trees will be removed, all being on Walker owned lands within and adjacent to the extraction area. Habitat will be created in the same natural heritage feature from which trees are being removed and ecological functions will be restored within the same natural system.

It is the Joint Board's finding that mitigative measures including replacement and enhancement are contemplated by the PPS, the NEP, and the Municipal Official Plans and may be considered when dealing with the loss of a portion of significant woodland, its wildlife habitat, and water features as set out in the PPS.

Whether the mitigation measure is called reforestation, afforestation, replacement or net gain is not important. The PPS test is whether the mitigation activity being proposed has the ability to remove or ameliorate any negative impacts that "threatens the health and integrity of the natural features or ecological functions for which an area is

identified" and whether the mitigation measures will result in enhanced beneficial effects which might result from the loss of a portion of the significant woodland. Based upon these considerations the Joint Board finds that the proposed reforestation is simply a mitigation measure and that it is appropriate.

Mr. Clarkson noted in his testimony that the NEP's objective for significant woodlands in section 2.9 allows tree cutting for permitted uses, but requires conditions that would minimize adverse impacts and that the policy further encourages natural regeneration and reforestation using native trees. He further testified that section 2.9.1.e of the NEP allows the cutting of trees to facilitate permitted uses without requiring an NEC Development Permit.

Mr. Clarkson maintains that the reforestation plan will meet the objectives of section 2.9 of the NEP and that the Settlement Agreement with the Township will ensure that the habitat restoration objectives of the reforestation plan are achieved. Mr. Clarkson also takes comfort from the Settlement Agreement requirements to place a Conservation Easement in perpetuity on reforested Walker lands outside of the *ARA* License Area. He sees these as effective planning tools to ensure that there will be no negative impacts on the natural features or ecological function of the reforested woodlands proposed for the area and as such the applications would be consistent with the applicable provincial and local planning policy regimes.

The Joint Board agrees with the Proponent's submissions regarding section 2.7 of the NEP, New Development within Wooded Areas. This section is more oriented toward traditional and smaller scale developments and is not completely applicable to a quarry proposal. However, the Joint Board finds that the intent of this section to preserve as much as possible of wooded areas and to protect the trees that will be retained is maintained by the Proposal. This will be accomplished through the protection of the wooded areas in the northern peninsula and on other adjacent lands, through the reforestation plan, and through the Site Plan provisions which protect trees outside of the extraction area.

It is instructive to note that within the Escarpment Protection Area, the Escarpment Natural Area, and even the Escarpment Rural Area designations, the NEP recognize "Forest, wildlife and fisheries management" as permitted uses. Similarly the Natural Heritage Reference Manual section 13.2 provides that factors such as "the successional status and replaceability of the woodland components and functions within a reasonable time frame (e.g., 20 years)" can be considered and further the PPS contemplates that "Mitigation also includes any action intended to enhance beneficial effects (Emphasis added)".

It is the Joint Board's finding in this case that the reforestation is a permitted use in the NEP and can be considered as a mitigation technique to ensure no negative impacts to the ecological features and functions of this woodland.

However, as noted in the section of this Decision on wetlands, the timing of the re-establishment of the woodland is an issue. The Joint Board recognizes that the features and functions of a portion of a 60 year old significant woodland are not replaced in ten or twenty years. It is clear to the Joint Board that the current phasing plan for extraction may not provide sufficient time for the reforestation measures to take hold. The NEC's Exhibit 43, Book 7, Tab 19, P 354 clearly sets out the anticipated losses for the various woodland segments by quarry phase. If the current phasing were altered such that Phase 1 and Phase 3 followed each other sequentially, then 10.25 hectares and 9.71 hectares (total 19.96 hectares) of wood lands would be lost of which 12.1 hectares would be interior forest. It is also clear to the Joint Board if the Phase 1 area were limited to the edge of the existing woodlands, as shown in Exhibit 43, Book7, Tab19, P 353, none of the significant wood lands on the site would be affected by the first phase of quarry operations, and that by all accounts, subject to market conditions, quarrying in this area would last for some 10 years. It is the Joint Board's finding that this revised phasing approach would allow sufficient time to determine, based upon the evaluation criteria set out in the Township Settlement Agreement, whether subsequent phases could go forward. In the Joint Board's finding the revised phasing would progress from phase 1 northward into the current Phase 3 area and finally into the current Phase 2 area on the understanding that the reforestation evaluation criteria set out in the Township's Settlement Agreement had been met to the satisfaction of the Municipality.

It is the Joint Board's conclusion, as set out the in the Phasing of Quarry Expansion part of this Decision, that the change in phasing of the extraction along with the Evaluation Criteria of the reforestation program as set out in the Township's Settlement Agreement with Walker are sufficient to protect the ecological feature and functions consistent with the directions of the PPS and the NEP. If for any reason the reforestation program is not performing as advertised, then the quarrying of the revised Phase 2 and Phase 3 areas should be further delayed.

The Joint Board does not find any negative impacts resulting from the revised Phase 1 portion of the extraction to the significant woodland area on the site. There is no evidence that the hedgerow to be removed as part of the Revised Phase 1 extraction would result in any negative impacts contemplated by the PPS, and it would be consistent with the policies of the NEP and the Municipal Official Plans.

Duntroon Escarpment Forest Life Science ANSI

The Regionally Significant Duntroon Escarpment Forest Life Science ANSI is located to the northeast of the proposed quarry. It forms part of the larger significant woodland which stretches for many miles both north and south of the subject lands and provides connectivity through this concession with forest lands to the north and south.

Mr. Charlton in his assessment of the Regionally Significant Duntroon Escarpment Forest West ANSI noted that this area is about 98 hectares in size, that it is regionally and not provincially significant and that there are no PPS consistency issues associated with this ANSI. Mr. Usher agrees with this assessment.

However, Mr. Charlton advised the Joint Board that part of the ANSI site is protected under the NEP through the Escarpment Protection Area designation. He also confirmed that he together with officials from the MNR had field-truthed the western limit of this ANSI and the ANSI "B" wetland as set out at Exhibit 59, Tab D, Figure 1. He testified that the setback being proposed from the edge of the quarry would be 10 metres from the wooded areas that compose the Regionally Significant Duntroon Escarpment Forest West ANSI and that it is appropriate to mitigate any impacts on these features from the proposed quarry.

Ms Pounder in her evidence expressed concern that the NEC staff had not been consulted when the boundary of the ANSI was field-truthed by MNR Staff and that the field determination could include the Millar Pond as part of the ANSI. However, it is clear that at the time of this application the area associated with the Millar Pond was within the Escarpment Rural Area designation.

Ms Grbinicek testified that in her opinion the setbacks from the Regionally Significant Duntroon Escarpment Forest West ANSI proposed were inadequate and that the Proponent had not demonstrated that these setbacks would result in no negative impacts to this ANSI, its features and functions.

The proposal provides for a 10 metre setback from the edge of the ANSI. The Joint Board notes that Section 2.14 of the NEP would allow some encroachment into the ANSI and includes provisions for establishing an appropriate setback in consultation with the MNR.

The Joint Board heard no compelling evidence that the proposed quarry will physically alter or negatively impact this ANSI. There was testimony that a portion of the interior forest of this ANSI will be reduced by the loss of some adjacent forest on the Walker site. However it is the determination of the Joint Board that the reforestation program in proximity to this feature will enhance over time the interior forest found in this ANSI and

as such would be consistent with the PPS requirement to mitigate negative impacts and would be consistent with the NEP policies 2.14.

Other Wildlife Habitat

Other wildlife habitat which may be affected by the proposal includes corridor and linkage functions. The evidence of Mr. Wynia is that, with respect to significant wildlife habitat, the PPS, the Township Official Plan and the Simcoe County Official Plan provide for the highest policy test, which is the no negative impact test similar to that for significant woodlands.

It was his evidence that the NEP's section 2.8 only requires that developments should minimize impacts on wildlife habitat, maintain wildlife corridors and linkages and enhance wildlife habitat where ever possible, and that this test is not as rigorous as the test in the PPS. As noted earlier in this Decision, the Joint Board concurs that the PPS generally provides the most rigorous test for natural heritage issues.

The Joint Board is satisfied that the less rigorous tests of the NEP have been met in that major wildlife corridor to the east will be enhanced by the proposed reforestation in proximity to the Duntroon ANSI and further plantings on the south side of County Road 91, and that the other wildlife corridors particular along County Road 31 while somewhat smaller in width will be maintained and enhanced through additional visual and mitigation plantings. This corridor along County Road 31 may in fact be enhanced with the closing of County Road 91 thus removing any impediments or hazards to the movement of wildlife crossing this former County Road. Furthermore the proposed planting on the Osprey quarry lands will enhance the wildlife corridor in that area. There is no compelling evidence that any of the linkages currently on the site will not be maintained albeit in slightly different locations. The Joint Board accepts the evidence of Mr. Featherstone that the reforestation plans and the relocation of the Millar Pond will enhance wildlife habitat in their respective locations. Similarly the proposed planting to the north of the quarry will provide improved and larger corridor linkages to the large forested areas to the north of Sideroad 26/27.

Fish Habitat

The Joint Board in considering the planning policy tests accepts the testimony of Mr. Wynia that, with respect to fish habitat, the PPS and Simcoe County policy tests are that there be no negative impacts on the natural feature or its ecological functions and that the Township's Official Plan test is avoiding habitat or demonstrating that impacts are mitigated to an acceptable degree.

In considering the tests with respect to fish habitat section 2.1.5 of the PPS and section 2.6 of the NEP are the most relevant. Section 2.1.5 of the PPS states that:

> 2.1.5 *Development* and *site* alteration shall not be permitted in *fish habitat* except in accordance with *provincial* and *federal requirements*.

Section 2.6 of the NEP states as a development criteria objective that:

> 2.6 New Development Affecting Water Resources
>
> The objective is to ensure that new development affecting streams, Watercourses, lakes, wetlands, and groundwater systems will have minimum individual and cumulative effect on water quality and quantity, and on the Escarpment environment."

The Joint Board after considering the Municipal Official Plan policies finds them to be consistent with the PPS and the NEP.

The Board heard that there is no fish habitat on site. This fact is not in dispute. Mr. Wynia maintained that the mitigation measures being proposed and governed by the AMP would ensure no negative impacts on fish habitat downstream in the Pretty River, the Beaver River and Batteaux Creek watersheds. He also noted the Proponent's commitment to fish habitat enhancements downstream in the Beaver River system and that the MOE and the Federal Department of Fisheries and Oceans expressed no concerns with the loss of the small upstream tributary system known as SW2 stream system located within the current Phase 2A area.

Mr. Charlton also proffered that the quarry operations would have no direct impacts on downstream fish habitat found in the Beaver, Pretty River and Batteaux Creek systems and that this position was accepted by officials from the Federal Department of Fisheries and the local Conservation Authorities. Representatives of the Conservations Authorities testified that they were not aware of the position of the Federal Department of Fisheries. The evidence of representatives from the NCVA was that this review and approval process (HADD Habitat Alteration Disturbance or Destruction) is a common and well understood process and that in the first instance the NVCA stands in the place of the Federal Department of Fisheries wherever a project is in proximity to fish habitat, and that any such development would be covered by the Conservation Authority's regulations and their permitting process. The same would hold for the GSCA who has jurisdiction over the Beaver River watershed in this area. It is clear from the evidence that the only fish habitat that might be impacted is located downstream. The Joint Board is satisfied from the evidence that the requirements of the Federal Department of Fisheries can be met for the various watercourses that find their headwaters on or in

proximity to the Walker property, and that, as such, the Conservation Authorities' approvals with regard to fisheries issues must be documented before any works associated with the quarry expansion are undertaken.

The Joint Board was advised by the witnesses for the NVCA that permits would be required from the NVCA for any reconstruction works on Side Road 26/27 due to the proximity of a cold water stream to the north of the existing road, and that this was a standard and common practice associated with municipal road works and would provide the appropriate protections to the cold water fish habitat found in the streams abutting this road allowance. This permitting process is a function of the road reconstruction and maintenance and is not a direct impact or function of the proposed quarry.

The Joint Board is satisfied that such approvals would be consistent with the planning policy requirements of the PPS, and the NEP and would not offend any Municipal Official Plan policies and that sufficient further approvals are in place to ensure the protection of the fish habitat in proximity to Sideroad 26/27.

Watershed and Watercourse Issues

The Joint Board in considering the PPS policy requirements for water issues with respect to portions of the SW2 water course found on the site and the catchment areas for the Pretty River, Batteaux Creek and Beaver River watersheds must have regard for sections 2.2.1 and.2.2.2 of the PPS.

The SW2 watercourse is part of a tributary of the Beaver River which flows south through Rob Roy 6 wetland adjacent to the existing quarry and joins a larger tributary of the Beaver River to the west of Grey Road 31. Mr. Sorensen opined that a 30 meter setback set out in the GSCA Ontario Regulation 151/06 (Exhibit 246) should be maintained adjacent to the portions of the SW2 system identified as SW2A and SW2B. Mr. Sorensen's position was originally as set out in his comments in 2008 and remained unchanged in spite of the additional work conducted by the Proponent. He is opposed to any quarry activity below the water table or to any development within the areas and setbacks associated with Ontario Regulation 151/06. His positions were never confirmed nor approved by the executive of his Conservation Authority.

Mr. Sorensen conceded under cross examination that a permit from the Conservation Authority would not be required for any of the regulated lands if these lands formed part of an *ARA* license approval. This exemption provision is set out in section 28(11) of the *Conservation Authorities Act*.

Ms. Pounder adopts as well the position of Mr. Sorensen and further opined that the loss of the SW2A and SW2B stream system would not be consistent with objective # 2 of the NEP. She further maintains that it had not been demonstrated that the proposal would not negatively impact the Beaver River watershed system in the immediate area. She fundamentally disagrees with the advice of the MOE that this stream system (SW2) is of little significance and could be removed without impacting the Beaver River system (Exhibit 37, Vol. 13, Tab 172).

After considering the submissions, the Joint Board finds that mitigation with respect to water features is contemplated by the PPS and section 2.6 of the NEP and has been appropriately addressed by the Proponent through their background studies, revised Site Plans and Site Plan Notes, and can be properly regulated by the MOE through its approval process to discharge water and the final AMP.

The Joint Board is satisfied that the issues with respect to both surface and subsurface water are well understood. The relevant provincial Ministries (MNR and MOE) in their correspondence have not attached any measure of significance to the portion of the SW2 system on the site, or its potential loss. MNR has not identified the retention of this watercourse as a concern. MOE has indicated, through the Ministry's evaluation, that this watercourse is of little importance and it does not consider the effects of dewatering on the SW 2 watercourse to be significant. MOE indicates that mitigation measures will be considered through the Permit to Take Water process (Exhibit 37, Vol. 13, Tab 172, P 9640).

The Joint Board finds that the loss of the small SW2 watercourse in the current Phase 2A area can be appropriately mitigated and would not constitute the loss of a significant feature. The Joint Board finds that, if required, the pumping of water from the proposed quarry to an area near the SW2 location can mitigate impacts on Rob Roy 6 until the final level of the existing quarry lake is achieved. .

Furthermore, pursuant to section 28(11) of the *Conservation Authorities Act*, Ontario Regulation 151/06 would not apply as the area associated SW2 stream is totally within the area to be licensed under the *ARA* and that as such the *ARA* License requirements would prevail.

The Joint Board finds the mitigation methods proposed to deal with water and fish habitat matters to be reasonable and that the demonstrated mitigation techniques are consistent with the policy directions of the PPS and the NEP, and would not offend the policies of the County or Township Official Plans. Furthermore adequate protections

are available through the permitting process of the PTTW and Certificates of Approvals required from the MOE.

Visual Impact and Road Access Assessments

Potential visual impact of the proposal is a key consideration under the provisions of the NEP, in particular with regard to objective #4 of the Plan which states the following:

> 4. 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.

Objectives #1 and 2 of the Escarpment Rural Area designation are also relevant requiring maintenance of open landscape character by encouraging the conservation of traditional cultural landscape and cultural heritage features and also requiring the maintenance of scenic values of lands in the vicinity of the Escarpment.

The Proponent's approach to meeting the requirements of the above provisions has been to propose measures that will block views from various strategic points into the quarry and evidence has been provided of the visual mitigation techniques intended to be employed with the proposal (Exhibit 37, Vol. 8, Tabs 72, 75, 76). The Joint Board in considering the evidence and opinions of Mr. Buck and Ms Laflamme is satisfied that the visual mitigation techniques being imposed in the revised Site Plans (Exhibit 379) and Site Plan Notes (Exhibits 378) are sufficient to appropriately screen the proposed quarry operations from the public road allowances, adjacent public lands, the Bruce Trail and other public lands to the north of Sideroad 26/27. The Joint Board is satisfied that the revised visual mitigation planting details found on the revised Site Plans and Site Plan Notes will mitigate visual impacts in the manner simulated by Mr. Buck.

The Joint Board accepts the recommendation of Ms Laflamme that Natural Environment Site Plan Note 13 (Exhibit 107) is not sufficient and that it has been appropriately revised in Exhibit 378 with the inclusion of wording to ensure that all plantings will be properly maintained and dead material shall be replaced.

The Joint Board notes that Rehabilitation Plan Note 4, which speaks to the plantings required as part of the progressive rehabilitation of the quarry, makes no reference to maintenance of planted material as part of these works. Mr. Clarkson in response to a question from the Joint Board indicated that this was an oversight.

The Joint Board directs that Rehabilitation Plan Note 4 (Exhibit 378) be amended by the addition of the following wording at the end of this note:

> All such plantings forming part of the Rehabilitation Plan shall be kept healthy and dead material shall be replaced as required.

Ms Laflamme also expressed concerns that the visual mitigation areas might not be sufficient at the western end of the property in the area of the intersection of County Roads 31 and 91. Her concern arises in the event that the current 65 metre buffer is reduced as a result of the approval of the MAQ quarry proposal and if the travelled portion of the existing road is relocated and reconstructed within its given road allowance. Both Mr. Buck and Mr. Clarkson testified that it was the Proponent's intent to maintain at all times a 30 metre buffer in this area and that Visual Note 5 as set out in Exhibit 378 addressed this concern.

The Joint Board understands the issues but feels for greater clarity the following should be added so that Visual Note 5 reads as follows:

> if the extraction setback is reduced along the east side of Grey road 31 in accordance with noise note 1 (above this page), there shall be at all times no less than 30 meters of vegetation either to be maintained or planted measured west from the westerly extraction limit to the edge of the travelled portion of Grey Road 31 or to the edge of the given road allowance whichever is the greatest.

Ms Laflamme in her testimony expressed concerns that the planting detail for the visual mitigation planting had not been provided and did not form part of the Site Plan Notes or details in Exhibit 107. Mr. Buck and Mr. Clarkson, in reply, took the Joint Board through revised details for the visual mitigation planting as set out in revised Site Plan Notes (Exhibit 378) and as shown on the Site Plan details (Exhibit 379).

The Joint Board is satisfied that the revisions as set out in Exhibits 378 and 379 to the visual mitigation plantings appropriately deal with the issues raised by Ms Laflamme.

The Joint Board has carefully considered the conflicting opinions provided by Mr. Buck and Ms Laflamme regarding the Open Landscape Character of the area and the compatibility of the proposed quarry with the objectives of the NEP. The NEP defines Open Landscape Character as:

> Open Landscape Character – the system of rural features, both natural and human-made which make up the rural environment, including forests, slopes, stream sand stream valleys, hedgerow, agricultural files, etc.

The Joint Board notes that objective #4 of the NEP requires maintaining and enhancing the open landscape character “in so far as possible” and that the definition of open landscape character includes human made elements. From these provisions the Joint Board concludes that some intrusion into the open landscape character is acceptable in view of the other objectives of the NEP. Also, features such as quarries and quarry lakes are not precluded from comprising part of the open landscape character of the Escarpment.

Ms Laflamme opined that the continued expansion of quarry uses in this area would degrade the existing landscape unit (unit 183) and that an expanded quarry of the size proposed with it large after use lake (pond) would not be compatible with objective #4 and would not be consistent with the her concept of the term Open Landscape Character resulting from her discussions with Ms Pounder.

The Joint Board would note the Land Evaluation Study 1976 (“LES”) Exhibit 43, Book 5 Tab 4, considers inland lakes to be a positive feature in the ranking of scenic value of a Landscape Unit and that the Joint Board, differently constituted, for the Dufferin Milton quarry (Exhibit 66) determined quarry rehabilitation lakes to be a positive feature as set out in LES.

In consideration of the above, the Joint Board prefers the opinions put forward by Mr. Buck to the very restrictive construction put forward by the NEC and finds that the proposed quarry and its rehabilitated after use would be consistent with the NEP’s definition of a Cultural Landscape and compatible with the NEP’s definition of Open Landscape Character as found in this part of the NEP Area.

It is instructive to note the NEC’s Processing Guide for a Plan Amendment from Escarpment Rural Area to Mineral Resources Extraction Area (Exhibit 37, Vol. 1, Tab 10, P 423) contemplates that mitigation measures may be applied to protect adjacent lands with higher rankings (“outstanding”, “very attractive” or “attractive”). The Joint Board finds this test has been met in that the quarry proposal will not be visible to or from the Bruce Trail and will not impact any views or vistas to or from the quarry to higher ranked landscaped units adjacent to the proposal. It should be noted that the quarry site is ranked as “average”.

It is the Joint Board’s finding that the proposal when viewed as a whole and within the context of the existing area would satisfy objective #4 of the NEP.

The Joint Board also finds that the proposal, as set out in the revised Site Plans (Exhibit 379) and Site Plan Notes (Exhibit 378), subject to the changes directed by the Joint Board, meets the visual mitigation requirements of the NEP and the *ARA*. Furthermore,

it will not negatively impact any views to or from the Niagara Escarpment, and to or from the Bruce Trail, or County Road 31, and it will not diminish access to this part of the Niagara Escarpment Area.

The Joint Board has considered the evidence of Ms Laflamme as adopted by Ms Pounder that the Road Settlement Agreements could result in a loss of access to this part of the Niagara Escarpment and to the Bruce Trail. The Joint Board finds that there will be no loss of public access to the Escarpment or the Bruce Trail in this area resulting from the Road Settlement Agreements. The Agreements merely relocate but do not diminish access to this part of the Escarpment. Access to the existing Bruce Trail and its parking lot on County Road 91 will be maintained as will the existing loop trail system on the south side of County Road 91. There is no loss of access to publicly owned lands in the immediate area to the north.

It is the Joint Board's finding that Sideroad 26/27 with its improvements (within the existing road allowance) as set out in the Road Settlement Agreements can provide an appropriate alternative access to the closing of the portion of County Road 91 with nominal visual impacts to the Niagara Escarpment and is to be preferred to the reconstruction of County Road 91 to full Simcoe County Road primary arterial road standards. The existing access and crossing of the Bruce Trail with existing Sideroad 26/27 is virtually unchanged. This conclusion of the Joint Board is based upon the testimony of Mr. McNalty that there would no change to the vertical cross section of Sideroad 26/27 and that the road improvement works would be contained within the existing road allowance and reconstructed to a local Township road cross-section. This is an operational decision the Township could make today even without the quarry application and such should not affect or restrict the Bruce Trail crossing of Sideroad 26/27.

Nor does the Joint Board accept the opinion of Mr. Usher that the proposal to create a local access road from Walker's new gate to Concession Road 10 on former County Road 91 would limit public access to the Bruce Tail and its parking lot. The Joint Board finds the Road Settlement Agreement (Exhibit 37, Vol. 12, Tab 245) to be clear and accepts the testimony of Mr. McNalty and the Township's submissions that any bylaw restricting access passed by the municipality would ensure access to existing properties including access by the general public to the Bruce Trail and its parking lot.

The Joint Board has reviewed the visual evidence provided by both Mr. Buck and Ms Laflamme regarding the potential loss of scenic views to the east resulting from the closing of a portion of County Road 91. The Joint Board prefers the evidence of Mr. Buck that there will be no loss of scenic views from the Bruce Trail loop situated on

the south side of County Road 91, nor does the Joint Board find that the loss of the superior view (highest) resulting from the closing of a portion of County Road 91 to be significantly different from the eastward view still available from the western limit of remaining open portion of this road allowance. It is the Joint Board's determination that the view from the western limit from the remaining open portion of County Road 91 provides the best scenic view eastward including Nottawasaga Bay, and that equivalent or better views are also available from Concession Road 10 west of County Road 91, a position testified to by Mr. Buck.

The Joint Board accepts the evidence of the transportation experts that all of the proposed road improvement to former County Road 91 can be contained within the existing road allowance and, as such, accepts the evidence of the visual experts that there will be no negative visual impacts resulting from these works on views of the Niagara Escarpment from the east.

The NEC raised concerns that the reconstruction of Sideroad 26/27 could impact scenic views along this road allowance as set out in Ms Laflamme's visual evidence found at Exhibit 204. She also expressed safety concerns about the relationship of the road's intersection with the current Bruce Trail crossing. The uncontradicted evidence of the transportation experts was that these works would be contained within the existing Sideroad 26/27 allowance at a Township local road cross-section. The Joint Board finds that the road safety issues are clearly engineering matters that require engineering judgement at the time of design and ultimately reside with the Road Authority, being the Township of Clearview and not the NEC.

The Joint Board is hard pressed to conclude that the reconstruction of an existing Township road within its established road allowance would negatively impact the Bruce Trail crossing from a public safety viewpoint when one considers the style and form of the existing crossing, and the limited anticipated volume of traffic using the reconstructed Sideroad 26/27. In comparison the existing conditions along the northern edge of County Road 91 pose greater yet acceptable public safety issues where Bruce Trail users must cross and walk along and within the undefined shoulder of County Road 91, than the current or proposed direct crossing on Sideroad 26/27.

The Joint Board finds that Sideroad 26/27 should be considered an existing use and essential transportation facility with respect to the various land use designations found in the NEP, and that the determination to open this local road on a year round basis is an operational matter that vests with the Township of Clearview. The Joint Board accepts the opinion of Mr. McNalty that this road project would fall under Ontario Regulation 828, "Development within Development Control Areas" (Exhibit 75), passed

pursuant to the *NEPDA*, and that since this road existed prior to the passing of the NEP that such works would not require a Development Permit from the NEC.

The issue of whether subsequent NEC Development Permits are required for the potential road works is not a matter that needs to be determined by the Joint Board. It can be dealt with at the time the Municipality announces and presents its documents, and engineering plans with respect to the proposed works for former County Road 91 and Sideroad 26/27.

The Joint Board does not accept Ms Pounder's testimony that these works should have been subject to a full class environmental assessment. The determination as to whether these works would fall under a Class A or A+ undertaking resides with the Municipality as set out in the Municipal Class Environmental Assessment Manual (Exhibit 80). If one does not agree with the Municipal Council's determination of the undertakings class there are other remedies beyond this Joint Board.

It is the Joint Board's finding that since these public road works are essential to the successful and safe operation of the proposed quarry they must be in place prior to the commencement of extraction. The Joint Board has reviewed the revised Site Plan Notes (Exhibit 378) and the Road Settlement Agreements with the Township and can find no statement that the reconstruction of County Road 91, as testified to by the transportation panel, is a precondition to the shipping of product from the new quarry. The uncontradicted evidence is that these works are a requirement to the successful operation of the new quarry.

The Joint Board will direct that the Site Plan Notes be amended to indicate:

> That prior to the commencement of shipping of quarry product from the proposed quarry that the improvements to former County Road 91 and Sideroad 26/27 as contemplated by the Settlement Agreement be undertaken to the satisfaction of the Township of Clearview.

The Joint Board is satisfied from the uncontradicted expert testimony of the transportation engineers that the works proposed for Sideroad 26/27 can be contained within the existing road allowance and will improve access to this part of the Escarpment, the Bruce Trail, and the Nottawasaga Lookout Provincial Nature Reserve on a year round basis, with nominal visual impacts to the Escarpment beyond what currently exists. Similarly, views to the north and south from this open road allowance will be available year-round and will be relatively unchanged. The same conclusion applies to the proposed works for former County Road 91.

Transportation Issues

Expert transportation evidence was provided by witnesses who testified on behalf of the Township and County of Simcoe. Mr. Philp, Mr. Doherty, Mr. Arcardo, and Mr. McNalty, testified as a panel. The settlement agreements, traffic noise, and road access issues are dealt with in other sections of this Decision. This section deals mainly with the traffic study and assessment of the suitability of a haul route which was addressed through the testimony of the panel.

The evidence of the traffic experts supports the use of the proposed haul route from the quarry east on Simcoe County Road 91 and then north or south on Simcoe County Road 124. The expert panel indicated that the route will provide an appropriate and safe level of operation, taking into account anticipated traffic volumes and quarry truck traffic. This conclusion is based largely upon analyses undertaken by Mr. Philp, who produced an initial study of the haul route in September 2007 (Exhibit 37, Vol. 9, Tab 80), and prepared an update which takes into account changes to the roads and traffic regime, based upon the settlement agreements in March 2010 (Exhibit 37, Vol. 9, Tab, 81). The studies considered anticipated traffic and collision history of the proposed route, and considered the potential cumulative effects of other quarry applications in the area.

It was Mr. Philp's evidence that the 500 daily limit on quarry trucks specified in the settlement agreement, when considered together with the background traffic that would be diverted as a result of the closure of a portion of Simcoe County Road 91, would result in lower total traffic volumes (estimated reduction of 895 trips/day in the peak month) than currently exist on the eastern segment of the road. It was his opinion that the traffic volumes anticipated would be within the limits recommended for a "local road" by the Transportation Association of Canada's Geometric Design Guide for Canadian Roads and that this usage would justify the downloading of this segment of road to the Township and the redesignation of this segment of road to a collector road under the jurisdiction of the Township of Clearview.

Mr. Philp, in considering the safety aspects of the proposed haul route used among other factors, collision records provided by the County of Simcoe, and found that nothing unusual could be attributed to the collision occurrences on this road. It was his evidence that the collision occurrences appeared similar to collision occurrences on other Simcoe County roads. He noted that many individual occurrences were weather related as shown on Exhibit 73, Slides 16, 17 and 18 with a slightly higher occurrence rate near the intersection of Grey Road 31 and Simcoe Road 91.

Mr. Philp proffered that the closing of this segment of Simcoe Road 91 in combination with the proposed road works and the lowering of the speed limit for a portion of the road would improve the safety conditions, would be less intrusive to surrounding properties, and would require no major road widening. He testified that if Simcoe County Road standards were applied, they would require a wider road allowance and the flattening of grades, resulting in greater impacts on adjacent lands when compared to the collector road standards of the Township of Clearview.

Mr. Philp indicated, based upon his analysis of alternative haul routes for the proposed quarry, that the best route, going east on County Road 91, had been selected. He also stated that his analysis supports the transfer of jurisdiction of the above-noted portion of County Road 91 to the Township of Clearview.

Mr. Philp's position was supported by other members of the panel. Mr. Doherty noted the County's support for the proposed changes to the road network. Mr. Arcardo's opinion is that the road improvements on Simcoe County Road 91 can be undertaken within the existing road allowance. Mr. McNalty's opinion is that the Settlement Agreement is sound from the perspective of the Township's road network. He sees the closing of this portion of Simcoe County Road 91 as a benefit to local residents, due to the reduction in traffic volumes using the road.

Mr. McNalty reviewed, the applicable sections of the Municipal Class Environmental Assessment Manual (Exhibit 80) for the Joint Board, and opined that the road works proposed in the settlement agreement should be considered a "pre-approved Schedule A+ Class Assessment" project requiring public notice of the proposed works, as set out in the Manual.

Mr. McNalty also indicated that all the roads mentioned in the Settlement Agreement predated the NEP and should be considered existing uses and essential transportation facilities with respect to the various land use designations found in the NEP. In his opinion, the proposed road projects would not require a Development Permit from the NEC under Ontario Regulation 828 Sections 5.4.3 and 5.5 (Exhibit 75), passed pursuant to the *NEPDA.*

Mr. McNalty opined that to the best of his knowledge, Sideroad 26/27 had a standard 20 metre road allowance and that he believed the proposed improvements could be undertaken within the existing road allowance. He testified that paving of a local road should only be considered when average daily traffic volumes exceeded 400 vehicles per day.

Mr. Shaw, Grey County's Director of Transportation and Public Safety, and Mr. McNalty testified as a panel with respect to the Road Settlement Agreement reached between Grey County, the Township of Clearview, and Walker Aggregates Inc., dated July 28, 2010. Mr. Shaw indicated that his concerns and those of Grey County were based on ensuring that an east-west connection between the municipalities of Clearview and Grey Highland was maintained if, and when, Simcoe County Road 91 was closed. He confirmed that these concerns were set out in his Participant's statement (Exhibit 79). It was his opinion at that time that Sideroad 26/27 should be "constructed to a township standard or better; and hard surfaced with double surface treatment or a hot mix surface."

He confirmed that the signatories to the July 28, 2010 Settlement Agreement (Exhibit 100) had been in discussions regarding the settlement now before the Joint Board since May of 2010. He reviewed the operative section of the agreement, Section 2.1, and testified that works set out in this Road Settlement Agreement resolved all his issues with respect to Side Road 26/27 and was fully supported by Grey County, and on this basis the County of Grey was withdrawing from the Hearing, as set out in its resolution (Exhibit 101). He confirmed, as did Mr. McNalty, that the trigger of 400 vehicles per day was an appropriate standard to determine when the Sideroad 26/27 should be upgraded from a gravel road. The panel confirmed that the tar and chip method of hard surface was an appropriate surface treatment for this road, as set out in section 2.1.2 of the Grey County Road Settlement Agreement.

Mr. Shaw when questioned about the a letter from Municipality of Grey Highlands dated July 23, 2010 (Exhibit 114), expressing continued concern about the closing of Simcoe County Road 91, responded that the matter of the settlement now before the Joint Board was supported unanimously by Grey County Council, of which the Municipality of Grey Highlands has two members.

The Board heard no evidence from transportation experts in opposition to the proposed haul route. However, concerns were raised by a number of lay witnesses testifying on behalf of the CCC.

Mr. Gillham, on behalf of the CCC, disputed the estimated traffic volumes and indicated that if a longer time frame before the year 2000 were studied, that there were other traffic accidents involving trucks one of which involved a gravel truck rear-ending a school bus in front of his home. In his opinion, a full Municipal Class Environmental Assessment should have been conducted to select the haul route and to review the impacts of the proposed road works, before the municipalities entered into the road settlement agreement. Other lay witnesses for the CCC supported this opinion.

Mr. Philp, on questioning from Counsel for the CCC, indicated that some local residents had provided him with anecdotal accounts about traffic incidents with Quarry trucks but that he had not been able to confirm the incidents from either County or Ministry of Transportation collision records. He confirmed that of the collision occurrences recorded for the segment of Simcoe County Road 91 from Duntroon to Grey County Road 31, there were nine in the uphill direction, while eight were in the downhill direction. It was his evidence that weather, more than direction of travel, appeared as an issue related to these collision incidents.

Mr. McNalty, on questioning from the Joint Board, confirmed that the Settlement Agreement required Clearview Township to adopt a bylaw which would restrict truck traffic and load restrictions on Sideroad 26/27 on a year round basis. He testified that that such a bylaw would normally place a vehicle axle limit of five tons on the road but would permit the road to be used for delivery, emergency service, maintenance and snowploughing vehicles.

After considering the submissions, it is the Joint Board's opinion that the evidence supports use of the proposed haul route east on Simcoe County Road 91 to County Road 124. The relevant traffic studies have properly assessed and predicted the impact of anticipated traffic on the haul route in conjunction with proposed works and operational changes. The Joint Board finds that the haul route with the proposed works, limits on truck traffic, closure of a portion of County Road 91 and controls on speed limit, as set out in the settlement agreements, can provide a safe and appropriate level of operation for the anticipated volumes and types of traffic.

On October 26, 2011, well after the completion of the Hearing, the Joint Board received a motion from the CCC requesting that the evidence regarding an accident on County Road 91 be considered by the Joint Board in making its Decision.

The CCC in its motion requested the following relief:

1. That the Board conduct an inquiry of the circumstances of the near fatal truck accident on County Road 91 ("CR 91") that occurred on September 9, 2011. The inquiry should include interviews of the driver of the truck and investigating Ontario Provincial Police ("OPP") Officer;
2. In the alternative, CCC requests an Order from this Board permitting a Written Motion to be considered by the Board to re-open the case to allow these Motion materials to be considered as part of its final decision;
3. Admission of Motion materials included herein as evidence, including most particularly the OPP Report prepared by Constable David Brown providing details of a serious quarry truck accident

> approximately 2 km east of the Walker Aggregates Inc. gate, and including the affidavits of Mrs. Ann Warren and Mr. Bruce Gillham;
>
> 4. An Order for the issuance of a summons to CCC for Mr. Charles Patterson, the driver of the truck that crashed, and an abridgement of time to allow drafting of a further affidavit from the CCC interviewer containing the statement of Mr. Patterson; and
> 5. Such other relief as counsel may advise and this Board may permit.

The Joint Board determined that it would consider a motion in writing to determine whether the relief requested should be granted and if the Hearing should be reopened to consider new evidence. Responses to the motion were filed by the Proponent, Simcoe County, and Clearview Township, and the CCC filed a reply submission.

There is a high threshold established by the Courts for reopening a Hearing in order to consider new evidence, which has been enunciated in a number of Decisions including *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., 2001 SCC 59, [2001] 2 SCR 983. The Courts have determined that a Hearing could be reopened only in view of the following considerations:

> (a) Would the evidence, if presented at the hearing, probably have changed the result?, and
>
> (b) Could the evidence have been obtained before hearing by the exercise of reasonable diligence?

Furthermore, the Joint Board is aware that through the above Decision the Supreme Court has held “that the discretion to reopen a matter should be used sparingly and with the greatest of care so that abuse of process does not occur.”

There is no doubt that the referenced evidence could not have been obtained earlier because the accident occurred after the Hearing concluded. With regard to whether the evidence if presented at the Hearing probably would have changed the result, the Joint Board considered affidavits from Mr. Philp, Mr. McNalty and Mr. Doherty. All three expert witnesses indicated that evidence regarding this single accident would not change their opinion about the suitability of the haul route.

In consideration of these opinions, and of the potential for evidence about one accident to effect the Board’s conclusions about the haul route which were based upon a more fulsome review of the accident history, the Joint Board issued the following Order:

> The Joint Board has considered the Motion brought by the Clearview Community Coalition, the responses by the Proponent, the County of Simcoe and the Township of Clearview, and the reply by the Clearview Community Coalition. The authorities submitted by the Parties related to the Motion have also been considered.

> The Joint Board finds that the high threshold established by the Courts and through Ontario Municipal Board procedures for the reopening of a hearing for the consideration of new evidence has not been met. Therefore, the Joint Board dismisses the Motion brought by the Clearview Community Coalition to reopen the Hearing in this matter, in its entirety, without costs.
>
> Detailed reasons for this Order will be provided in the upcoming Decision of the Joint Board regarding the Hearing."

Appendix C contains more detail on the reasons for the Joint Board's Decision about this motion.

Sound Impacts and the Preferred Haul Route

Haul Route Sound

The Joint Board is satisfied that the Proponent's noise consultants have appropriately modelled the haul route sound level changes consistent with established industry practice, and while it might be convenient for Mr. Coulter's "Null" hypothesis (Exhibit 229) to exclude existing Walker quarry truck traffic in the determination of future sound impacts, it does not reflect the existing condition found in the area and does not reflect the current required practice of the acoustical industry when considering sound level changes from a proposed undertaking.

Mr. Coulter opined in his testimony that the Municipal Councils did not have all of the alternatives with respect to the haul route sound impacts before them when they made their decision to enter into the Road Settlement Agreements, and that the haul route data was flawed, a position shared by Mr. Gillham. They opined instead, that a Class "C"; Environmental Assessment should have been undertaken to determine the preferred haul route and the sound impacts on adjacent properties. There is nothing in the Municipal Class Environmental Assessment Manual (Exhibit 80) that would suggest that the selection of a quarry haul route should be subject to the Class Environmental Assessment process. Mr. Gillham opined that the criteria used to determine the haul route were inadequate and misleading. The more compelling evidence is that the consultants who undertook this work were following the directions of the County of Simcoe's Transportation office and that the County officials were satisfied that the studies to determine the preferred haul route were appropriately done.

The Municipal Councils had all of the work of Mr. Emeljanow, the advice of their transportation experts, and the advice of the appropriate staffs at the Township and County levels when they made their determinations regarding the haul route and the Road Settlement Agreements. The evidence is that in the first instance, the proposed

downloading of County Road 91 came from County staff. It is clear to the Joint Board that the Municipal Councils' decisions as reflected in the Road Settlement Agreements, were designed to mitigate sound levels, minimize many traffic safety concerns expressed to them by local residents over the years, to minimize any visual impact on the views of the Niagara Escarpment that could have resulted from the implementation of the Ainley report which reviewed upgrading County Road 91 to arterial standards (Exhibit 47, Tab 7), and to find a cost effective solution to the concerns about the roads in this area.

It is the Joint Board's finding that their decisions properly reflect the public interest for the area as the Councils perceived it, and represent good planning.

The Joint Board heard evidence about the sound impact from the use of Jake Brakes and the Proponent's policy to drivers regarding their use and the private enforcement Walker uses to implement its policy to truckers. The Joint Board was advised that there are no Provincial regulations regarding the use of Jake Brakes other than the sound level requirements for new trucks.

By all accounts the decision to use Jake Brakes as a safety device must reside with the individual truck driver's assessment of individual conditions and circumstances. The Joint Board finds that the existing approach used by the Proponent to limit the use of Jake Brakes to be appropriate and will not interfere in this traffic safety matter.

Mr. Coulter opined that the proposed hours of operation for shipping being 5:00 a.m. to 5:00 p.m. Monday to Friday and 7:00 a.m. to 3:00 p.m. on Saturday were not consistent with what he understands to be the Proponent's existing practice of 6:00 a.m. to 5:00 p.m. Monday to Friday and closed on Saturday. He opined that in this proposed change from current operations, trucks, in fact, would be passing many homes on their way to the quarry at around 4:30 a.m. and that noise level during this night time period could cause a startling effect to some people sleeping along the route. He maintained that the current 6:00 a.m. start time would be more appropriate. Mr. Gillham confirmed that he is currently affected by quarry trucks, and that the proposed changes would constitute a new impact from a time of day perspective to what he now experiences.

The Joint Board notes that the existing quarry license has no restrictions on its hours of operation, and heard conflicting testimony from area residents about normal operating hours of the existing quarry. The proposed hours of operation, as agreed to by the Proponent in its settlement with the Township of Clearview, are set out at Exhibit 378, Site Plan Note 28. The Joint Board heard no compelling testimony or explanation in

support of the shipping times set out in the settlement agreement with the Municipality beyond that they reflected Proponent's operational needs.

The Joint Board finds merit in Mr. Coulter's suggestion and the concerns expressed by Mr. Gillham regarding the proposed start times for the shipping of product. The Joint Board heard no testimony that the Proponent has consistently operated on Saturday in the past or that its start time for shipping during the week in the past was not 6:00 a.m. The testimony is unclear with respect to operational hours within the quarry itself. The more compelling testimony is that the proposed starts times for deliveries represent a new condition and, in the Joint Board's findings, have not been adequately supported by the Proponent.

Accordingly, the Joint Board will direct that Operational Plan Site Plan Note 28, as set out at Exhibit 378, be amended to read:

> Shipping 6:00 a.m. to 5:00 p.m. Monday to Friday and no shipping on Saturday.

The Joint Board is satisfied that the Amendment proposed by Walker with respect to emergencies as set out in Operational Plan Site Plan Note 28, Exhibit 378, meets the concerns raised by some of the CCC's witnesses. In all other respects the Site Plan Note with respect to hours of operation as shown on Exhibit 378 shall remain unchanged.

On Site Sound Impacts

The Joint Board heard conflicting anecdotal evidence from members of the CCC and other Participants about on-site noise at the existing quarry. Members of the CCC testified that they were bothered by quarry operational noises at distances of up to 2.5 km from the existing quarry. Conversely, other Participants in closer proximity to the existing quarry testified that they had no issues with Walker's operations. Members of the CCC further suggested that no noise assessment had been made of the impact on people traveling the Bruce Trail. By all accounts the Bruce Trail is some 400 metres at the closest point to the proposed quarry which is a greater distance than the noise monitoring required for the nearest residential receptors. Mr. Emeljanow testified that at this distance, operational noise from the proposed quarry would meet the Ministry's guidelines for sound. The Joint Board heard no compelling evidence that the sounds resulting from the proposed quarry operations could not be mitigated to meet Provincial Standards, subject to the changes to the Site Plan Notes recommended by Mr. Sylvestre-Williams, and which have been included in the revised Site Plans (Exhibit

379) and the Site Plan Notes (Exhibits 378). The Provincial guidelines for sound do not mandate that the quarry must be silent. Instead, reasonable sound guidelines have been put in place that all quarry operations must follow. There is no evidence that the Bruce Trail, some 400 metres at its closest point, would be impacted by onsite quarry noise. Nor is the Joint Board convinced by the testimony of Mr. Bell, who owns a vacant property on Sideroad 26/27 that his property would be negatively impacted by sound from the proposed quarry operation. The more compelling evidence with respect to Mr. Bell's property is that the quarry will operate within established Provincial sound guidelines. Even Mr. Coulter when questioned by Counsel for Walker agreed that the on-site noise would be mitigated to meet the Provincial guidelines.

The Joint Board finds that the proposed quarry, subject to the Site Plans (Exhibit 379) and the Site Plan Notes (Exhibits 378), can meet the Provincial sound guidelines.

Blasting

Mr. Van Bers, the blasting expert retained by the Proponent, carried out an impact analysis of the air and ground vibrations associated with the blasting requirements for the proposed quarry. His report together with his 2007 assessment of the cumulative impacts of the MAQ quarry proposal are found at Exhibit 37, Vol. 9, Tabs 92 and 93. He reviewed for the Joint Board the MOE's guidelines for blasting in quarries, known as NPC119, and testified that these guidelines would permit a ground vibration of 12.5 mm/s and an air vibration of 128dBL at the nearest residential receptor. He confirmed that, in his opinion, the blasting program for the proposed quarry could be carried out within these parameters. He noted that he had reviewed the blasting records for the existing quarry and noted that the material in the new quarry was a similar rock formation, and on this basis he had a good understanding of the effects of blasting in this type of rock.

He testified that from his review of the data records of blasting at the existing quarry, he would anticipate that the NPC119 guidelines would be met at a distance of 350 metres from the blast site. He confirmed that monitors would be placed at the nearest residential receptor to ensure that blasts were modified to meet the NPC119 guidelines. He confirmed on questioning from the Joint Board that, in his opinion, the blasting would have no negative impacts on any wells in the area and that there would be no negative impact from the cumulative effects if the MAQ proposal was approved.

He testified, on questioning from Counsel for the NEC, that he did not anticipate that the blasting in the area of the Northern Peninsula or around Phase 2B would have any negative effect on the structure of the rock formations underneath these areas. Some

members of the CCC indicated that as far away as 2.5 km they could feel the vibrations from the existing quarry blasts. Under cross-examination, some of the Lay CCC witnesses were presented with letters from Duntroon Highlands Golf and Highland Nordic Inc. stating that their operations had not been impacted by the existing Walker quarry, and that they were not opposed to the new quarry expansion. The Joint Board heard no compelling testimony that any properties would be negatively impacted from the proposed blasting at the quarry.

The Joint Board is satisfied based upon the uncontradicted evidence of Mr. Van Bers, and subject to the revised Site Plan Notes (Exhibit 378), that blasting at the proposed quarry can be carried out within Ministry guidelines with no negative impacts to the surrounding residences or other recreational and tourism uses, such as the Bruce Trail, Highland Nordic Inc. and Duntroon Highlands Golf.

Economics and Tourism

Some of the Lay witnesses for the CCC proffered that the Collingwood area was in transition, and that tourism in its many forms would lead and play a significant economic role in the area's future and will replace the heavy industry jobs being lost. The substance of the argument put forward by the members of the CCC was that the continuation of the quarry operation at the Duntroon location for some 60 years was not a land use compatible with the concept of a tourism economy for the area.

The Joint Board in this regard, prefers the evidence of Mr. Norman, an economist called by the Proponent, who opined that any impacts from the existing quarry were already factored into the businesses found in the settlement areas and the tourism enterprises located in proximity to the existing quarry. Tourism has grown with the existing quarry in the area and the continuation of the quarry operation in the same general location would have no additional negative economic impacts on these sectors of the local economy. The Joint Board would also note that the local Chamber of Commerce, which represents a wide group of businesses in the Collingwood area, supports the proposal.

The Joint Board heard no compelling evidence that the tourism industry in the immediate area of the existing quarry has been negatively impacted by the existing quarry operations. In fact the nearest recreational uses, Highland Nordic Inc. and Duntroon Highlands Golf, expressed no concerns with the proposal in letters to the Joint Board (Exhibits 241and 242). The Joint Board is satisfied that the proposal with the conditions set out in the revised Site Plan Notes will have no negative impacts on the tourism industry at present, or in the future. The more compelling evidence is found in the NEP itself where it identifies that rehabilitated quarry projects have been

successfully included in the Niagara Escarpment Parks and Open Space System providing tourism opportunities to people visiting the Niagara Escarpment. It is also instructive to note as set out at Exhibit 266, that quarry operations and wineries have been able to coexist successfully in very close proximity within the Niagara Region for many years.

Some of the lay witnesses testified that the quarry would impact property values in the area, while other lay witnesses opined that the existing quarry had no impact on local property values. The Joint Board heard that if there was any impact on real estate values this has long been factored into real estate market due to the length of time the existing quarry has been in operation. Furthermore, the Joint Board was advised by Mr. Clarkson that the Proponent is prepared to enter into agreements with local residents to ensure present property values and had done so in the past.

The Joint Board finds nothing of substance in the evidence that would raise a substantial concern for property value impacts resulting from the applications.

The Adaptive Management Plan (AMP)

The AMP is a fundamental component to the application now before the Joint Board because it includes key monitoring and mitigation procedures which will be implemented during the entire life of the quarry operation. The NEC and CCC raised concerns about enforceability of the AMP and the capacity of the Provincial Ministries to deal with the complexities of the AMP document. Those opposed to the AMP find fault in the fact that the document before the Joint Board is a draft and take the position that it is not complete because the Proponent has not demonstrated that the proposed quarry land use can go forward with no negative impacts.

However, the Joint Board heard expert opinion on both sides which said that the AMP as a planning tool is fundamental to the orderly and environmentally safe development of the quarry over time, and would allow for the dynamic altering and adjustment of proposed mitigation measures as required instead of the rigid set in time Site Plan note conditions. The Joint Board finds that the AMP, like the Site Plan Notes and the NEC's Development Permit conditions are fundamental to understanding the Proponent's intent that the proposed land use be regulated in an orderly and environmentally safe fashion over the long term life of the quarry. An understanding of the AMP's purposes and proposed mitigation and contingency measures is integral to the determination of the appropriateness of the quarry land use.

The Joint Board heard no compelling evidence that the AMP as a long term planning tool can not work. The measures identified in the AMP are standard monitoring and mitigation techniques which, if implemented in conjunction with the site plan notes, should ensure that the quarry is operated in a manner that does not have unacceptable impact on the environment. The more compelling evidence is that the AMP is a state-of-the-art tool that should be employed to ensure the environmentally safe operation of a below the water table quarry. In addition, the Joint Board does not find as a flaw, that the final document (AMP) was not before us, or that the MNR should be the approval authority to monitor and authorize changes to this dynamic document over the life of the quarry and to ultimately be responsible to ensure that it is being enforced. This is similar to the obligations of the MNR under the *ARA.* The AMP is merely an effective monitoring and long term planning tool to assist the Ministry in its oversight of the quarry operation, as required by the *ARA.*

The NEC contends that the AMP is not final and that it does not have a policy basis in provincial legislation or regulations. However, the Joint Board heard that the NEC has supported an AMP as a mitigation measure in the Sutherland Quarry NEP amendment application.

The NEC has also questioned the capacity of MNR and MOE to carry out their respective roles that may be required through the AMP. Ms Pounder opined that there was no formal policy regime in place at the MNR to deal with this new planning tool called an AMP, and that this is a concern.

However, the Joint Board heard that the AMP as a planning tool has been effectively applied and has formed part of the Site Plan Notes and implementation strategies in other quarry applications (Dufferin Milton), and that the NEC through its Development Permit conditions has left the monitoring and any subsequent changes in the AMP to other more capable agencies or parties.

In addition there is no compelling evidence that the MNR needs to be the agency responsible for the AMP over the long term as demonstrated in the Dufferin Aggregate agreements with Halton Conservation and the Region of Halton (Exhibit 140). It may not be necessary for the MNR to administer in all cases the final AMP document when another capable independent third party is prepared to assume that responsibility.

The Joint Board recognizes that through the provisions of the *ARA*, the MNR will maintain oversight as the Site Plan and licensing authority, but an independent third party can have a monitoring and managing role as contemplated in Site Plan Notes (Exhibit 378 Hydrogeology note 7E p. 20). The best evidence is that appropriate

agreements with sufficient securities can be arranged to secure long term performance of the obligations in an AMP, as is found in the Dufferin Aggregate agreement with Halton Conservation and the Region of Halton (Exhibit 140). Similar but specifically tailored agreements in this case could be developed using this template to secure the financial obligations associated with the performance and enforcement of the final AMP for the proposed Duntroon quarry. It appears from the submissions to the Joint Board, that the Township of Clearview is prepared to take on this responsibility for the lake filling phase of the proposal and has the capability to effectively administer this part of the AMP.

The purpose of the AMP document in the Joint Board's finding was best articulated by Mr. Featherstone of the NVCA when he testified that the AMP was a tool:

> To implement a practical program based on the "precautionary principle" which appropriately responds to ecological and environmental changes over the life of the project.

Some witnesses, including the Environment Commissioner of Ontario, testified that the MNR has neither the staff resources, the technical skills required nor the financial capacity to administer this complicated aggregate license and the associated AMP throughout the life of the quarry. The Environment Commissioner appeared under summons from the CCC and testified on the broad planning and environmental policy regimes in place in Ontario as they relate the Aggregate Industry and the ability of the Provincial Ministries to deal with complex aggregate industry matters. His Will Say Statements are found at Exhibit 48, Tab 6. The Commissioner testified that he had made his position with respect to the lack of resources known to the Provincial Government and that some resources had been added, but that in his opinion, the additional resources were not enough.

The Environmental Commissioner expressed concern about the lack of MNR resources on a Province-wide basis. When considering how this concern should be interpreted at the local level, with regard to this appeal the Joint Board is mindful of the following:

1. The MNR is continuing to administer and enforce aggregate licenses throughout the province.
2. The Joint Board is aware of no moratorium being imposed on the issuance of new licenses pending an improvement in the capacity of MNR.
3. The Joint Board heard no direct evidence at the hearing from MNR staff who will be responsible for the administration and enforcement of the license for the proposed quarry.

4. MNR has been fully engaged in the review of the proposal and was initially a Party in this appeal, but changed its status to Participant prior to the commencement of the hearing when its issues were resolved (Exhibit 37, Vol. 13, Tab 179).

5 The Joint Board heard no definitive analysis of MNR resources at the local level that would lead to the conclusion that MNR does not have the capacity to administer and enforce the proposed ARA license.

The administration of the *ARA* is a fundamental legislated requirement of the MNR. In this regard, the Joint Board accepts the position of the Ministry Staff that they have the capacity and resources to carry out their legislated responsibilities as set out in their correspondence (Exhibit 37, Vol. 13, Tab 179 and Exhibit 93). The Joint Board does not accept the position that the provincial ministries do not have the technical skills available to administer and make decisions about this *ARA* license application and the AMP or, as in the case of Dufferin Milton, that some of these responsibilities cannot be assigned to a willing independent third party. The Joint Board would note from the voluminous documentation filed in support of this application that the appropriate ministries have been fully engaged in the review of all these technical documents as required by their legislated mandates and have provided their comments and directions for changes including requests for peer reviews, before giving their approval in principle to the proposed quarry land use from their ministries perspective.

There is no evidence or basis to conclude that the Provincial Ministries are not prepared or able to continue to meet their ongoing approval and regulatory responsibilities.

The compelling evidence is that the regulatory framework is in place for the implementation and enforcement of the AMP. Through this Decision the AMP will be a condition of the license and included in the Site Plan notes, and consequently it can be enforced by the MNR through section 15 of the ARA. Furthermore, through this Decision condition # 5 of the NEC development permit requires that the operation be in accordance with the ARA Site Plans which require implementation of the AMP. Therefore, there may be potential to enforce the AMP through the provisions of the *NEPDA* development permit process.

The recent Decision of the Ontario Municipal Board regarding the Rockfort Quarry proposal was entered in evidence (Exhibit 259) and formed part of the arguments of the Parties. The Joint Board recognizes that concerns about the capacity of MNR to administer an AMP in that case and carry out appropriate monitoring, may have been a factor in the Board's refusal of that application. However, the Joint Board understands that the facts in the Rockfort Quarry proposal were significantly different than those in the current appeal. Substantial mitigation measures to prevent major impacts to

groundwater resources were required and had not been designed or demonstrated to be effective. No independent third party emerged to take responsibility for the oversight required by the AMP and no financial securities to ensure implementation of the AMP were being proposed.

Furthermore, while the Joint Board respects the opinion of the Environmental Commissioner, the Joint Board has heard no direct evidence from the MNR staff. There has been no opportunity in this Hearing to directly test the capacity issue. The Parties opposed to the application had the opportunity to call appropriate MNR witnesses, but they did not. Therefore, the Joint Board must rely on the evidence that has been submitted which indicates that the MNR is engaged in the process, has no objection to the proposed AMP, and will continue to be engaged in the implementation and oversight of the AMP.

It is the Joint Board's finding that the Provincial Ministries in this case, commented on the areas under their jurisdiction and provided their technical advice to the other approval authorities on areas where they had expertise consistent with their legislated responsibilities.

Mr. Usher in his testimony, expressed concerns that the matters associated with the AMP were found in the Site Plan Notes and were not set out as specific *ARA* license conditions. His interpretation of the Aggregate Resource Policy manual was that license conditions and Site Plan Notes are two separate and distinct matters in that changes to an *ARA* license condition are more rigorous than changes to a Site Plan note. Mr. Clarkson provided the Joint Board with a fulsome review of the various conditions schedules associated with an *ARA* license and the requirements of the Site Plan Notes. He noted that the Site Plans and their Notes are the documents used in the field and that from a practical viewpoint it was important the Site Plan Notes provided fulsome directions to the operator and the *ARA's* inspectors. He opined that the AMP triggers and monitor requirements found in the Site Plan Notes were appropriate and that this was the preferred location to place them.

The Joint Board accepts Mr. Clarkson's testimony but sees the final AMP document as a fundamental part of the *ARA* license approval and will direct that the *ARA* license for the proposed quarry have as a condition:

> That the final AMP substantially in the form presented at the Hearing, Joint Board Case 08-094, is a condition of the *ARA* License.

It is the Joint Board's finding that a final AMP should form a condition of the *ARA* License, and that an agreement or agreements should be in place with an independent third party or parties, or MNR, to secure the appropriate funding for the monitoring and mitigation measures associated with the final AMP document over the lake filling phase of the quarry's operation and for any other phases of the operation as may be required by MNR.

The Joint Board is satisfied that the draft AMP document before it (Exhibit 37, Vol. 10, Tab 102) is well understood and that the conditions and "trigger events" contained in the *ARA* revised Site Plan Notes (Exhibits 378 and 387) are adequate in the first instance to monitor the hydrogeological and natural heritage features found on the site and can be amended over time as new data sets become available. The preponderance of the evidence from the engineers is that the use of an AMP is a more modern and sophisticated approach to dealing with potential impacts from a quarry's operations over time and should be used in this case.

The Joint Board sees merit in some of the recommendations put forward by Mr. Switzer of the NVCA to improve the AMP. The Joint Board would note that the most compelling testimony resulting from the hydrogeological modeling and the Karst investigations is that no impacts are anticipated to the springs and seeps along the Escarpment and watercourses that support the Pretty River and Batteaux Creek water system. Mr. Switzer confirmed that the MOE will require permits to discharge water and that in support of such permits the MOE will require detailed engineering drawings and analysis and will make Mr. Switzer's recommendations 1 and 4 redundant.

Mr. Switzer in a reply to the Joint Board, testified that he saw his recommendations as notices to be included in the AMP document but were not intended in the first instance to require detailed engineering drawings. Mr. Switzer opined that his fundamental concern was that the water quality and quantity presently going to the Pretty River and Batteaux Creek watercourses is maintained through the monitoring and mitigation protocols of the AMP.

The Joint Board sees merit in the following recommendations of Mr. Switzer and will direct that the following be included and considered prior to the final approval of the AMP document. The Joint Board would note that with respect to Mr. Switzer's recommendation #1, it will direct that further testing program be established and not that detailed engineering of potential contingency measures be undertaken.

> Recommendation #1
>
> The management measures for recharging the dolostone aquifer to maintain the groundwater discharge to the springs on the escarpment be tested to confirm its ability to meet downstream targets to the satisfaction of the MNR in consultation with the NVCA through the AMP process.
>
> Recommendation #2
>
> The AMP should clearly state that reducing the hydraulic conductivity of the rock mass at the north end of the quarry to achieve the desired lake level should not be undertaken if it will reduce pre-quarry discharge rates to the NVCA watercourses below the escarpment.
>
> Recommendation #3
>
> That the AMP and rehabilitation plan be updated to address the design and operation of the ultimate discharges from the post quarry lake
>
> Recommendation #5
>
> That the response times for the recharge systems be determined during site testing and if these times are inadequate to protect the downstream environment, that groundwater monitoring systems and associated targets be developed and incorporated into the AMP.

The Joint Board heard testimony from several witnesses that the use of injection wells had not been demonstrated and that the AMP and the application should be rejected on this basis. However, the evidence demonstrates that this method was never requested to be tested by any party but was merely included in the AMP as a contingency measure, and the testing undertaken by the proponent was nothing more than a demonstration that water could be injected in to the Amabel formation. The Proponent's experts clearly testified that to direct water to specific springs by the injection method would be difficult. Instead, they rely more on direct pumping to specific surface locations, such as the SW9 sinkhole and other locations and surface features identified on the site.

It is not uncommon with planning approval documents that there be a conditional approval of the land use or project, subject to the entering in contractual agreements (e.g. draft plans of subdivision agreements, Site Plan agreements, agreements subject to provisional consents and development permits, etc.). In the case of the draft AMP document (Exhibit 37, Vol. 10, Tab 102) this is no different and runs parallel to the long term responsibilities of the MNR and other agencies to ensure that the conditions of the *ARA* license and their specific regulations are being followed. The Joint Board is also satisfied that the revised Site Plans and Site Plan Notes and the Township's Settlement Agreement ensure the financial stability of the AMP document, and properly places the financial burdens associated with the AMP, its monitoring and its mitigation measures if required, with the Proponent as a precondition to the commencement of the extraction

process. The Joint Board believes the financial burden associated with all aspects of the AMP is properly placed with the Proponent as a required cost of doing business. There is no evidence that the Proponent is not prepared to meet these financial and operational obligations.

The Joint Board is satisfied that the revised Site Plan Notes subject to the changes being directed in this Decision, are appropriate to implement the AMP document, and that any changes to the Site Plan Notes with respect to the final AMP document, should be undertaken prior to the Joint Board's final approval of the Proposal and directions to the Minister.

The Joint Board does not find that the AMP's draft status is fatal to the application.

The draft AMP document also identified both mitigation and contingency measures. It is the Joint Board's finding that it would be unreasonable to require as a precondition to the determination of the quarry land use that all contingency measures identified in the draft AMP which might never be required, be pre- engineered and demonstrated prior to determining the quarry land use. It is sufficient to identify these measures. The more important issues for the Joint Board are the identification of the monitoring triggers contained in the AMP and the Site Plan Notes and the constraints they impose on the quarry's operation. It is the Joint Board's finding that with respect to potential surface water and ground water impacts these matters are well understood and that the AMP document can be finalized with some minor changes.

The Joint Board, after considering the evidence, finds that the AHTF Colony 1 found in the Northern Peninsula Area is a significant Natural Heritage Feature that deserves to be monitored and should be added to the Natural Heritage features to be monitored by the AMP, and that appropriate triggers should be added to reflect the monitoring of this Natural Heritage Feature to the satisfaction of MNR. The Joint Board agrees that the northern Peninsula should be excluded from the *ARA* License area, but should be subject to a Site Plan Note that the health and condition of AHTF colony 1 are to be monitored through the AMP document during the life of the quarry. The Joint Board concurs with Ms Pounder that the area of the northern peninsula as shown on the Site Plans, should remain in the Escarpment Rural Area.

Accordingly, the Joint Board will direct that the AMP be modified as set out in this Decision. The Joint Board further directs that the MNR forward a final AMP document and associated third party agreements securing the AMP requirements during the lake filling phase and during any other phases of the operation as may be required by MNR

to the Joint Board, and that the final AMP, as approved by MNR, should be a condition of the *ARA* license.

Phasing of Quarry Extraction

The Joint Board has considered the phasing program being put forward by the Proponent. It is clear from the evidence and submissions of those opposed to the applications that one of the primary areas of concern deals with the area known as Phase 2A and 2B together with the 100 meter connection to the Northern Peninsula. This area forms part of the 32.8 ha maple forest proposed to be removed in proximity to the endangered Butternut trees and AHTF colony 1 found on the site. The maintenance of the current Phase 2 area as long as possible in its natural state in the Joint Board's finding would be a prudent and consistent with the evidence that monitoring and the development of more contemporary data sets to be generated by AMP monitoring program are essential to the long term success of the project.

The Joint Board finds that a re-ordering of the phasing program would allow for the new reforestation plans (afforestation) to take hold and provide for new areas of wildlife corridor connectivity and upland habitat to be established. It would also permit the monitoring and development of new data sets of the hydrogeology and Natural Heritage Features, including the AHTF colony 1 which were agreed by all the experts to be an important part of the approval conditions bearing in mind the precautionary principle. It would also be consistent with the reforestation monitoring and further approvals contemplated by the Township of Clearview's Settlement Agreement with Walker regarding the demonstration that the reforestation plans (afforestation) were successful.

The Joint Board heard no compelling evidence that the proposed phasing of the quarry extraction could not be modified such that the sequence of extraction begins with Phase 1, followed by a progression into Phase 3, then by Phase 2A, and finishing with Phase 2B and the 100 meter connection only on the condition that a permit is issued by the MNR under the *ESA* for the removal of the Butternut trees. The Joint Board believes that such changes in the extraction sequence are preferred and are consistent with the expert opinions that continued monitoring and improved baseline data sets are vital components to the safe and environmentally sound management and operation of the proposed quarry. It would also allow for a significant period of time to pass in order to allow for the monitoring, collection of new data sets and the further evaluation of the Butternut trees sustainability and recovery in its current location.

The Joint Board as indicated earlier in this Decision, is also concerned about the impacts that could result to the significant woodland under the proposed phasing. Namely, that if the current phasing was altered such that Phase 1 and Phase 3 followed each other consecutively then 10.25 ha and 9.71 ha (total19.96 ha) of wood lands would be lost of which 9.39 ha would be interior forest. The respective areas of these significant woodlands loss are set out for the various proposed phases of development on a series of maps found at Exhibit 43, Book 7, Tab 19, pages 354, 355, 356. Furthermore, the current Phase 1 area would result in the immediate loss of 10.25 ha of woodland containing 6.11 ha of interior forest.

It is also clear to the Joint Board if the Phase 1 area were amended and limited to the edge of the existing major woodland, as shown on the map in Exhibit 43, Book 7, Tab 19, P 353, none of the significant woodland and its associated interior forest would be affected by this revised Phase 1 and by all accounts subject to market conditions, this revised area would provide some 11 to 12 years of aggregate material. This would allow for additional time to determine the success of the mitigation reforestation (afforestation) plantings based upon the demonstrated success of the reforestation, as set out in the Evaluation Criteria found in the Township of Clearview's Settlement Agreement with Walker. The phasing areas as revised Phase 2 (Formerly Phase 3) and ultimately revised Phase 3 (formerly Phase 2) could be progressively mined, subject to meeting the Evaluation Criteria found in the Township's Settlement Agreement. From the evidence, the proposed change in phasing does not appear to make a significant difference with regard to potential impacts on adjacent wetlands.

This, in the Joint Board's finding, would permit a progressive removal of the woodland, subject to the demonstration that the reforestation (afforestation) was performing as intended. This would represent good planning that is consistent with the direction in the PPS and Natural Heritage Reference Manual and would assist in mitigating any negative impacts resulting from the loss of the significant woodland area. The Joint Board is also satisfied that the Evaluation Criteria and review process set out in the Township's Settlement Agreement with Walker are appropriate to adequately monitor and determine the success of the reforestation (afforestation) program being proposed.

Accordingly, the Joint Board will direct that the Site Plans and Site Plan Notes be amended such that the Phase 3 area becomes Phase 2, and the Phase 2A area becomes Phases 3A, and the Phase 2B area becomes Phase 3B. The new Phase 3B area should also contain the 100 meter connection in a location to provide maximum protection to the AHTF colony 1, and further that the Phase 1 area be modified to exclude the significant woodlands area shown on Exhibit 43, Book 7, Tab 19, P. 353

such that major components of the significant woodland are not cut during this revised first Phase and revised Phase 2, together with any other changes to the Site Plan Notes that are consistent with this direction. The Phase 1 woodlands should be added to the adjacent sections of Phases 2 and 3 as appropriate.

In all other respects the Site Plans (Exhibit 379) and Site Plan Notes (Exhibit 378) with regard to the phasing shall remain unchanged except for further directions set out in this Decision.

The Roads Settlement Agreement and the Township Official Plan

The Joint Board has considered the extensive evidence and submissions with respect to the Road Settlement Agreement. In the Joint Board's findings, it is clear that the County of Simcoe has the authority under the *Municipal Act* to download a County Road to a local municipality and that this action is outside the jurisdiction of the Joint Board. However, within the context of this case, the test is whether the actions set out in the various Settlement Agreements are in the public interest and represent good planning.

The Joint Board notes that the road downloading as set out in the Road Settlement Agreement is conditional upon the approval of the Proponent's Aggregate applications, and that it be considered within the context of the all of the approvals required. The Road Settlement Agreement, without these other approvals, would be null and void and would maintain the status quo with respect to the County's Road Classification system. It is equally clear to the Joint Board that the County of Simcoe pursuant to Section 4.11.6 of the County's Official Plan (Exhibit 47, Vol. 1, Tab 2) could undertake without an Amendment to the County Plan the downloading of a County Road to a local municipality.

The NEC contends that an Amendment to the County Official Plan is required to download County Road 91 because it would be contrary to the direction in the County's Transportation Master Plan ("TMP") and the Official Plan's policy directions for arterial roads. The Joint Board does not share this view. Official Plans be it the County's or the Township's, must clearly identify the criteria and standards for their various road classifications before any public works may be considered. The TMP is merely a background document that helps Council inform its policy decisions and capital works budget and is not a precondition to the road transfer contemplated by the Road Settlement Agreements.

Having said this, the Joint Board feels obligated to comment on the lack of accuracy and currency of parts of the Simcoe County Official Plan Consolidation which were

presented in evidence. Official Plans are important public documents that identify the growth directions of the Municipality, form the basis for the expenditure of public works dollars, and provide guidance to the general public and those contemplating development. The rigour of the formal Official Plan Amendment process in the Joint Board opinion has merit and is required by the *Planning Act* beyond the correction of minor typographical errors or the reconciliation of facts. In the Joint Board's opinion, an essential part of the planning process is to maintain accurate and current Official Plan documents.

The NEC maintains that the Road Settlement Agreement is not consistent with the approved Official Plans and that pursuant to section 24 of the *Planning Act* the Municipalities have no authority to enter in to these agreements.

The Joint Board disagrees. It is the Joint Board's finding that the Agreement in question is conditional and that any subsequent implementation actions are subject to approval before this Joint Board including the Township's Official Plan Amendment and as such the Agreement would be sanctioned as it falls under the ambit of sections 24(2) and 24(3) of the *Planning Act.*

It is the Joint Board's finding that the downloading of an existing County Road to a member Municipality can be undertaken without an amendment to the County of Simcoe Official Plan as set out in the *Municipal Act* and that the subsequent deletion of that segment of a County Road from the Transportation Schedule of the County Official Plan would reflect a factual matter not requiring a County Official Plan Amendment.

It is not as clear that an Official Plan Amendment to the Transportation Schedule of the Township of Clearview Official Plan would not apply in this case. The Road Settlement Agreement contemplates the undertaking of public works on several of the Township roads in the area. The Joint Board is cognizant of Section 24 of the *Planning Act* which states that:

> Public works and by-laws to conform with plan:
>
> 24. (1) Despite any other general or special Act, where an official plan is in effect, no public work shall be undertaken and, except as provided in subsections (2) and (4), no by-law shall be passed for any purpose that does not conform therewith.

The downloading of Simcoe County Road 91 as proposed to the Township of Clearview would result in a clear change to the road classification network of the Township that needs to be reflected in its Official Plan. This action in the Joint Board's finding is not a technical change but is a fundamental change to the Township's road system and requires an amendment to the Township's Official Plan without which there would be no

authority to undertake some of the public works in the manner contemplated by the Road Settlement Agreement.

The Joint Board is satisfied with part of the evidence of Mr. Uram that the public works contemplated by the Road Settlement Agreement could be undertaken on Concession Road 10 and Sideroad 26/27 in conformity with the current Township of Clearview Official Plan's Transportation designations. However, the Joint Board finds the same would not apply to the works contemplated by the Road Settlement Agreements for the remaining open portions of former Simcoe County Road 91.

Clearly, the current text of the Township Official Plan as set out in Section 6.1.2 describes this portion of the Simcoe County Road 91 as an Arterial Road which is also clearly shown on the Official Plan Map Schedule A-Map1 North West Land Use and Transportation Plan. If the Township as set out in the Road Settlement Agreement wishes to reconstruct this segment of former Simcoe County Road 91 to a local Township Road, and to a Township Collector Road standard as set out in the Road Settlement Agreement then an Amendment to the Township's Official Plan must be undertaken otherwise one would expect the current Township's Official Plan Arterial Road standards to apply to the downloaded section of County Road 91. This would be contrary to the evidence and rationale presented by the planning and transportation experts in support of the Road Settlements Agreements and would provide little comfort upon which area residents could rely that the works contemplated and testified to by Mr. Arcardo and Mr. McNalty would be constructed to the standards now being recommended by these experts.

Official Plans are serious public documents that guide the growth of the municipality and are of benefit to the Municipal Council, its citizens, and those who seek development within their community. Official Plans must reflect the clear directions of Council and should not obscure Council intentions. The Joint Board does not accept that portion of Mr. Uram's evidence that the changes being proposed in the Road Settlement Agreement to County Road 91 are "Variations in alignment or the establishment of additional roads." County Road 91 currently exists, and there is no change in its alignment. The proposal as set out in the Road Settlement Agreement is to close a portion of this road and to maintain the remaining existing road allowance but to downgrade its status and function to that of a Local Township Road and a Township Collector Road.

In the Joint Board's finding the closing of a portion of County Road 91 could be undertaken without an amendment to the Township's Official Plan. However the downgrading of its status and function to that of a Local Township Road and a

Township Collector Road is a significant change in the status and proposed function of this segment of a public road requiring the appropriate changes to the Township's Official Plan so that residents, the abutting municipalities and the general public are assured of Council's intentions and so that the works contemplated by the Roads Settlement Agreements can be undertaken pursuant to the requirements of Section 24 of the *Planning Act.*

The Joint Board does not find the failure to make the appropriate changes to the Transportation Schedule and text of the Township Official Plan as fatal to the Official Plan Amendment of the Township now before us. Sufficient uncontradicted testimony and justification for the road change was presented during the course of this Hearing by the expert transportation panel. The Joint Board finds, based upon the compelling and uncontradicted evidence of expert transportation witnesses, that the appropriateness of the change in the status of County Road 91 has been justified, and that it represents good planning for this part of the Township of Clearview and the County of Simcoe.

The Joint Board has considered the opinions of Ms Pounder and Mr. Usher that there has not been sufficient planning justification to warrant the change in the road network contemplated by the Road Settlement Agreements. In this regard they rely on the public process and findings of the County's Transportation Master Plan Study (TMP). However, County Council is not bound by the findings of the TMP until they find effect in a new and approved County Official Plan.

The Joint Board has determined earlier in this Decision that proper consultation with adjacent and affected municipalities has occurred and finds no inconsistencies with the County of Grey and the County of Simcoe's Official Plans that would result from the proposed Road Settlement Agreement or that there has been any breach of the requirements of the PPS. The Joint Board in considering the Grey County Official Plan's Roads Plan would note that the east-west alignment of Grey County Road 31 still connects to an Arterial Road being the north south alignment of Grey Road 31 to Singhampton. Clearly local roads in a rural municipality such as Concession 10 serve a local access function to abutting properties and also the function of moving people to and from higher order roads. This is the function that is now being proposed for Sideroad 26/27.

The most compelling and uncontradicted evidence from the transportation experts is that the roads that form part of the Road Settlement Agreement will carry low volumes of traffic in the future and that the proposed road classifications are appropriate to the functions and volumes of traffic they are predicted to handle.

The Joint Board in this case is also satisfied based upon the preponderance of the evidence that there has been appropriate consultation and co-ordination among the Municipalities as required by the PPS with respect to the proposed changes to the road system in this area. The Joint Board does not accept the proposition that since the Municipality of Grey Highlands did not approve the upper tier road settlements that it somehow has a veto over the process. The Municipality of Grey Highlands is a member of Grey County Council and as such had input into the County of Grey's agreements with Simcoe County and the Township of Clearview.

There is no evidence that the Municipal Councils in considering the potential Road Settlement Agreements in camera breached in any of the requirements of the *Municipal Act.* It is clear to the Joint Board after considering all of the testimony and positions put before this panel that the Municipal Councils acted in what they believed to be the public interest, and attempted to meet some of the long held and expressed traffic safety concerns raised by the residents of the area. The Joint Board is satisfied from the evidence that the Councils knew the issues before them and acted in the public interest as they saw it. Mere disagreement with a Council decision in a contentious public policy matter does not constitute a breach in the determination of the public interest required by the *Planning Act* that this Joint Board should overturn.

The Joint Board relies upon the Settlement Agreements as part of the factual underpinnings of this proceeding and finds nothing in the Agreements that are contrary to the planning policies that are before this Joint Board.

It is the Joint Board findings that in order to consummate the Road Settlement Agreement an Amendment to the Transportation Schedule of the Township of Clearview's Official Plan and appropriate text changes are in order to carry out the contemplated public works on former County Road 91. Furthermore for the reasons set out in this Decision the Joint Board prefers and accepts the evidence of the County Planner that an Amendment to the County of Simcoe's Official Plan is not required in this instance.

The Joint Board will direct that the Township of Clearview Official Plan Amendment (Exhibit 125) Land use and Transportation Schedules be further modified by adding and designating that portion of Simcoe County Road 91 being downloaded to the Township of Clearview in the manner set out in the Road Settlement Agreement (Exhibit 37, Vol. 15, Tab 245) and that the appropriate text amendments be made to Sections 6.1.2, 6.1.3 and 6.1.4 to reflect the change in status of the transferred portions of former Simcoe County Road 91.

The NEP Amendment

The NEC maintains that the extraction area is the only area that should be considered for redesignation from Escarpment Rural Area to Mineral Resource Extraction Area and that the setback buffer areas along County Road 91 and County Road 31 should remain within the Escarpment Rural Area designation. The NEC also maintains that the redesignation of the portion of County Road 91 to be closed from Escarpment Rural Area to Mineral Resource Extraction Area has not been justified. With regard to an existing road allowance within the public domain the common practice is that adjacent land use designation would go the centerline of the road allowance to ensure that no lands within the NEP were left undesignated.

There is no request before the Joint Board to designate the portion of County Road 91 to be closed and transferred to the Proponent from Escarpment Rural Area to Mineral Resource Extraction Area. Further it is the conclusion of the Joint Board that no NEP land use designation change has been justified for the portion of County Road 91 that is to be closed.

Accordingly the Joint Board will direct that the portion of County Road 91 to be closed be designated Escarpment Rural Area and that this be clearly shown in the NEP and Township Official Plan Amendments along with the 30 metre buffer areas measured from the east side of Grey Road 31 and the north limit of former Simcoe Road 91.

The NEC and the CCC raised concerns about the designation of buffer areas and natural areas. This includes the stand of Butternut trees which Mr. Usher suggested should be designated Escarpment Natural Area. The NEC is also concerned about the delineation of the boundary of the Duntroon Escarpment Forest ANSI which was determined without the participation of the NEC staff. The NEC maintains that Millar Pond should be included within the ANSI and therefore designated Escarpment Natural Area.

As noted elsewhere in this Decision, the Joint Board is satisfied with the Proponent's approach for dealing with the Butternut habitat. It would make little sense to designate this area as Escarpment Natural Area and require the Proponent to go through another NEP amendment process if in the future the area is no longer a Butternut habitat and the MNR issues a permit for the removal of the habitat.

It is the Joint Board's finding that the best evidence regarding the current location of the boundary between the Escarpment Rural Area and the Escarpment Natural Area designation in the area of the Duntroon ANSI is the line determined in the field by the

MNR officials. The MNR is the agency responsible for the delineation of the ANSI and its boundary, not the NEC. In any event the Site Plan Notes require that this setback be established by the OLS survey and this survey can form the boundary between the *ARA* license area and the NEP Escarpment Natural Area designation. With regard to the designation in the area of Millar Pond, the Joint Board does not agree with the NEC's submissions that in its current location it is within the Escarpment Natural Area.

The Joint Board finds that the licensed area should reflect the area where extraction and other operational activities of the quarry will occur. Buffer areas and lands where management and mitigation activities are proposed do not need to be included within the licensed area. It was Mr. Clarkson's testimony that any areas shown on the Site Plans or referred to in the Site Plan Notes would form part of the *ARA* license regardless of the NEP land use designations and that these restrictions and requirements could extend beyond the *ARA* license area. The Board accepts the submissions of the Proponent that these areas fall under the purview of the *ARA* license, and can be protected and activities can be carried out in these areas through provisions in the Site Plan.

It is the Joint Board's finding that Exhibit 124 provides an appropriate basis for an Amendment to the NEP subject to the following changes:

1. The buffer areas for AHTF colony 1 and for Rob Roy 2 should be increased as noted above and reflected in the Amendment.
2. As indicated earlier in this Decision the Joint Board is satisfied that the AHTF colony1 should be left in the Escarpment Rural Area designation and should be protected through Site Plan Notes, the AMP document and the provisions of the *ARA* license.
3. That the area of County Road 91 to be closed and transferred to the Proponent is to be left and shown on the NEP Amendment Schedule in the Escarpment Rural Area designation.
4. That the Escarpment Rural Area designation is to be maintained on those lands extending 30 meters north from the limit of former County Road 91 and 30 meters from east limit of Grey County Road 31.
5. That the portion of County Road 91 to be closed be designated as Escarpment Rural Area in the NEP Amendment.
6. That the NEP Amendment Schedule "A" be further amended to show the licensed area excluding the area of AHTF and the buffers as noted earlier in this Decision which shall all remain in their existing NEP designation.

NEP Development Permits

The NEC Development Permit for the Proposed Quarry

Ms Pounder at the request of the Joint Board documented her concerns with respect to some of the wording of the proposed NEC Development Permit submitted by the Proponent (Exhibit 130) on the understanding that she does not support in any way the application. Her concerns are set out in Exhibit 297. The Joint Board also had the benefit of a comparison chart, Exhibit 335 of the NEC Development Permit conditions for the Vineland Quarry, the Dufferin Milton Quarry, the Walker Proposed Duntroon Quarry, and Ms Pounder's recommendations for conditions in this case.

Some of Ms Pounder's issues set out in Exhibit 297 go to matters of form to which the Joint Board will not comment beyond stating that the normal formatting should be followed. It is also clear that the Parties have no concerns with Conditions 1, 2, 3 and 4 as proposed by the Proponent at Exhibit 130 now revised as Exhibit 388.

Ms Pounder sought clarity and finality with respect to Condition 5 to the approval process and wanted the NEC Development Permit to be based solely on the decision of this Joint Board as opposed to the more open ended approach put forward by Mr. Clarkson which would allow changes deemed appropriate by the Minister. The Joint Board's role in an *ARA* appeal is to provide directions to the Minister. However, the final approval of the *ARA* license and its conditions vests with the Minister and the NEC Development permit conditions should not in any way fetter the discretion of the Minister. The Joint Board finds the wording of Condition 5 as set out at Exhibit 388 to be appropriate and consistent with the *ARA* and directs no change.

Ms Pounder testified that with respect to Clause 6 of Exhibit 130 (now Exhibit 388) that the wording would allow grading and works associated with the quarry operation within the Phase 2B area where the endangered Butternut trees are located, and as well within the area of the AHTF colony (northern peninsula).

The Joint Board is satisfied that with the changes to the Site Plan Notes as discussed earlier in this Decision together with the directions the Joint Board has given with respect to the AHTF colony 1 are sufficient to protect these features and does not subscribe to the notions put forward by Ms Pounder with respect to Condition 6. This condition makes specific reference to the Mineral Resources Extraction Area which deals directly with those areas that may be extracted. The Joint Board is satisfied with Condition 6 of Exhibit 388 as worded. No change is ordered.

Ms Pounder suggested that Clauses 7 and 8 of Exhibit 130 (now Exhibit 388) be deleted as the precise details of the engineering of the some of the mitigation works have not been submitted. The Joint Board is satisfied that a prima facia case has been made that the mitigation measures can work subject to their detailing in the final AMP and further that the Joint Board will withhold its Order pending receipt of a final AMP document on the advice of the MNR. The Joint Board is satisfied that with the amended Site Plan Notes, the final AMP document, the posting of financial securities to the satisfaction of MNR with an independent public agency and the associated agreements being in place prior to the commencement of extraction, that these measures are sufficient to ensure that the public interest is secured and the environment is protected. These matters are in part set out in the settlement agreements.

It is Joint Board's finding that for clarity the words "in accordance with the AMP" should be added to Conditions 7and 8 in Exhibit 388 after the word "designation".

Ms Pounder testified that Condition 9 of the NEC Development Permit should be significantly amended as set out in Exhibit 297 to in fact give *de facto* control of all planting and reforestation to NEC staff. The Joint Board finds that the Township of Clearview, through its Settlement Agreement, should maintain a more direct role in ensuring that the reforestation being proposed will be carried out. Furthermore, the Visual Site Plan Notes as amended by Exhibit 378 in the Joint Board's finding are sufficient to ensure that appropriate visual planting will be undertaken in accordance with acceptable industry standards. It is the Joint Board's finding that the final visual mitigation planting plans should be provided to the NEC and accordingly will direct that the Condition 9 be amended to read after the word "Plans", "and said plans shall be provided to the NEC."

It was agreed by both Mr. Clarkson and Ms Pounder that Condition 10 of Exhibit 130 merely stated the obvious and was not required and should be deleted. Exhibit 388 deletes this condition. The Joint Board agrees and will direct that Condition 10 of Exhibit 130 be deleted.

Ms Pounder recommended that a condition be added to Exhibit 130 (now Exhibit 388) to the effect that prior to the issuance of a NEC Development Permit that an Official Plan Amendment to the County of Simcoe Official Plan be passed that was not in conflict with the NEP Amendment PS161. In light of the Joint Board's determination that a County of Simcoe Official Plan Amendment is not required in this case no action is directed in this matter. The Joint Board is satisfied that Exhibit 388 reflects this decision.

Condition 11 reflects the need for a Township of Clearview Official Plan Amendment prior to the issuance of a NEC Development Permit, and that an amendment be passed that is not in conflict with the NEP Amendment PS161. This condition as set out in Exhibit 388 is not in dispute. No change to condition 11, Exhibit 388 is required.

It was Ms Pounder's evidence that Condition 12 of Exhibit 130 (Now Exhibit 388) should reflect the determination of this Joint Board, and as such should be more specific. The Joint Board sees merit in Ms Pounder's suggestion, subject to its earlier caveat that the Minister has the final approval of the *ARA* license, and will direct that Condition 12 of Exhibit 388 be amended to read:

> 12. This Development Permit shall not issue until the Niagara Escarpment Commission has been notified by the Ministry of Natural Resources that a Category 2, Class A License to permit a quarry below water pursuant to the *Aggregate Resources Act (ARA)* is ready to be issued in accordance with the directions and Site Plans directed by the Joint Board in File 08-094 as finally approved by the Minister. Once the Development Permit is issued in accordance with the Joint Board's direction, as approved by the Minister a copy of the approved license and site plans shall be filed with the Niagara Escarpment Commission and these shall be the Site Plans and license referred to under Condition 5.

Ms Pounder in her Exhibit 297 takes exception to Condition 13 in Exhibit 130 put forward by the Proponent. The fundamental issue at play here is the NEC staff assertion that the AMP has not been finalized and that on this basis no NEC Development Permit should be available until detailed engineering is available. The Joint Board in this Decision has made it clear that it must be in receipt of a final AMP document prior to issuing its Orders approving the necessary Official Plan and NEP Amendments, the required NEC Development Permits, and prior to advising the Minister to approve the *ARA* License. Clearly the NEC should be provided with the final AMP document and the Joint Board will so direct. The Development Permit condition as proposed by Ms Pounder would have the effect of negating the decision of this Joint Board and the subsequent decisions of approvals legislated to the MNR and the MOE. This is not consistent with other NEC Development Permit conditions in other quarry matters where after the determination of the land use the NEC through its Development Permit process has deferred to the expertise and approvals legislated to other authorities. Ms Pounder also expressed concern that there was no approval by a regulatory approval authority for mitigation measures that might be added to the AMP beyond the regulated authorities of the MOE.

Mr. Clarkson in reply took the Joint Board to a new Hydrogeology Note 7E of the revised Site Plan Notes, Exhibit 378 which states the following:

> (E) Prior to the construction of any Mitigation measure or contingency mitigation measure outside of the limits of extraction, its design shall be included in the AMP, as approved by the MNR, unless the design of the measure has been approved pursuant to a permit issued under another statue such as the *Ontario Water Resources Act* (eg. Permit To Take Water, Certificate of Approval).

It was his testimony that this Site Plan Note would require design approval for mitigation measures to be included in the AMP by the prescribed regulatory agency such as the MOE or alternatively the MNR, and this would apply to any subsequent mitigation measure design changes over the life of the quarry that would then be added to the AMP.

The Joint Board is satisfied that this revised Site Plan Note represents good planning and provides for proper regulatory review and approval. However it is the Joint Board's determination that the wording might be clearer and will direct that the Site Plan Note Hydrogeology Note 7E of Exhibit 378 be amended to read:

> (E) Prior to the construction of any Mitigation measure or contingency mitigation measure outside of the limits of extraction, its design shall be approved by the MNR, and included in the AMP unless the design of the measure has been approved pursuant to a permit issued under another statute such as the *Ontario Water Resources Act* (E.G. Permit To Take Water, Certificate of Approval).

The issues with respect to Condition 13 of Exhibit 130 are similar to the matters the Joint Board has decided with respect to Conditions 7 and 8.

It is the Joint Board's finding that deference should be given as set out in Condition 13 in Exhibit 130 (Now Exhibit 388) to the final AMP, MOE, MNR and the independent third party that has assumed responsibility for the holding of the securities and the administration of the AMP monitoring and approved final mitigation measures during the lake filling period.

However, it is the Joint Board's finding that the independent third party that is holding the financial securities for the AMP monitoring and mitigation measures should be added to Condition 13 of Exhibit 130 (Now Exhibit 388) and that with this addition the public interest will be protected.

The Joint Board will direct that Condition 13 of Exhibit 388 be amended by adding the following after “the Ministry of the Environment”:

> …the independent third party that is holding the financial securities for the AMP…

Ms Pounder testified that Condition 14 of Exhibit 130 should be amended to reflect the most recent reforestation plans of Stantec being the Consolidated Report, Stantec April 2010 Appendix “D”. Mr. Clarkson opined that the revised condition 14 of Exhibit 388 refers to “the Plans” and that this means all of the Site Plans, Exhibit 379 and all the technical plans referred to in the Site Plan Notes, Exhibit 378. He further opined that with the changes to the planting details and the revised Site Plan Notes, Exhibit 378 that Ms. Pounder’s concerns in this regard have been addressed. The Joint Board agrees and no change is ordered to Condition 14 of Exhibit 388.

Ms Pounder in her Exhibit 297 testified that that Condition 15 of Exhibit 130 should be amended by the addition of the following wording, “Copies of the PTTW and C of A and any extension, amendments or replacements to them that allow development shall first require a further development permit(s) and shall be filed with the NEC within two (2) weeks.”

Ms Pounder on questioning from the Joint Board advised that once the NEC is satisfied as to the land use, the normal practice is to allow through the Development Permit process for the local municipality or the local Conservation authority or other approval authority to implement matters set out in the NEC Development Permit. This process was clearly shown in Exhibit 310 dealing with consent on the Carmarthen Farms and is further reflected in the deference the NEC gave to the Region of Halton and Conservation Halton with respect to the operation and management of the AMP in that case (Exhibit 140). It is clear from Ms Pounder’s own testimony that the expertise and authority to issue the PTTW and Certificates of Approval for the discharge of water vest with the MOE and not the NEC. The Joint Board concludes that to accede to Ms Pounder’s request would add nothing to the MOE’S approval process but delay and could stymie timely consideration of these works

The Joint Board finds that Condition 15, Exhibit 130 as amended by Condition 15 in Exhibit 388 places the proper authority with the MOE and will not direct the change suggested by Ms Pounder.

Ms Pounder in her Exhibit 297 testified that Condition 16 of Exhibit 130 should be amended such that the NEC and the MNR should approve the independent third party that is holding the financial securities for the AMP, and that the quantum of the financial

securities should be determined by a report certified by an actuarial professional with copies being provided to the NEC and the MNR.

The Joint Board finds no difficulty with the NEC and the MNR being given copies of the agreements arrived at by the independent third party and the Proponent to administer the final AMP similar to the Dufferin Milton Agreement (Exhibit 140). However, the responsibility for any agreement must vest in the first instance with parties to the agreement whether it is the Township of Clearview, the Conservation Authority, or the MNR.

The Joint Board sees little merit to the changes to Condition 16 of Exhibit 130 (Now Condition 16, Exhibit 388) suggested by Ms Pounder and will direct no changes in that regard.

Ms Pounder in her Exhibit 297 testified that that Condition 17 of Exhibit 130 should be deleted as the Joint Board should have final approval of the AMP. The Joint Board agrees that the AMP should be finalized before the proposal is permitted to proceed and is directing changes to the AMP through this Decision. However, it is the Joint Board's opinion that provided the AMP is in a form substantially as presented at the Hearing and that the changes as set out in this Decision are incorporated that MNR should retain approval of the AMP and therefore condition 17 of Exhibit 30 (Now Condition 17, Exhibit 388) should remain.

The Joint Board heard no testimony from any party that proposed Conditions 18 and 19 as set out in Exhibit 388 should be changed. The Joint Board is satisfied that Conditions 18 and 19 (Exhibit 388) remain unchanged.

Ms Pounder expressed concern for Condition 20 (Exhibit 388) and in particular does not agree with the alternative Condition 20 (ii) which states that:

> (ii) the license issued under the *ARA* for these lands is Amalgamated with license for the existing licensed quarry immediately to the south (License no. 3514).

Ms Pounder does not believe that the two licenses can be amalgamated because in her opinion they do not meet the policy requirements of the MNR. The two *ARA* licenses are not directly adjacent to one another as they are currently separated by the County Road 91 road allowance lands. She agreed under cross-examination that there were situations where two quarry licenses were separated by road allowance. Condition 20(ii) provides for the option that the MNR may be able to amalgamate the two licenses for administrative purposes without the need for an additional NEC Development

Permit. The clear evidence is that such an administrative procedure would have no effect or alter in any way the substance of the two existing licenses.

It is the Joint Board's finding that whether at some time in the future the existing *ARA* Duntroon license and the *ARA* license for the proposed quarry are to be amalgamated has no bearing on the matters the Joint Board must decide in this case, and should be left to a future date. Nor does the Joint Board conclude that the administrative matters contemplated by Condition 20 (ii) constitute development requiring a further NEC Development Permit. Accordingly the Joint Board will direct that Condition 20 (ii) as found in Exhibit 388 be left as written.

The NEC Development Permit for the Existing Quarry

Ms. Pounder proffered no evidence or expressed any concerns with the proposed NEC Development Permit for the existing quarry Exhibit 126 beyond her concerns that the proposed quarry should not be approved and that on this basis this NEC Development Permit was not required. She freely admitted that if the proposed quarry were approved it would be good planning to allow for the transition of the physical plant as set out in the Site Plan Notes and the proposed Development Permit.

The Joint Board after considering all of the testimony regarding the existing quarry and the proposed relationship of the existing quarry with the new quarry is satisfied that the NEC Development Permit, as set out at Exhibit 126, is appropriate with respect to content and represents good planning and should be approved subject to any standard formatting changes.

The *ARA* License

The licensing of the quarry is the responsibility of the Minister of Natural Resources and is governed by the requirements of the *ARA*.

The purposes of the *ARA* are set out in Section 2 and are:

> (a) to provide for the management of the aggregate resources of Ontario;
> (b) to control and regulate aggregate operations on Crown and private lands;
> (c) to require the rehabilitation of land from which aggregate has been excavated; and
> (d) to minimize adverse impact on the environment in respect of aggregate operations.

The test under Section 2(d) of the *ARA* is "to minimize adverse impacts" on the environment as opposed to the test of no negative impacts (similar to the requirements

of the NEP). It was Mr. Clarkson's testimony that the revised Site Plans and Site Plans Notes are designed to ensure that the purposes of the *ARA* are met. In this regard he relies on the setbacks established for the wetlands and the ANSI, the removal of the northern peninsula and the setbacks proposed for the AHTF colony 1 and the protections in place for the Butternut trees found on the site as set out in the Site Plan and Site Plan Notes. He also relies on the evidence of Mr. Hilditch and Mr. Risley that no significant habitat for the Bobolink exists on the extraction lands or the buffer lands associated with the proposal and that quarry operations will not have any negative impacts on the potential Bobolink habitat in the immediate area. In all other respects he believes that from a full reading of the revised applications one must conclude that the proposed quarry can be operated over its life with no negative impacts to the Natural Heritage features and functions found in the areas. Section 12 of the *ARA,* reproduced earlier in this Decision sets out the matters that the Minister and this Joint Board must have regard for when considering a license application made under the *Act.*

Mr. Clarkson provided the opinion that the applications now before the Joint Board have had proper regard for the matters set out in Section 12 of the *ARA* and that a quarry license should be given subject to the revised Site Plans (Exhibit 379 in black) and revised Site Plan Notes (Exhibit 378 and 387) and the adoption of a final AMP document in consideration of the following factors:

1. All of the reports and testimony of the experts retained by Walker,
2. The quality and quantity of the aggregate resource, and its proximity to markets,
3. The poor agricultural quality of the land,
4. The low density of homes in the area,
5. The distance of the site from nearby communities (Singhampton and Duntroon) and the fact that the major haul route remains unchanged and will be improved and carry a lower volume of quarry traffic at reduced speeds,
6. The setbacks, buffers, and mitigative measures proposed to protect the surrounding natural environment and hydrogeology of the area over the long term,
7. The fact that Walker has been a good operator and has never had its license suspended or revoked,
8. The settlements reached with the municipalities,
9. The revised Site Plans and Site Plans Notes and the proposed draft AMP,
10. The rehabilitation plans, and
11. The reforestation plan and proposed after use of the site.

It is clear to the Joint Board that if the application can meet the planning policy tests of the PPS, the NEP and the local Official Plans that the tests of the *ARA* as set out in Section 12 can be met as well. The Joint Board for the reasons contained in this Decision and subject to the changes being directed in this Decision is satisfied that appropriate regard has been given to the matters set out in Section 12(1) of the *ARA.*

The Joint Board is satisfied that the *ARA* provides sufficient sanctions, fines, and enforcement provisions to adequately regulate the project subject to a final AMP document with the modifications directed by the Joint Board and the confirmation of a third party agreement associated with the AMP. The evidence is that the NEC through its Development Permit process consistently defers the implementation of NEC Development Permit conditions to the local municipalities or other capable third parties and Provincial Ministries. It is the Joint Board's finding that such a delegation by the NEC in its Development Permits would be appropriate in this case as set out in the directions in this Decision regarding the content of the NEC Development Permits required for this project.

Mr. Clarkson also confirmed that The Ontario Aggregate Reserve Corporation (TOARC) is the agency responsible for the rehabilitation of abandoned quarries in the case where a license had been revoked and that TOARC collects fees based upon the amount of aggregate extracted. He confirmed that TOARC, under Section 6.00.02 of the MNR Aggregate Resources Policy Manual is not required to rehabilitate an abandoned site in the manner set out in the Rehabilitation Plans established under an *ARA* license.

Ms Pounder sees this as a concern in that the long term mitigation and rehabilitation measures for the proposed quarry might not be in accordance with the Site Plans, the Site Plan Notes and the final AMP. There is no evidence before the Joint Board that the Proponent has ever failed to meet its Rehabilitation Plan obligations at other quarry sites it owns. No evidence was presented that the Proponent has ever been cited for a failure to meet the obligations of its *ARA* license or that it has ever had a license suspended or revoked.

It is clear that Section 12. (1)(j) of the *ARA* contemplates that in the consideration of whether a license should be issued the history of the Proponent is a factor. There is nothing before the Joint Board that would suggest that the proposed license should be rejected on the basis of Section 12.(1) (j) of the *ARA.*

With regard to the concern that many of the mitigation measures being proposed are outside of the *ARA* license area the Joint Board accepts the Proponent's evidence that the *ARA* license conditions and Site Plan Notes are given a very broad interpretation by

the Ministry. It is clear to the Joint Board that one of the fundamental purposes of the Site Plan Notes is to ensure that aggregate operations are undertaken in a safe and environmentally sound manner and to achieve these objectives mitigation measures must be performed beyond the extraction area and the area of the *ARA* license. The Joint Board finds this to be a common and well understood practice fundamental to the safe and environmentally sound operation of a quarry. Further the Joint Boards finds in this case nothing in the proposed *ARA* license conditions or the revised Site Plan Notes that would restrict or inhibit the MNR in meeting its obligations under the *ARA*.

Conclusions and Directions

The Joint Board after considering all of the evidence is satisfied that the approval of the Proponent's proposal as set out and modified by this Decision is in the public interest and represents good planning that should be approved subject to the directions and modifications set out in this Decision.

The Joint Board in arriving at its decision has considered all of the documents filed, the testimony of the Participants, the expert and lay witnesses, the evidence filed and submissions made by those who participated in the Hearing.

The Joint Board can find no significant flaws in Mr. Clarkson's Planning Assessment of the Proponent's proposal with respect to the policy directions of the NEP or the Objectives of the *NEPDA*, the PPS, the County of Simcoe, or the Township of Clearview Official Plans other than those articulated by the Joint Board in this Decision. His review was comprehensive, fair, and compelling and, in the Joint Board's finding, appropriately reflects the planning policy directions and respective weights one should ascribe to a full reading of the planning documents governing this case.

Through its approval the Joint Board is directing that there be modifications to the proposal and to the various documents and planning instruments that will control the development and operation of the quarry and further protect the public interest. These modifications are set out in detail below, but can be briefly summarized as follows:

- Prior to the Orders coming into effect approving the applications the Joint Board is directing that the AMP be amended and finalized, and that the third party agreement with appropriate financial securities be executed,
- The Joint Board is respectfully directing the Minister to issue the ARA license with a number of recommended changes to the Site Plan, Site Plan Notes and conditions, and with recommended conditions for the license,

- The Joint Board will withhold its Order with regard to the NEP Amendment until the changes noted below are incorporated,
- The Joint Board will approve the proposed Amendment to the Township of Clearview Official Plan subject to incorporation of the required changes noted below, and
- The Joint Board is Ordering a number of changes to the development permit conditions as noted below.

In consideration of the above, the Joint Board, for the reasons contained in this Decision, makes the following contingent Orders that will come into effect, upon receipt of notice from MNR to the Joint Board, that the Adaptive Management Plan substantially in the form presented at the Hearing, and as modified by the Joint Board's directions noted below has been finalized, and that any required agreements between the Proponent and a public agency (i.e. the Township of Clearview) for the lake filling period and for any other phases of the operation as may be required by MNR for implementation of the AMP monitoring and mitigation measures have been executed.

THE JOINT BOARD DIRECTS that the AMP (Exhibit 37, Vol. 10, Tab 102) be modified as set out in this Decision, namely that:

(A) The northern peninsula and the AHTF be included as a Natural Heritage Feature to be monitored and that appropriate triggers and protocols be developed to guide the monitoring program to the satisfaction of the MNR.

(B) The following notice recommendations shall be included:

Recommendation #1

The management measures for recharging the dolostone aquifer to maintain the groundwater discharge to the springs on the escarpment must be tested to the satisfaction of the MNR in consultation with the NVCA through the AMP process.

Recommendation #2

The AMP should clearly state that reducing the hydraulic conductivity of the rock mass at the north end of the quarry to achieve the desired lake level should not be undertaken if it will reduce pre-quarry discharge rates to the NVCA watercourses below the escarpment.

Recommendation #3

That the AMP and rehabilitation plan be updated to address the design and operation of the ultimate discharges from the post quarry lake.

Recommendation #5

That the response times for the recharge systems be determined during site testing and if these times are inadequate to protect the downstream environment, that the groundwater monitoring system and associated targets be developed and incorporated into the AMP.

(C) And further that the MNR provide the Joint Board with the final AMP document (that includes the enhancements contained in the recommendations above), and confirmation that the Proponent has entered into an agreement with a public agency that will hold securities sufficient to ensure the effective implementation of the monitoring and mitigation measures identified for the post extraction (lake filling) period as described in the AMP.

Contingent upon fulfillment of above provisions the Joint Board makes the following Orders:

1. **THE JOINT BOARD** respectfully directs that the Honourable Minister of Natural Resources issue to Walker Aggregates Inc. a Category 2, Below Water, and Class "A" Quarry License to extract limestone from its property at Lot 25 and Part Lot 26, Concession 12, and Part Lot 25, Concession 11, in the Township of Clearview in the manner set out in Site Plans Exhibit 379 (black) and Site Plan Notes Exhibit 378 as amended by Exhibit 387 being page 17 subject to the following changes.

   A. That the *ARA* license include a condition;

      1. That the final AMP, substantially in the form presented at the Hearing, Joint Board Case 08-094, is a condition of the *ARA* License.

   B. That the Site Plans (Exhibit 379) and the Site Plan Notes (Exhibits 378 and 387) be amended as follows;

      1. That the Site Plan Notes and the proposed AMP now before the Joint Board be modified to include monitoring and mitigation measures to the satisfaction of the MNR to ensure the viability and success of the AHTF colony 1 located in the Northern Peninsula Area.

      2. That the Site Plans and Site Plan Notes be amended to exclude from the Phase 2A area a 100 meter connection between the Phase 2B area and the Northern Peninsula and that the 100 meter connection be added to the current Phase 2B area to the satisfaction of the MNR.

3. That the Site Plans and Site Plan Notes be amended such that the Phase 3 area becomes the Phase 2 area and the Phase 2A area becomes Phase 3A area and the Phase 2B area becomes the Phase 3B area. The now Phase 3B area should also contain the 100 metre connection, in a location to provide maximum protection to the AHTF colony 1, and further that the Phase 1 area be modified to exclude the significant woodlands area shown on Exhibit 43, Book 7, Tab 19, p. 353 together with any other changes to the Site Plan Notes are consistent with this direction.
4. That the Site Plan be amended to incorporate a minimum 120 metre buffer between the proposed extraction area and Rob Roy 2 wetland.
5. That the Site Plan be amended so that the buffer between the extraction area and colony 1 of the AHTF in the northern peninsula is increased to a minimum of 100 metres.
6. That Rehabilitation Plan Note 4, Exhibit 378 be amended by the addition of the following wording at the end of this note:

   > All such plantings forming part of the Rehabilitation Plan shall be kept healthy and dead material shall be replaced as required.

7. That Operational Plan Site Plan Note 28 be amended to read Shipping 6:00 a.m. to 5:00 p.m. Monday to Friday with no shipping on Saturday. The exception note (Note 28) found at Exhibit 378 and shown in red is approved.
8. That the Site Plan and Site Plan Notes be amended to include the requirement that the AHTF colony 1 located in the northern peninsula be included in the AMP with appropriate monitor protocols to the satisfaction of the MNR.
9. That the Township's Settlement Agreement and the revised Site Plans and Site Plan Notes be amended such that the conditions with respect to the monitoring of the reforestation plan success found in the Township's Settlement Agreement should be maintained but altered to reflect the changes in phasing being directed by the Joint Board; the purpose being that the same proof of success must be demonstrated before any quarry activities are undertaken in the new Phase 2 and Phase 3 Areas.

10. That prior to the commencement of shipping of quarry product from the proposed quarry that the improvements to former County Road 91 and Sideroad 26/27 as contemplated by the Road Settlement Agreements be undertaken to the satisfaction of the Township of Clearview.

11. That Visual Note 5 be amended to read as follows:

> if the extraction setback is reduced along the east side of Grey Road 31 in accordance with noise note 1 (above this page), there shall be at all times no less than 30 meters of vegetation either to be maintained or planted measured west from the westerly extraction limit to the edge of the travelled portion of Grey Road 31 or to the edge of the Given Road Allowance which ever is the greatest.

12. That the final Site Plan Notes with respect to Hydrogeology Section 6C contain the following:

    MONITORING SHALL BE CONDUCTED AS FOLLOWS:

    (iii) Weekly temperatures and manual measurements of flow at Dug Pond Outlet Channel in Rob Roy swamp PSW Unit #3 (to be installed prior to extraction) frequency shall be weekly until such time that a stage-discharge relationship is established. Manual flow and temperature monitoring shall be monthly thereafter.

13. That Site Plan Note Hydrogeology Note 7E of Exhibit 378 be amended to read:

    (E) Prior to the construction of any mitigation measure or contingency mitigation measure outside of the limits of extraction, it's design shall be approved by the MNR, and included in the AMP, unless the design of the measure has been approved pursuant to a permit issued under another statute such as the *Ontario Water Resources Act* (eg. Permit To Take Water, Certificate of Approval).

14. That the Site Plan include a note indicating that prior to commencement of extraction the Proponent shall submit details of the proposed method for conveying water from the proposed quarry lake to Rob Roy 2 and ANSI A and B wetlands to the satisfaction of the MNR and MOE, in consultation with the GSCA and NVCA.

2. **THE JOINT BOARD ORDERS** that the appeal is allowed and the NEP is to be amended as set out in Exhibit 124 and is to be further modified such:

    1. That the AHTF colony 1 should be left in the Escarpment Rural Area designation and excluded from the ARA license, but monitoring protocols should be established and included in the Site Plan Notes and the AMP document.

    2. That the area of County Road 91 to be closed and transferred to Walker be left and shown on the Amendment Schedule in the Escarpment Rural Area designation.

    3. That the Escarpment Rural Area designation is to be maintained on those lands extending 30 metres north from the north limit of former County Road 91 and 30 metres from the east limit of Grey County Road 31.

    The above amendments will not prevent, through tunnelling or an open cut, the use of a portion of the closed County Road 91 and the adjacent 30 meter buffer area for the purposes of the transfer of materials and equipment between the old quarry and the new on a temporary basis. The Joint Board will withhold its final Order pending receipt of a revised NEP Amendment implementing the above directions.

3. **THE JOINT BOARDS ORDERS** that the appeal is allowed, and the Official Plan of the Township of Clearview is modified by amending:

    (i) The Land use and Transportation Schedule, and the text of the Official Plan in Sections 6.1.2, 6.1.3, 6.1.4 to reflect the road classifications as set out in the Road Settlement Agreement, Exhibit 37, Vol. 15, Tab 245, and further is modified as set out in Exhibit 125.

    (ii) That the area of County Road 91 to be closed and transferred to Walker be left and shown on the NEP Amendment Schedule to the Township of Clearview Official Plan as Escarpment Rural Area designation.

    (iii) That the Escarpment Rural Area designation is to be maintained on those lands extending 30 metres north from the north limit of former County Road 91 and 30 metres from east limit of Grey County Road 31.

    The Joint Board will withhold its Final Order pending receipt and confirmation from the Township of Clearview of an Official Plan Amendment implementing this direction.

4. **THE JOINT BOARD ORDERS** that a NEP Development Permit be issued with conditions for the existing Duntroon Quarry located at Lot 24 Concession XII in the Township of Clearview, in the manner set out in Exhibit 126 subject to any normal formatting changes.

5. **THE JOINT BOARD ORDERS** that a NEP Development Permit be issued with conditions for the Duntroon Quarry located at Lot 25 and Part Lot 26, Concession 12, and Part Lot 25, Concession 11, in the Township of Clearview in the manner set out in Exhibit 388 subject to the following changes.

   (1) The deletion of the words “In this regard” as found in Condition 13 of Exhibit 388.

   (2) That Conditions 7 and 8 of Exhibit 388 be amended to read “in accordance with the AMP” after the word “designation”.

   (3) That Condition 9 of Exhibit 388 is amended to read after the word “Plans” and “said plans shall be provided to the NEC”.

   (4) That Condition 10 of Exhibit 388 is deleted.

   (5) That Condition12 of Exhibit 388 is amended to read: This Development Permit shall not issue until the Niagara Escarpment Commission has been notified by the MNR that a Category 2, Class A License to permit a quarry below water pursuant to the *ARA* is ready to be issued in accordance with the directions and Site Plans directed by the Joint Board in (Case No. 08-094) as finally approved by the Minister. Once the Development Permit is issued in accordance with the Joint Board’s direction, as approved by the Minister a copy of the approved licence and Site Plans shall be filed with the Niagara Escarpment Commission and these shall be the Site Plans and licence referred to under Condition 5.

   (6) That Condition 13 of Exhibit 388 be amended by adding after the Ministry of the Environment “the independent third party that is holding the financial securities for the AMP”.

   (7) All other conditions as set out in Exhibit 388 shall remain as written.

Contingent Order

These findings and determinations noted above are made and directed by the Joint Board. The Joint Board will withhold its final Order and directions to the Minister of

Natural Resources with respect to the *ARA* licence until it is notified by the MNR staff that a final AMP document has been finalized in accordance with the Joint Board's direction and that the Site Plans and Site Plan Notes have been amended in accordance with this Decision.

Further that the Township Official Plan Amendment, the NEP Amendment and the Niagara Escarpment Development Permits have been amended in accordance with this Decision.

Upon receipt of these amended documents the Joint Board's final Order and directions to the Minister of Natural Resources will issue.

Decision

This is the decision, the direction and the order of the majority of the Joint Board Panel established under the *Consolidated Hearings Act*, R.S.O. 1990 c.C.29.

"Chris Conti"
Chris Conti, Panel Chair

"John Peter Atcheson"
John Peter Atcheson, Panel Member

Appendix A – Exhibit List

Appendix B – List of Witnesses

Appendix C – Major Determinations of the Joint Board during and Following the Hearing

Appendix A

Exhibit List

1. Notice of Hearing.
2. Chronology and Background Duntroon Quarry Expansion.
3. Proposed Timetable to CHB Hearing.
4. Preliminary Procedural Order.
5. Schedule of Proposed Hearing Days.
6. Report of the Niagara Escarpment Commission.
7. Letter of December 7, 2009 re: Adaptive Management Plan (Draft).
8. Letter re: Hydrogeological Testing program edits, dated April 10, 2010.
9. Letter of D. Kappos re: Notice of Motion, dated March 31, 2010.
10. Notice of Motion from Niagara Escarpment Commission.
11. Affidavit of Christopher J. Neville.
12. Affidavit of Service of Jannette Westman, Affidavit of Service of Louise Maclean, and Notice of Response by Niagara Escarpment Commission's Response to Motion of the Clearview Community Coalition.
13. Affidavit of Service of Valeria Maurizio re: Walker Aggregates Inc. Notice of Response to Motion.
14. Affidavit of Service of Susan L. Wise re: The Corporation of the Township of Clearview Response to the Motion of the Niagara Escarpment Commission and the Motion of the Clearview Community Coalition.
15. Copies of the Procedural Orders of the Joint Board of the Office of Consolidated Hearings regarding the Walker Aggregates Inc. Hearing.
16. Motion Record of the Response to Motion of Walker Aggregates Inc.
17. Walker Aggregates Inc. Document Book Index.
18. Motion material of Emelia Franks.
19. Draft detail Hearing Schedule submitted by Walker Aggregates Inc.
20. Responding Motion record of the Corporation of the Township of Clearview to the Motion of the Niagara Escarpment Commission.

21. Notice of Response of the Clearview Community Coalition to the Motions of the Niagara Escarpment Commission and Emelia Franks.

22. Motion Record of the Clearview Community Coalition.

23. Responding Motion record of The Corporation of the Township of Clearview to the Motion of the Clearview Community Coalition.

24. Niagara Escarpment Commission's Response to Motion of the Clearview Community Coalition.

25. Will Statements of Gordon Miller, Environmental Commissioner of Ontario.

26. Excerpt of Niagara Escarpment Commission staff report, dated November 18, 2009.

27. Extracts from the Township of Clearview Official Plan.

28. Emails dated April 6, 2010, re: allegation of The Township of Clearview's breach of the Joint Board's Procedural Order.

29. Email correspondence of Counsel for the Niagara Escarpment Commission dated April 29, 2010, Nelson Aggregate Joint Board Decision.

30. April 27, 2010, Planning witnesses meeting summary of agreed facts.

31. Emails April 28, 2010 re: NEC planning issue #8.

32. Agreed Statement of Facts, expert witnesses - Visual Impact Assessment.

33. Agreed Statement of Facts, expert witnesses – Ground and Surface Water Resources.

34. Agreed Statement of Facts, expert witnesses – Natural Environment.

35. Opening Statement of Counsel for the Niagara Escarpment Commission.

36. Overview Statement of Mr. W. Brent Clarkson.

37. Walker Aggregates Inc. Document Books Volume 1 to Volume 15.

37.A Walker Aggregates Inc. Updated Document Book Index.

38. Site Plan Existing Features Plan 1 of 4.

39. Site Plan Operational Plan Plan 2 of 4.

40. Site Plan rehabilitation Plan 3 of 4.

41. Duntroon Quarry and Vicinity Land Ownership Map.

42. Residences and County Road #91 Map.
43. Niagara Escarpment Commission Document Books Volume 1 to Volume 7.
44. Niagara Escarpment Commission Reply Document Book.
45. Supplementary Reply Witness Statement of Daryl W. Cowell.
46. Supplementary Reply Witness Statement of Christopher J. Neville.
47. County of Simcoe Document Books Volume 1 and Volume 2.
48. Clearview Community Coalition Document Book.
49. Site Sketch, Spring 2009 Conditions and Surface Features Exhibit 37, Volume 6, Tab 59, page 4482.
50. Key Ecological Features and Proposed Duntroon Expansion, Exhibit 37, Volume 10, Tab 102, page 8022.
51. Duntroon Quarry Expansion, Hydrogeological Evidence, Power Point Presentation, April 20, 2010.
52. Distance Drawdown Relationship Graph Existing Quarry.
53. Expansion Quarry Impact Assessment groundwater Modeling Power Point Presentation, April 2010.
54. Explanation of Calculations of stream flow Values, May 6, 2010.
55. Extraction Areas Within Surface Drainage Basins.
56. Karst Investigations of the Duntroon Quarry Expansion Lands (Power Point Presentation).
57. Location Key Map for Karst Photographs Appendix B.
58. Location Key Map for Karst Photographs of the Existing and Proposed Quarries.
59. Visual Evidence and Photographic record of Natural Heritage Features Duntroon Quarry Expansion.
60. Document Book of the Township of Clearview.
61. Mr. Charlton's Wetland Schematic existing condition.
62. Mr. Charlton's Wetland Schematic proposed condition.
63. Mr. Charlton table of Contiguous Woodland Areas to Amphibian Breeding Pools.
64. Revised Figure 7.2 Exhibit 59, Tab A, page 6609R.

65. Duntroon West Escarpment Forest Natural Area Report.

66. Order in Council December 1, 2006 and Joint Board Decision June 8, 2005 J.B. File 03-086.

67. Memos October 29, 2008 to David Gibson re: Theoretical Hydrographs Rob Roy 6 wetland.

68. Memo of B. Clarkson dated October 3, 2008.

69. Woodland Heritage of Southern Ontario selected extracts.

70. Extract Natural Heritage Information Centre Submission Report May 25, 2010, Milk Snake.

71. Guidelines for Identifying Significant Portions of the Habitat, and Significant Wildlife Habitat, for the Eastern Massasauga Rattlesnake in Eastern Georgian Bay and Bruce Peninsula Populations, Ontario, February 2005.

72. Cosewic extract Bobolink, April 2010.

73. Overview slide presentation of Christopher Philip.

74. Site Plan Notes Operational Plan 2 of 4, Rehabilitation Plan 4 of 4.

75. Extract Ontario Regulation 828 “Development within the Development Control Area”, *Niagara Escarpment Planning and Development Act*.

76. Extract Status of Municipal Road Projects Under the Class Environmental Assessment.

77. I. Rowe Summary of NEP Permitted Uses Sections.

78. Simcoe County Transportation Master Plan July 2008.

79. Participant Statement, Gary Shaw, Director Transportation and Public Safety, County of Grey.

80. Municipal Class Environmental Assessment Manual as amended in 2007.

81. Extract Flamborough Quarry Route Draft Transportation Report May 2009.

82. County of Simcoe Haul Route Agreement re: Durham Stone and Paving Inc.

83. County of Simcoe Haul Route Agreement re: Montgomery and Durham Stone and Paving Inc.

84. County of Simcoe, Speed Reduction Report County Road 91 Duntroon, May 11, 2005.

85. Letter from Chris Doherty to John Millar, June 20, 2008.

86. Duntroon AMP Key Principles.

87. Nottawasaga Valley Conservation Authority, Staff Report and Resolution, dated March 26, 2010.

88. Extract from Exhibit 16 being “Exhibit’s to the Affidavit of Mr. Brent Clarkson”.

89. S Cross-Section Sketch Surface Discharge System, Schematic Location Shown on AMP Figure E.1.

90. Proposed changes to the Site Plan Notes.

91. Forest Management Plan for the MacDonald Property 2003.

92. Witness Statement, Andrew Hims, and May 28, 2009 re: James Dick Construction Limited Hearing (Board File: PL000643).

93. E-mails between B. Clarkson and Kathy Woeller, April 30, 2010.

94. Extracts from the *Fisheries Act*.

95. The *Conservation Land Act*.

96. Slide Presentation of Mr. John Emeljanow, P Eng.

97. Amended Site Plan Notes re: Noise.

98. Visual Assessment Impact Photographs (April 2010).

99. Conceptual Photograph simulations of the existing and proposed quarry – Photograph (a), (b), and (c), November 17, 2009.

100. Road Improvement Agreement County of Grey, Township of Clearview and Walker Aggregates Inc., July 28, 2010.

101. Resolution TAPS 149-10 Grey County Council, July 6, 2010.

102. Bylaw 4675-10 County of Grey.

103. B. Clarkson Photograph Book (April 21, 2010), Proposed Duntroon Quarry Expansion.

104. Examples of Walker Aggregates Inc. Rehabilitation Plans.

105. Revised Site Plans Walker Aggregates Inc. – Duntroon Quarry Expansion, August 20, 2010 being Plans 1, 2A, 2B, 3, and 4.

106. Updated *ARA* Site Plan Notes, Summary of Modifications, August 20, 2010.

107. Revised Site Plan Notes, August 25, 2010.

108. Revised Schedule A to proposed Amendment 161-05 of the Niagara Escarpment Plan, page 2665R.

109. Revised Schedule A to proposed Official Plan Amendment to the Township of Clearview Official Plan, page 2670R.

110. Revised Schedule B to proposed Official Plan Amendment to the Township of Clearview Official Plan, page 2671R.

111. Revised Schedule C to proposed Official Plan Amendment to the Township of Clearview Official Plan, page 2672R.

112. Email July13, 2009 request for comments on the AMP from B. Clarkson and Email from Kathy Pounder.

113. Emails July 29 and 30, 2010, Clarkson and Laing.

114. Grey Highlands letter July 23, 2010 opposing the closing of Simcoe County Road #91.

115. Proposed modifications to Site Plan Condition 5.10., 2nd variation.

116. Email August 27, 2010 from M. Vanden Heuvel re: Ministry of Natural Resources interpretation of clause 5.5 of Ontario Regulation 244/97.

117. Duntroon Quarry Expansion AMP Chronology.

118. Walker operation Improvement workshop Commitments.

119. Extract from Ontario Regulation 854/1990.

120. Walker letter to truck drivers (June 2008).

121. Letter from Ministry of the Environment, March 20 2008 Re: water taking and transfer Ontario Regulation 387/04.

122. Letter from Ministry of the Environment, November 21, 2005 Re water taking permit existing quarry.

123. Notes of Mr. Estrela regarding proposed resolution of planning Issue #8 together with a copy of the *Consolidated Hearing Act*.

124. Proposed Amendment to the Niagara Escarpment Plan.

125. Proposed Amendment to the Township of Clearview Official Plan.

126. Proposed Niagara Escarpment Plan Development Permit for the existing Duntroon Quarry Site.

127. Proposed addition condition to the proposed Niagara Escarpment Plan Development Permit for the Duntroon Expansion Quarry Site.

128. Environmental Registry notice of August 20, 2010, that Ontario Regulation 230/08 will be amended by September 29, 2010 to change the status of the Bobolink to Threatened.

129. Extract of Ontario Regulation 242/08 passed pursuant to the *Endangered Species Act* 2007.

130. Proposed Niagara Escarpment Development Permit Conditions Duntroon Quarry Expansion.

131. Extract from the UNESCO web site regarding World Biosphere Reserves.

132. Authorization of the County of Simcoe for Walker to apply for a NEC Development Permit for a tunnel under County Road #91 January 21, 2010.

133. Extracts from the Aggregate Resources Program Manual.

134. Niagara Escarpment Plan Map 5 – County of Simcoe, County of Dufferin.

135. Letter September 29, 2010 from Janet Gillham to the Council of the Township of Clearview, plus attachments, re: notice.

136. Amendment to Ontario Regulation 230/08, dated September 30, 2010, re: status of Bobolink (threatened species).

137. E-mail chain Clarkson and MNR October 3, 2008 to October 21, 2008, plus memo.

138. E-mail April 2, 2009 from K. Woeller to B. Clarkson.

139. Extract Ontario Regulation 244/97 Sections 1 to 8.

140. Adaptive Management Plan Agreement dated October 1, 2003 between Dufferin Aggregates and the Regional Municipality of Halton and the Halton Region Conservation Authority.

141. Extract the *Consolidated Hearing Act*.

142. Letter (June 8, 1998) from Ministry of Northern Development and Mines.

143. Aggregate Resources Inventory of (a) The Regional Municipality of Halton, (b) Wellington County, (c) The Regional Municipality of Peel, (d) Dufferin County; and (e) Osprey Township.

144. Issues relating to designation of the Bobolink as a threatened species under the *Endangered Species Act* 2007.

145. Duntroon Lands Bobolink Habitat Suitability Assessment prepared by Savanta Inc., October 15, 2010.

146. Extract Ontario Breeding Birds Atlas, Guide to Participants (March 2001).

147. Memo from Mr. Charlton to Ms. Bull, October 4, 2010, plus attachments.

148. Letter from Ms. Bull to Mr. DaSilva, October 13, 2010, re Bobolink re: Disclosure of Documents.

149. Memorandum of Understanding delegating lower tier Official Plan and Official Plan Amendments from the Province to the County of Simcoe.

150. By-law No. 5478 Delegating the Authority to approve and/or comment on development applications to the County of Simcoe Corporate Services Committee.

151. Report dated February 15, 2006 to Simcoe County Corporate Services Committee recommending Terms of Reference for the Simcoe County Transportation Master Plan and changes to Schedule 5.5 of the County of Simcoe Official Plan.

152. Extract from the *Planning Act*, Consolidation from July 1, 2010.

153. Schedule 5.5 County Road System, dated October 1997 to the adopted County of Simcoe Official Plan.

154. Schedule 5.5 County Road System, dated May 2000 to the County of Simcoe Official Plan.

155. Notice of Decision from Ministry of Municipal Affairs and Housing to approved the County of Simcoe Official Plan, dated April 1, 1998 with modifications.

156. Schedule 5.5 County Road System, dated April 2007 to the County of Simcoe Official Plan.

157. Extract from the *Municipal Act*, 2001, Consolidated from September 1, 2010.

158. **158A.** Schedule 5.1 – Land Use Designations, dated October 28 1997 to the adopted County of Simcoe Official Plan.

158B. Schedule 5.3 – Niagara Escarpment Plan Land Use designations, dated October 1997 to the adopted County of Simcoe Official Plan.

158C. Schedule 5.4 – Natural Heritage System, dated October 1997 to the adopted County of Simcoe Official Plan.

159. **159A.** Schedule 5.1 – Land Use Designations, dated June 2 200 to the County of Simcoe Official Plan as modified by the Minister.

159B. Schedule 5.3 – Niagara Escarpment Plan Land Use designations, dated June 12 2000 to the County of Simcoe Official Plan as modified by the Minister.

159C. Schedule 5.4 – Natural Heritage System, dated March 1999 to the County of Simcoe Official Plan purportedly showing the Minister modifications.

160. E-mail and letter dated November 24, 2008 from the NEC re: comments on the draft 2008 County of Simcoe Official Plan (Re: mapping errors).

161. Letter dated October 19, 2010 from the Clerk of the Municipality of Grey Highlands, plus attached Council Resolutions.

162. Kathy Woeller letter dated October 8, 2010 together with the Site Assessment of the proposed licence area at Duntroon Quarry for Bobolink habitat, authored by Mr. Chris J. Risley.

163. Kathy Woeller letter dated October 15, 2010 together with a map referencing the fields assessed by Mr. Chris J. Risley.

164. Schematic of trees to be removed in Phase 1 and Phase 3, prepared by Mr. Wynia.

165. Transmittal notices with respect to the Walker Official Plan Amendment Application.

166. Planning Report, December 1, 2008 regarding a public meeting schedule to hear submissions regarding the Walker Official Plan Amendment application.

167. Resolutions of the Township of Clearview dated January 18, 2010, January 25, 2010 and February 8, 2010 authorizing the settlement agreements.

168. Slide presentation of Mr. Christopher J. Neville.

169. Slide presentation of Mr. Daryl W. Cowell dated October 20, 2010.

170. Mr. Cowell’s retainer from the NEC to do a peer review of the Walker Karst reports.

171. Email chain March 18 and 19, 2009 between Ms. Pounder and Mr. Neville.

172. Survey of Existing Duntroon Quarry, November 3, 2009.

173. Schematics of the existing model, 4 scenarios showing the inferred groundwater divide (existing condition) and the inferred groundwater divide under three model simulations.

174. Consolidation of Hydrogeological Figures 2007 with 2008 monitoring summary reports.

175. Outline of Evidence of Ms. Grbinicek.

176. Composite Figure of Figures found at Exhibit 43, Book One, Figures 18, 19, 20, and Figure Exhibit 43, Book Seven, page 353.

177. Participants Statements being Exhibits 177-1 to 117-17, (177-18A, 177-18B, 177-18C, 177-18D1 through 177-18D18, Walker Employee Statements), and 177-19, 177-20, 177-21, 177-22, 177-23, 177-24, 177-25, 177-26, 177-27, 177-28, 177-29, 177-30, 177-31, 177-32, 177-33

178. Walker Website “Expansion Documents”.

179. Agenda and Minutes of the Municipality of Grey Highlands dated November 8, 2010, October 22, 2010, October 7, 2010 and September 27, 2010.

180. OREA Sellers Property Information Statement.

181. Aerial Photographs – Mosaic of Grey and Simcoe County.

182. Working draft (January 2009) – Significant Wildlife Habitat Ecoregion Criteria Schedules Extracts

183. Supplementary Witness Statement of Robert l. Bowles, November 16, 2010.

184. Power Point Presentation, Tracking Change on the Niagara Escarpment by Lisa Grbinicek, 2008.

185. Selected emails and Memos from L Grbinicek, December 21, 2007, December 19, 2007, August 15, 2008, August 5, 2008, September 17, 2008, November 4, 2008, May 22, 2009.

186. Extract Report and Proceeding, The Society for Ecological Restoration’s, 13 Annual Conference.

187. Forest Restoration Project Sign, Nottawasaga Bluffs Conservation Area.

188. 1966 Aerial Photograph – Walker Lands and Surrounding Area.

189. 1980 Aerial Photograph – Walker Lands and Surrounding Area.

190. Extract of a Presentation by Anne Marie Laurence “An elevation of the Effectiveness of the Niagara Escarpment Plan in Protecting Provincially Significant Life Science Areas of Natural & Scientific Interest”, 2008 Leading Edge Conference.

191. Presentation of Anne Marie Laurence “An elevation of the Effectiveness of the Niagara Escarpment Plan in Protecting Provincially Significant Life Science Areas of Natural & Scientific Interest”, 2008 Leading Edge Conference.

192. Butternut Health Assessment in Ontario, The foundation for Butternut Recovery.

193. Butternut – Strategies for Managing a Threatened Tree (M.E. Ostry et al).

194. Extracts from the Breeding Birds Atlas 2002 – 2005, being 194A. Red Breasted Nuthatch, 194B. Veery, 194C. Black-throated Green Warbler, 194D. Blackburian Warblers, and 194E. Winter Wren.

195. 1991 paper – A new fern Nothogenus from Ontario (A. Reznicek) et al.

196. An Information Report, May 20, 2010, re: Natural Heritage Reference Manual 2005 Edition by Lisa Grbinicek to the Niagara Escarpment Commission.

197. Email chain re: Millar Cow Pond to K. Pounder October 30, 2009.

198. Journal of Herpetology, Volume 17, No. 2 (Jun 1983), page 176-177.

199. American Society of Ichthyologist and Herpetologists Volume 1989, No. 3, (August 8, 1989), page 779-781.

200. Journal of Wildlife Management 68(4), page 1151-1158.

201. Lisa Grbinicek Letter, October 24, 2008 re: Draft Environmental Assessment Bruce to Milton Transmission Reinforcement Project.

202. Extracts from the Breeding Birds Atlas 2002-2005 being 202A. Ovenbird, 202B. Black-throated Blue Warbler, and 202C. Scarlet Tanager.

203. Map 6 of Niagara Escarpment Plan, June 1, 2005.

204. Visual Figures Folio of L. Laflamme.

205. Niagara Escarpment Commission Illustrative Visual, April 28, 2010.

206. Witness Statement of Mr. Wilf Ruland, March 11, 2010 and Reply Witness Statement of Mr. Ruland, April 1, 2010.

207. Supplementary Witness Statement of Mr. Wilf Ruland, December 13, 2010.

208. List of References to the evidence of Mr. Wilf Ruland.

209. Conceptual Cross Section of a Wetland by Mr. Wilf Ruland.

210. Mr. Wilf Ruland's Consolidated Conclusions and Recommendations January 2011.

211. Witness Statement of Mr. Wilf Ruland, October 12, 2010 re: MAQ Hearing on behalf of Grey Matters.

212. Calculations behind Table 1 of Mr. Wilf Ruland's Reply Witness Statement April 1, 2010 as generated by Mr. Hims.

213. Revised Calculations for Table 1 of Mr. Wilf Ruland's Reply Witness Statement dated April 26, 2010.

214. Groundwater Velocity Equation.

215. Extracts from Groundwater and Well Second Edition by Fletcher G. Driscoll.

216. Technical Guidance Document for Hydrogeological Studies in Support of Category 3 Applications for Permit to Take Water, Ministry of the Environment (April 2008).

217. Report on Well Sampling an Analysis Lot 25 Con 10 WPT Clearview Township by Trace Environmental, February 4, 2001.

218. Field Research Slides for American Hart's Tongue Fern Colonies in Ontario by Robert Bowles (January 2011).

219. Vermont Biology Technical Note 1, Vernal Pool Habitats in Conservation Planning, (November 2010).

220. Mr. Bowles' field Notes for April 28, 2010.

221. Photographs of the Millar pond taken by Mr. Bowles on April 28, 2010.

222. Mr. Bowles' field notes dated May 31, 2010.

223. Mr. Bowles' field notes dated May 31, 2010, June 16, 2010 and May 24, 2010.

224. Mr. Estrela's letter to Mr. Donnelly dated April 22, 2010.

225. Mr. Donnelly's letter of reply to Mr. Estrela dated April 23, 2010.

226. Extract from Exhibit 18, the Affidavit of Anton Reznicek, April 1, 2010.

227. General Description re: American Hart's Tongue Fern prepared by the Michigan Natural Features Inventory.

228. Niagara Escarpment Commission – Dufferin-Simcoe-Grey –Tour (Autumn Splendour).

229. Mr. Coulter's Schematic of his Null Condition Concept.

230. Motor Vehicle Safety Regulations C.R.C., c. 1038, January 10, 2011.

231. Ministry of the Environment, Noise Assessment Guideline in Land Use Planning, Publication LU 131.

232. Ministry of Transportation, Environmental Guide for Noise (October 2006).

233. Oakville Bus Depot Relocation and Expansion report of J.E. Coulter Associates Limited, June 30, 2009.

234. Noise Impact Study (Revised) for Material Reuse Facility, Kingston, Ontario, J.E. Coulter Associates Limited, April 24, 2008.

235. The Clearview Community Coalition's Lay Witness Statements, 235-1 Mr. Neill Lanz, 235-2 Ms. Denyse Martial, 235-3 Dr. Richard Cornell, 235-4 Mr. William J. Saunderson, 235-5 Mr. Dick Corner, 235-6 Ms. Ruth A. Grier, 235-7 Mr. Bruce Gillham.

236. Chronology of the Clearview Community Coalition's Involvement in the Walker Quarry Application.

237. Aird & Berlis letter, dated March 31, 2009 – Notice of Intent to Participate by the Clearview Community Coalition.

238. Participant Statement of Jim Swinton October 19, 2010.

239. The Bruce Trial Conservancy Letter dated May 27, 2010.

240. Highlands Nordic Outdoor Programs Guide.

241. Letter dated February 10, 2011 from Larry Sinclair, Highland Nordic Inc.

242. Letter dated February 8, 2011 from Grant Sampson, Duntroon Highlands Golf.

243. Participant Statement of Mr. Andrew J. Sorensen of the Grey Sauble Conservation Authority.

244. Map of the Grey Sauble Conservation Authority Area.

245. Extract of the *Conservation Authorities Act* R.S.O. 1990.

246. Ontario Regulation 151/06, Grey Sauble Conservation Authority, Regulation of Development, Interference with Wetlands, and Alterations to Shorelines and Watercourses.

247. Map Schedule 154 to Ontario Regulation 151/06, revisions June 30, 2009 to May 11, 2010.

248. Grey Sauble Conservation Trails Brochure.

249. 249A. Participant Statement of the Blue Mountain Watershed Trust Foundation (BMWTF) dated February 13, 2010. 249B. Participant Statement of the Blue Mountain Watershed Trust Foundation (BMWTF) dated March 10, 2010.

250. Participant Statement of the Nottawasaga Valley Conservation Authority dated March 8, 2010.

251. Supplementary Witness Statement of Mr. Chris Hibberd dated February 10, 2011.

252. Supplementary Witness Statement of Mr. Glenn Switzer dated February 10, 2011.

253. Supplementary Witness Statement of Mr. Davis Featherstone dated February 11, 2011.

254. Ontario Regulation 172/06 Nottawasaga Valley Conservation Authority: Regulation of Development, Interference with Wetlands, and Alterations to Shorelines and Watercourses, including Map Schedules 79 and 80.

255. Minutes of the Nottawasaga Valley Conservation Authority Executive Committee dated February 26, 2010.

256. Come to Clearview Map.

257. Official South Georgian Bay Passport Map, Collingwood, the Blue Mountains and Area.

258. Ministry of Natural Resources, Review of the *Aggregate Resource Act* with respect to “Rehabilitation of Land from which Aggregate has been Excavated” (July 2006).

259. Ontario Municipal Board Decision, November 12, 2010, Files PL000643, PL060448, James Dick Construction Limited.

260. State of the Aggregate Resource in Ontario Study, Consolidated Report, February 2010, Ministry of Natural Resources.

261. Nottawasaga Valley Conservation Authority, Watershed Plan Strategic Review and Update 1996- 2015, dated November 24, 2006.

262. Nottawasaga Valley Conservation Authority Staff Report, February 26, 2010.

263. Email of G. Switzer dated March19, 2010, re: AMP Targets.

264. Extract Provincial Policy Statement (September 1997).

265. Extract from Vineland Estates Winery Web Page (March 4, 2011).

266. Map: Location of Wineries in Relation to Aggregate Pits and Quarries within the Niagara Peninsula.

267. Extract from Georgian Hills Vineyards Web Page (March 4, 2011).

268. Letter from Gary Shaw, Director of Transportation and Public Safety, County of Grey, confirming Grey County Road #2 is a Year Round Aggregate Haul Route.

269. Extract *Ontario Municipal Act* re: Local Improvements.

270. Extract *Ontario Health and Safety Act*, R.S.O.1990, Regulation 851, Industrial Establishments.

271. Email from Robert J. Long, March 15, 2011 Re: Preliminary design for a Descending Truck Arrestor Bed, Duntroon.

272. Creemore Echo, February 6, 2009, Letter to the Editor from Dick Corner.

273. Township of Clearview Council Minutes dated February 1, 2010.

274. Letter dated February 23, 2010 from Ruth A Grier to the Council of the County of Simcoe.

275. Extract from Mineral Aggregates in Ontario, Statistical Update 2009.

276. Map Aggregate Resources of the Niagara Escarpment Plan Area 2008 (NEC Website).

277. Ontario Municipal Board Decision File PL070011, issued April 30, 2008.

278. Problem Solving Protocol prepared by Mr. Bruce Gillham.

279. Mr. Gillham's calculations of the percentage Walker trucks on County Road #91 resulting from the Road Settlement Agreement.

280. Correspondence regarding a Township of Clearview Council Resolution dated October 12, 2004 to the County of Simcoe re: County Road 91.

281. Letter – Duntroon Community Association, dated 7/9/07 to Simcoe County Roads Department RE: Traffic County Roads 91 and 124.

282. Brochure – The Bruce Trail Conservancy.

283. Map, Designated Areas under the *Aggregate Resources Act.*

284. Map, Aggregate Officers of Ontario.

285. 3 Maps: Blow ups of Niagara Escarpment Plan Designations for Dufferin Aggregates, The Warren Paving and Materials Group Ltd., and Graham Bros Aggregates Ltd.

286. Slide Presentation of Ms. Kathryn Pounder.

287. Ontario Regulation 828 “Development within the Development Control Area”, *Niagara Escarpment Planning and Development Act*.

288. Niagara Escarpment Plan, Office Consolidation March 11, 2010, highlighting the words Maintain Maintenance, Enhance, Protect and Retain prepared by K. Pounder.

289. Extract: Aggregate Resources Inventory of Dufferin County, Southern Ontario, and Paper 163 (Revised 2009).

290. ARA Notice and Letter dated March 4, 2011 from The Highland Company regarding a Proposed Melancthon Quarry Applications.

291. Extract, The Resource, from the Planning Summary Statement. re: The Proposed Melancthon Quarry Applications.

292. By-law No. 5635 of the County of Simcoe, re: to Promote Sustainable Forest Management Practices.

293. Nottawasaga Lookout Interim Management Statement.

294. Progressive Rehabilitation Plan, existing Duntroon Quarry Page 3 of 5.

295. Ms. Pounder’s Overlapping Policies Venn Diagram Re: 2005 NEP and the 2005 PPS Re: Woodlands.

296. 3 Maps: Blow ups of Niagara Escarpment Plan Designations for Dufferin Aggregates, The Warren Paving and Materials Group Ltd., and Graham Bros Aggregates Ltd. including the area of the ARA licence.

297. Development Permit Conditions Amendment requested by the Joint Board in response to Exhibit 130, Proposed Niagara Escarpment Development Permit Conditions Duntroon Quarry Expansion submitted by Walker.

298. Draft Schedule “A” to the NEP Amendment as presented by Ms. Pounder in response to Exhibit 108.

299. Extract from MNR Intranet for the Midhurst District.

300. Extract, *Environmental Assessment Act*, Section 16.

301. Summary Conclusions of Kathryn Pounder regarding the NEC'S Listed Issues (Exhibit 15).

302. Extract, The Mineral Resource Planning Study of the Niagara Escarpment Plan Area and Surrounding Areas, Bird and Hale Limited (November 1995).

303. Extract and Blow up of Figure 11-14 – Composite of Social & Natural Heritage Constraints from The Mineral Resource Planning Study of the Niagara Escarpment Plan Area and Surrounding Areas, Bird and Hale Limited (November 1995).

304. **304A.** NEC Staff Report Re Protocol for the Ministry of Natural Resources Responses to the Niagara Escarpment Plan Amendment Applications to Create or Expand Mineral Aggregate Operations (April 6, 2010).

304B. Protocol for the Ministry of Natural Resources (MNR) Responses to the Niagara Escarpment Plan (NEP) Amendment Applications Circulated by The Niagara escarpment Commission (NEC) to Create or Expand Mineral Aggregate Operations, Final Draft.

304C. Minutes of the Niagara Escarpment Commission April 15, 2010.

305. NEC Staff Report dated September 16, 2010 re: Niagara Escarpment Plan Amendment PG167-07 Harold Sutherland Construction Ltd.

306. Extract from the County of Simcoe Official Plan dated November 25, 2008.

307. Extract from the Hearing Officers Report, March 1993 being the Executive Summary and Mineral Resource Extraction Sections. The Exhibit was revised by the addition of Page 206 by Ms. Pounder.

308. Email from B. Clarkson to K. Pounder October 19, 2009.

309. Map, Location of Bruce Trail Optimum Route-Duntroon produced by the Bruce Trail Conservancy, August 25, 2010.

310. NEC Staff Comments, re: Consent Applications B08/10 and B09/10, Carmarthen Farms, Township of Clearview.

311. Planning Report, June 9, 2010, re: Consent Applications B08/10 and B09/10, Carmarthen Farms, Township of Clearview.

312. Walker Aggregate's Letter, March 21, 2010 to the Bruce Trail Conservancy, re: Land Dedication on the East Side of the Existing Quarry.

313. Bruce Trail Conservancy Letter, April 5, 2010, Response to Walker Aggregate's Letter March 21, 2010.

314. Chart and Maps of Sections of the NEP that are less than 3.5 km in width, prepared by B. Clarkson.

315. Selected Measurements of the NEP width Map 5 Duntroon, prepared by B. Clarkson, March 31 2011.

316. Extract of the 1994 Niagara Escarpment Plan.

317. Extract, "In Focus A Review of the Niagara Escarpment Plan April 12, 2001" being the Transmittal letter and Topic 6.

318. E-mail Chain from B. Clarkson to M. Bull, re: June 24, 2009 letter from Dan Orr of MOE to Ms. Pounder Advising of MOE's Findings from Their Comprehensive Review of Reports.

319. NEC Staff Report dated February 17, 2011, re: Niagara Escarpment Plan Amendment PD191-11 Former Lafarge Pit, Town of Mono.

320. Extract of 1995 NEP as Approved by the Provincial Cabinet on June 12, 1985.

321. Extract from MNR Website re: Draft and Final Recovery Strategies for Species at Risk April 2, 2011.

322. Environmental Registry, Regulation Proposal Notice of MNR re: the Butternut Tree.

323. NEC Final Position Staff Report re: a Niagara Escarpment Plan Amendment being an Amendment PC178 09 (Harmonization of the Niagara Escarpment Plan with the *Endangered Species Act* 2007).

324. Minutes of the Niagara Escarpment Commission, February 17, 2011.

325. Walker's Breakdown of Ms. Pounder's Page 18 of Exhibit 286 Re: Planting areas within and outside the Proposed Extraction Area.

326. NEP Map 3, plus enlargements of the areas of Warren Paving and Dufferin Aggregates Milton, prepared by Walker's Counsel.

327. NEP Map 4, plus enlargement of the area of Graham Bros. Aggregates Ltd., prepared by Walker's Counsel.

328. NEC email from Michael Baran, NEC Planner dated March 18, 2011 re: Number of NEC development Permit Applications.

329. Protocol Agreement to Address the Roles and Responsibilities of the MNR and MOE Regarding Aggregate Extraction Operations within the Province of Ontario, May 2008.

330. Extract from Exhibit 13 of the Dufferin Milton Consolidated Hearing File 03-086.

331. Updated Adaptive Environmental Management and Protection Plan (AMP) Milton Quarry Extension May 2003.

332. Water Management Agreement between Dufferin Aggregates and the Halton Region Conservation Authority and Peninsula Ready – Mix Inc. October 1, 2003.

333. NEC Development Permit, Permit No. 8784H/E/2000-2001/314, Dufferin Aggregates Milton.

334. NEC Development Permit, Permit No. 8051N/E/00-01/313, Vineland Quarries and Crushed Stone Ltd.

335. Comparison Chart of NEC Development Permit Conditions Vineland v. Dufferin Milton v. Duntroon v. NEC, Exhibit 297 of Ms. Pounder.

336. Dufferin Aggregates Letter February 8, 2011 re: NEC Staff Report September 17, 2009 re: Dufferin Aggregates Acton Quarry.

337. K. Pounder Letter dated February 28, 2011, in Response to the Dufferin Aggregates Letter, February 8, 2011.

338. NEC Minutes dated February 17, 2009.

339. Simcoe County Resolution 2008-154 Re: Transportation Master Plan Study Report.

340. Simcoe County Staff Report dated June 11 2008 Re: Transportation Master Plan Study Report.

341. Extract, *Environmental Assessment Act* Section 39, Extract, *Legislation Act* 2006 Part III, Regulations Section 17, Extract Municipal Class Environmental Assessment Manual Section A.1.2.2 Project Schedules.

342. Extract, *Public Transportation and Highway Improvement Act* Section 29.

343. Extract, *Municipal Act* 2001 Sections 34.(1),(2) 43. 44(1)(2) and 270.(1).

344. Extract, *Development Charges Act*, 1997 Part II.

345. Extracts from “In Focus A Review of the Niagara Escarpment Plan April 12, 2001” being Discussion Paper #2 – Rural Tourism, Discussion Paper #5 –

Intensive Recreational Development in Escarpment Parks & the Status of land Trusts.

346. NEC Letter dated July 9, 2001 Re: Comments to the Township of Clearview Official Plan.

347. Extract from the New County of Simcoe Official Plan, being Section 4.4 Aggregate Developments.

348. Website page from “Conserve Our Rural Environment” (CORE) and “Citizens Alliance for a Sustainable Environment” (CAUSE).

349. Anthony Usher Outline of Evidence, New Walker Duntroon Quarry – Case 08-094.

350. Supplementary Document Book of Tony Usher.

351. Extract Aggregate Resources Program Manual Section A.R. 5.00.02.

352. Ontario Environmental Review Tribunal Decision Case Nos. 06-160, 06-181, 06-183 dated April 4, 2007.

353. Judgment of the Ontario Superior Court of Justice Divisional Court, *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)*, Court File No. 451/07.

354. Mr. Usher’s list of “Shall” PPS Policies Relevant to this Application.

355. Extract Aggregate Resources Program Manual Section A.R. 1.00.00.

356. Ontario Environment Review Tribunal Report to the Minister, Case No. H. 91-28, dated July 10, 1991, re: An Appeal by Mrs. D. Sampson et at from a Decision of the Niagara Escarpment Commission to issue a development permit to Seeley & Arnill Aggregates Ltd.

357. Mr. Fairbrother’s Letter dated April 11, 2010 to Mr. Donnelly Requesting Disclosure with Respect to Mr. Usher’s Witness Statement of March 12, 2010.

358. Mr. Donnelly’s reply letter dated April 23, 2010 regarding the Request for Disclosure with Respect to Mr. Usher’s Witness Statement of March 12, 2010.

359. Email dated March 31, 2010 from T. Usher to B. Clarkson re: Technical Comments on the NEC Development Permit and Site Plan Changes.

360. MNR Letter dated April 2011, Re: St. Marys Cement Inc. – Bromberg Pit.

361. Proposed Amendment to Ontario Regulation 242/08 (General) under the *Endangered Species Act* 2007 respecting Bobolink.

362. Letter dated May 17, 2011 from Mr. Eric Millar.

363. Email Chain from Janet Gillham to A. Usher re: Walker's Hours of Operation.

364. Site Plan Notes Plans 1 to 5 Superior Aggregates Company.

365. Selected Superior Aggregates ARA Site Plan Notes pertaining to Off Site Matters, prepared by B. Clarkson.

366. Email from Anthony Usher to James Parkin re: Site Plan Notes Halminen Quarry.

367. County of Simcoe Planning services report dated June 27, 2000.

368. A Notice of Motion brought by the Niagara Escarpment Commission seek on: (A) Order with respect to the admissibility of certain documents sought to be tendered by Walker into evidence as Reply; (B) A direction from the Board regarding the disclosure of all to be tendered in Reply evidence; (C) An abridgement of the time for service of the notice of motion; and (D).Such relief as Counsel may advise and this board may permit, Exhibit 368B, the Affidavit of Service of MS. K. Pounder.

369. Notice of response to Motion brought by the Clearview Community Coalition seeking relief to Exclude from Reply Evidence and in particular: (A) Tabs 1-5 and Tab 7 in accordance with the NEC motion Exhibit 368B; (B) An Order adjourning the Admissibility of Tab 9 (Wind Report) and Tab 12 (Walker- MAQ Co-Ordination Agreement) and any forthcoming planning disclosure until May 30, 2011 to permit sufficient time to review the evidence with our experts; (C) An abridgement of the time for service of the notice of motion; and (D) Such relief as Counsel may advise and this Board may permit.

370. Notice of response to Motion brought by Mrs. Emelia Franks seeking relief to exclude from reply evidence and in particular: (A) An Order excluding the following Hydrogeology Reply materials: 1. Photograph book of the Rob Roy PSW Unit 3 and downstream; 2. Supplemental Wetland Hydrogeology testing program Summary, May 2011; 3. Wetland Over burden Flow calculations; 4. Rob Roy PSW Unit 3 Flow monitoring Data by C.C. Tatham and Associates Ltd.; 5. SW# monitoring Data; and 6. 2007 Hydrogeologic model of existing quarry drawdown. (B) An Order adjourning the cross-examination of Dr. Worthington and Mr. Hims until May 30, 2011. (C) An abridgement of the time for service of the notice of motion. (D).Such relief as Counsel may advise and this Board may permit.

371. Walker Aggregates Inc. Response to the motion brought by the Niagara Escarpment Commission Regarding the admission of Reply evidence.

372. 372A. E-mail from D. Kappos to Mr. Fairbrother regarding Reply Witnesses and Disclosure of Reply Evidence dated May 9, 2011; 372B. Response E-mail from Mr. Fairbrother to Mr. Kappos re: Exhibit 372A.

373. Email from Wilf Ruland, re: reply evidence.

374. Email from Mr. David S. White transmitting part A of the Azimuth report for the MAQ Quarry Application.

375. Duntroon Quarry Expansion Photograph Book of Rob Roy Unit 3 PSW and Downstream Flow System.

376. Surface Water Flow Monitoring Summary: Station SW3.

377. MAQ Flow Date for specific locations in the Rob Roy Unit 3, Rob Roy Unit 4 and Selected Locations along the Flow Route.

378. Revised Site Plan Notes dated May 24, 2011(to Exhibit 107).

379. Revised Site Plans Walker Aggregates Inc., Duntroon Quarry Expansion, May 24, 2011 being Plans 1, 2A, 2B, 3, and 4.

380. Supplemental Wetland Hydrogeological Testing Program Summary, dated May 19, 2011.

381. Mr. Hims Calculations of the Volume of Water Moving Through the Overburden.

382. Groundwater Hydrograph BH02-3 v. BH02-4.

383. Figures from the 2007 Groundwater Modeling Report for the Existing Duntroon Quarry: Existing Conditions Heads, Pre Quarry Heads Layer, and 2007 Model Drawdown from Pre-exist Footprint.

384. Revised Extracts from the revised site plans Exhibit 397 being Visual Mitigation Planting Layout Detail, and Visual Mitigation Planting Detail.

385. NEC Staff Information Report, dated May 16, 2011 re: a Niagara Escarpment Plan Amendment being an Amendment PC178 09 (Harmonization of the Niagara Escarpment Plan with the Endangered Species Act 2007). Withdrawing NEP Amendment PC178 09.

386. Mr. Clarkson's Proof of additional Exhibits being Exhibits 188, 189, 266, 303, 314, 315, 330, 335, and 365.

387. Revised page 17 to Exhibit 378 being Revised Site Plan Notes dated May 24, 2011.

388. Proposed Niagara Escarpment Development Permit Conditions Duntroon Quarry Expansion May 24, 2011, Replaces Exhibit 130.

389. Email dated April 6, 2011 from Robert Pineo to B. Clarkson re: MNR-NEC Protocol on Public Need.

Appendix B

List of Witnesses

1. Mr. Andrew Hims, P. Eng., a designated consulting engineer with a specialization in engineering geology and hydrogeology was retained by the Proponent and the previous owners of the existing Duntroon Quarry since 2002 to provide Hydrogeological technical support and advice with respect to the geology groundwater and surface water resources on and an adjacent to the existing Duntroon Quarry and to assist in the proposed quarry expansion application. He was qualified as an expert in hydrology and engineering geology.

2. Mr. David J. Ruttan, P. Eng., an expert in the fields and geological mapping, engineering geology, hydrogeology and computer mapping and modelling was retained by the proponent in 2006 to undertake groundwater modeling for the proposed quarry expansion in support of the quarry expansion application. He was qualified by the Joint Board as an expert in hydrogeology and groundwater modelling.

3. Dr. Stephen Worthington, P.Geo., was qualified as a Hydrogeologist with expertise in carbonate aquifers including the modeling of carbonate aquifers. Dr. Worthington was retained in September of 2004 by Jagger Hims Limited to provide advice with respect to the influence of Karst features on the hydrogeology and on the groundwater and surface water resources in and around the proposed Duntroon Quarry expansion lands.

4. Marcus J. Buck, P.Geo., a Registered Professional Geoscientist was qualified to give expert opinion evidence in the fields of Karst hydrogeology, geochemistry and geomorphology of Karst environments. Mr. Buck was retained by Jagger Hims Limited in April 2004 to assess Karst features and provide advice with respect to the influence of Karst features on the hydrogeology and on the groundwater and surface water resources in and around the proposed Duntroon Quarry expansion lands.

5. Mr. David Charlton was qualified as a Resource Ecologist, who is also qualified by the Ministry of Natural Resources as a Wetland Evaluator. His firm was retained in 2002 by the Proponent predecessor in title to undertake a level 2 Natural Environment Technical Report for the proposed quarry expansion. Mr. Charlton had project management responsibilities for the project and led a team of experts from his firm from 2002 up to the present.

6. Mr. Marcus V. van Bers, P. Eng., was qualified as an expert in rock mechanics and blasting including blasting control design, blast optimization, and associated feasibilities studies, but not related to the impacts of blasting on sensitive wildlife.

7. Mr. Christopher Philp, P. Eng., was qualified as professional engineer with specialization in traffic planning, traffic safety and traffic engineering (operations control). His firm or its predecessor was originally retained to do the traffic impact analysis in support of the original quarry expansion application. Mr. Philp direct involvement began in 2006 when commenting agencies requested consideration of the cumulative impact of other quarry applications in the area. He also undertook a traffic analysis report of the proposed road settlement which is found at Exhibit 37, Volume 9, Tab 81.

8. Mr. Chris Doherty was qualified as an Engineering Technician, who is employed by the County of Simcoe. He is familiar with the County of Simcoe's transportation system and its operation and is also familiar with transportation matters relating to Walkers expansion application and the settlement agreement with respect to roads of Walker with the County of Simcoe and the Township of Clearwater.

9. Mr. Joseph Arcardo, P. Eng., was qualified as professional engineer with specialization in the area of road planning, design and construction and became involved in the project in April of 2009 to review the design requirements for the haul route as proposed in the road settlement agreement between Walkers and the Municipalities.

10. Mr. Donald McNalty, P. Eng., was qualified as a Professional Engineer with expertise in Municipal Engineering related to transportation. He was retained by the Township of Clearview to assist in the peer review of the transportation material in support of the proposal.

11. Mr. John Emeljanow, P. Eng., was qualified as an acoustical engineer with experience in undertaking noise impact analysis of Quarry operations. His firm was retained in 2003 to undertake a sound impact analysis of the proposed Duntroon Quarry expansion and the proposed haul routes to ensure their compliance with Ministry of the Environment's requirements.

12. Mr. Kenneth W. Buck was qualified as Landscape Architect with particular expertise and experience in Visual Impact Assessments and visual impact computer simulations. His firm was retained by Walker in 2005 to undertake a Visual Impact Assessment of the proposed quarry expansion. He updated his

work with an addendum report in 2007 in response to questioning from the Township of Clearview and staff of the NEC and in 2009 - 2010 at the request of the NEC staff prepared visual computer simulation for agreed to and selected vantage points around the quarry proposal as set out at Exhibit 37, Volume 8, Tab 78.

13. Mr. Peter Norman was qualified as an economist. Mr. Norman was retained to review the economic impacts of the expansion and related increased truck traffic on small commercial enterprises and the tourism sector in Clearview. His witness statement and work upon which he relies is set out at Exhibit 37, Volume 9, Tab 97.

14. Mr. Brent Clarkson was qualified as a Land use Planner with expertise in the area of aggregate applications. Mr. Clarkson is authorized to prepare and certify site plans under the Aggregate Resources Act by the Ministry of Natural Resources. Mr. Clarkson was retained in November of 2002 by Walker to assist and provide leadership in support of their application for a quarry expansion at Duntroon.

15. Mr. Shaw, the County of Grey's Director of Transportation and Public Safety was qualified to give the Board opinion evidence of transportation and public safety issues, and the settlement reached by Grey County and the Township of Clearview and the proponent. He was qualified by the Joint Board due to his many years of practical experience in the field of transportation and roads and as an employee of Grey County for some 45 years in a variety of transportation and roads related positions.

16. Mr. Nicholas Sylvestre-Williams, P. Eng., was qualified as an expert in the field of acoustical engineering. He was retained by the Township of Clearview to undertake a peer review of the haul route and on-site noise studies prepared by Valcoustics in support of the Duntroon Quarry expansion.

17. Mr. Michael Wynia was qualified as a Land use Planner with expertise in the areas of land use and environmental planning. He is also qualified by the Ministry of Natural Resources as a Wetland Evaluator. Mr. Wynia is the Planning Director of the Township of Clearview.

18. Mr. Tom Hilditch was qualified as a terrestrial ecologist with an expertise in vegetative and wildlife habitat. Mr. Hilditch is chairman of the Species at Risk Program Advisory Committee (SARPAC) that advises the ministry of natural

resources on implementation strategies under The Endangered Species Act 2007. Mr. Hilditch is not an Ornithologist.

19. Ms. Kathy Suggitt was qualified as a land use planner. Ms. Suggitt is the Manger of Policy Planning for the County of Simcoe.

20. Mr. Chris J. Risley is an Avian and Mammalian species at Risk Biologist with the Ministry of Natural Resources. Mr. Risley has been a Regional Coordinator, for the Ontario Breeding Bird Atlases (1981 - 1985; 2001-2005). Mr. Risley was qualified as a Biologist with a specialty in Birds.

21. Mr. James R. Uram was qualified as a Land use Planner. Mr. Uram is the Plan Review Manager for the Township of Clearview, a position he has held since March of 2007.

22. Mr. Christopher J. Neville, P. Eng., was qualified as an expert in Hydrogeology with an emphasis in the evaluation of ground water resources and ground water modelling. He was retained in April of 2005 to undertake a peer review of the groundwater modelling undertaken by Walker in its various reports in support of the quarry application.

23. Mr. Daryl W.Cowell, P. Geo., a Registered Professional Geoscientist was qualified to give expert opinion evidence in the fields of Karst and glacial geology. He was retained in March of 2008 by the NEC to provide a peer review of the Karst investigations and the Karst aspect of the sites hydrogeology investigations conducted on behalf of Walker.

24. Ms. Lisa Grbinicek was qualified as Ecologist, who is also qualified by the Ministry of Natural Resources as a Wetland Evaluator and a Certified Butternut Health Assessor, and was qualified to give opinion evidence policy matter related to the Natural Environment. Ms. Grbinicek is a Senior Strategic Advisor employed by the Niagara Escarpment Commission.

25. Ms. Linda Laflamme was qualified as a Landscape Architect with a particular expertise in Visual and Site Assessments. Ms. Laflamme is employed by the Niagara Escarpment Commission as a Landscape Architect.

26. Mr. Wilf Ruland, P Geo., a Registered Professional Geoscientist was qualified to give expert opinion evidence in the field of hydrogeology. Mr. Ruland was retained in December of 2009 by Ms. Franks to assist her with respect her concerns about the quarry proposal.

27. Mr. Robert L. Bowles, a Field Naturalist was qualified to give expert opinion evidence in the fields of field inventories and habitat evaluation, species at risk element occurrences, and wetland evaluation. Mr. Bowles was retained on December 8, 2009 to assist the Clearview Community Coalition in Natural Heritage associated with the Walker quarry proposal.

28. Dr. Reznicek, an Evolutionary Botanist was qualified to give expert opinion evidence about the Ecological Conservation requirements of the American Hart's Tongue Fern.

29. Mr. John Coulter, P Eng., was qualified to give expert opinion evidence in the field of Acoustical Engineering.

30. Mr. Neill Lanz, a member of the Clearview Community Coalition who lives in the area testified as a Lay witness. His participant statement is set out at Exhibit 235-1.

31. Ms. Denyse Martial, a member of the Clearview Community Coalition who lives in the area testified as a Lay witness. Her participant statement is set out at Exhibit 235-2.

32. Mr. Andrew J. Sorensen was qualified as a Planning Technician with expertise in Conservation Authorities matters.

33. Mr. Chris Hibberd, RPP, the Director of Planning for the Nottawasaga Valley Conservation Authority was qualified to give expert opinion evidence in the area of Environmental Planning.

34. Mr. Glenn Switzer, P. Eng., the Director of Engineering and Technical Services for the Nottawasaga Valley Conservation Authority was qualified as a Civil Engineer with expertise in the area of Water Resources.

35. Mr. David Featherstone, the Manager, Watershed Monitoring Program for the Nottawasaga Valley Conservation Authority was qualified to give expert opinion evidence in the area of Ecology.

36. Dr. Richard Cornell, M.D., a member of the Clearview Community Coalition who lives in the area testified as a Lay witness. His participant statement is set out at Exhibit 235-3.

37. Mr. William J. Saunderson, a member of the Clearview Community Coalition who lives in the area testified as a Lay witness. His participant statement is set out at Exhibit 235-4.

38. Mr. Gordon Miller, the Environmental Commissioner of Ontario, testified under summons, by the Clearview Community Coalition and was qualified to give expert opinion evidence in the fields of Ontario's Aggregate, environmental and Land use policies, Regulations and Compliance Requirements, as well as Plant and Soil Ecology.

39. Mr. Dick Corner, a member of the Clearview Community Coalition who lives in the area testified as a Lay witness. His participant statement is set out at Exhibit 235-5.

40. Ms. Ruth A. Grier, a former Provincial Cabinet Minister, and a member of the Clearview Community Coalition who lives in the area testified as a Lay witness. Her participant statement is set out at Exhibit 235-6.

41. Mr. Bruce Gillham, a member of the Clearview Community Coalition who lives in the area testified as a Lay witness. His participant statement is set out at Exhibit 235-7.

42. Ms. Kathryn Pounder, Senior Strategic Advisor with the Niagara Escarpment Commission was qualified as a Land use Planner with expertise in the Area of Environmental Policy Planning and Urban Planning.

43. Mr. Anthony Usher was qualified as a Land use Planner with expertise in the area of Environmental Policy Planning. Mr. Usher was retained by the Clearview Community Coalition on January 7, 2010 to assist them in the Planning matters before the Joint Board.

Appendix C

Major Determinations of the Joint Board During and Following the Hearing

The Joint Board during the course of this hearing was requested by Counsel for the parties to make a number of procedural orders or decisions. The most significant of these decisions are summarized in this Appendix, in the order in which they were delivered over the course of the proceeding. These procedural decisions were delivered orally by the three Member panel of the Joint Board, with the exception of the order issued on December 19, 2011, in respect of the motion to re-open the hearing. For ease of reference, the most significant of these decisions are included in this Appendix and are as follows.

1. Site Visit: The Joint Board was requested by the Parties to take a day long site visit of the proposed quarry expansion area, the existing quarry and surrounding area. The Joint Board for logistical reasons and in a concern for an abundance of fairness declined the site visit and indicated that it was satisfied that the body of exhibits and anticipated evidence from the many witness scheduled to be called by the parties together with the participant's statements was sufficient for the Joint Board to have a full and complete understanding of the proposal and the character and nature of the surrounding area.

2. Additional Session for Participants: The Joint Board on August 23, 2010 responded to a request by Counsel for the CCC to have the Joint Board hold a town hall meeting for those residents not currently represented or not on the participants list in order that these unnamed individuals might make presentations to the Joint Board on the various settlement agreements and other matters. The Joint Board after considering the submissions of all Counsel determined that appropriate public notice had been given in accordance with the relevant legislation and the Ontario Municipal Board's Rules of Practice and Procedure which had been agreed to by the Parties to be the rules to be followed for this hearing and which were followed in the various preliminary hearings and Procedural Orders leading up the commencement of this hearing. However; the Joint Board further determined out of an abundance of caution and a willingness to hear all issues relating to the applications that it would, subject to the parties agreeing on a particular time, permit the addition of and would hear from additional individuals wishing participant status on the understanding that they would be required to submit participant statements in advance to the parties and that their submission would be considered as evidence subject to the full rights of

cross-examination by the Parties. The Joint Board on August 26, 2010 confirmed its previous direction and further directed Counsel for the CCC to arrange and notify those individuals that might still have an interest in making a presentation to the Joint Board and that these additional participant statements be exchanged no later than October 22, 2010 and that the Joint Board on consent of the Counsel for the parties would hear these additional participant statements on November 23, 2010 which would include if necessary an evening session. The Joint Board gave no direction for any party to publish a public notice seeking further submission but left the method of notice up to the individual parties.

3. Additional direction regarding session for Participants: The Board on September 30, 2010 on a submission of Mr. Rowe and the filing of Exhibit 135 and after considering submission from Counsel present reconfirmed its direction of August 26, 2010 to the parties concerning the process to be followed if further participants were to come forward and be heard by the Board. The Board further directed that with respect to this matter that Counsel govern themselves accordingly.

4. Withdrawal of County of Grey: Counsel for the County of Grey on August 25, 2010 tentatively filed with the Board Exhibits 100,101 and 102 and indicated that on the basis of these filings the County of Grey had reached a settlement of its issues and wished to withdraw as a participant from the hearing. The Board after considering submissions from all counsel determined to reserve on any consideration of these Exhibits and the County of Grey's request until August 30, 2010 in order to permit the other parties to have time to consider the materials presented and the County of Grey's request. The Joint Board on August 25, 2010 directed Counsel for the County of Grey to be present on August 30, 2010 and to have Mr. Shaw, the County of Grey's Director of Transportation and Public Safety present. On August 26 Mr. Rowe on behalf of the Township of Clearview indicated and requested that he have Mr. Donald McNalty P. Eng., present on August 30, 2010 as he was familiar with the terms of the new Road Improvement Agreement between the County of Grey, Township of Clearview and Walker Aggregates Inc. dated July 28, 2010. The Joint Board made no determination at that time about what additional testimony it might hear on August 30, 2010. The Joint Board on August 30, 2010 with the consent of Counsel admitted Exhibits 100, 101 and 102 and heard evidence from Mr. Shaw and Mr. McNalty as a panel.

5. Motion to amend the notice of undertaking: On September 2, 2010, Mr. Estrela, on behalf of Walkers (Proponent), made submissions with respect to directions on the Notice of Undertaking filed by Mr. Kappos, set out as Exhibit 29, and regarding the NEC's planning issue #8. It provides:

> Is there legal authority to permit the non-accessory uses of a processing plant and asphalt at the existing quarry as proposed in the operational plans?

This issue relates to the question of the legal authority to permit material extracted from the proposed quarry "expansion" in Lot 25 and Part Lot 26 Concession XII and Part of Lot 25 Concession XI in the Township of Clearview, County of Simcoe to be processed using the facilities at the existing quarry on Lot 24 Concession XII in the Township of Clearview, County of Simcoe. Associated with this issue is whether the original Notice of Undertaking, as directed under the *Consolidated Hearings Act* for this Hearing, properly described the proposed Undertaking, and whether material extracted from the proposed quarry at Lot 25 and Part Lot 26 Concession XI and Part of Lot 25 Concession XI in the Township of Clearview, County of Simcoe could be processed on an interim basis with equipment located within the existing quarry immediately south of Simcoe County Road 91,in Lot 24 Concession XII in the Township of Clearview, County of Simcoe.

The Notice of Undertaking for the Pre hearings and this Hearing was as follows:

> A public Hearing will be held regarding a proposal by the Proponent for an expansion of the Walker's existing "Duntroon Quarry" onto Lot 25 and Part Lot 26 Concession XII and Part lot 25 Concession XI, Township of Clearview, and County of Simcoe for the purpose of extracting aggregate material.

Counsel for the Proponent, The Niagara Escarpment Commission, The Township of Clearview, and the County of Simcoe made submissions and consented to the Joint Board, pursuant to its power under subsection 6(4) of the *Consolidated Hearings Act*, amending the Notice of Undertaking to read as follows, or in a manner to be determined by the Joint Board (the proposed amendments have been high-lighted):

(i) General nature of the undertaking:

> …the undertaking in this matter is generally described as the expansion of Walker's existing "Duntroon Quarry' onto Lot 25 and Part Lot 26 Concession XII and Part lot 25 Concession XI, Township of

Clearview, County of Simcoe for the purpose of extracting aggregate material, **and to provide for all activities related to the production of aggregate from the proposed quarry expansion onto Lot 25 and Part Lot 26 Concession XII and Part lot 25 Concession XI, to be carried out at the existing "Duntroon Quarry" located at in Lot 24 Concession XII in the Township of Clearview, County of Simcoe.**

(ii) Identify that the hearings are required in respect of applications pertaining to the existing quarry:

(a) An Amendment to the Niagara Escarpment Plan pursuant to section 10(3) of the *Niagara Escarpment Planning and Development Act*, and

(b) A Niagara Escarpment Development Permit pursuant to section 25 of the *Niagara Escarpment Planning and Development Act.*

(c) An Amendment to the Township of Clearview Official Plan pursuant to Section 22(7) of the *Planning Act.*

The consenting parties to the change in the Notice of the Undertaking also filed on consent with the Joint Board at this time the following Amendments and documents being Exhibits:

124. Proposed Amendment to the Niagara Escarpment Plan.

125. Proposed Amendment to the Township of Clearview Official Plan.

126. Proposed Niagara Escarpment Plan Development Permit for the existing Duntroon Quarry Site.

127. Proposed addition condition to the proposed Niagara Escarpment Plan Development Permit for the Duntroon Expansion Quarry Site.

These exhibits were filed on the clear understanding that the parties could raise outstanding matters, if necessary, at an appropriate time during the Hearing regarding whether these Exhibits should be admitted by the Joint Board.

Mr. Donnelly on behalf of the CCC and Ms. Franks spoke in opposition to the proposed change to the Notice of Undertaking. Mr. Donnelly indicated that he was not opposed to the substance of the request for the amendments. However, it was his submission that the original Notice of Undertaking was wrong in that the undertaking was described as an "expansion", instead of a "new"

undertaking, and that the proposed amendments to the Notice of Undertaking would carry this error forward.

The Joint Board, on September 2, 2010, determined that it would reserve its decision in order to fully consider the submissions of the Parties on the matters raised. The Joint Board advised that it would not require further motion materials or submissions on the matter and would render a decision on or before the reconvening of the Hearing.

ORAL DECISION DELIVERED ON SEPTEMBER 27, 2010

The Joint Board has considered the submissions of the Parties. The intent of the proposed amendments is not in dispute. The disagreement among the Parties involves the description of the undertaking in the original Notice of Undertaking as a quarry "expansion" and whether this description should be carried forward in the amended Notice.

The Joint Board, in considering the submissions and material filed by the Parties, is satisfied that the amendments to the Notice of the Undertaking are minor in nature and reflect the Proponent's description of the proposal. The Joint Board is of the view that no prejudice will occur to any Party, or the public, by the amendments to the Notice of Undertaking being proposed and consented to by Counsel for the Proponent, The Niagara Escarpment Commission, The Township of Clearview, and the County of Simcoe.

The Joint Board notes that subsection 3(2) of the *Consolidated Hearings Act* identifies requirements for providing notice and states:

> A notice under subsection (1) must specify the general nature of the undertaking, the hearings that are required or that may be required or held, and the Acts under which the hearings are required or may be required or held.

It is clear from this section that the intent of requiring a Notice of Undertaking is, to set out the general nature of the undertaking and the applicable approvals and document amendments that are required. It is not intended to provide a legally conclusive definition of the undertaking. The Joint Board is satisfied that the amendments being proposed are technical and minor in nature and provide additional clarity to the matters that the Joint Board must decide.

The Joint Board is also in agreement with the submissions of Counsel for the Proponent, The Niagara Escarpment Commission, The Township of Clearview, and the County of Simcoe that an additional NEC development permit would be

required for the proposed additional processing activities of aggregate at the existing quarry and that the conditions of the proposed NEC development permit for the use of the existing quarry as set out at Exhibit 126 would be required if the Joint Board were to find at the conclusion of the hearing that ARA license should be given for the new quarry.

The Joint Board wishes to make it abundantly clear that in arriving at this decision, at this time, in this specific matter of the Notice of the Undertaking, it is making no determination on the matters under appeal and, in particular, whether the description of the proposed quarry by the proponent as an "expansion" is accurate.

Accordingly Pursuant to subsection 6(4) of the *Consolidated Hearings Act* the Joint Board will direct that the Notice of Undertaking be amended and added to as follows (emphasis has been given to the amendments for clarity in the decision but the emphasis is not to appear in published Notice):

(i) General nature of the undertaking:

> …the undertaking in this matter is generally described as the expansion of Walker's existing "Duntroon Quarry' onto Lot 25 and Part Lot 26 Concession XII and Part lot 25 Concession XI, Township of Clearview, County of Simcoe for the purpose of extracting aggregate material, **and to provide for all activities related to the production of aggregate from the proposed quarry expansion onto Lot 25 and Part Lot 26 Concession XII and Part lot 25 Concession XI, to be carried out at the existing "Duntroon Quarry" located at in Lot 24 Concession XII in the Township of Clearview, County of Simcoe.**

(ii) Identify that the hearings are required in respect of applications pertaining to the existing quarry:

(a) An Amendment to the Niagara Escarpment Plan pursuant to section 10(3) of the *Niagara Escarpment Planning and Development Act*, and

(b) A Niagara Escarpment Development Permit pursuant to section 25 of the *Niagara Escarpment Planning and Development Act.*

(c) An Amendment to the Township of Clearview Official Plan pursuant to Section 22(7) of the *Planning Act.*

No further notice is required

This is the Order of the Board.

Procedural Motions arising from the status of the Bobolink:

6. The Joint Board on September 27, 2010 was advised by Counsel for the Proponent that a notice had been place on Environmental Registry August 20, 2010 that the status of the Bobolink was to change from a “species of concern” to “threatened”. This amendment to Ontario Regulation 230/08 occurred on September 30, 2010. At that time, Counsel for Walker had not determined how they would proceed with this matter. If they were to call additional evidence it was agreed that on a timely basis they would provide Counsel for the other parties with any new evidence and support documents upon which they might rely. It was agreed that no questions during Mr. Clarkson’s cross-examination would be asked relating the issue of the Bobolink. It was also agreed that Counsel for the Proponent could recall if necessary Mr. Clarkson on this specific matter.

7. On October 5, 2010, Mr. DaSilva raised a concern with the Joint Board that the material provided by the Proponent with respect to the Bobolink was not complete. Ms. Bull replied that they had provided Counsel for the parties with the information they had requested from Mr. Charlton as soon as it was available and that the proponent was still considering how they might deal with this issue and would provide Counsel for the other parties with any additional evidence they might wish to call as soon as it was available. The Board accepted Ms. Bull’s undertaking.

8. On October 7, 2010 nearing the end of Mr. Clarkson’s cross-examination, Mr. Rowe indicated that as the next party to call evidence, he was reluctant to call his witness until the issue of the Bobolink had first been addressed by the Proponent, a position supported by Mr. Green. If the Township could not proceed, the hearing would need to adjourn either until the Proponent’s evidence came forward regarding the Bobolink or to consider a change in the order of evidence. Mr. Donnelly expressed concern that any adjournment would be prejudicial to his client as they had witnesses available based upon the current schedule. This position was supported by Mr. Kappos. Mr. Fairbrother indicated that he understood the concerns of Counsel but he and his clients were still determining how they might deal with this new issue. The Board expressed concern with any further adjournment noting that it appeared that currently the

hearing was behind the schedule agreed to by the parties. The Joint Board directed Counsel for the Parties to consult over the weekend on a process to be followed but also directed that witnesses be ready to proceed on October 12, 2010 as set out in the schedule and that the Joint Board would revisit the matter at the continuation of the hearing on October 12, 2010.

9. On October 14, 2010, the Joint Board made the following findings after hearing submission from Counsel for the parties regarding how to proceed with evidence regarding the Bobolink and issued the following directions and Orders:

> 1. The Joint Board will reconvene on Tuesday, October 19th at 10:00 a.m. to consider evidence related to the Bobolink;
> 2. The Board directs that all information from the Proponent's witness, Mr. Hilditch regarding Bobolink be made available to the other Parties by Friday, October 15th at 4:30 p.m.;
> 3. The Board directs that a certified court reporter attend on Tuesday, Wednesday and Thursday next week, as required pursuant to Board's Rules No. 94 and 95;
> 4. The Board has pre-approved a summons for Mr. Chris Risley of the Ministry of Natural Resources and directs that pursuant to Board Rule No. 45, a request be submitted to the Board offices by the Proponent for Mr. Risley to appear at the appropriate time when he will be required to testify regarding Bobolink and;
> 5. The Board directs that the County of Simcoe be prepared to proceed with their case in the event that time is available next week.

10. On October 20th, Mr. Donnelly requested disclosure from the Proponent as to when its fields along Grey County Road had been ploughed. Ms. Bull indicated that she was not prepared at this time to make submissions but would reply as soon as possible. The Joint Board made no ruling but left the matter to be resolved by Counsel.

11. On October 21st, Ms. Bull replied with respect to her knowledge as to when the fields in question had been ploughed and the type of crops that were being grown. Counsel for the NEC and CCC expressed concern with Ms. Bulls statement and requested disclosure of the date the ploughing occurred, the farmer involved and the nature of the crop in the field prior to its tillage Upon considering the submission of Counsel, the Joint Board determined that:

> With respect to the submissions as they relate to the matters the Board must decide regarding the Bobolink, the Board is not making any findings. The Board will wait to hear the evidence of further witnesses to make determinations, if any, on this matter and the Board further directs that the Parties exchange witness statements consistent with our previous ruling.

12. Mr. Donnelly on October 27th during the evidence of Mr. Clarkson on the Bobolink issues rose and suggested to the Joint Board that his client based upon the testimony received would have modified the issues list set out at Exhibit 144. Counsel for the NEC on questioning from the Board confirmed that their issues being 1, 2, and 7 - 12 remained. Counsel for the CCC could not confirm for the Joint Board with any precision what issues remained for his client regarding the Bobolink. He maintained that they were not satisfied with Ms. Bull's undertaking as to when the northwest field was ploughed but was making no formal requests at this time. Mr. Rowe in his submissions sought a direction from the Joint Board that there be no changes to the Issues unless the changes would be based upon facts that the Parties did not become aware of before Wednesday (October 27th).

13. The Joint Board after considering the submission gave the following ruling and direction:

> The Board will allow the Parties until Monday November 01, 2010 to determine on consent if they wish to modify the Issues List. The Board will consider submissions, if required on Monday morning.

14. The Joint Board at the commencement of the hearing on November 1, 2010 heard submissions from the Counsel with respect to the issues set out at Exhibit 144. Counsel for the NEC advised the Joint Board that in light of the testimony of Mr. Hilditch and Mr. Risley they had determined that nothing further would be gained by further exploring the Bobolink issue. Mr. Donnelly at the same time indicated that his clients were dropping Issues 3, 6, 11 and 12, but wished to substitute additional issues namely:

> 3. Is there Bobolink habitat, *specifically areas where the species lives, used to live, or is believed to be capable of living*? If so, is it significant wildlife habitat pursuant to section 2.1.4*(d)* of the PPS? (CCC)
>
> 4. If the Bobolink habitat is significant wildlife habitat,
>
> (a) has the applicant demonstrated that the proposed development and site alteration including all proposed extraction, aggregate operation, mitigation, and reforestation activities will have no negative impact in accordance with section 2.1.4*(d)* of the Provincial Policy Statement (2005)? (CCC)
>
> (b) should the lands be designated Escarpment Rural, Natural or Protection Area? (CCC)
>
> 11. Should it be found necessary or desirable to restore any Bobolink habitat that may have previously existed, would it be premature to approve the applications unless or until restoration has been provided for?

15. The Joint Board after considering the submissions of Counsel determined and directed that the Board understands that the CCC has dropped Issues 3 and 6 in Exhibit 144 and the NEC has withdrawn its concerns with respect to the Bobolink matter. The Joint Board in considering the other submissions of Counsel finds that they relate to matters that would be better considered in another forum as the matter before this panel is the determination of the planning merits of the applications that are before it, and the Board finds that there is no reason to delay this hearing based on future uncertain events. The Board directs Exhibit 144 to be amended by the deletion of Issues 3 and 6 and the Board will not make further changes to the issues regarding the Bobolink at this time.

16. Participant status of Mr. Hunter: Counsel for the Proponent on November 3, 2010 raised a concern regarding a particular participant statement filed in accordance with the Joint Board's direction dated August 23, 2010 of Mr. Hunter, who was alleged to be a retained witness of Ms. Franks. The Joint Board did not consider the matter until Ms. Franks was present. After hearing submission of Counsel for the parties and Ms. Franks, the Joint Board directed that the parties have further discussion regarding the matter. The Joint Board was subsequently advised that Mr. Hunter had withdrawn as a participant. Mr. Rowe made submission about the statements of other participants witnesses. The Joint Board determined on November 4, 2010 that these matters could be considered when the participants were present.

17. Supplementary witness statement of Ruland: On December 16, 2010 after considering the submissions from Counsel for the Parties, the Joint Board determined that it would allow Mr. Ruland's supplementary witness statement to be filed on the basis that it may be relevant to issues that have already been raised, during the course of the hearing to date and furthermore, the Joint Board finds that none of Parties would not be prejudiced by allowing this additional statement.

18. Scheduling: On December 16, 2010, the Joint Board was asked by the Counsel for the Parties to make a number of determinations with respect to the furthering scheduling of the hearing. The Joint Board's determinations were as follows:

Schedule

1. The Joint Board will sit on January 19 and 20, 2011,

2. The Parties will be advised during the Christmas holiday period about including March Break on the schedule;
3. The Board has determined that it would prefer not to sit on Fridays on a regular basis;
4. The Board is prepared to sit late and start earlier in the day as required;
5. The hearing will be scheduled to include the month of April, and Counsel should be prepared to adjust their schedules to accommodate hearing time in April as may be required;
6. The Board notes that a significant amount of time has been spent, and significant delay has occurred in dealing with motions and procedural matters, particularly on Thursday afternoons. We ask that Counsel work together to resolve these matters during evening hours so that they do not take up valuable hearing time;
7. On December 29, 2010 the Joint Board advised the parties that it would not sit during the March break, being March 14 to 18 inclusive.

19. Filing of new report by Mr. Bowles: Ms. Bull on January 24, 2011 brought a motion to exclude new material filed with her on that date related to a new report prepared by Mr. Bowles, a witness being called by the CCC. It is alleged that this new evidence relates to field work conducted by Mr. Bowles in the summer of 2010 after the evidence of Mr. Charlton, and relates to matters set out in Mr. Charlton's Exhibit 59 and relates to the American Harts Tongue Fern (AHTF). Ms. Bull contends that the issues associated with the AHTF has been an issue dating back to the Procedural Order for this hearing and that her client would be prejudiced to have this new material filed at this late date.

    On January 25th, the Joint Board heard submission from Mr. Donnelly that the material to be filed was merely a response to the evidence of Mr. Charlton set out in Exhibit 59.

    On January 26, 2011, after considering the submissions of all Counsel and in view of the late delivery of Mr. Bowles's report and the apparent consent of the Parties that colony 1 of the American Hart's Tongue Fern constitutes significant wildlife habitat;

    The Joint Board has determined that it would be prejudicial to the Proponent to allow the new field research carried out by Mr. Bowles to be entered into evidence, and therefore will not allow slides 9 to 25 inclusive to be entered.

20. Evidence of Mr. Bell: On March 3, 2011, the Joint Board heard submissions from Counsel for the parties as to whether the evidence of Mr. Bell, a Lay witness for the CCC with respect to noise should be allowed. Mr. Bell owns land to the north

of the proposed quarry site on the north side of Sideroad 26/27. The Joint Board made the following ruling:

> After considering the submissions of the Parties, the Joint Board will hear the evidence of Mr. Bell and will consider his evidence to be his view, but not an expert opinion.

21. Exhibits 290 and 291; On April 4, 2011, the Joint Board heard submissions from Counsel for the parties as to whether the exhibits to be tendered by the Mr. Kappos on behalf on the NEC dealing with the availability of Amabel dolostone should be admitted as evidence. The Joint Board made the following ruling:

> The Joint Board has considered the submissions of the Parties and will allow the NEC to enter Exhibits 290 and 291 on the basis that the availability of aggregate resources may be a relevant consideration in the Niagara Escarpment Plan.
>
> The Joint Board makes no determination about the priority of the PPS versus the guideline document of the NEC at this time, or about the issue of whether the differing provisions in the PPS and the guideline document constitutes a conflict. We look forward to hearing legal argument on this point in the final submissions.
>
> The Board stresses that the evidence on other quarry applications that are in process and not approved is speculative and any evidence about their feasibility should be limited.

22. Usher Supplementary document book: On May 20, 2011, the Joint Board heard submission from Counsel for the Parties as to whether the Supplementary Document Book of Tony Usher (Exhibit 350) should be allowed to be admitted as evidence. The Joint Board after considering the submissions of Counsel made the following ruling:

> The Joint Board has heard the submissions of the Parties and in the abundance of caution will allow Exhibit 350 to be filed. We continue to hold the Parties to their commitment to maintain the timelines of the schedule and that the evidence in the hearing will be completed by May 31st.

23. Exhibit 371: On May 24, 2011, the Joint Board heard a motion brought by the NEC to exclude certain material filed by Walker as part of their disclosures to be use by their witnesses in rely. The motion in part was supported in response motions by Ms. Franks, and the CCC. The Proponent in reply, submitted reply material Exhibit 371. Counsels for the Township of Clearview and the County of Simcoe made no written submissions but support the position adduced to the Joint Board by Counsel for the Proponent. The Joint Board after considering the submission of Counsel made the following determinations.

> The Joint Board has considered the submissions of the Parties and will allow Tabs 1, 2, 3, 4, 5, 6, 7, 8, 10 and 11 to be entered on the basis that these documents meet the requirements of reply evidence. The Board will not allow Tabs 9 and 12 to be entered on the basis that these documents do not appear to meet the requirements of reply evidence. The Joint Board further directs that reply evidence on planning matters be submitted to the other Parties by 4:30 p.m. on Thursday, May 27, 2011.

24. Scheduling of submission of written argument: The Joint Board based upon the fact that it would not be hearing oral arguments heard submission from Counsel present regarding written submissions on June 1, 2011 and gave the following direction:

> The Joint Board has considered the submissions of the Parties and since we are receiving only written argument, the Joint Board believes it is necessary to provide sufficient time for filing written argument and reply.
>
> Therefore, the Board directs that written argument by the Proponent and Parties of like position is to be filed on or before 12:00 Noon on Friday, June 24, 2011,
>
> The arguments of Parties in opposition to the proposal are to be filed on or before 12:00 Noon on Wednesday, July 13, 2011,
>
> The reply by Parties in support of the proposal shall be filed on or before 12:00 Noon on Friday, July 29, 2011.
>
> The Joint Board requests that parties of like position attempt to coordinate their submissions and Authority books should be combined if possible to avoid duplication.
>
> Submissions should be provided in hard copy and electronic format to the Joint Board office. The electronic submissions of the argument should be provided in "Word". If there are concerns about the version of Word to be used for the submissions, the Parties should contact the Office of the Consolidated Hearings Board.

25. Motion to Re-open the hearing after the conclusion of evidence and written submissions: The Joint Board on October 26, 2011 received a motion from the Clearview Community Coalition (CCC) to reopen the Walker Aggregates Inc. Consolidated hearing. The substance of the motion request was as follows.

    The following relief is requested:

    1. That the Board conduct an inquiry of the circumstances of the near fatal truck accident on County Road 91 ("CR 91") that occurred on September 9, 2011. The inquiry should include interviews of the driver of the truck and investigating Ontario Provincial Police ("OPP") Officer.

2. In the alternative, CCC requests an Order from this Board permitting a Written Motion to be considered by the Board to re-open the case to allow these Motion materials to be considered as part of its final decision;
3. Admission of Motion materials included herein as evidence, including most, particularly the OPP Report prepared by Constable David Brown providing details of a serious quarry truck accident approximately two kilometres east of the Walker Aggregates Inc. gate, and including the affidavits of Mrs. Ann Warren and Mr. Bruce Gillham;
4. An Order for the issuance of a summons to CCC for Mr. Charles Patterson, the driver of the truck that crashed, and an abridgement of time to allow drafting of a further affidavit from the CCC interviewer containing the statement of Mr. Patterson; and,
5. Such other relief as counsel may advise and this Board may permit.

The Joint Board on October 31, 2011 determined that

> …it would consider the motion brought forward by the Clearview Community Coalition in writing in accordance with OMB Rule # 36. The Joint Board understands that the motion materials have already been served on all Parties. Based upon this understanding, the Parties shall adhere to the following schedule in responding to the motion:
>
> 1. Written Submissions by other Parties in support of the Motion – 5:00 p.m. on Thursday, November 3rd.
> 2. Written Submissions by Parties opposed to the Motion – 5:00 p.m. on Thursday, November 10th.
> 3. Written Response by the Moving Party – 5:00 p.m. on Tuesday, November 15th.

The Joint Board having received the submission from the parties in the manner prescribed and duly considering all of the material filed issued the following Order on December 19, 2011.

ORDER

The Joint Board has considered the Motion brought by the CCC, the responses by the Proponent, the County of Simcoe and the Township of Clearview, and the reply by the CCC. The authorities submitted by the Parties related to the Motion have also been considered.

The Joint Board finds that the high threshold established by the Courts and through Ontario Municipal Board (OMB) procedures for the reopening of a hearing for the consideration of new evidence has not been met. Therefore, the

Joint Board dismisses the Motion brought by the CCC to reopen the Hearing in this matter, in its entirety, without costs.

Detailed reasons for this Order will be provided in the upcoming Decision of the Joint Board regarding the Hearing.

REASONS

The Joint Board's reasons in issuing the above noted Order are as follows.

Background and findings:

The motion brought by the CCC results from a traffic accident that occurred on September 9, 2011. It involved a single vehicle travelling east on CR 91 after picking up a load of aggregate from Walker's Existing Quarry. The CCC in their motion requests that the Joint Board conduct an inquiry into the circumstances surrounding this accident and summons the driver and the investigation of the OPP Officer.

Any traffic accident is an unfortunate circumstance. The Joint Board's mandate in this case was to determine whether the quarry land use being requested by the Proponent as set out in the various planning instruments and policy instruments governing the lands in questions should be approved. The Joint Board should not be the jurisdiction investigating the details of this traffic accident. This is a matter best left to the police and the local road authorities to determine and to take any remedial actions they deem necessary.

The Joint Board finds after considering the affidavits and submission filed that there would little probative value in conducting and inquiry in the manner requested by the CCC in its motion, in relation to the matters and evidence the Joint Board was asked to consider during the course of the hearing regarding the preferred haul route for the proposed quarry.

The fundamental concern for the Joint Board is whether this single traffic accident event would materially affect the decision the Joint Board must make in this case regarding the haul route for the proposed quarry.

The Joint Board's jurisdiction under the *Consolidated Hearing Act* is to determine the appropriateness of the quarry use being proposed by the Proponent and while the Joint Board has wide powers with respect to how it conducts its hearing, they must be used in fair and non-prejudicial manner to all of the parties.

The issue of the appropriate haul route for the proposed new quarry is, but one matter that the Joint Board must decide in this case.

The Board notes that CR 91 has been a designated haul route and a connecting link between the Grey and Simcoe Counties for many years. The Board during the course of this 139 day hearing heard extensive professional traffic engineering evidence regarding this history of accidents on this road in comparison to accident records on other Simcoe County Roads. The Joint Board also heard extensive engineering evidence associated with road settlement agreements with the Township of Clearview, the County of Simcoe and the County of Grey designed to change the designation of several roads in the area and to develop new standards that would lower the speed and design criteria for CR 91. Part of this evidence dealt with the closing of a part of CR 91, downgrading its function to a local road and a Township Collector Road, and its reconstruction, along with the reconstruction of other local roads in the immediate area, to a Township Collector Road and Local Road engineering standard. This traffic engineering evidence presented during the course of the hearing was comprehensive, dealing with among other things traffic volumes, traffic accidents, alternative haul routes, geometric road design, road noise, the use of Jake brakes, road closings and the reconstruction of the roads in the area, and other traffic related infrastructure in the area of Duntroon.

The Joint Board heard no testimony from any professional traffic engineer contrary to the evidence submitted by the Proponent, the County of Simcoe, the County of Grey or the Township of Clearview. The Board heard testimony from Lay witnesses called by the CCC about their concerns with respect to CR 91 continuing to be the haul route for the proposed quarry and their opinions regarding the determinations of the municipalities and the work of traffic engineers. The Township of Grey Highlands, the abutting local municipality to the west, opposed the closing of a portion of CR 91 at the hearing. They wished it to remain open as a major east west connection.

Threshold Test for Reopening Hearing to Consider New Evidence

The parties generally agree that the Courts and the OMB have set a very high threshold for the reopening of a hearing namely:

(a) Would the evidence, if presented at the hearing, probably have changed the result?

(b) Could the evidence have been obtained before hearing by the exercise of reasonable diligence?

The onus in this situation rest with the moving party (CCC) seeking to reopen a hearing to demonstrate that the evidence would probably have changed the result. A determination that the new evidence may change the result is not sufficient. Furthermore the Supreme Court of Canada has held "that the discretion to reopen a matter should be used sparingly and with the greatest of care so that abuse of process does not occur." (*671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., 2001 SCC 59, [2001] 2 SCR 983). The Courts have also held that the admission of fresh evidence must be done by balancing the public interest in the finality of litigation and the realities of the specific case. (*Gardiner Miller Arnold LLP v. Kymbo International Inc*., (Ont. SCJ), 2006)

Clearly the evidence of this accident could not have been obtained prior to or during the hearing.

The test for the Joint Board is whether the inclusion of this one accident in the accident statistics presented during the course of the hearing would materially affect the Joint Board's decision with respect to the determination of the haul route for the proposed quarry. This one piece of additional evidence must be considered and balanced against the fullness of the testimony the Joint Board heard during this 139 day hearing regarding the use of this road as a haul route and the undertaking proposed by the proponent in this area as set out in their Settlement Agreements with the municipalities.

The Joint Board has carefully considered the affidavit evidence filed by the parties in support of their respective positions and finds that the circumstances associated with this one very unfortunate accident does not meet the test to reopen this hearing. Nor does the Joint Board find that any public interest would be served by reopening the hearing on this very specific matter. The issues related to the determination of the haul route for the proposed quarry, and the professional opinions proffered during the course of the hearing were fully explored through the testimony and cross-examination of both professional and Lay witnesses. The Joint Board accepts and prefers the affidavit testimony of Mr. Philp, P. Eng., Mr. McNalty, P.Eng., for the Township of Clearview, and Mr. Doherty, the County of Simcoe's Engineering Technician, that this one accident would not alter their testimony or opinions regarding the use of CR 91 as the preferred haul for the proposed quarry as presented to the Joint Board during the course of this hearing.

The Joint Board finds that the submissions provide no probative value to cause the Joint Board to reopen this matter in the manner proposed by the CCC in its motion as the new evidence of the single accident is not of the magnitude that would change the Joint Board's determinations with respect to the preferred haul route.

Dissenting Reasons

Dated this **18th day** of **June, 2012.**

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Overview

I agree with my colleagues that this development should not proceed as proposed. However, I disagree with their analysis and their finding that the proposed quarry can proceed if the revisions required by my colleagues are accepted by Walker Aggregates Inc. (the "Applicant"), the Counties of Grey and Simcoe, and the Township of Clearview.

I am compelled to write dissenting reasons because of the importance of the matters raised in this proceeding. The basis of the disagreement with the decision of my colleagues rests in the application of the development control approach of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") and the Niagara Escarpment Plan ("NEP").

While my colleagues acknowledge the primacy of the *NEPDA* and the NEP in regards to the proposed development, on key issues they do not utilize the *NEPDA* and NEP tests for the threshold NEP amendment and development permit applications, and, instead, they apply the policies of the Provincial Policy Statement ("PPS") and the provisions of the *Planning Act*. The practical result is that, in this special area of the province that is the geological backbone of southern Ontario and a World Biosphere Reserve, crucial aspects of the proposed development are not analyzed through the protective lens of the statutory provisions of the *NEPDA* and the policies of the NEP.

In my view, and contrary to the finding of my colleagues, the *NEPDA* and the NEP do provide direction and give definitive guidance for the protection of the natural environment of the Niagara Escarpment and land in its vicinity. The Joint Board must fully apply the *NEPDA* and NEP tests to the NEP amendment and development permit applications.

When those tests are brought to bear on those applications, it is clear that this site in the NEP Area, with a large existing quarry across the road, is not the right location for another large quarry and human-made end-lake. The site is at the center of an intricate array of natural features, functions and systems that are, collectively, a unique ecologic area (with one exception that is discussed below). They include:

- the Niagara Escarpment;
- the headwaters/watersheds of the Beaver River, the Pretty River and the Batteaux Creek;
- a karst "high-k zone" that has not been fully evaluated;
- karst features such as sinking streams and sink holes on top of the Escarpment;

- 74 springs that discharge from the Amabel aquifer below the Escarpment brow immediately to the east;
- the SW2 spring and watercourse in the southwest corner;
- the Rob Roy complex of provincially significant wetlands;
- unevaluated wetlands that are Areas of Natural and Scientific Interest (ANSIs "A" and "B"), which the Parties agree should be treated as provincially significant wetlands;
- breeding ponds and vernal pools of amphibians, e.g., Wood Frog, Western Chorus Frog and Spotted Salamander;
- provincially significant upland amphibian breeding habitat (e.g., Spotted Salamander);
- habitat of the Western Chorus Frog, a "threatened" species at the federal level, that is located in the Millar Pond on the eastern edge of the site;
- a provincially significant woodland;
- the provincially significant habitat of 23 Butternut trees, an endangered species in Ontario;
- the continentally significant habitat of a colony of the American Harts Tongue Fern ("AHTF"), estimated to contain approximately 10,000 plants and clumps ("Colony 1");
- two smaller AHTF colonies ("Colonies 2 and 3");
- the Duntroon Escarpment Forest Life Science ANSI;
- wildlife corridors and linkages;
- interior forest habitat of area sensitive birds; and
- potential Bobolink habitat (also an endangered species in Ontario) in the north-west field on the site, and the neighbouring property across the road, immediately to the west of the site.

The NEC accurately describes this area as a "strong functioning Natural Heritage System". It is a unique ecologic area with its hub, or the "glue" that holds together the many natural features, functions and systems, being the provincially significant woodland. The maps attached as Appendices "D" and "E" (Exhibit 43, Tab F, and Exhibit 176,

respectively) give an appreciation of the natural features of the area, although their functions, and the underlying and overlapping systems, are not portrayed.

As will be discussed later, NEP amendment and development permit applications are not granted as of right: they must be decided on the circumstances of each case. Even if a proposed development may be technically feasible, that does not mean that it should proceed, particularly in a case such as this where natural features, functions, and systems will be permanently removed or drastically altered. The destruction and removal of natural features, functions and systems in the NEP Area are not vindicated by the Applicant's arguments, and my colleagues' findings, that there is more of the natural environment elsewhere (a "more elsewhere" approach), or that some trade-off or compensation will result in a "net gain".

While the Applicant, through its counsel and expert advisers, puts forward an extensive case for this proposed quarry development, and the "Walker team" would likely do as good a job as possible operating the quarry, the onus is on the Applicant to demonstrate, on a balance of probabilities, that the *NEPDA* and NEP amendment and development permit tests are met. I find that the Applicant has not done so. In that regard, I agree with the recommendations of the Public Interest Advisory Committee ("PIAC"), the Niagara Escarpment Commission ("NEC") Staff, the NEC Commissioners, the Grey Sauble Conservation Authority ("GSCA") and the Nottawasaga Valley Conservation Authority ("NVCA"); and the views of the Blue Mountain Watershed Trust, the Clearview Community Coalition ("CCC"), Emelia Franks, a number of the participants, and various witnesses, including the Environmental Commissioner of Ontario.

Specifically, regarding the NEP Part 1.2.1 amendment application test, I find that the proposed new Mineral Resource Extraction Area designation does not meet the Purpose of the *NEPDA* and the NEP because it would not maintain the Niagara Escarpment and land in its vicinity substantially as a continuous natural environment, and would not ensure only such development occurs as is compatible with that natural environment. I find that the NEP amendment application would not meet Objectives 1, 2, 3, 4, 5 and 7 of the *NEPDA* and the NEP. I also find that the NEP amendment is not justified and is not consistent with other relevant provincial policies, in this case the Greenbelt Plan and the PPS. I further find that the NEP amendment application does not satisfy the Part 1.5 Escarpment Rural Area-Development Policies for Mineral Extraction. I find that the requested designation of a new Mineral Resource Extraction Area cannot be accommodated by an amendment to the NEP.

Regarding the NEP development permit application, the proposed quarry is not a Permitted Use in the Escarpment Rural Area under Part 1.5 of the NEP unless the NEP amendment application is successful. In addition, even if it were a Permitted Use, it does not satisfy the Development Criteria in Parts 2.2, 2.6, 2.7, 2.8, 2.11 and 2.14 of the NEP. In the result, I find that an NEP development permit should not be issued for the proposed development.

Therefore, with the *caveat* in the next paragraph, I would dismiss the NEP amendment and development permit applications for the proposed quarry. As those applications are the threshold applications in this matter, the applications for the development permit to use the processing plant in the existing quarry for the proposed quarry, the amendment of the Township of Clearview Official Plan and the *ARA* licence, should be dismissed as well.

However, before dismissing the applications, and without inferring that such an application would be successful, I would give the Applicant the opportunity to make further submissions for an NEP amendment and development permit for a proposed quarry limited to the central and easterly field area of the site, with appropriate buffers (generally outlined by the hand drawn dashed line on the map referred to above, and attached as Appendix “E”). In my view, that is the only area of this site where a development proposal for a quarry might satisfy the *NEPDA* and NEP amendment and development permit tests. Further submissions would be required because the arguments for and against the existing development proposal involve many interrelated factors that would have to be reconsidered.

Issues

The following framework for the analysis puts the issues of whether the *NEPDA* and NEP amendment and development permit tests have been satisfied first because they are the threshold issues that have to be decided in this case. The issues are:

1. whether the NEP should be amended by redesignating the area of the proposed quarry from Escarpment Rural Area to Mineral Resource Extraction Area. This requires a determination of whether the proposed NEP amendment application passes the three branch general test for all NEP amendments, as set out in Part 1.2.1 of the NEP (referencing sections 6.1, 8, and 10(6) of the *NEPDA*), and a consideration of the matters listed in the NEP Part 1.5 Development Policies for Mineral Extraction for evaluating NEP amendment applications;

2. whether the NEP development permit for the proposed quarry should be approved. This requires a determination of whether the Joint Board should approve the NEP development permit for the proposed quarry, refuse to issue the permit, or issue the permit subject to terms and conditions, pursuant to section 25(4) of the *NEPDA* in accordance with the NEP. This determination requires consideration of the NEP Part 1 Permitted Use and Part 2 Development Criteria policies;
3. whether the NEP development permit for the existing quarry to use the existing processing plant and accessory buildings for the proposed quarry, for an interim period of time, should be approved. This also requires a determination of whether the development permit should be issued pursuant to section 25(4) of the *NEPDA* in accordance with the NEP;
4. whether the Township of Clearview Official Plan should be amended to implement the Road Settlement Agreement; and
5. whether the Minister of Natural Resources should be directed to issue a Category 2 – Class A licence subject to the *Aggregate Resources Act* ("*ARA*") Site Plans.

The overarching issue in this case is, perhaps, best captured by paraphrasing the Purpose of the *NEPDA* and the NEP as follows: whether allowing the NEP amendment and development permit applications for the proposed quarry will provide for the maintenance of the Niagara Escarpment and land in its vicinity substantially as a continuous natural environment, and ensure only such development occurs as is compatible with that natural environment.

I state the overarching issue in the above terms because the *NEPDA* is the priority statute in this proceeding. Within the context of this overarching *NEPDA*-focused issue, the more specific issues arising from the tests found in the applicable laws, plans and policies are analyzed in turn below. As will be seen, my colleagues do not consistently use the *NEPDA* as the analytical focus. When the *NEPDA* is interpreted and applied consistently, the proposed development at this specific site, even as modified by my colleagues' decision, cannot be accommodated without departing from the legislative direction. In this case, the significant difference between my colleagues' approach to the issues and the *NEPDA*-focused approach yields a significant difference in the result.

Discussion, Analysis and Findings

Interpreting and applying the *NEPDA* and the NEP

The interpretation of the provisions and policies of the *NEPDA* and the NEP, and their legal effect, are fundamental to the decision in this case. To the extent the provisions

and policies of the *NEPDA* and NEP are not utilized to assess these applications, the tool of development control is not utilized – the default being the usual planning approach using the more general policies of the PPS, as if the site of the proposed quarry were not in the NEP Area and not under development control.

My colleagues find that provisions and policies of the *NEPDA* and NEP, regarding natural heritage features in particular, are functionally deficient because, in their view, they provide "little direction", "general direction", give "little definitive guidance", and "the most rigorous tests are found in the PPS, rather than the NEP". They state, at pages 12 and 39 of their decision (emphasis added):

> Natural heritage issues are a significant part of this appeal. However, the NEP provides little direction about how to satisfy its provisions related to natural heritage areas. The policies and objectives of the NEP relating to natural heritage resources and the Escarpment environment provide general direction and use terms such as "protection" of these areas, "minimizing the impact", and "preserve as much as possible". There is little definitive guidance in the NEP regarding what constitutes protection, when impact is not minimized and the amount of area that needs to be preserved.
>
> …
>
> Policies in the NEP relate to specific types of natural heritage features including woodlands, wetlands, habitat of endangered species, etc. However, most contain only general direction for protecting these areas and for assessing impacts. In the Joint Board's determination, the most specific directions for protecting these features and the most rigorous tests are found in the PPS, rather than the NEP.

With respect, the above findings fail to appreciate and implement the development control approach of the *NEPDA* and the NEP. The inevitable result of the above findings is to effectively nullify the development control approach of the *NEPDA* and the NEP, not apply their tests to the natural environment of the Niagara Escarpment and land in its vicinity regarding these applications, and conclude, wrongly in my view, that most of the area of the proposed site is suitable for a quarry.

The question of whether the provisions and policies of the *NEPDA* and the NEP are too general and of little definitive guidance, as compared to the policies of the PPS, has been considered in previous decisions. In *Wat Lao Veluwanaram of Ontario*, 2000 Carswell Ont. 8541 (Office of Consolidated Hearings), the Joint Board came to the opposite conclusion to that of my colleagues and found that the PPS was more general in nature than the NEP, and the NEP more specific in assessing the merits of a particular application. That Joint Board was dealing with a similar situation that it described as being "made more complicated by the fact that it is affected by several 'layers' of policy, each touching in some degree upon both the *NEPDA* development

permit application and the site plan referral under the *Planning Act*." A citizens group appealed the NEP application and the applicant, a religious organization, appealed the Municipality's inaction on their site plan application. The Joint Board cited the direction in the PPS that "Provincial plans, such as those adopted under the … *Niagara Escarpment Planning and Development Act* … will take precedence over the policies in this statement." The Joint Board also observed, at p. 12 (emphasis added):

> In addition it is the observation of the Joint Board that the policies of the PPS are more general in nature, referring to general land use patterns and land requirements. The policies of the NEP are more specific in assessing the merits of this particular application.

There are many provisions and policies of the *NEPDA* and the NEP that provide comprehensive direction and definitive guidance in assessing a development proposal, which is one of the advantages of using development control. The following provisions specifically deal with the natural environment of the Niagara Escarpment and whether a development such as the proposed quarry would:

- provide for the maintenance of the Niagara Escarpment and land in its vicinity substantially as a continuous natural environment (the Purpose of the *NEPDA* and the NEP);
- be compatible with the natural environment of the Niagara Escarpment and land in its vicinity (the Purpose of the *NEPDA* and the NEP);
- be in a unique ecologic area that must be protected (Objective 1 of the *NEPDA* and the NEP);
- maintain and enhance the quality and character of natural streams and water supplies (Objective 2 of the *NEPDA* and the NEP);
- maintain and enhance the open landscape character of the Niagara Escarpment in so far as possible, … by preserving the natural scenery (Objective 4 of the *NEPDA* and the NEP);
- support municipalities within the Niagara Escarpment Plan Area in their exercise of the planning functions conferred upon them by the *Planning Act* (Objective 7 of the *NEPDA* and the NEP);
- protect the natural environment (Part 1.5 Development Policies for Mineral Extraction in applications for an NEP amendment to redesignate Escarpment Rural Area to Mineral Resource Extraction Area). The considerations listed in this Part include: (a) protection of: groundwater and surface water systems on a watershed basis; habitat of endangered (regulated), endangered (not regulated), rare, special

concern and threatened species; adjacent Escarpment Protection and Escarpment Natural Areas; adjacent Rural Area natural features; provincially significant wetlands; provincially significant ANSIs; and (b) to maintain and enhance the quality and character of natural systems, water supplies, including fish habitat;

- comply with the General Development Criteria (Part 2.2), including that: 1(a) the long term capacity of the site can support the use without a substantial negative impact on the Escarpment environmental features such as contours, water quality, water quantity, natural vegetation, soil and wildlife; 1(b) the cumulative impact of development will not have serious detrimental effects on the Escarpment environment (e.g. water quality, vegetation, soil, wildlife, and landscape); and 4, is designed and located in such a manner as to preserve the natural characteristics of the area;
- comply with the New Development Affecting Water Resources Development Criteria (Part 2.6);
- comply with the New Development Within Wooded Areas Development Criteria (Part 2.7);
- comply with the Wildlife Habitat Development Criteria (Part 2.8);
- comply with the Forest Management Development Criteria (Part 2.9);
- comply with the Mineral Resources Development Criteria (Part 2.11), whose objective is to minimize the impact of new mineral extraction operations and accessory uses on the Escarpment environment; and
- comply with the Areas of Natural and Scientific Interest (ANSIs) Development Criteria (Part 2.14), whose objective is to protect provincially and regionally significant elements of the natural landscapes of Ontario.

In addition to all of the above provisions in the *NEPDA* and the NEP that provide direction and guidance, and still focusing only on the natural environment of the Niagara Escarpment and land in its vicinity, the following are relevant defined terms contained in Appendix 2 of the NEP:

Areas of Natural and Scientific Interest (ANSIs)	Biosphere Reserve
Bruce Trail	Carrying Capacity
Compatible	Conservation
Cumulative Effect	Ecological(ly)
Endangered Species (Regulated)	Endangered Species (Not Regulated)
Escarpment Environment	Fish Habitat

Headwaters	Natural Environment
Nature Preserve	Open Landscape Character
Preservation	Protection
Rare Species	Regionally Significant Areas of Natural and Scientific Interest
Source Area	Special Concern Species
Stream/Watercourse	Threatened Species
Watershed Management	Wetlands
Wildlife Habitat	Wildlife Management

While the *NEPDA* and the NEP cannot anticipate every conceivable matter, and define every possible term, their provisions and policies are comprehensive and flexible, which are attributes of development control. The natural environment provisions and policies that my colleagues find too uncertain, subjective and undefined, have been successfully utilized by the NEC in its day-to-day operations since the approval of the NEP in 1985, and by the Niagara Escarpment Hearing Office ("NEHO") and previous Joint Boards in their many decisions.

I agree with the finding of the Joint Board in *Wat Lao, supra,* that the provisions and policies of the *NEPDA* and the NEP are more specific than the PPS policies in relation to the NEP Area. The development control approach was specifically chosen as the planning tool to protect the unique Niagara Escarpment landform. The *NEPDA* and the NEP were drafted to implement this unique (at the time) tool. By contrast, the policies of the PPS are general minimum standards to be applied province-wide (PPS policy 4.6).

I also agree with the submission of the NEC that: "This Board is required to give the *NEPDA* such fair, large and liberal interpretation as best ensures the attainment of its objects" and that, as set out in its Purpose and Objectives, the *NEPDA* "has as its primary focus natural heritage conservation over resource allocation. (Ref.: *Legislation Act, 2006*, S.O. 2006, s. 64(1).)"

I find that the provisions and policies of the *NEPDA* and NEP do provide comprehensive direction and definitive guidance for dealing with the NEP amendment and development permit applications in this case, and natural environment issues in particular. While the PPS policies also apply, they supplement the provisions and policies of the *NEPDA* and the NEP, and do not usurp the *NEPDA* and NEP tests. The *NEPDA* and NEP provide the threshold tests that can, and must, be applied at first instance.

In addition, the PPS, as a statement of policy, does not have priority over the statutory provisions of the *NEPDA*. As between the two relevant policy documents, the NEP and the PPS, the latter clearly states that the NEP shall take precedence over the policies in

the PPS to the extent of any conflict (policy 4.9 of the PPS). As will be further discussed, later in these reasons, I disagree with the finding of my colleagues that there is no conflict (e.g., "need" as a justification factor).

Development control

The *NEPDA* and the NEP originated with the Gertler Report, commissioned by the Province in 1967. It was released in 1968 and has been described as having identified urbanization and quarrying operations as primary threats to the Niagara Escarpment. The *NEPDA* was enacted in 1973, and the NEP was approved on June 12, 1985.

In *Niagara Escarpment Commission v. Paletta International Corp.*, [2007] O.J. No. 3308, the Ontario Divisional Court commented on the importance of development control and the *NEPDA*, at paragraph 27:

> Subsection 24(1) of the NEPDA provides that in an area of development control, no development shall be undertaken unless it complies with a development permit or is permitted by regulation. Subsection 24(3), as amended in 1999, states that no approval or decision that relates to development shall be made in respect of any land located within an area of development control in the NEP unless a development permit has been issued under the NEPDA, or there is an exemption by regulation to those permit requirements.

Joint Board and NEHO decisions have consistently held that a key feature of the development control approach of the NEP is that a development permit is not granted as of right.

A recent decision on a preliminary matter by the Joint Board in *Nelson Aggregate Co., Re.* (2010), 52 C.E.L.R. (3d) 198, provides a useful summary of cases discussing development control under the NEP. The decision concluded, at paragraph 29:

> … the Joint Board concurs with the findings in *Wilson* [cited below] and *Renchko* [*Renchko v. Niagara Escarpment Commission* [2008] O.E.R.T.D. No. 32 (N.E.H.O.)] that there is no unimpeded right to undertake the types of developments that are considered "Permitted Uses" in a given designation.

The Joint Board also found, at paragraph 111, that:

> the development control regime was chosen as a mechanism to protect the unique Escarpment environment, which is a World Biosphere Reserve and to ensure that all new development is compatible with the purpose of the NEPDA and the NEP.

In *Wilson v. Niagara Escarpment Commission* (2006), 24 C.E.L.R. (3d) 198 (N.E.H.O.), the Hearing Officer found, at paragraphs 38 to 41, that:

> the unique importance of the Niagara Escarpment and its special legislative regime ought to be considered in assessing the compatibility of a proposed development with the NEP. … Because the NEPDA employs a "development control" approach to land use planning, there is an opportunity for the NEC, and a Hearing Officer in an appeal, to look at each development on its own merits and determine whether it should be approved and what conditions of approval may assist in ensuring that the development best accords with the NEP. … The development control approach also provides an opportunity for individual development decisions to be made in a manner that respects the special legislative significance given the Niagara Escarpment. This is reinforced by the wording of the NEP itself. Permitted Uses are listed, but there is no unimpeded right to undertake the types of developments that are permitted in a given designation ….

The Hearing Officers in *Paxton v. Niagara Escarpment Commission*, [2006] O.E.R.T.D. No. 54 stated, at paragraph 27:

> This approach does not create unimpeded rights to undertake any development simply because it is identified as a permitted use under the NEP. The NEC makes individual development decisions, and a Hearing Officer on appeal must similarly examine each proposed development on its individual merits. These decisions can require more than the "bare minimum" in order to respect the special legislative significance given the Niagara Escarpment.

Similarly, the requirements for an NEP amendment underscore the "special legislative significance given the Niagara Escarpment", as described in *Wilson, supra*. Part 1.2.1 of the NEP, dealing with NEP amendments, provides that "land use designations may be changed" so long as certain requirements are met. The Purpose of the *NEPDA* and the NEP requires that any development must be "compatible" with the natural environment. Objective 5 of the Escarpment Rural Area provides for the designation of new Mineral Resource Extraction Areas which "can be accommodated", by an amendment of the NEP. In the NEP Escarpment Rural and Mineral Resource Extraction Areas, a Part 1 use "may be permitted", and uses are expressly "subject to Part 2, Development Criteria". (Emphasis added.)

Consistent with the many decisions that have held that a development permit is not granted as of right in the NEP Area, I find that there is also no unimpeded right to the designation of new Mineral Resource Extraction Areas by an amendment of the NEP. Even if a proposed quarry might be technically feasible, and satisfies the policies of the PPS and the provisions of the *ARA*, that does not give it a green light in the NEP Area. The more stringent tests of the *NEPDA* and the NEP must be met first.

NEP an environmentally focused and environmental conservation plan

The Applicant disputes that the NEP is an “environmental conservation plan", and argues that such a description is not a balanced interpretation of the NEP policies in the context of applications for new Mineral Resource Extraction Areas. The Applicant further submits that the balance between development, preservation and the enjoyment of the Niagara Escarpment described in the Introduction in the NEP, is implemented, in part, by not allowing aggregate extraction in Escarpment Natural Areas and Escarpment Protection Areas, but allowing it in Escarpment Rural Areas.

The NEC submits that the NEP is an “environmental conservation plan”, whose focus is on “protection” and “maintenance” of the natural environment, rather than compensation or net gain. The NEC argues that the “balance” must be understood in the context of the original paring down of the NEP Area. The NEC’s submission quotes from documentation from the original NEP hearings that:

> [T]he significant reduction in the area covered by this Plan (63% from that of the Preliminary Proposals and the Planning Area), has led the Commission to concentrate more fully on environmental protection within the reduced area.

The NEC submits that it is the policies of the NEP, as they currently exist, that establish the "balance". The NEC further submits the primary focus of the *NEPDA*, as set out in its Purpose and Objectives (sections 2 and 8), is natural heritage conservation over resource allocation.

I agree with the NEC’s description of the NEP as an “environmental conservation plan”. I also agree with my colleagues’ finding, at page 10 of their decision, that “the NEP is an environmentally focused plan”. Unfortunately, and this is fundamental to my disagreement with their decision, my colleagues engage in a <u>rebalancing</u> of what has already been achieved in the *NEPDA* and the NEP. This rebalancing results in their making numerous findings that contradict the finding that the NEP is environmentally focused.

My colleagues state, at page 18 of their decision, that the role of the Joint Board in this matter is a balancing exercise (emphasis added).

> As noted earlier in this Decision, the issue for the Joint Board is, within the provisions of the relevant statutes and planning documents, <u>determining the appropriate balance</u> between the environmental, economic and social benefits to the Provincial and local economies of mining this aggregate resource and the environmental, economic and social benefits of protecting unchanged the features of the Niagara Escarpment found on the entire site and the environmental, economic and social benefits that flow from them to society.

> This balancing of these competing public interests goes to the heart of the matters the Joint Board must decide in this case, and has framed the positions of the various opposing parties in this Hearing.

With respect, the Joint Board is to apply the *NEPDA* and NEP tests to the proposed NEP amendment and development permit application. It is not the function, or within the jurisdiction, of the Joint Board to engage in a rebalancing of "environmental, economic and social benefits". Such a rebalancing does not reflect either the Purpose of the *NEPDA* and the NEP, which is the maintenance of the natural environment of the Niagara Escarpment and ensuring that only compatible development occurs, or their Objectives. The comparative environmental, economic and social benefits of mining the aggregate resource and removing natural features and functions of the Niagara Escarpment were considered in the comprehensive reports that led to the creation of the *NEPDA* and the NEP, and the imposition of development control in the first place. I agree with the NEC submission that the policies of the NEP, as they currently exist, already establish the "balance" of environmental, economic and social benefits.

Attempting to revisit the "balancing" that is already embedded in the *NEPDA* and the NEP inevitably leads to a "business as usual" planning analysis. Rising above the usual planning analysis to protect the Niagara Escarpment was the very reason for choosing development control as the planning tool. The pitfalls of rebalancing environmental protection against "economic and social benefits" when interpreting environmentally focused legislation, such as the *NEPDA*, were illuminated in the case of *Labrador Inuit Assn. v. Newfoundland (Minister of the Environment & Labour)* (1997), 25 C.E.L.R. (N.S.) 232 (Nfld. C.A.), at 234, and cited in *Parry (Re)*, [1999] A.E.A.B.D. No. 1, at paragraph 7 (emphasis added):

> The legislation, if it is to do its job, must therefore be applied in a manner that will counteract the ability of immediate collective economic and social forces to set their own environmental agendas. It must be regarded as something more than a mere statement of lofty intent. It must be a blueprint for protective action.

An example of "balancing" that is, in my view, in direct contraposition to the NEP, is the statement by my colleagues, at page 10 of their decision, that (emphasis added):

> In the Joint Board's opinion, the inclusion of an objective in the Escarpment Rural Area designation of the NEP is an expression of the importance of providing for new Mineral Resource Extraction Areas within the NEP area, where appropriate.

I strongly disagree that providing for new Mineral Resource Extraction Areas in the NEP Area is an indication of the importance of this very limited Escarpment Rural Area objective. Such an interpretation counteracts the NEP being an "environmentally

focused plan". The following provisions underscore that the *NEPDA* and NEP amendment test does not elevate the importance of mineral extraction in the NEP Area:

- the Introduction to the NEP states that the *NEPDA* "established a planning process to ensure that the area would be protected";
- the Purpose of the *NEPDA* and the NEP, is to maintain the Niagara Escarpment and land in its vicinity substantially as a continuous natural environment;
- only such development can occur as is compatible with that natural environment;
- a proposed change in land use designation must meet the Purpose and Objectives of the *NEPDA* and the NEP;
- there is no specific reference to mineral extraction in the Purpose and general Objectives of the *NEPDA* and NEP, while there are specific references to the natural environment; and
- New Mineral Resource Extraction Areas can be designated only if they can be accommodated by an amendment to the NEP; and a new quarry may be a Permitted Use (requiring an amendment to the NEP) subject to the NEP Part 2 Development Criteria.

As can be seen, under the existing balance in the *NEPDA* and NEP, while development, such as the mining of aggregate, is not prohibited in the NEP Area, it has a distinctly secondary and restricted role: only such development can occur as is compatible with the natural environment of the Niagara Escarpment and land in its vicinity. The Objectives make it clear that the primary goal is protection of the natural environment and that agriculture, forestry, and even recreation, are secondary economic activities. The economic activity of mineral resource extraction is even more limited as it is not even mentioned in the general Objectives of the *NEPDA* and the NEP.

I find that the NEP is an environmentally focused, and environmental conservation, plan and that the NEP amendment test does not involve a rebalancing of the environmental , economic and social benefits of aggregate extraction (in my view there are no identified environmental benefits) against the environmental, economic and social benefits of the natural environment of the Niagara Escarpment. The NEP policies must be interpreted consistently within the existing statutory framework of the *NEPDA*.

Recent quarry decisions

The Parties highlighted in their submissions two recent decisions on quarry proposals that involved applications to designate new areas for aggregate extraction. They are the decisions in *Dufferin Aggregates, Re* (2005), 15 C.E.L.R. (3d) 281 (Jt. Bd.) ("*Dufferin Aggregates*"), a quarry proposal that was also in the NEP Area, and *James Dick Construction Ltd. v. Caledon (Town)*, [2010] O.M.B.D. No. 905 ("*James Dick*"), a quarry proposal in an area adjacent to, but outside of, the NEP Area. This case is also referred to below in the discussion of the capacity of the Ministry of Natural Resources ("MNR").

***Dufferin Aggregates* (Dufferin quarry)**

The Dufferin quarry proposal also required an NEP amendment and development permit. The existing quarry was nearing depletion. The owner had assembled 242 hectares of land with the intention of licencing 82.5 hectares. The location was in the vicinity of one watershed (Sixteen Mile Creek), three wetlands (two of which were provincially significant), and possible Jefferson Salamander habitat. The area to be licenced was described in the decision as being primarily cleared land, except for some patches of shrubs and conifers. The surrounding area included forest, environmentally sensitive areas, ANSIs, wetlands, and the brow of the Niagara Escarpment (1 kilometer away). The quarry would be the source of approximately 60 million tonnes of high quality dolostone. After the aggregate is extracted, the quarry pit is to become a lake. Unlike the case before us, the Joint Board was unable to conclude that the underlying rock was karstic.

At that time, a party could apply to the Lieutenant Governor in Council (Cabinet) to review an order of a Joint Board. On requests for a review by two of the parties, Cabinet varied the decision of the Joint Board. The following were key requirements underpinning the decision of that Joint Board, and the Statement of Cabinet confirming the decision, that a quarry could proceed with varied conditions (emphasis added):

- the addition to the NEP Area of approximately 70 hectares of lands owned by Dufferin Aggregates, to augment the continuous natural corridor and provide linkages between ecologically sensitive areas, which lands were required to be designated as Escarpment Natural Area;
- the redesignation of various adjacent lands from Mineral Extraction Area and Escarpment Rural Area, to Escarpment Natural Area, including the above 70

hectares, for a total addition to the Escarpment Natural and Protection Areas of approximately 177 hectares; and

- the rehabilitation of a roadway to a wooded condition so that it will become a natural heritage corridor.

The Cabinet decision pointedly referred to the addition of lands to the NEP Area as follows:

> Cabinet is also mindful of the importance the Joint Board placed on the addition to the Niagara Escarpment Planning Area of approximately 70 Ha of lands, owned by Dufferin Aggregates, to augment the continuous natural corridor and provide linkages between ecologically sensitive areas. In this respect, and in recognition that Dufferin Aggregates has already made an undertaking to commit these lands to the Niagara Escarpment Planning Area, Cabinet supports the Minister of Natural Resources taking the necessary steps to have these lands added to the Niagara Escarpment Planning Area.

The addition to the NEP Area of a substantial area of land that was suitable for designation as Escarpment Natural Area was essential to Cabinet's confirmation of the decision. The Applicant in the case before us has not made any such proposal. The Applicant's proposal is for a conservation easement over a much smaller area that is already within the NEP Area. While a conservation easement would benefit the natural environment, it does not add any land to the NEP Area, and does not fit into the NEP development control scheme, as would the designation of lands as Escarpment Natural or Protection Area.

In *Dufferin Aggregates*, the redesignation of adjacent lands within the NEP Area to Escarpment Natural Area and the rehabilitation of a roadway to a natural heritage corridor are progressive requirements of the proposed development that do not "rob Peter to pay Paul", as does the suggested "net gain" approach in the case before us (discussed later in these reasons). The addition of substantial lands to the NEP Area suitable for designation as Escarpment Natural Area in *Dufferin Aggregates* is wholly different than the Applicant's proposal, in the case before us, of destroying, and then attempting to duplicate, features and functions elsewhere within the existing NEP Area.

James Dick **(Rockfort quarry)**

In the case of *James Dick*, a decision of the Ontario Municipal Board ("OMB"), the proposed quarry was on an 89 hectare site in Caledon, zoned "Rural Area", surrounded by agricultural and rural residential uses, and environmentally sensitive features in the Credit River watershed, immediately north of the Niagara Escarpment. Although the

proposed quarry was not in the NEP Area, the OMB member observed that “Caledon is characterized by its rolling hills … the Niagara Escarpment and the Bruce Trail”.

The proposed development was refused in its entirety, even though the area was not covered by development control as it was outside of the NEP Area. The decision has particular relevance to these applications because:

- the OMB was adamant that cultural heritage features not be isolated and become an “island”, or be completely removed, such that the whole character of the area would be changed. By analogy, the Applicant’s development proposal in the case before us would isolate natural heritage features by creating a Butternut “island” and an AHTF “peninsula”, and completely remove a significant woodland;
- the OMB recognized the inherent constraints on the MNR being the decision maker under the Adaptive Management Plan (the “AMP”), as has been argued in the case before us, due to:
    - a potential conflict in deciding on environmental concerns when it is also the regulator of aggregate extraction; and
    - MNR’s “demonstrably inadequate resources”; and
- the OMB found that understanding whether there is a need for the aggregate resource was relevant, even though the applicant did not have to prove that there is a “need” for the aggregate resource under the PPS (the proposed development was not subject to the *NEPDA* and NEP amendment test).

It is counterintuitive that an application for a proposed quarry in a location outside of the NEP Area, which is not under development control and not in a unique ecologic area, should be less successful than the application before us for a quarry in a protected area of the natural environment of the Niagara Escarpment. The instant site contains a much wider array of natural features and functions to be protected than would ordinarily be encountered on sites outside of the NEP Area.

Evidence and witnesses

With a few exceptions, my colleagues prefer the evidence and opinions of the witnesses for the Applicant and the municipalities over the evidence of the Parties opposing the proposed quarry. Alternatively, they find that those Parties have not put forward any compelling evidence, without giving reasons or making findings of credibility. In particular, the decision does not favour the evidence of the NEC witnesses, except in regard to some minor matters in the fine-tuning of conditions for the development. In

my view, the witnesses for both sides gave credible, though different, evidence on the matters relevant to the findings that I have made.

In regard to the overarching issue of the protection of the natural environment of the Niagara Escarpment, I found the evidence of the NEC witnesses particularly helpful in distinguishing the practical application of the development control provisions and policies of the *NEPDA* and the NEP from the standard, but not applicable and not very helpful in this context, "good planning" analysis. The experience of the NEC Staff was represented in this matter by:

- Lisa Grbinicek, a Senior Strategic Advisor with over 10 years of experience at the NEC. She was qualified as an expert ecologist, capable of providing opinion evidence with respect to the policy framework related to the natural environment;
- Kathryn Pounder, Senior Strategic Advisor with the NEC. She was qualified to provide the Joint Board with expert opinion evidence in land use planning, with particular expertise in environmental policy planning and urban planning. Ms. Pounder coordinated public agency meetings, the circulation of comments, and the review by the Public Interest Advisory Committee, and attended all of the hearing days; and
- Linda Laflamme, a Landscape Architect with the NEC. She was qualified as an expert in landscape architecture with expertise in visual assessment. In particular, Ms. Laflamme testified regarding the open landscape character of the Niagara Escarpment.

Ms. Grbinicek, Ms. Pounder and Ms. Laflamme co-authored the NEC Staff Position Report in this matter.

The interpretation of the NEP amendment and development permit tests are questions of law that do not stand or fall on the credibility of particular witnesses. In *Niagara River Coalition v. Niagara-on-the-Lake (Town)* (2010), 49 C.E.L.R. (3d) 159, the Ontario Court of Appeal held, at paragraph 43, that "the proper interpretation of an official plan is not a factual matter to be decided based on opinion evidence from planners, but rather a question of law". That holding is equally applicable to the provisions and policies of the *NEPDA* and the NEP. It is up to the Joint Board to make up its own mind, and not to simply adopt the opinion of the experts and lay witnesses on the very matters to be decided by the Joint Board.

Issue # 1: Whether the NEP should be amended by redesignating the area of the proposed quarry from Escarpment Rural Area to Mineral Resource Extraction Area.

This requires:

A. a determination of whether the proposed NEP amendment application passes the three branch general test for all NEP amendments, as set out in Part 1.2.1 of the NEP (referencing sections 6.1, 8, and 10(6) of the *NEPDA*); and

B. consideration of the matters listed in the NEP Part 1.5 Development Policies for Mineral Extraction for evaluating NEP amendment applications.

A. The Part 1.2.1 amendment test

The three branches of the NEP amendment test in Part 1.2.1 of the NEP are whether:

1. the Purpose and Objectives of the *NEPDA* and the NEP are met by the proposed changes in land use designation;

2. the amendment is justified, as required by sections 6.1(2.1) and 10(6) of the *NEPDA*; and

3. the proposed amendment:

   (a) and the expected impacts resulting from the proposed amendment, do not adversely affect the Purpose and Objectives of the *NEPDA*;

   (b) is consistent with the Purpose and Objectives of the *NEPDA* and the NEP; and

   (c) is consistent with other relevant provincial policies.

1. Whether the Purpose and Objectives of the *NEPDA* and the NEP are met by the proposed changes in land use designation.

(a) Purpose of the *NEPDA* and the NEP

> The purpose of this Act [Plan] 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.

“maintenance”

The Applicant argues that so long as the natural environment corridor of the Niagara Escarpment is continuous, then it is being maintained, and, in this case, the proposed quarry will not sever the NEP Area.

The NEC argues that the emphasis in the *NEPDA* is on the "maintenance" of the natural environment. It was the evidence of Ms. Grbinicek that "maintenance" in the NEP requires a development proposal to demonstrate that the natural features identified are being maintained substantially as a continuous natural environment, and "enhancement" of that natural environment is only supported where impacts to the features and functions are being avoided or minimized, according to the applicable NEP development criteria.

Witnesses for the NEC, Ms. Laflamme, Ms. Grbinicek and Ms. Pounder, testified that the NEP Area in the vicinity of the proposed quarry is already a particularly narrow "bottleneck", and that the Applicant is asking to redesignate roughly one-half of the width of this narrow area to Mineral Resource Extraction Area. The "bottleneck" is illustrated on the map attached as Appendix "F" (Exhibit 204), which demonstrates that the NEP Area is quite narrow in the vicinity of the site. The NEC argues that a lengthy quarry operation that drastically alters this area of the NEP, by creating a pit and then an "unnatural" lake, does not maintain the Niagara Escarpment and land in its vicinity "substantially as a continuous natural environment". The NEC is also concerned that the proposed development would fragment the NEP Area.

My colleagues find, at page 14 of their decision in their discussion of water features, that "the Board assigns no special significance or added level of protection through use of the terms 'maintenance' and 'enhancement'. They are not defined terms in the NEP."

I do not agree with the above interpretation and finding. The NEP uses variations of the terms "maintain", and "enhance" in many of its most important policies. In my view, these terms do have significance, and are added protection, in the application of the Purpose and Objectives of the *NEPDA* and the NEP. Whether or not these terms are defined is not determinative of whether they have meaning. As discussed later, the meaning of these terms is also crucial to determining whether the principle of "net gain" applies to development proposals in the NEP Area.

The law is clear that every word in a statute, in this case the *NEPDA*, is presumed to make sense and advances the legislative purpose. The Supreme Court of Canada recently stated in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] S.C.J. No. 53 at paragraph 38:

> As Professor Sullivan notes, at p. 210 of her text, "[i]t is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose." As former Chief Justice Lamer put it in *R. v.*

> *Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28, "[i]t is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage."

The Joint Board has an obligation to interpret the wording of the provisions and policies of the *NEPDA* and the NEP. *Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 (applied in the decision of the Environmental Review Tribunal in *Erickson v. Ontario (Ministry of the Environment)*, [2011] O.E.R.T.D. No. 29 ("*Erickson*"), at paragraphs 498-509) is generally regarded as the leading authority for the "modern principle" of statutory interpretation. The Supreme Court held, at paragraph 21, that there is only one approach to statutory interpretation, "namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

The term "maintenance" is contained in the Purpose of the *NEPDA*, a statute, and the NEP, a plan authorized by the statute. The term "maintain" is also used in general Objectives 2 and 4 of the *NEPDA* and the NEP. Though different principles may apply to the interpretation of a statute, as compared to a plan, in this case the Purpose and the Objectives of the *NEPDA* and the NEP are the same. Therefore, their interpretation, using the modern principle of statutory interpretation, is the same.

With respect to the use of the term "maintain" in the NEP, it is clear from the definitions in the NEP that the terms "maintain" and "maintenance" have a different meaning than the terms "restoration" and "enhancement". (Also, see the definitions of "Conservation", "Forest Management", and "Nature Preserve" in Appendix 2 of the NEP.) The dictionary definition of "maintain" includes "cause to continue…retain in being (…condition…), to continue in (position…), take action to preserve in good order…." (*The Concise Oxford Dictionary*, 7th ed., (Toronto, Ontario: Oxford University Press, 1982.)

I agree with the submission of the NEC that the terms "maintain" and "maintenance", as used in the *NEPDA* and the NEP, do not include the complete removal of a feature or function. That would not cause the feature, function, or system to continue, be retained or preserved in good order. An interpretation of the *NEPDA* and the NEP that would allow their removal would be repugnant to the legislative context. On the other hand, the terms do not mean that there can never be a change of any kind. It is a matter of degree that will depend on the circumstances of each case. There is some flexibility.

The meaning of the phrase "maintain and enhance" will be further discussed below in relation to general Objective 2.

"natural environment"

The Applicant's witness, Mr. Clarkson, testified that, in his opinion, a continuous natural environment will be maintained both during extraction and after development of the proposed quarry. The Applicant submits that "the NEP itself makes it clear that a lake, man-made or natural, clearly comes within the definition of natural environment in the NEP", and that Ms. Pounder agreed with this.

The NEC relies upon the opinion of Ms. Grbinicek that an operating quarry and large human-made lake will not maintain the natural environment.

The definition of "natural environment" in the NEP is very broad: "the air, land and water or any combination or part thereof, of the Province of Ontario." Nevertheless, the Applicant's submission that a human-made lake comes within the definition of "natural environment" in the NEP is a contradiction of terms. If something is "human-made" then it is not "natural" as that word is commonly understood. I note that the NEP definition of "open landscape character" makes this distinction. The definition provides (emphasis added) "the system of rural features, both natural and human-made which makes up the rural environment, including forests, slopes, streams and stream valleys, hedgerows, agricultural fields, etc."

Further, it would be absurd to interpret the term "natural environment" in the Purpose of the *NEPDA* and the NEP as meaning the "human-made environment". I find that the proposed quarry pit and human-made lake (with a deep, regular floor, predominantly cliff-like shoreline, minimal useful aquatic habitat, etc.) would not be a "natural environment" within the meaning of the Purpose of the *NEPDA* and the NEP. They are not features of "a landscape that is unequalled in Canada" as described in the Introduction to the NEP.

"substantially" and "continuous"

As already noted, the Applicant argues that so long as the natural environment corridor of the Niagara Escarpment is continuous, then it is being maintained. In this case, the proposed quarry will not sever the NEP Area.

The NEC argues, in addition to the "bottleneck" argument above, and based on Ms. Grbinicek's opinion, that:

> human-made lakes/or "very large ponds" as characterized by Mr. Charlton, of this magnitude (particularly here, where there is the cumulative effect of the existing Walker quarry end-lake and the proposed new quarry end-lake) are not compatible with the surrounding natural features of the Escarpment environment; will not serve the purpose of the NEP of "maintenance of...substantially a continuous natural environment"; will not maintain existing connectivity including an

> existing wildlife corridor, nor will it amount to "protection of the natural environment" in accordance with Development Policies for Mineral Extraction under Part 1.5 of the NEP.

Nevertheless, my colleagues agree with the Applicant's submissions and find, at page 18:

> There is no compelling evidence before the Joint Board that the proposed application would offend the first Purpose of the NEP, as in this area the Niagara Escarpment and lands in its vicinity will be maintained as a substantially natural environment and there will be no break in the continuous natural environment resulting from this application.

The above finding states this part of the NEP amendment test negatively, and appears to reverse the onus that is on the Applicant to demonstrate that the NEP amendment application meets the Purpose of the *NEPDA* and the NEP.

In my view, the finding is also based on such a narrow interpretation of the first branch of the Purpose that almost every type of development proposal would qualify as meeting the Purpose of the *NEPDA* and the NEP. Very few projects of any type are so extensive that they would span the entire width of the NEP Area and thus sever it. While the proposed development will not physically sever the Escarpment corridor, I agree with the submission of the NEC that a quarry pit and large human-made end-lake in this narrow neck of the NEP Area will not maintain the Niagara Escarpment and land in its vicinity substantially as a continuous natural environment. The NEP Area in this location will become substantially, first an unnatural human-made pit, and then a human-made lake. Further, the proposed development will not provide the connectivity across the landscape that the current terrestrial woodland feature does. The pit and end-lake will "fragment" the natural features, functions, and systems of the Niagara Escarpment and land in its vicinity.

"ensure"

The Applicant does not dispute that it bears the onus of proving that the proposed development satisfies the *NEPDA* and NEP amendment and development permit tests. I find that the Applicant must prove, on a balance of probabilities, that the NEP amendment will ensure, as in make certain, that only such development occurs as is compatible with the natural environment of the Niagara Escarpment and land in its vicinity. In other words, "possibly", or "likely", is not good enough. It is a very high standard. For the reasons set out below I find that the Applicant has not met it.

"compatible"

The Applicant argues that the proposed quarry is compatible with the natural environment of the Niagara Escarpment because it will not impair features and functions such as groundwater and surface water, and, in Mr. Clarkson's opinion, the eventual lake will be compatible with the surrounding area.

The NEC submits that the Applicant has failed to demonstrate that an operating quarry, including a large post-quarry lake adjacent to another large human-made lake, will be compatible with the natural environment.

My colleagues find, at page 18 of their decision, that there is compatibility because there is no "compelling evidence that a quarry use cannot be compatible with the natural environment." They also find that the end-lake will be compatible with the open landscape character of the Niagara Escarpment (see Objective 4).

"Compatible" is a defined term in the NEP. It means: "where the building, structure, activity or use blends, conforms or is harmonious with the Escarpment's ecological, physical, visual or cultural environment." Consistent with my finding that the proposed quarry pit and end-lake would be in the middle of, and thereby destroy, a unique ecologic area, and in the alternative would not maintain and enhance natural systems (see the discussion of the Development Policies for Mineral Extraction below), I find that they would not be compatible within the Purpose of the *NEPDA* and the NEP because they would not blend, conform or be harmonious with the natural environment of the Niagara Escarpment and land in its vicinity, including the Escarpment's ecological, physical, visual or cultural environment.

I point out that my colleagues' finding in respect of this term again appears to reverse the onus by putting it on the opponents of the development proposal. The onus remains on the Applicant to demonstrate that the NEP amendment and development permit for the proposed quarry will ensure that only such development occurs as is compatible with the natural environment of the Niagara Escarpment and land in its vicinity. As indicated, I find that the Applicant has not met the onus.

Summary of findings on the Purpose

I find that the NEP amendment application does not meet the Purpose of the *NEPDA* and the NEP because:

- the term "maintenance" in the Purpose of the *NEPDA* and the NEP, and the terms "maintain" and "enhance" in the Objectives do have significance;

- the Joint Board is obliged to interpret these terms;
- in the *NEPDA* and the NEP, “maintain” means to cause a feature, function, or system to continue, be retained or preserved in good order;
- “maintain” does not include the complete removal of a feature or function;
- the terms “maintenance” and “maintain”, as used in the *NEPDA* and the NEP, do not mean that there can never be a change of any kind. It is a matter of degree that will depend on the circumstances of each case;
- the proposed quarry pit and human-made lake would not be a “natural environment” within the meaning of the Purpose of the *NEPDA* and the NEP;
- a quarry pit and large human-made end-lake in this narrow neck of the NEP Area will not maintain the Niagara Escarpment and land in its vicinity “substantially as a continuous natural environment”. The NEP Area in this location will become substantially, first an unnatural human-made pit, and then a human-made end-lake;
- the Applicant has not met the high standard to “ensure” that as the result of the proposed NEP amendment only such development will occur as is compatible with the natural environment of the Niagara Escarpment and land in its vicinity; and
- the proposed quarry pit and end-lake resulting from the NEP amendment would not be “compatible” within the meaning of the Purpose of the *NEPDA* and the NEP because they would not blend, conform or be harmonious with the natural environment of the Niagara Escarpment and land in its vicinity, including the Escarpment’s ecological, physical, visual or cultural environment.

(b) Objectives of the *NEPDA* and the NEP

A NEP amendment application must also meet the general Objectives set out in section 8 of the *NEPDA*. They are repeated under the “Purpose and Objectives” heading in the NEP. The NEP Part 1 Land Use Policies for the various land use designations each have their own objectives. The relevant Escarpment Rural Area objectives are discussed later in these reasons in regard to the NEP development permit application, which is Issue #2.

Objective 1: To protect unique ecologic and historic areas.

With respect to the wetlands, the ANSI, the woodlands, the Butternut habitat, and the habitat of Colony 1 of the AHTF, the Applicant initially argued that the proposed

amendment to the NEP is consistent with the Objectives of the *NEPDA* and NEP since it has been demonstrated that unique ecologic areas will be protected, and the proposed development is compatible with the Purpose of the *NEPDA*. In its reply, the Applicant clarifies that it was Mr. Clarkson's evidence that, in his view, the woodland on the site is not unique and the other significant natural heritage features in the area, as "significant" is defined in the PPS, will be protected whether or not they are unique.

The Applicant further argues that the NEP Development Policies for Mineral Extraction, Part 1.5.1(b), provide that final rehabilitation can be taken into account in considering whether the Objectives of section 8 of the *NEPDA* are met, and that "protection" under Objective 1 must include an interim period where natural features, or parts of natural features, are removed, provided they will be re-established and restored in the long term.

The NEC submits that the NEP amendment application does not meet sections 1.2.1 and 8 of the *NEPDA* because it fails to protect unique ecologic areas. The NEC argues that all NEP amendment applications must meet Objective 1, that "unique ecologic areas" may be located within any NEP designation, and they must be protected in whichever designation they are found. For instance, in this amendment application, some of the features of the unique ecologic area are in an area designated Escarpment Natural Area (e.g., wetlands and the ANSI), and some are in the Escarpment Rural Area designation (e.g., Butternut habitat and Colony 1 of the AHTF).

The NEC submits that the operative word in this Objective is "protect", and that this does not mean "replace". The NEC rejects the "net gain/compensation" approach (further discussed below) that would purport to allow the complete removal of a feature from the site, such as most of the on-site significant woodland in this case. The NEC argues that the removal of that feature would not protect the natural systems of the area. The NEC further submits that the Applicant has not demonstrated that the proposed buffers and mitigation measures will protect what is left of the unique ecologic area(s).

On behalf of the NEC, Ms. Pounder took a "natural systems approach" to evaluating the interrelationships of the features and functions on this site to assist in determining what is meant by the term "unique ecologic areas". The NEC relies upon the opinion of Ms. Pounder, relying upon the evidence of Ms. Grbinicek, that the "unique ecologic areas" on the site, and in its vicinity, include the provincially significant woodland (where the AHTF Colony 1 and the Butternut habitat are located); the provincially significant wetlands; the ANSI (including wetlands A and B); and Escarpment springs.

In support of this being a unique ecologic area, the NEC also relies upon the evidence of Ms. Grbinicek that one of the reasons the woodland on this site is provincially significant (in addition to its size and interior habitat) is due to the uncommon characteristics of the presence of the Butternut (an endangered species in Ontario), and the AHTF (which the NEC alleges is a special concern species unique to the dolomitic Escarpment location within the woodland, and within North America). Mr. Charlton estimated that Colony 1 contains approximately 10,000 plants and clumps.

In addition, Mr. Ruland testified that "the interplay here between the wetlands and karst makes this an exceptionally complex system" and when considering the presence as well of a "high k zone" and the Niagara Escarpment…"it all makes this setting rather unique in my experience."

Findings

Objective 1 applies to all NEP designations

This Objective applies to all NEP amendment applications, which is why, as noted by my colleagues, the term is not specifically referred to in other policies. A unique ecologic area could be located in whole, or in part, in any NEP designation. For instance, in the Escarpment Rural Area, one of the two criteria for designation is (emphasis added): "Lands in the vicinity of the Escarpment necessary to provide an open landscape, and/or are of ecological importance to the environment of the Escarpment."

"unique ecologic areas"

The full term "unique ecologic areas" is not specifically defined. However, the term "Ecological(ly)" is defined in the NEP as "the sum total of all the natural and cultural conditions which influence and act upon all life forms including humans." Also, the definition of "compatible" in the NEP is (emphasis added): "where the building, structure, activity or use blends, conforms or is harmonious with the Escarpment's ecological, physical, visual or cultural environment."

The Introduction to the NEP recognizes that the entire Niagara Escarpment, and land in its vicinity, is unique in its own right. It provides (emphasis added): "The particular combination of geological and ecological features along the Niagara Escarpment result in a landscape unequalled in Canada."

The importance of the term is also underscored in the Introduction by the observation that in 1990 UNESCO named the Niagara Escarpment a World "Biosphere Reserve", defined in the NEP as (emphasis added):

> an international designation of recognition from the United Nations Educational Scientific and Cultural Organization (UNESCO) under the "Man and Biosphere Program (MAB)" that recognizes the unique natural features and ecological importance of the area regulated by the Niagara Escarpment Plan.

The site of the proposed quarry, and the area in its vicinity, have numerous features and functions that have already been identified above, and which, on their own and combined, qualify as "unique ecologic areas". For example, the habitats of the endangered Butternut and the continentally significant AHTF Colony 1 are themselves unique ecologic areas. They are located within a significant woodland, and, in combination, they are a "unique ecologic area". Further, these features and functions are hydrogeologically connected to an ANSI, wetlands (including the Rob Roy system), and Escarpment springs. The area is the headwaters for three rivers that flow into Georgian Bay. There are many natural systems that overlap and intertwine on the site and in its vicinity. Considering features, functions and systems in combination is consistent with looking at an "area", and with the above NEP definition of the term "ecological(ly)".

The dictionary definition of "unique" is "of which there is only one", but it also includes the broader meaning of "remarkable, unusual" (*The Concise Oxford Dictionary*, *supra*).

As an example of common usage in the instant case, the Applicant submits that the NEP amendment application is justified, in part, because of (emphasis added) "the fact that Walker is a long-standing producer of unique quality aggregate to the Georgian Triangle market, the GTA market and beyond". The evidence is that the aggregate is not "one of a kind" as there are other operating quarries producing the same or similar product. Likewise, I find that a natural feature, function, or system, or a combination of them, can be "unique" in the context of Objective 1 of the NEP because it is remarkable or unusual, even if it is not the only one of its kind, at whatever scale is appropriate. Also, the term "unique ecologic areas" in this context does not mean the whole of the NEP Area, or there could be no development at all. It can mean ecologic areas that are unique to the NEP Area and within the NEP Area.

The Parties did not make submissions as to the scale on which something must be unique, e.g., whether the scale is the NEP Area, the Province of Ontario, Canada, or the world. I do not believe that it is necessary to decide this point in this case because of the overwhelming list of natural features, functions and systems in this location, on any scale. I note that while the Applicant disagrees that the woodland is unique, it does not take a position on the other features identified by the NEC.

I find that the area of the site of the proposed quarry and its vicinity, with its combination of natural features, functions, and systems, as listed in the Overview, is a unique ecologic area. I also find that the AHTF Colony 1 and the Butternut habitat, as well as the provincially significant woodland on the site in which they live, are "unique ecologic areas" in their own right.

Features and functions to be removed due to NEP amendment

The footprint of the proposed quarry and the unnatural end-lake at the site will drastically, and permanently, alter this unique ecologic area. It will result in the destruction of most of the significant woodland that is its core. This will diminish the remaining natural features, functions, and systems in the area, including linkages, and surface and groundwater flow and recharge, and leave isolated and oddly shaped landforms of uncertain long-term ecological value. Within the context of the end-lake, the on-site habitat of the endangered Butternut will become a Butternut "island" with a causeway, or it will be lost altogether if all of the extraction phases proceed, which is discussed below. The habitat of Colony 1 of the AHTF will become a "peninsula".

The information in the following chart lists the features that will be lost as the result of the NEP amendment and development of the quarry, if all of the extraction phases proceed. It is obtained from NEC Exhibit 43, Book 7. (The number of retainable Butternut trees has been changed to 23, from 22, to reflect the evidence at the hearing.)

Natural Heritage Feature Lost	**Phase 1**	**Phase 2A**	**Phase 2B**	**Phase 3**	**Total Loss**
American Hart's Tongue Fern	Colony #2			Colony #3	2
Intermittent Spring	1				1
Suffosion Doline	1	1	1		3
Surface Drainage (ha.)	24.71	12.65	3.11	23.79	64.26
Intermittent Watercourse	1				1
Ephemeral Pond		Lost			

Natural Heritage Feature Lost (continued)	Phase 1	Phase 2A	Phase 2B	Phase 3	Total Loss
Perennial Spring		1			1
Losing Reach (watercourse with gradual infiltration)		1			1
Retainable Butternut			23		23
Pond				1	1
Residential or livestock water supply well				1	1
Significant woodland (ha.)	10.25	8.26	3.11	9.71	31.33
Other wooded area (ha.)	1.82				1.82
Wooded interior – 100 m. buffer (ha.)	6.11	2.74		3.28	12.13

The chart only lists the features that will be lost. The functions, including natural systems, that will also be lost, are discussed elsewhere in these reasons.

The chart is based on the phasing of the aggregate extraction as proposed by the Applicant. The variations to the phasing required by the decision of my colleagues, although not proposed by the Applicant, do not affect the end result of features lost. Also, the “net gain” approach does not alter the end result either because there is nothing being added to the NEP Area, as discussed later in these reasons.

Central and easterly fields

As indicated in the Overview, the central and easterly fields are the only areas of the site where aggregate extraction might satisfy the *NEPDA* and NEP amendment and development permit tests, though I make no finding in this regard as further submissions would be required. The fields have important features and functions, such as being part of the open landscape character and a buffer in the Escarpment Rural Area, field habitat for plants and animals, and providing hydrogeological connection for surface and groundwater and to the wetlands and springs. The evidence is that these

fields are of moderate agricultural value. On balance, I find that the central and easterly fields on the site are not a "unique ecologic area" in their own right and are not sufficiently "remarkable" or "unusual" to significantly contribute to that status for the area.

If a proposed quarry in this field area could satisfy the *NEPDA* and NEP amendment and development permit tests, then many of the problems created by the larger footprint of the quarry pit and end-lake would be reduced or solved. For example, the proposed quarry and end-lake would be smaller in size, and the quarry would operate for a much shorter period of time. The impacts of the quarry operation on the natural environment of the Niagara Escarpment, the open landscape character of the area, and the local residents, including such things as the excavation of the pit, transportation of the aggregate, traffic, noise and any tourism issues, would all be reduced. Further, the necessary monitoring, rehabilitation, and mitigation measures (including the proposed AMP), would all be substantially simplified, and of shorter duration.

Findings of colleagues

The following are the relevant findings of my colleagues on Objective 1, made at pages 21, 22 and 39 of their decision. The findings are set out below at length because it is necessary to understand the context (emphasis added).

> With regard to the need to protect unique ecologic areas, the Joint Board notes that there is no definition of these areas in the NEP and there are no policies that specifically refer to this term. There is some dispute among the Parties whether some of the natural heritage features in the subject area should be classified as unique ecologic areas. In the absence of a definition or NEP policy, the Joint Board will not make a specific finding about which features should properly be classified as unique ecologic areas. …
>
> Potential impacts of the proposal on natural heritage features on and adjacent to the site are major considerations in this appeal. In the context of the NEP, many of these issues fall under NEP objective # 1, which is "to protect unique ecologic and historic areas". As stated earlier, the term "unique ecologic areas" is not defined in the NEP. Policies in the NEP relate to specific types of natural heritage features including woodlands, wetlands, habitat of endangered species, etc. However, most contain only general direction for protecting these areas and for assessing impacts. In the Joint Board's determination, the most specific directions for protecting these features and the most rigorous tests are found in the PPS, rather than the NEP. …
>
> The Joint Board finds that the evidence is not sufficient to make specific findings about which features should appropriately be classified as "unique ecologic areas" under the NEP. The requirements of the NEP to protect unique ecologic areas and the NEP's policy direction related to these areas are addressed through the submissions regarding the more rigorous PPS tests for natural heritage features. In the majority of cases, the Joint Board's findings relating to the PPS tests also address the

> related requirements in the NEP, although the NEP provisions may not be specifically referenced. Where there is a need to address specific policies of the NEP apart from PPS requirements, the relevant evidence and findings are provided in the following sections.

The difficulties with these findings are that they:

- make no finding on this first Objective of the *NEPDA* and NEP amendment test;
- do not invoke and apply the appropriate rules of statutory interpretation to give meaning to a key provision in the *NEPDA*, a statute, and the identical policy in the NEP;
- apply policies of the PPS in priority to, or purport to substitute them for, the statutory provisions of the *NEPDA* and the policies of the NEP regarding natural heritage and natural environment matters;
- equate other policies of the PPS with provisions of the NEP; and
- fail to evaluate the extensive evidence regarding natural heritage and natural environment matters that relate to whether this is a unique ecologic area(s).

With respect, failing to properly consider, and make a finding, on Objective 1 is a fundamental flaw in the analysis that makes it impossible to decide whether the proposed NEP amendment meets the *NEPDA* and NEP tests. Objective 1 is contained in a statutory provision of the *NEPDA*, and the Joint Board has an obligation to determine the meaning of legislation in its total context.

It is of note that the Applicant does not argue that there are no unique ecologic areas on the site or in its vicinity, that the term is undefined, or that there is insufficient evidence. The Applicant argues that the NEP amendment application meets Objective 1 because any unique ecologic areas are protected.

With regard to there not being sufficient evidence to make a finding as to whether the site and its vicinity is a unique ecologic area, in the Overview there is a lengthy list of features and functions on the site of the proposed quarry, and in its vicinity, that qualify this area. There is abundant evidence on which to make a finding on Objective 1. As previously stated, I find that collectively the natural features, functions, and systems in the area of the proposed quarry, and its vicinity, are a unique ecologic area (with the exception being the central and easterly fields), and that some of the features are unique ecologic areas in their own right. Such areas are to be protected under Objective 1 of the *NEPDA* and the NEP.

Redesignation of endangered species habitat to Mineral Resource Extraction Area

One remarkable feature of this unique ecologic area, that is also unique in its own right, that the Applicant proposes, and my colleagues agree, be redesignated from Escarpment Rural Area to Mineral Resource Extraction Area, is the habitat of the 23 retainable Butternut trees (the Butternut "island"). Such a redesignation would allow future extraction of aggregate in that location, depending upon the fate of the Butternut, e.g., the Butternut becoming "unretainable", being delisted, or the Applicant obtaining a permit under the *Endangered Species Act, 2007,* S.O. 2007, c. 6, ("*ESA, 2007*") for the destruction of the endangered species and its habitat.

Part 2.8 of the NEP is discussed below in relation to the development permit application and the development criteria. It provides: "Wildlife Habitat: The objective is to protect the habitat of endangered (regulated) … endangered (not regulated), rare, special concern and threatened, plant and animal species, and minimize the impact of new development on wildlife habitat."

The Parties agree that the Butternut habitat is also "significant habitat of endangered species" within the meaning of the PPS.

In addition to Ms. Grbinicek's opinion that the "near island" habitat proposed for the Butternut will result in negative impact to its significant habitat, and "does not represent a long-term commitment to the protection of the habitat of an endangered species nor does it allow for adequate determination of the viability of the identified retainable trees", the NEC submits that the Applicant has not met the onus to justify the redesignation but is seeking to do so based on speculation.

On this issue, my colleagues find, at pages 50 and 97 of their decision, that there is:

> no conflict in applying the Mineral Resource Extraction Area designation of the NEP to the area of the Butternut trees provided this habitat is protected in a manner satisfactory to the MNR.
>
> …
>
> As noted elsewhere in this Decision, the Joint Board is satisfied with the Proponent's approach for dealing with the Butternut habitat. It would make little sense to designate this area as Escarpment Natural Area and require the Proponent to go through another NEP amendment process if in the future the area is no longer Butternut habitat and the MNR issues a permit for the removal of the habitat.

I strongly disagree with the finding that the NEP designation of the habitat of an endangered species can be changed to Mineral Extraction Area. This is a particularly worrisome precedent for species at risk, whether inside or outside of the NEP Area.

Neither speculation that the Butternut will be de-listed as an endangered species, removed under an *ESA*, 2007 permit, or will die off, nor the inconvenience to the Applicant in having to make a future NEP amendment application, are considerations under the *NEPDA* and NEP amendment and development permit tests.

The Applicant and my colleagues attempt to justify redesignation of this endangered species habitat on the basis that it is not strictly "development" because it is not a change in land use but just a change in land use designation. My colleagues find, at page 49 of the decision:

> In this case of the Butternut tree area no new lot is being created, nor are any buildings or structures being proposed for this part of the site. There will be a change in land use designation, but the NEC and CCC have not established in their evidence or arguments that a change in land use as noted in the above definition includes a change in land use designation. The mere changing of a NEP land use designation does not in the Joint Board's finding constitute a change in the specific use of the lands upon which the habitat of the endangered Butternut trees currently exist.

In addition to reversing the onus that is on the Applicant under the NEP amendment test, this is a circular argument that stands the NEP amendment test on its head. Issue #1 in this matter is whether the Applicant's proposed development satisfies the *NEPDA* and NEP amendment test. There can be no change in the NEP designation unless the test is met. The *NEPDA* and NEP amendment test is not whether "no new lot is being created", nor is it whether there are "any buildings or structures being proposed"; my colleagues' finding effectively by-passes the amendment test.

My colleagues rely upon the definition of "development" in the PPS for the above finding. Whether the definition of "development" under the PPS is relevant to this case, as opposed to the *NEPDA* definition, and whether the definition is broader under the *NEPDA* than the *Planning Act*, the Applicant has to establish that there should be a change in designation using the *NEPDA* and NEP test for an amendment, and not a PPS test. With respect, my colleagues use the wrong test regarding the designation of the Butternut habitat and come to the conclusion that the designation should be changed to Mineral Resource Extraction Area, which is not supportable, in my view.

Changing the designation of the Butternut habitat to accommodate the Applicant's development is also not consistent with my colleagues' finding regarding the habitat of the AHTF Colony 1. It is a "species of concern" in an area of the site that is to become the "northern peninsula" if the quarry proceeds. My colleagues find "that in order to properly protect the AHTF Colony 1 it should be maintained outside of the licensed area, within the Escarpment Rural Designation of the NEP". This is the opposite of their

finding regarding the Butternut habitat. The habitat of an endangered species deserves at least as great, if not greater, protection than a species of concern.

Changing the designation in anticipation of some future event that would be unfavourable to the Butternut also contradicts the finding of my colleagues that the NEP is an "environmentally focused plan" and is not an approach, with which they agree, that "will 'exercise caution and special concern for natural values' in the face of uncertainty" (see the discussion of the Precautionary Principle below).

There is an alternative. If circumstances change regarding the Butternut habitat, then the Applicant could make a focused application to change the designation of that location in the NEP Area.

Ironically, the evidence of some of the witnesses is that it is more appropriate to redesignate the Butternut habitat as Escarpment Natural or Escarpment Protection Area. I would agree with that suggestion. I find that the designation of the area of the Butternut habitat on the site should not be changed from Escarpment Rural Area to Mineral Resource Extraction Area.

A "more elsewhere" approach and destruction of the woodland on-site

As discussed above, the significant woodland on the site is at the hub of this unique ecologic area. It is linked, at the north-easterly edge of the site, to woodland that continues in a northerly direction.

NEP Part 2.7 is discussed below, but it provides: "New Development Within Woodland Area: The objective is to ensure that new development should preserve as much as possible of wooded areas." The NEC argues that this provision is more protective than the PPS because it applies to all woodland, and not just woodland that qualifies as "significant" under the PPS.

All of the Parties agree that the woodland on the site qualifies as "significant woodland" under the Natural Heritage Reference Manual and policy 2.1.4(b) of the PPS. The NEC submits that the significant woodland on the site is also "significant wildlife habitat" under the Natural Heritage Reference Manual and policy 2.1.4(d) of the PPS, and, therefore, the Applicant must demonstrate no negative impact to the feature or its ecological function. The MNR acknowledges that the responsibility for the determination of the significance of the woodland and wildlife habitat on the site of a proposed undertaking is that of the planning authority (in this case, the NEC and the municipality), not the MNR.

In regards to the woodland on the site being significant, the Applicant submits, and my colleagues find, at page 57 of their decision (emphasis added):

> it is the health and integrity of this larger woodland that must be considered in evaluating negative impact. In that context, the loss of forest, interior forest and associated functions only affect a part of the significant woodland.

In referring to NEP Part 2.7, New Development Within Wooded Areas, my colleagues agree with the Applicant, and find that this Part is more oriented toward smaller scale developments, and is not completely applicable to a quarry proposal. These reasons deal with this Part of the NEP below, in relation to Issue #2, because it is a development criterion to be considered on a development permit application. My colleagues also substantially rely on the "net gain" approach, referred to above, and discussed in more detail below.

The NEC calculates that the proposed quarry will completely remove approximately over 31 hectares of significant woodland, and 12 hectares of interior forest (approximately 10 hectares of interior forest in the extraction area, and an additional two hectares outside of the proposed extraction area, but within the regionally significant Duntroon Escarpment Forest Life Science ANSI). It was Ms. Grbinicek's evidence that the loss of this 31 hectare woodland will disturb the linkages and wildlife corridors on the site and will threaten its ecological function.

Ms. Grbinicek gave the opinion that the PPS policies should be interpreted to encompass the woodland on the site. The NEC submits that this is supported by the fact that the PPS definition of "significant woodland" refers to an "area" as being "functionally important due to its contribution to the broader landscape", i.e., the woodland in the broader landscape may be made up of a variety of stands with their own ecological functions.

The NEC submits (emphasis added):

> It would be perverse to consider that features and functions determined to be significant under the PPS could be disregarded by a "more elsewhere" approach of simply pointing to the presence of features and functions elsewhere, outside of the lands subject to a land use planning application.

I agree with the submissions of the NEC that the "more elsewhere" approach is not consistent with the provisions and policies of the *NEPDA*, NEP, and PPS. The significant woodland on the site has distinctive natural features, functions and systems. The Applicant is not seeking to change the designation of the larger woodland. These

are *NEPDA* and NEP amendment and development permit applications for a specific location in the NEP Area.

I find that this woodland should be protected at both levels: as a woodland under the NEP, and in terms of the PPS as a "significant" woodland, in its own right on the site, and as a part of a larger woodland (also "significant") off-site. In this case, the most immediate concern is that most of the significant woodland on-site will be destroyed. The *NEPDA* and NEP amendment, and the development permit, will not "ensure that new development should preserve as much as possible of wooded areas", as the NEP requires, nor will the woodland on-site continue to be "significant" in its own right under the PPS. Protecting the woodland on-site is more in keeping with both the development control policies of the NEP, an environmentally focused conservation plan, and the more general policies of the PPS.

Net gain

It is fundamental to the Applicant's NEP amendment and development permit applications that "rehabilitation" of natural features and functions includes locations off the site of the proposed quarry. This is referred to as a "net gain" approach. It is related to the "more elsewhere" approach discussed above. Rehabilitation will be further discussed below in regards to Parts 1.5.1(b) (Development Policies for Mineral Extraction), and 1.9 (the Mineral Resource Extraction Area designation).

The Applicant's "net gain" submissions largely focus upon replacement off-site of the woodland and wildlife habitat that will be destroyed on-site as the aggregate is extracted. The Applicant relies upon Part 1.5.1(b) of the NEP to support its submissions regarding the "net gain" approach. It provides for "Opportunities for achieving the objectives of section 8 of the *Niagara Escarpment Planning and Development Act* through the final rehabilitation of the site". The "objectives of section 8" are the general Objectives of the *NEPDA*, which are identical to those of the NEP. Part 1.5.1(b) does not refer to the Purpose of the *NEPDA* or the NEP.

The NEC submits that the NEP does not contain "net gain" policies that allow for the consideration of compensation for the complete destruction and removal of woodlands or wildlife habitat, in particular when they also have been identified as "significant" under the PPS. The NEC argues, based on the evidence of Ms. Laflamme and Ms. Grbinicek, that the actual on-site "rehabilitation" planting that comes within the NEP definition would be 8.38 hectares.

My colleagues agree with the Applicant's submissions and find, at pages 58 and 59 of their decision, that (emphasis added):

> In the context of the larger woodland, the Joint Board finds that the proposed removal of the forest on the site in conjunction with the reforestation that will take place does not threaten the health and integrity of the forest or its function and therefore is not a negative impact. …
>
> The NEC disputes the suitability of replacing a portion of the woodland as an appropriate measure to be used for mitigating impact in this area. The NEC contends that this is ecological compensation for the woodland to be removed and should not be considered mitigation. …
>
> It is the Joint Board's finding that mitigative measures including replacement and enhancement are contemplated by the PPS the NEP, and the Municipal Official Plans and may be considered when dealing with the loss of a portion of significant woodland, its wildlife habitat, and water features as set out in the PPS.
>
> Whether the mitigation measure is called reforestation, afforestation, replacement or net gain is not important. The PPS test is whether the mitigation activity being proposed has the ability to remove or ameliorate any negative impacts that "threatens the health and integrity of the natural features or ecological functions for which an area is identified" and whether the mitigation measures will result in enhanced beneficial effects which might result from the loss of a portion of the significant woodland. Based upon these considerations the Joint Board finds that the proposed reforestation is simply a mitigation measure and that it is appropriate.

The difficulties with the above findings are:

- there are no "net gain" policies for the natural environment or natural heritage features in the NEP or the PPS;
- if there are any such municipal policies in a local plan (official plan) or zoning by-law covering any part of the NEP Area, then there would be a conflict with the NEP and the provisions of the NEP prevail (section 14 of the *NEPDA*);
- "net gain" cannot be justified on the basis of the PPS, as it does not contain such a policy, and, if it did, such a policy would also be in conflict with the NEP and the NEP would prevail;
- the Applicant has not made any proposal to add lands to the NEP Area that would be designated Escarpment Natural Area, unlike in *Dufferin Aggregates*, *supra*; and
- there is no consideration given, or finding made, under the NEP in regards to existing features and functions that will be destroyed in the NEP Area to be reforested off-site.

The “net gain” principle has been rejected by a previous decision of a NEHO Hearing Officer. The NEHO deals with *NEPDA* and NEP appeals where a Joint Board is not required. In *Barlow v. Niagara Escarpment Commission*, [2011] O.E.R.T.D. No. 25, a recommendation to the Minister of Natural Resources under the *NEPDA*, the Hearing Officer found, at paragraph 91 (emphasis added):

> the objective of Part 2.7 [of the NEP] is to “preserve as much as possible of wooded areas”, and the objective of Part 2.15 is, in part, to locate new facilities “so the least possible change occurs in the environment and the natural … landscape.” The wording of these provisions clearly indicates that the required protection is in respect of the existing wooded areas and natural landscape. The impact of vegetation removal in an area is not minimized in that area, nor is the area preserved as much as possible, by compensatory biodiversity initiatives in other areas located within or outside the planning jurisdiction of the NEP. Consequently, although it is acknowledged that this biodiversity initiative certainly has environmental benefits, the Hearing Officer has not considered it when determining whether the proposed Development is in accordance with the provisions of the NEP.

The NEP Area is a finite area under development control. If a feature is removed, or otherwise destroyed, in one area, and a similar feature created in another location within the NEP Area, then an existing feature will be destroyed within the NEP Area in the new location as well. The end result is that there will be two areas where features have been destroyed. In this case, the proposal is to destroy a woodland and reforest a field to the north and east of the site of the excavation, also in the NEP Area. The result will be the destruction of two features in the NEP Area, a woodland and open field, and the creation of one new feature over time, along with the human-made lake. Of course, so-called “net gain” outside of the NEP Area adds nothing to the features and functions within the NEP Area.

Further, the “net gain” approach advocated by the Applicant and accepted by my colleagues could “open the floodgates” to NEP amendments for aggregate extraction and other development, and accelerate the destruction of the natural environment and fragmentation of the NEP Area. To illustrate, a proponent applying for an NEP amendment need only assemble land in the Escarpment Rural Area that is twice the size of the area from which it intends to extract aggregate, and then allocate one-half of the area for replacement features, functions and systems, purporting to result in a “net gain”. In fact, there will be a net loss whenever a natural feature in the NEP Area is replaced by a human-made one.

In my view, “net gain” and “compensation” are not applicable to the destruction and removal of features, functions and systems of the natural environment in the existing NEP Area, and they should not be “read into” the NEP. If the natural environment of the

Niagara Escarpment and land in its vicinity is destroyed in one location of the NEP Area, it cannot be recreated somewhere else in the NEP Area without altering, or destroying, the features and functions in that new location. A circumstance where "net gain" in relation to the NEP Area might work is where a development proposal requires that substantial, and suitable, land be added to the NEP Area, as was the case in *Dufferin Aggregates*. In that event, features and functions would not be destroyed within the existing NEP Area as "compensation" for something destroyed in another location in the NEP Area. Another circumstance might be where an existing road is removed within the NEP Area and the area is rehabilitated to a natural state and given an Escarpment Natural Area designation.

I find that the NEP amendment and development permit tests do not include "net gain" considerations in regard to the natural environment in the existing NEP Area, with the possible exceptions noted above.

I do not believe that the Applicant has demonstrated that "net gain" is a policy of the PPS, either. If it is, then that would be a conflict with the policies of the NEP, and the latter's "no net gain" approach would prevail.

Conclusion regarding Objective 1

To conclude, I find that the NEP amendment application does not meet Objective 1 of the *NEPDA* and the NEP because it will not protect the unique ecologic area(s) on the site and in its vicinity.

Objective 2: To maintain and enhance the quality and character of natural streams and water supplies.

The Applicant submits that a development under the NEP can make changes to watercourses as long as the quality and character of the watercourse are maintained and protected. The Applicant argues that Objective 2 does not require that every component or branch of a natural stream be maintained, and that, for instance, a stream diversion is permitted (see Development Criterion 2.6 of the NEP – New Development Affecting Water Resources). The Applicant argues that the position of the NEC that the provisions of the NEP require that all natural heritage features be maintained in their current state and then enhanced, if possible, and that mitigation should not be taken into account in deciding upon an NEP amendment application, is too narrow. The Applicant further argues that the NEC's interpretation of Objective 2 is inconsistent with the Development Policies for Mineral Extraction in the Escarpment Rural Area, which direct that groundwater and surface water systems are to be protected on a "watershed basis" (Part 1.5.1(a)(i)).

The Applicant argues that none of the hydrogeology experts disputed or raised any particular concern that the removal of SW2 spring and stream system would adversely impact the downstream system, after considering active discharge to Rob Roy 6 wetland and the SW2 watercourse during quarry operations and passive discharge from the lake in the existing quarry after extraction. It was Mr. Clarkson's evidence that the impact to SW2 is not "unacceptable", and a letter from MOE advised that: "MOE staff do not consider the effects of the dewatering on the SW2 watercourse to be significant or unacceptable."

The Applicant submits that the phrase "maintain and enhance" in the NEP can be achieved through mitigation or rehabilitation. As with Objective 1, the Applicant relies upon Part 1.5.1(b) of the NEP and the "net gain" approach. The Applicant argues that "enhancement, replacement, compensation, or net gain" are not separate from "mitigation and rehabilitation" in assessing whether a development is consistent with the NEP or results in a negative impact under the PPS.

The NEC submits that the use of the phrase "maintain and enhance" in Objective 2, and other policies of the NEP, calls for maintaining, or preserving, what exists and then "enhancing" or "making it better". It further submits that this does not allow for a "compensation" or "net gain" approach, as discussed above. Ms. Pounder gave the example of enhancing a stream by planting trees in the setback areas. The NEC further submits that the phrase "maintain and enhance" must be interpreted using an ecosystem approach, as called for in the MNR Statement of Environmental Values (the "MNR SEV").

Regarding the SW2 spring and stream system, the NEC asserts that there is no dispute that the proposed quarry will affect both its quality and character, regardless of whether the spring itself is removed or there is a significant removal of the "springshed", because the Applicant asserts that it is not a feature of any significance. The NEC submits that consideration should also be given to the functional overlap of the SW2 system and the north-south wildlife corridor on the east side of County Road 31. Ms. Pounder and Mr. Sorensen (of the Grey Sauble Conservation Authority) testified that the SW2 spring should be preserved.

In addition to the SW2 system, Ms. Pounder testified that Objective 2 applies to "water supplies", which include the catchment areas for the wetlands (including Rob Roy 2, the ANSI A and B wetlands, and Rob Roy 6). She relied on the evidence of Mr. Ruland, Mr. Neville, Mr. Cowell and Mr. Switzer and their concerns with respect to the proposed mitigation measures to replace the loss of these catchment areas due to extraction and the ability to establish a self-functioning passive system on final rehabilitation. The NEC

submits that the loss of the catchment areas is significant. The evidence is that the annual water surplus (precipitation over evaporation) for the proposed extraction area amounts to approximately 300 million L/year, and that this water currently recharges a system of on-site and off-site features, including the wetlands, seeps, streams and Escarpment springs and domestic water supplies. The NEC states that the proposed quarry would reapportion this water through active management during the operation of the proposed quarry, and for at least the 33 years that it will take to fill the end-lake. Thereafter, a passive reapportioning is to take place. The NEC argues that this is a massive tampering with the natural streams and water supplies, with unproven and uncertain results.

The NEC further argues that the existing quarry has already diverted groundwater away from the Batteaux Creek watershed toward the Beaver River watershed and that the proposed quarry would accentuate the diversion of both groundwater and surface runoff. It was Mr. Neville's opinion that there is insufficient information to confirm that the changes caused by the existing quarry have been insignificant. The NEC further argues that if the MAQ Highland quarry across the road, to the west, is approved, that would have a cumulative effect on changes to the natural surface and groundwater drainage patterns.

The NEC submits that NEP Objective 2 is more restrictive regarding development, and natural streams and water supplies, than the PPS water policy 2.2.

Findings

SW2 is a spring and natural stream. The definition of a "stream/watercourse" in the NEP is: "a feature having defined bed and banks, through which water flows at least part of the year." In this case, the SW2 spring and the initial portion of the stream will be entirely removed when the aggregate is extracted.

The catchment area is the source of natural surface and groundwater supplies for a number of natural features, functions and systems, e.g., wetlands, seeps, streams, Escarpment springs, and, possibly, domestic water supplies. The Applicant cannot say for certain what the ultimate effect of the proposed quarry will be upon them, although my colleagues find that it will cause drawdowns under the wetlands and significant reductions in their catchment areas.

Nevertheless, my colleagues make the following findings regarding Objective 2, at pages 14 and 22 of their decision, with which I disagree:

- the NEP assigns no special significance or added level of protection to the terms "maintain and enhance" (as with the terms "maintenance and enhancement") as

they relate to water resources and water supplies because, in part, they are not defined terms in the NEP;

- the more definitive tests with regard to natural systems are provided by the PPS;
- a portion of the SW2 stream system on the site can be removed without any negative impacts, and impacts on watersheds have been appropriately addressed; and
- the proposed measures and enhancements will meet Objective 2 of the NEP.

Dealing with the findings in the above order, the term “maintenance” was discussed previously in relation to the Purpose of the *NEPDA* and the NEP. I repeat the finding that the terms “maintain” and “enhance” have significance, whether or not they are defined, and the Joint Board is obliged to interpret and apply these statutory provisions.

Objective 2 is to maintain and enhance the quality and character of natural streams and water supplies, which is not the same as the PPS “no negative impact” test, although they can supplement one another. As already discussed, I disagree with the finding that the PPS contains the more definitive tests with regard to natural systems.

While I agree with the Applicant’s submission that general Objective 2 does not prohibit any change whatsoever to natural streams and water supplies, I do not take the NEC submission to be that extreme.

To say that a portion of the SW2 spring and stream system on the site can be removed without any negative impacts is a *non sequitur*. The spring and a portion of the stream will cease to exist, which will be the ultimate negative impact. The fact that the MOE does not oppose their destruction is not determinative of the matter because the MOE has a different mandate than the NEC. I agree with the submission of the NEC and find that the removal of the SW2 natural spring and a portion of the natural stream cannot be interpreted as maintaining and enhancing its quality and character.

The impacts on the water supplies are uncertain. The sources for the water supplies are at risk: a large catchment area will be removed and the implications of the high karst zone have not been fully investigated. The Applicant must ensure that the development is compatible with the natural environment. I find that the Applicant has not met its onus to demonstrate that the NEP amendment for the proposed quarry will ensure that the quality and character of natural streams and water supplies are maintained and enhanced.

Objective 3: To provide adequate opportunities for outdoor recreation.

While the eventual lake might provide adequate opportunities for outdoor recreation, including a possible connection to the Bruce Trail, the Applicant has not made a commitment to outdoor recreation at the site or its public use. My colleagues do not comment on this Objective. I find that the Applicant has not shown that the NEP amendment application meets Objective 3.

Objective 4: 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.

The Applicant submits that although the proposed quarry will, by necessity, result in a permanent alteration to the landscape, the development and rehabilitation of the site and lands in the vicinity will ensure the maintenance and enhancement of the open landscape character through the creation of rural features.

The Applicant argues that the NEC has given no consideration to the overall proposal when it discusses changes to the landscape during the operational phase of the proposed quarry, and that this ignores the proposed reforestation area and rehabilitated side slope plantings. The Applicant again relies upon the Development Policies for Mineral Extraction and argues that they direct consideration be given to opportunities to maintain and enhance the open landscape character. (See the discussion of Part 1.5.1(b) above in regard to Objectives 1 and 2.)

Mr. Clarkson, on behalf of the Applicant, relies on the phrase “in so far as possible” in section 8(d) of the *NEPDA* (identical to NEP Objective 4) to qualify this Objective.

The NEC submits that there will be a permanent loss of open landscape character because the quarry pit, and eventual unnatural lake, will permanently change the landform and do not preserve the natural scenery. It was the opinion of Ms. Laflamme that the continued expansion of quarry uses in this area would degrade the existing landscape unit (unit 183), and that an expanded quarry of the size proposed with its large end-lake would not be compatible with Objective 4 and would not be consistent with her concept of the term “open landscape character” resulting from her discussions with Ms. Pounder.

The NEC also submits that the closure of, and restricted access to, County Road 91 diminishes the viewing of the open landscape and enjoyment of the natural scenery

from that vantage point. The NEC submits that Objective 4 has not been met, relying on the opinion of Ms. Laflamme adopted by Ms. Pounder.

The NEC argues that in *Hamilton General Homes (1971) Ltd. (Re.)* (2007), 31 C.E.L.R. (3d) 231, the Joint Board in that case agreed with Ms. Laflamme's testimony that the development proposal in that proceeding would result in a loss of open landscape character despite the proponent's reliance on open landscape features maintained on adjacent lands. The applications in *Hamilton, supra,* were dismissed.

The NEC also relies upon the interpretation of the phrase “in so far as possible” by the Joint Board in *Hamilton, supra,* as follows:

> In the context of any decision under the *NEPDA*, whether it is an application for a development permit, severance or a plan amendment, decision-makers must seek to further the NEP’s objective of maintaining the open landscape character in perpetuity. The Joint Board finds that the “in so far as possible” and “substantially” wording demonstrates that the *NEPDA* does not create an absolute prohibition on everything that has had an impact on, or will adversely impact, the natural environment or open landscape. The wording, nonetheless, demonstrates a legislative intent that strongly favours maintaining and enhancing the open landscape character and natural environment rather than detracting from it.

The Applicant argues that its NEP amendment application is distinguished from the one in *Hamilton, supra,* because that case dealt with a plan of subdivision and urban development, whereas an aggregate operation only operates for an interim period, after which final rehabilitation allows for the restoration of rural features that complement the open landscape character of the surrounding lands.

Findings

The “Visual Impact Assessment”, dated September 2005, prepared for the Applicant by Stantec, describes the landscape of the site for the Proposed Quarry as “rolling terrain and open fields enclosed by hedgerows and woodlots… .”

The term “maintenance” in the Purpose, and the phrase “maintain and enhance” in Objective 2, are discussed above. I found that features and functions are neither maintained nor enhanced if they are removed. Objective 4 adds the qualifier “in so far as possible”. I adopt the reasoning of the Joint Board in *Hamilton, supra*, that while this means that there is not an absolute prohibition on negative alterations of the open landscape character, the phrase also indicates “a legislative intent that strongly favours maintaining and enhancing the open landscape character and natural environment rather than detracting from it.”

As already noted, “open landscape character” is defined in the NEP as (emphasis added) “the system of rural features, both natural and human-made which makes up the rural environment, including forests, slopes, streams and stream valleys, hedgerows, agricultural fields, etc.” The definition refers to a “system” of rural features. The more rural features that a development removes, both in number and area, the more diminished the system will be.

My colleagues agree with the Applicant. They consider the end-lake to be a positive feature. They prefer the opinions put forward by Mr. Buck and find that the proposed quarry and its rehabilitated after-use would be consistent with the NEP’s definition of a cultural landscape, and compatible with the NEP’s definition of open landscape character in this part of the NEP Area.

My colleagues further find that the test in the NEC’s Processing Guide for a Plan Amendment from Escarpment Rural Area to Mineral Resources Extraction Area has been met in that the quarry proposal will not be visible from the Bruce Trail and will not impact any views or vistas to or from the quarry to higher ranked landscaped units adjacent to the proposal. They conclude that the proposal when viewed as a whole, and within the context of the existing area, would satisfy Objective 4 of the NEP.

In my view, a quarry operation is not in the same category of features as farming and forestry. While they are all “human-made”, the latter are sustainable uses of the land. A quarry is not sustainable – it removes land and changes the landscape forever. I find that in this location, which I have already found is a unique ecologic area (with the exception of the central and easterly fields), neither a pit with an operating quarry, nor a quarry pit filled with water to make an unnatural human-made end-lake, preserves the natural scenery.

Again, it is also my view that replacing features of the natural environment of the Niagara Escarpment and land in its vicinity, in another location in the NEP Area is, at best, a shell game as the end result is that features will be removed in two locations of the NEP Area. For instance, in this case the Applicant is proposing to replace the significant woodland that is on-site with a new woodland to be planted in an open agricultural field off-site. The end result is the destruction of two features (the significant woodland on the site and the agricultural field off-site) and the creation of two features (the end-lake on-site, and a woodland off-site in place of the agricultural field).

Replacing woodlands and fields with first a pit, and then a pit filled with water, will be such a complete change in the make-up of the open landscape character, as it exists

now, that it cannot be said to be maintained and enhanced so far as possible. There will be a radical and complete change, much like the situation in *Hamilton, supra*.

For all of the above reasons, I find that the NEP amendment application for the proposed quarry does not meet Objective 4. It will not 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.

Objective 5: To ensure that all new development is compatible with the purpose of the NEP.

This Objective underscores the importance of the Purpose of the NEP. I have already found that the NEP amendment application does not meet the Purpose of the *NEPDA* and the NEP. Of note, Objective 5 also repeats the high "ensure" standard that the Applicant must meet regarding the Purpose of the NEP that I have discussed above. My colleagues do not refer to, or make a finding, regarding this Objective.

Objective 6: To provide for adequate public access to the Niagara Escarpment.

The Applicant argues that it has facilitated access to the Bruce Trail through the provision of a side trail and a parking lot and that the proposed quarry will not affect access to the Niagara Escarpment through the Bruce Trail, or otherwise. The Applicant points out that the NEC's "driving tour" does not even include County Road 91, and, in any event, views of the proposed quarry would be screened.

The Applicant argues that the NEP Objectives, and whether one road provides better visual access than another, are not relevant to municipal infrastructure decisions, which are beyond the jurisdiction of the Joint Board. The Applicant submits that NEP Part 2.15 Transportation and Utilities Development Criterion directs that new and reconstructed transportation facilities have minimal impact on the Escarpment environment, not that roads be kept open.

The NEC submits that the development and widening of the 26/27 Side Road could remove parking spots for Bruce Trail users, and that visual access to the Niagara Escarpment will be reduced due to the closure and restricted access to County Road 91 under the Road Settlement Agreement.

Findings

Although the partial closure of County Road 91, and other proposed changes to the road system due to the NEP amendment application and the Road Settlement Agreement (discussed below) would undoubtedly change the means of public access to

the Niagara Escarpment, including visual access, and possibly delay the addition to the optimum route of the Bruce Trail, I find that there would still be adequate public access to the Niagara Escarpment. I agree with my colleagues' finding that there will be no loss of public access to the Escarpment or the Bruce Trail in this area resulting from the Road Settlement Agreement because the Applicant undertakes to maintain access to the existing Bruce Trail and its parking lot on County Road 91 and the existing loop trail system on the south side of County Road 91.

Objective 7: To support municipalities within the NEP area in the exercise of the planning functions conferred on them by the *Planning Act*.

Prior to the start of the hearing, the County of Simcoe and the Township of Clearview entered into a Road Settlement Agreement with the Applicant. The applicable County of Simcoe Official Plan is the Official Plan adopted October 28, 1997 and approved by the OMB on November 2, 1999 (the "SCOP"). The applicable Township of Clearview Official Plan was adopted by Township Council in September 2000 and was approved by the County of Simcoe in January of 2002 (the "TCOP").

The Applicant submits that the policy requirements of the SCOP and the TCOP are similar to the policies of the NEP and the PPS, and the same evidence that demonstrates consistency with the applicable PPS and NEP policies also demonstrates appropriate regard for, and conformity with, the relevant SCOP and TCOP policies. Mr. Clarkson concluded that the applications "conform with" their policies.

The NEC submits that the Road Settlement Agreement, the provisions regarding closure of County Road 91 and the development of Side Road 26/27 in particular, make the approval of the applications inconsistent with the planning functions conferred on the Township and the County by the *Planning Act*. Relying upon the evidence of Ms. Pounder and Mr. Usher (the planning witness for the CCC), the NEC submits that the applications are not in conformity with the SCOP and are inconsistent with the TCOP. The NEC alleges that although the "municipal planners", Mr. Uram (Planner for the Township of Clearview), Mr. Wynia (Planning Director for the Township of Clearview), and Ms. Suggitt (the Manager of Policy Planning for the County of Simcoe), gave evidence that the applications comply with the SCOP and the TCOP, they had not conducted a full review of the applications, had not been present throughout the hearing, had not reviewed all relevant materials, and that Ms. Suggitt had failed to assess the applications against the policies of the NEP.

The NEC maintains that the Road Settlement Agreement is not consistent with the approved official plans, and that pursuant to section 24 of the *Planning Act*, the municipalities have no authority to enter into these agreements. The NEC contends that a SCOP Official Plan amendment is required to download County Road 91 because it would be contrary to the direction in the County's Transportation Master Plan ("TMP") and the Official Plan's policy directions for arterial roads.

The NEC further argues that the applications for the proposed quarry are premature as there are no SCOP and TCOP amendment applications before this Joint Board to enable the passing of a by-law, or by-laws, to permit the transfer of a portion of Simcoe County Road 91 from the County of Simcoe to the Township of Clearview, its closure and transfer to the Applicant, restricted access, and to engage in improvements to Side Road 26/27 as a collector road.

The NEC further submits that the alleged "compensation/net gain" policies in the SCOP and TCOP cited by the Applicant do not apply and do not enable the destruction of 31 hectares of significant woodland and significant wildlife habitat within the area of the site proposed to be designated as Mineral Resource Extraction under the NEP. (This has already been discussed above under Objective 1, in regard to "net gain".)

The NEC therefore submits that the applications do not meet Objective 7.

Findings

This Objective is to "support" municipalities in the exercise of their planning functions, which includes complying with their official plans. The development control provisions and policies of the *NEPDA* and the NEP prevail over local plans (official plans) and municipal zoning by-laws where development control is in effect in the NEP Area (see section 14 of the *NEPDA*, previously discussed). Municipalities either duplicate the *NEPDA* and NEP policies in their official plans or incorporate them by reference.

My colleagues say, at page 4 of their decision, that the following points that relate to the municipalities significantly influenced their findings on this quarry proposal in general:

> …
>
> 4. The Proponent has entered into agreements with the Clearview Township and Simcoe County which provide substantial benefits to these Municipalities above and beyond those authorized by the statutory framework of the *ARA*, the *Planning Act,* and the *Municipal Act*;
>
> 5. Both the Township and County support the proposal and the Township has advised the Joint Board that "the quarry expansion will make a significant contribution to the economic well being of the Township, County and areas beyond" (Clearview Township Argument, p. 1); …

They further find that the Joint Board is required to evaluate the development proposal under "subsection 2.1 of the *Planning Act* which requires the Board to have regard for the decisions of municipal council." With respect, this section of the *Planning Act* does not apply to the NEP amendment and development permit applications because it relates to decisions by an approval authority or the OMB "under this Act", i.e., the *Planning Act*, and not to a decision by the NEC or other decision maker under the *NEPDA*.

The direction in the NEP to "support municipalities" has to be read in conjunction with the *NEPDA* sections 13 (by-laws, etc., to conform to the NEP), 14 (conflict between NEP and provisions of local plan or by-law), 23 (Regulations under the Act), and 24 (development permits and development control); *NEPDA* R.R.O. Regulation 828 section 3 ("Zoning by-laws and the Minister's orders made under section 47 of the *Planning Act* have no effect in the area of Development Control designated under Regulation 826, R.R.O., 1990."); the NEP Part 1.1.1 (more restrictive policies in municipal official plans, secondary plans and by-laws); and PPS policy 4.9 ("Provincial Plans shall take precedence over policies in this Provincial Policy Statement to the extent of any conflict. Examples of these are plans created under the *Niagara Escarpment Planning and Development Act* and the *Oak Ridges Moraine Conservation Act, 2001*." A "provincial plan" is defined in the *Planning Act* to include "the Niagara Escarpment Plan established under section 3 of the *Niagara Escarpment Planning and Development Act*").

Further, the Niagara Escarpment is a landform that crosses many municipal boundaries. The prime directive of the *NEPDA* and the NEP is to protect the Niagara Escarpment and not to prefer the interests of individual municipalities.

I have already found that the NEP amendment application does not meet the Purpose of the *NEPDA* and the NEP, and most of their general Objectives. Therefore, as the SCOP and TOP incorporate the NEP policies, and in view of sections 13 and 14 of the *NEPDA* requiring that municipal development, by-laws and local/official plans not conflict with the NEP, I find that the NEP amendment application does not meet this Objective.

Regarding the Road Settlement Agreements, they are contractual matters that are conditional upon the approval of the various applications for the proposed quarry. The following is a summary of my understanding of my colleagues' findings as to the need for official plan amendments as the result of the Road Settlement Agreements:

- a SCOP amendment is not required for Simcoe County to download County Road 91 to the Township of Clearview;

- a TCOP amendment is required for the Township of Clearview to accept the downloading of County Road 91 from Simcoe County;
- a TCOP amendment is required for the public works on County Road 91;
- a TCOP amendment is not required for the closing of County Road 91, i.e., its transfer to the Applicant; and
- a TCOP is not required for the public works on Clearview Side Road 26/27.

I agree with my colleagues' findings that TCOP amendments are required for the Township to accept the downloading of County Road 91, and to undertake public works on Road 91 after the downloading, but not for the public works on Side Road 26/27.

I disagree with their findings that a SCOP amendment is not required to download County Road 91 from the County to the Township, and a TCOP amendment is not required for the closing of a portion of County Road 91 by the Township.

I observe that the following reasons given by my colleagues, at page 93 of their decision, for requiring official plan amendments for some of the changes apply equally to the other changes (emphasis added):

> The downloading of Simcoe County Road 91 as proposed to the Township of Clearview would result in a clear change to the road classification network of the Township that needs to be reflected in its Official Plan. This action in the Joint Board's finding is not a technical change but is a fundamental change to the Township's road system and requires an amendment to the Township's Official Plan without which there would be no authority to undertake some of the public works in the manner contemplated by the Road Settlement Agreement.

In my view, the same logic applies at the County level such that there will also be "a clear change to the road classification network of the" County, as well as the Township.

Further, the closure of a portion of County Road 91 is as great a change to its status and function, if not a greater change, as changing its status from a County to a Township road. The closure of a road is not a minor typographical error, reconciliation of facts, or just a technical change; it is a very real change on the ground for the community, travellers and the public works department.

Therefore, I find that a SCOP amendment is required to download County Road 91 from the County to the Township, and a TCOP amendment is required for the closing of a portion of County Road 91 by the Township.

Regarding the submissions of the NEC and the CCC that the proposed quarry applications are premature because official plan amendments are required, I find that

they do not prevent a decision on the NEP amendment but would be required before the proposed quarry could proceed.

Regarding the NEC and CCC allegations that there has been a lack of municipal procedural fairness, and that the Road Settlement Agreements are not a "good deal" for the municipalities and their residents, those are matters for a different forum, or forums, and not for this Joint Board to decide. Those contentious matters do not prevent this Joint Board from making a decision on the NEP amendment application.

2. Whether the NEP amendment is justified.

This is the second branch of the NEP amendment test set out in Part 1.2.1. It states:

> the justification for a proposed amendment to the Niagara Escarpment Plan means the rationale for the amendment, and includes reasons, arguments or evidence in support of the change to the Plan proposed through the amendment.

The process is described in section 6.1 (2.1) of the *NEPDA.* It requires that:

> An application to the Commission by a person or public body requesting an amendment to the Plan shall include a statement of the justification for the amendment and shall be accompanied by research material, reports, plans and the like that were used in the preparation of the amendment.

The Applicant relies upon the evidence of Mr. Clarkson to submit that justification for the NEP amendment application includes consideration of the following factors:

- the locational attributes of the proposed expansion lands;
- the quantity/significance of the resource;
- the benefits of the uses of aggregate;
- the fact that the Applicant is a long-standing producer of unique quality aggregate to the Georgian Triangle market, the GTA market and beyond;
- the proposal satisfies all policy requirements; and
- the proposal minimizes social and environmental impacts.

The Applicant also cross-examined Ms. Pounder to demonstrate that the following additional factors, referred to in the NEC Staff Report on the pending Sutherland Keppel Quarry application, are part of the "justification" analysis:

- the need for high quality aggregate as a source of material for the Applicant to remain competitive;

- the need to maintain competition in providing stone to construct public sector projects;
- the fact that the "need" for the development of the resource at that location had been supported by local municipalities, employees and business associates of the Applicant; and
- the fact that the MNR had provided a comment to the NEC on the need for the proposed mineral extraction.

The Applicant submits that policy 2.5.2.1 of the PPS eliminates alternate sites and need as justification factors. It states:

> As much of the *mineral aggregate resources* as is realistically possible shall be made available as close to markets as possible.
>
> Demonstration of need for *mineral aggregate resources*, including any type of supply/demand analysis, shall not be required, notwithstanding the availability, designation or licensing for extraction of *mineral aggregate resources* locally or elsewhere.

The Applicant submits that the above PPS policy applies to all lands within the NEP Area, as it does not conflict with the NEP because the NEP is either consistent with, or silent on, this policy.

In further support of the argument that it does not have to demonstrate "need" and that there are no alternative sites, the Applicant relies on the "Protocol for Ministry of Natural Resources (MNR) Responses to Niagara Escarpment Plan (NEP) Amendment Applications Circulated by the Niagara Escarpment Commission (NEC) to Create or Expand Mineral Aggregate Operations: Final Draft" (the "Draft Protocol"). Although it is a Draft Protocol, the Applicant submits that both the NEC and the MNR consider it to be in effect. Mr. Clarkson testified that he was directed by the MNR to "use the final draft version as approved by the NEC". The Draft Protocol states (emphasis in the original):

> these 3 PPS policies [including the no demonstration of need clause] **are not in conflict with, and are consistent with Section 1.5 of the NEP** which has a specific objective to provide for areas where new pits and quarries may be established...This is consistent with government policy and decisions since the inception of the NEP that mineral resource extraction may be permitted by the Niagara Escarpment Plan...In turn, this is consistent with the overall provincial policy that aggregate resources are "needed" and that individual applicants do not need to demonstrate "need" for any specific application.

The Applicant also refers to a letter from the MNR to the NEC, dated November 17, 2006, on the matter of need. The letter provides (emphasis added):

> All planning authorities shall be consistent with the Provincial Policy Statement issued under the Planning Act in their decisions. The existing quarry located in Pt Lot 24, Concession 12, Clearview Township contributes to the supply of materials to meet both public and private construction needs. However, the materials in the existing quarry are nearing depletion. The application to create a new quarry ensures the continued availability of high quality and quantity aggregate to meet the forecasted demand for public need including road maintenance, construction and special projects. The proposed use is consistent with the PPS policies for mineral aggregates and in particular will contribute to the achievement of policy 2.5.2.1 to supply aggregate needs in Grey and Simcoe Counties as close to market as possible.

The Applicant argues that Ms. Pounder, on cross-examination, acknowledged that "need" for aggregates, as described in policy 2.5.2.1 of the PPS, does not have to be established by the Applicant in this case.

The Applicant submits that a consideration of "alternate sites" and "need" are the same thing, and that the second paragraph of policy 2.5.2.1 of the PPS explicitly lists the "availability" of alternate sites as a component of the "demonstration of need". The Applicant, and my colleagues, rely upon the ruling of the Joint Board in *Dufferin Aggregates, supra,* in rejecting consideration of alternate locations as part of "justification". The Joint Board in that case found: "to require a study whether the existence of alternate supplies of aggregate outside the NEP area are available, would be a *de facto* prohibition on large pits or quarries."

The NEC submits that the justification test should not be interpreted narrowly, and that the justification analysis of Mr. Clarkson is flawed, because:

- it focuses on the aggregate resource at the site and not its natural heritage, hydrogeology, and landscape character;
- it measures the public interest against whether the proposed development is a good fit for the Applicant's business plan;
- the cumulative impacts of the proposed quarry in relation to the existing quarry and the proposed MAQ Highland quarry, immediately to the west of the site, have not been adequately considered (including cumulative impacts in the realm of landscape architecture; hydrology/hydrogeology/karst; natural heritage; traffic; tourism);
- the proposed quarry cannot be considered an "interim" land use because it permanently changes the landscape; and
- the aggregate on-site is not a "provincially significant resource". It has no special designation in the NEP, the SCOP or the TCOP.

The NEC argues that the PPS addresses the "need" and supply/demand status of aggregate resources at the provincial level. The NEC contrasts this with the NEP Area which has been identified as a special area of provincial interest, where the justification requirement for an NEP amendment to designate a new Mineral Resource Extraction Area within the NEP Area requires weighing the availability of alternate sites outside of the NEP Area. The NEC submits that this is integral to the analysis of whether it is in the public interest to site the proposed quarry within the NEP Area.

The NEC submits that evidence of nearby sites outside of the NEP Area, where significant quantities of equivalent, high quality Amabel dolostone aggregate resource are available, is relevant in the evaluation of "justification". The NEC argues that three such sites are: the licenced, but not yet operating Osprey quarry owned by Walker, the proposed MAQ Highland quarry across the road to the west, and the proposed Highland Melancthon quarry to the south.

The NEC points to the following passage from the Draft Protocol regarding the public interest, alternate sites, and need (emphasis added):

> *{"Note: MNR should also comment on to the degree possible or provide information, if any is available, to the NEC related to the following:}*
>
> *(a) the availability of the resource and product(s) from other sites from both within and outside the NEP within the market/demand area to meet the current and forecasted aggregate resource demand of the market area (to be specific and tailored to the application using available information).*
>
> *(b) The range of products (quality and quantity) from the proposed operation that contribute to the current and forecasted aggregate resource demands of the market/demand area (to be specific and tailored to the application using available information).*
>
> *(c) <u>the public interest for locating the proposed aggregate use within the Niagara Escarpment Plan considering available aggregate resources and alternatives to satisfy the demand for the resource in the market area. This information should also include reasons for the suitability of the proposed site using available information.</u>*
>
> *{Note: MNR may have relevant studies/reports/information on site characteristics, mineral resource inventory, natural heritage features and areas, licensed areas, current supply, forecasted demand, etc., that is available (not subject to FIPPA confidentiality) and this information should be provided, or offered, as part of the analysis for consideration by the NEC.}*

The Applicant argues that the above extract from the Draft Protocol is not a policy interpretation agreed upon by NEC and MNR, but simply sample text that may be provided by the MNR to the NEC when providing comments. The Applicant says the relevant text of the Draft Protocol is:

> while any available and relevant information on "need" related to this application may be considered in assessing the application, MNR in implementing Section 2.5.2.1 will not request that the applicant supply such information referred to in Section 2.5.2.1 and, in being consistent with the PPS, MNR considers that the "need" for these aggregate resources has been demonstrated for this proposal.

The Applicant submits that the above passage means that while a proponent may wish to bring forward evidence of "need" for consideration, there is no obligation to do so.

The NEC argues that the Draft Protocol is only a draft, it has lapsed, and it cites the "NEC Plan Amendment Guidelines" (the "Guidelines"), thereby acknowledging that they are in full force. The NEC submits that the Guidelines are of greater relevance to this matter than the Draft Protocol. The Guidelines were adopted by the NEC on October 19, 2005. The general "Tests for Justification" in the Guidelines that apply to all NEP amendments require:

> That the proposed amendment is in the public interest and there is a need to accommodate the proposed use within the Plan given the availability of alternatives both within and outside the NEP, within the market area where the proposed use may be located.

Specifically, regarding NEP amendments for mineral resource extraction, the NEC notes that the Guidelines provide:

> All proposed aggregate resource amendments are required, as part of justification, to address the public interest served in locating the proposed aggregate use within the area of the Niagara Escarpment Plan.

The Guidelines also recognize that the provisions of the NEP shall take precedence over the policies of the PPS to the extent of any conflict (policy 4.9 of the PPS), and the provisions of the PPS are only a minimum standard (policy 4.6 of the PPS). The Applicant and the NEC disagree on whether the Guidelines pre-date, or post-date, the PPS (2005).

The NEC argues that the justification analysis in the *Dufferin Aggregates* decision is a restrictive interpretation that should not be applied because it is contrary to a broad and liberal interpretation of the purpose and objectives of the *NEPDA* and the NEP. (See: *Legislation Act, 2006*, S.O. 2006, s. 64(1).)

Findings

There is no dispute that the Applicant has the onus of proving that the NEP amendment is justified. The "justification" requirement in the NEP and in the *NEPDA* (section 6.1(2.1)) for a NEP amendment underscore that the NEP Area is under development control and that an amendment, like a development permit itself, is not as of right.

Regarding the justification factors identified by the Parties, listed above, it is important to remember that this branch of the test is to determine whether the proposed amendment to the NEP is justified. In this case, the proposed amendment is to change the designation of a specific area to Mineral Resource Extraction.

In the context of the NEP alone, clearly it is relevant to ask on an NEP amendment application whether the proposed development that will be enabled by the amendment is justified in a specific location in the NEP Area. After all, the purpose of development control under the NEP is to ensure development is compatible with the natural environment of the Niagara Escarpment and, specifically regarding a new Mineral Resource Extraction Area, that the change in designation in a specific location can be accommodated.

While I agree with the submission of the NEC that the Applicant focuses upon the aggregate resource rather than the natural environment of the Niagara Escarpment and the broader public interest, I find that all of the factors require consideration, their respective weight depending upon the circumstances of each case.

The Parties disagree on whether "need" and "alternate sites" are among the "justification" factors. My colleagues accept the argument of the Applicant that they are not factors that have to be considered on an NEP amendment application. They agree with the Applicant that it has the option to bring forward evidence on need and alternate sites, but by virtue of policy 2.5.2.1 of the PPS it does not have to do so, and it cannot be penalized, in terms of meeting the NEP amendment test, if it fails to do so.

The Applicant and my colleagues particularly rely on the fact that "need" and "alternate sites" are not specifically listed as *NEPDA* and NEP justification factors. However, neither are most of the factors that the Applicant submits are relevant.

I find that it is not necessary for the NEP to specifically use the words "need" or "alternate sites" for them to be factors for consideration in the justification requirement. I find that a contextual interpretation of the justification branch of the NEP amendment test requires consideration of "need" and "alternate sites".

These findings put the NEP in conflict with policy 2.5.2.1 of the PPS, which says that demonstration of need for mineral aggregate resources shall not be required. Under policy 4.9 of the PPS, the provisions of the NEP prevail in the event of a conflict. Therefore, I find that in the NEP Area, policy 2.5.2.1 of the PPS does not apply because it conflicts with the NEP. I add, the fact that the PPS specifically excludes consideration of "need" and "alternate sites" in regards to development proposals made in the ordinary course is an indication that when those factors are not specifically excluded, which is

the case in the NEP, they should be considered. Further, in a protected area, such as the NEP Area, there is even greater reason for those factors to be considered.

The Applicant and the NEC rely upon the Draft Protocol and the Guidelines to buttress their respective arguments. While the Draft Protocol and Guidelines are informative, they are not authorities binding on this Joint Board and cannot be accepted as conclusive on matters that the Joint Board must itself decide.

Regarding the *Dufferin Aggregates* decision, in which the Joint Board commented that considering alternate sites outside of the NEP Area "would be a *de facto* prohibition on large pits or quarries" in the NEP Area, I believe that this is an overstatement of the weight to be given to one factor, i.e., alternate sites, in the analysis. The NEC does not submit that need and alternate sites are the only factors to be considered on a NEP amendment. They may be important factors, but their weight will depend upon the circumstances of each case. Therefore, I find that considering need and alternate sites is not a *de facto* prohibition on large quarries in the NEP Area.

Although the Joint Board may consider need and alternate sites as justification factor(s), an applicant still has the option to decide whether to provide evidence on those factors, presumably having assessed the strengths of its case and whether these factors, and any other factors for that matter, are relevant in the circumstances. Where an applicant elects not to do so, that does not preclude another party from addressing the issue.

Whether or not my finding that "need" and "alternate sites" are relevant justification factors is correct, in my view the Applicant in this case <u>does rely</u> on evidence and submissions regarding need, thereby waiving the PPS shield, if there is one. As already noted, the Applicant cross-examined Ms. Pounder to obtain her admissions that the NEP amendment application meets various aspects of the "need" requirement, i.e., the need for high quality aggregate, the need to maintain competition, and the need for the development of the resource at that location as supported by local municipalities.

In addition, the Applicant put the MNR letter dated November 17, 2006 in evidence, and my colleagues make the specific finding, at page 20 of their decision, that the letter (emphasis added) "confirmed that there is a <u>need</u> for the aggregate as had been their practice with the NEC in the past and its staff advised that in their opinion the requirements of section 2.5.2.1 of the PPS were met." With respect, it is implicit in this finding that the PPS "need" shield, if it exists, has been waived by the Applicant. The letter put in evidence by the Applicant, and the finding of my colleagues, make redundant the subsequent conclusions of my colleagues, at page 20 of their decision, that "there is no specific policy in the NEP that would be in conflict to override Section

2.5.2.1 of the PPS", and "Section 2.5.2.1 of the PPS applies as there is no specific or more rigorous policy in the NEP that would be in conflict with this policy of the PPS".

The Applicant cannot both rely upon some evidence of "need", thereby waiving the PPS policy, and argue that "need" is not a justification factor because of that same PPS policy. Having raised the matter, the Applicant does not provide convincing evidence to demonstrate that there is "need" for the aggregate resource to come from this site in the NEP Area, nor does the Applicant demonstrate that alternate sites are not reasonably available. On the other hand, the NEC provided convincing evidence that there is no special need for the aggregate from this site and there are nearby alternate sites for this aggregate resource that are not inside the NEP Area.

Having found that need and alternate sites are factors to be considered on the justification branch of the test, and, in the alternative, that the Applicant has waived the PPS shield, if it exists, I would weigh these factors with all of the other relevant factors. The factors listed above are not intended to be exhaustive and the ones that are relevant will depend upon the circumstances of each case.

I find that the NEP amendment application does not satisfy the justification branch of the amendment test, for the following reasons:

- when the focus is upon the natural heritage, hydrogeology, and landscape character and public interest concerns of the site, rather than only the aggregate resource, the proposed NEP amendment is not justified in this location as it is the hub of a system of features and functions that together represent a unique ecologic area in the NEP Area (with the exception of the central and easterly fields);
- there will be cumulative impacts of the proposed quarry and the existing quarry (including impacts on natural heritage, hydrology/hydrogeology/karst, and the open landscape character) that do not satisfy the *NEPDA* and NEP amendment test. Of lesser weight, because of the uncertainty of its proceeding, there are potential cumulative impacts to the features and functions of the Niagara Escarpment and land in its vicinity in this area from the proposed MAQ quarry immediately to the west of the site;
- the Applicant has not demonstrated that locating the proposed quarry on this site in the NEP Area is in the broader public interest, and meets the Purpose of the *NEPDA* and the NEP, as opposed to just its own business interests;
- the Applicant has not demonstrated that there are no alternate sites for this aggregate resource. The licenced Osprey quarry, and the proposed MAQ and

Melancthon quarries, are possible alternatives that are outside of the NEP Area. At the very least, these are indications that the aggregate resource is available from nearby sites that are not in the protected NEP Area. Also, there was evidence that the Applicant is not the only producer of this type of aggregate in the Georgian Triangle;

- the aggregate resource on the site has no special resource designation in the NEP, the PPS, the SCOP, or the TCOP. The SCOP does not identify the site on its "High Potential Mineral Aggregates Schedule";
- the Applicant has not demonstrated that there is a need to extract the aggregate resource from this site in the NEP Area;
- the NEP amendment application does not satisfy all policy requirements; and
- the resulting development would not minimize environmental impacts.

Even if the "need" related reasons above should be excluded from the analysis, then I conclude that the remaining reasons are compelling on their own, and also lead to the conclusion that justification has not been demonstrated.

3. Whether the proposed amendment:

(a) and the expected impacts resulting from the proposed amendment, do not adversely affect the purpose and objectives of the *NEPDA*;

(b) is consistent with the purpose and objectives of the *NEPDA* and the NEP; and

(c) is consistent with other relevant Provincial policies.

The first two requirements of the third branch of the NEP amendment test also refer to the Purpose and Objectives of the *NEPDA* and the NEP. The first branch of the test requires that the proposed amendment meet the Purpose and Objectives of the *NEPDA* and the NEP. For the reasons given regarding the first branch of the test, I find that the proposed amendment would adversely affect the Purpose and Objectives of the *NEPDA*, and would not be consistent with the Purpose and Objectives of the *NEPDA* and the NEP, contrary to sub-paragraphs 3(a) and (b) above. Therefore, these requirements will not be discussed further here.

The focus of the discussion in this part of the reasons is whether the proposed NEP amendment is consistent with other relevant Provincial policies. The main ones

addressed by the Parties are the Greenbelt Plan and the PPS. As set out below, I find that the proposed NEP amendment is not consistent with these two provincial policies.

(c) Whether the proposed amendment is consistent with other relevant Provincial policies

Greenbelt Plan

The Greenbelt Plan includes lands within the NEP Area. Under section 2.2 of the Greenbelt Plan, the requirements of the NEP continue to apply to lands within the NEP Area, with the exception of section 3.3. The Greenbelt Plan encourages the maintenance and expansion of publicly accessible parkland, open space, and trails, including the Bruce Trail. Section 3.3.2.2 takes a coordinated approach to encourage and develop trails, and to strategically direct more intensive activities away from sensitive landscapes.

The Applicant, on the basis of Mr. Clarkson's opinion, submits that the applications "conform with" the Greenbelt Plan.

The NEC, on the basis of Ms. Pounder's opinion, concluded that the applications are inconsistent with section 3.3 of the Greenbelt Plan because:

- of the uncertainties related to the continued availability of parking for the Bruce Trail on Side road 26/27;
- the delay with respect to dedication of portions of lands that are to be conveyed to the Bruce Trail Conservancy;
- the proposed quarry operation will be closer to sensitive landscapes of the Niagara Escarpment; and
- the applications fail to consider the management plan for the Nottawasaga Lookout Provincial Nature Reserve (section 3.3.3.4).

Finding

On balance, I find that the NEP amendment application would not strategically direct more intensive activities (in this case the quarry operation) away from the sensitive landscape of the many features and functions of the natural environment in this unique ecologic area, and, therefore, is not consistent with the policy of section 3.3.2.2 of the Greenbelt Plan.

Provincial Policy Statement (2005)

The PPS is issued under section 3 of the *Planning Act*, and provides policy direction on matters of provincial interest related to land use planning and development. The purpose of the PPS is to provide for appropriate development while protecting resources of provincial interest, public health and safety, and the quality of the natural environment. As already noted, the PPS specifically defers to the development control approach of the *NEPDA* and the NEP if there is a conflict. Policy 4.9 of the PPS provides: "Provincial plans shall take precedence over policies in this Provincial Policy Statement to the extent of any conflict. Examples of these are plans created under the *Niagara Escarpment Planning and Development Act* and the *Oak Ridges Moraine Conservation Act, 2001*."

Of particular relevance to these proceedings are the PPS policies that deal with Natural Heritage (2.1), Water (2.2), Agriculture (2.3), and Mineral Aggregate Resources (2.5). It is these policies, and in particular the Natural Heritage policies, that my colleagues interpret as effectively having priority over the NEP policies, with the result that they do not uniformly apply the *NEPDA* and NEP amendment and development permit tests to the proposed development.

The PPS Natural Heritage policies are pivotal to my colleagues' decision on the proposed development. The following is a brief summary of those policies:

- Policy 2.1.3 of the PPS prohibits development and site alteration in significant habitat of endangered and threatened species, significant wetlands in the part of the province, which includes the subject area;
- under policy 2.1.4 of the PPS, development and site alteration may be permitted in areas containing specified natural heritage features provided it is demonstrated that there will be no negative impact on the natural heritage features or their ecological functions; and
- the term "negative impact" for the natural heritage features on and in proximity to the site is defined as, "in regard to natural heritage features and areas, degradation that threatens the health and integrity of the natural features or ecological functions for which an area is identified due to single, multiple or successive development or site alteration activities".

I agree with, and adopt, the NEC's framing of the PPS Natural Heritage issues, as set out below:

> From a natural heritage system perspective, therefore, the PPS raises two separate but equally important questions, namely:
>
> a) does the site, and or its adjacent lands, contain significant natural features and, if so, have they been identified appropriately; and
>
> b) has Walker's demonstrated to the satisfaction of the Board that their proposed development will not occur in the areas identified in s.2.1.3 and 2.1.4 of the PPS (referred to above), and, otherwise, will have no negative impacts on the remaining natural features or their ecological functions.
>
> In other words, from a strictly ecological point of view, the question becomes: has Walker's demonstrated that its proposed development will not negatively impact the significant features of the natural heritage system within and adjacent to the proposed quarry operation? This question must be asked and answered in connection with all stages of the undertaking from site preparation, through all three phases of extraction, to final rehabilitation.

Finding

As I have already found that the NEP amendment application does not satisfy the first and second branches of the *NEPDA* and NEP amendment test, then even if it is consistent with the PPS policies, it cannot succeed.

In answer to the question, as posed by the NEC above, and for the reasons contained herein, I find that there are significant natural heritage features on, and adjacent to, the site of the proposed quarry and that the Applicant has not demonstrated that the NEP amendment application will result in a proposed development that will not negatively impact the significant features of the natural heritage system within and adjacent to the proposed quarry operation. Therefore, I find that the NEP amendment application is not consistent with the Natural Heritage policies of the PPS.

B. NEP Part 1.5 Escarpment Rural Area Objectives and Development Policies for Mineral Extraction for evaluating NEP amendment applications

The preceding discussion is about whether the NEP amendment application satisfies the general amendment test in Part 1.2.1 of the NEP. The provisions of the general test apply to all NEP amendment applications. When an NEP amendment application to change the designation of land in the Escarpment Rural Area to Mineral Resource

Extraction Area is being evaluated, in addition to satisfying the general amendment test, consideration must be given to the matters listed in the Escarpment Rural Area designation Part 1.5 Development Policies for Mineral Extraction.

As already noted, it is significant that the mining of aggregate resources is not referred to in the Purpose and general Objectives of the *NEPDA* and the NEP, as are such economic activities as agriculture and forestry, and recreation. The Purpose and Objectives make it clear that the primary goal of the *NEPDA* and the NEP is protection of the natural environment of the Niagara Escarpment and land in its vicinity. A new aggregate operation of this size is an exception to this goal.

NEP Part 1.5 Escarpment Rural Area objectives

The aggregate operation exception is set out in Escarpment Rural Area objective 5 (the lower case will be used to distinguish it from the general Objectives) as: “To provide for the designation of new Mineral Resource Extraction Areas which can be accommodated by an amendment to the Niagara Escarpment Plan.”

The Applicant submits that only this objective, of the five Escarpment Rural Area objectives in Part 1.5 of the NEP, needs to be met in this case. The Applicant argues, and it was Mr. Clarkson’s opinion, that the policies of the NEP must be interpreted in such a way as to give meaning to Escarpment Rural Area objective 5, and that if the NEC’s interpretation of the NEP provisions is correct, then no mineral extraction operation could ever be approved in the Niagara Escarpment. It was also Mr. Clarkson’s opinion that the applications are consistent with all five of the Escarpment Rural Area objectives, if that is required.

The NEC submits that the proposed NEP amendment application must be consistent with all of the Escarpment Rural Area objectives. It was Ms. Pounder’s evidence that this would be consistent with NEC practice regarding redesignation applications, whether or not for mineral extraction. The NEC submits that the NEP is “an environmental conservation plan” and the NEP amendment application is inconsistent with the other four objectives of the Escarpment Rural Area designation. The NEC therefore argues that the Applicant has not demonstrated that a new Mineral Resource Extraction Area "can be accommodated."

The CCC submits, on the basis of Mr. Usher’s opinion, that a redesignation to Mineral Resource Extraction Area must be consistent with Escarpment Rural Area objective 5, and should not seriously offend the other Escarpment Rural Area objectives. The CCC further submits that Escarpment Rural Area objective 5 does not permit aggregate

extraction “as-of-right” if minimum tests are met, rather, aggregate extraction must be determined to be the best use (i.e., most appropriate) in the context of all other NEP policies.

Findings

I agree with the Applicant’s submission that, by its very nature, a quarry proposal would be unlikely to satisfy the Escarpment Rural Area objectives, other than objective 5. As already noted, the Mineral Resource Extraction Area designation is an exception to the main thrust of the *NEPDA* and the NEP, which is to protect the natural environment.

However, I do not agree with the conclusion of the Applicant and my colleagues that accepting the NEC’s position would mean that there would never be new mineral extraction approved in the NEP Area. I do not think that this accurately characterizes the NEC position and is not borne out by the many NEC decisions that have approved quarries. For example, the Applicant and my colleagues rely upon the recent NEC approval of the Keppel Creek Quarry in the County of Grey, in a different location in the NEP Area, which approval has been appealed (see *Harold Sutherland Construction Ltd. v. NEC*, NEHO Case Nos. 11-145, 11-168-171). As I understand it, the NEC is not arguing that there can never be a quarry in the Escarpment Rural Area, rather, it argues that if a quarry is approved in this sensitive and unique site in the NEP Area, then a quarry could be approved anywhere in the Escarpment Rural Area designation. In my view, and for the many reasons given in this decision, the NEC has a legitimate “floodgates” concern.

Symptomatic of this concern is the finding of my colleagues, at page 10 of their decision, that Escarpment Rural Area objective 5 “is an expression of the importance of providing for new Mineral Resource Extraction Areas within the NEP area where appropriate.” I have already indicated that I strongly disagree with this finding and that, in my view, the designation of new mineral extraction areas is <u>not</u> elevated in importance in the Escarpment Rural Area, as compared to areas outside the NEP Area. In the Escarpment Rural Area designation, a new Mineral Resource Extraction Area can only be designated if it can be “<u>accommodated</u> by an amendment to the Niagara Escarpment Plan” (emphasis added). Again, the Purpose and general Objectives of the *NEPDA* and the NEP do not even refer to “mineral extraction”.

For the reasons given in the preceding discussion and findings on the *NEPDA* and NEP amendment test, I find that the NEP amendment application for the proposed quarry cannot be “accommodated” under Escarpment Rural Area objective 5.

NEP Part 1.5 Development Policies for Mineral Extraction

The Applicant submits that the NEP Part 1.5 Development Policies for Mineral Extraction, linked with the Development Criteria for Mineral Resources (Part 2.11), cover the full range of the issues relevant to the Purpose and Objectives of the *NEPDA* and NEP to be considered in the context of a mineral extraction use. Mr. Clarkson reviewed all of these policies in his witness statement and his oral testimony, and concluded that they have been satisfied.

The NEC submits, and my colleagues find, that the onus is on the Applicant to satisfy all relevant objectives, policies and development criteria, not only the policies for Mineral Extraction in Part 1.5 and the Development Criteria in Part 2.11. I agree. Part 2.11 is discussed further below under Issue #2 in regards to the development permit application. Part 2.11 has an objective to minimize impacts from development, and it specifically requires the protection of sensitive ecological and geological areas, and surface and groundwater resources.

The Part 1.5 Development Policies for Mineral Extraction are similar to, but not the same as, the provisions of the Objectives of the *NEPDA* and the NEP. For instance, Part 1.5.1(a) sets out protection of the natural environment as one of the matters to be considered in evaluating an application for an NEP amendment to redesignate Escarpment Rural Area to Mineral Resource Extraction Area. This does not overshadow the Purpose of the *NEPDA* and the NEP, and does not create a different standard. The matters listed in Part 1.5.1 supplement the Purpose and Objectives (numbers 1, 2, 4, 5, and 7 in particular).

1. (a) Protection of the natural and cultural environment.

The terms “protect” and “natural environment” (broadly defined in the NEP as “the air, land and water or any combination or part thereof, of the Province of Ontario”), have been discussed above.

(i) Protection of groundwater and surface water systems on a watershed basis

The Applicant relates this provision back to NEP general Objective 2, and argues that the NEC’s interpretation of that Objective is inconsistent with this provision because the latter directs that groundwater and surface water systems are to be protected on a “watershed basis”. The Applicant asserts that the NEC’s objection to the removal of the SW2 spring is too narrow an approach as it does not look at the effect on the watershed, which the Applicant asserts is negligible. The Applicant further argues that

all of the relevant policies in the AMP are now included on the *ARA* Site Plans and there is no uncertainty in the Hydrogeological or the Natural Environment *ARA* Site Plan Notes.

The NEC submits that the Applicant has not demonstrated that the groundwater and surface water systems will be protected on a watershed basis due to the uncertain evidence of the groundwater model, the uncertainty of the AMP provisions and their questionable enforceability.

Findings

The NEP defines "Watershed Management" as "the analysis, protection, development, operation and maintenance of the land, vegetation, and water resources of a drainage basin" (emphasis added).

I have already found that the NEP amendment application does not meet general Objective 2. Although this provision overlaps with general Objective 2, and with sub-paragraph c) in this Part (discussed below), it deals with different features.

Whether the watershed will be protected on a watershed basis is a broader determination than whether general Objective 2 will be met. Of note, the proposed quarry will be in the middle of the watersheds of the Beaver River, the Pretty River and the Batteaux Creek. The Applicant must meet the high standard to ensure only such development occurs as is compatible with the natural environment of the Niagara Escarpment and land in its vicinity.

I refer to my earlier findings regarding general Objective 1 and the features and functions identified by the Applicant and the NEC as being within a unique ecologic area that includes natural water systems. I find that the Applicant has not shown that the NEP amendment application will ensure the protection of groundwater and surface water systems on a watershed basis.

(ii) Protection of habitat of endangered (regulated), endangered (not regulated), rare, special concern and threatened species

The Applicant submits that the proposed quarry is in accordance with this policy because it protects the habitat of the Butternut. Although the designation of the Butternut habitat would be changed to Mineral Resource Extraction Area, Site Plan General Note 21 provides that no development will occur in the habitat of the Butternut as long as the habitat is identified.

Regarding the endangered species, the Butternut, the NEC submits that the proposed NEP Amendment is inconsistent with this policy because:

- carving out a Butternut “near island” does not allow for adequate determination of the viability of the identified retainable trees;
- a near island habitat is not a long-term commitment to the protection of the Butternut habitat;
- the near island results in a negative impact to the significant habitat of the Butternut under the PPS; and
- Site Plan General Note 21 allows for conditional extraction and site alteration in the Butternut habitat.

Regarding the habitat of the special concern species, the AHTF Colony 1, the NEC submits, on the basis of the evidence of Ms. Grbinicek, Dr. Reznicuk and Mr. Sorenson, that the proposed buffers are inadequate for its protection.

Findings

The redesignation of the habitat of the endangered Butternut from Escarpment Rural Area to Mineral Resource Extraction area has been discussed above regarding general Objective 1. There I found that the redesignation does not protect the habitat of the Butternut within this unique ecologic area. Wildlife habitat generally is also discussed below regarding Development Criterion 2.8.

I find that redesignating the habitat of the Butternut as Mineral Extraction Area, and confining its habitat to an exposed unnatural cliff-like island with a causeway, first in a pit and then in a human-made lake, is better described as anticipating the demise of the Butternut colony than ensuring its protection, as the Applicant is required to demonstrate.

I further find, and agree with my colleagues, that the Applicant has not demonstrated that the proposed buffers will protect the habitat of Colony 1 of the AHTF, a species of special concern.

(iii) Protection of adjacent Escarpment Natural and Escarpment Protection Areas

The Applicant submits that the proposal is consistent with this policy because adjacent Escarpment Natural (Rob Roy PSW Unit 6) and Escarpment Protection Areas (the ANSI

Wetlands, SW9 sinking stream, and Escarpment springs) will be protected. The Applicant argues that they will not be removed and mitigation measures will be taken.

The NEC submits, based on Ms. Pounder's opinion and Ms. Grbinicek's evidence, that the NEP amendment application is inconsistent with this policy because:

- two hectares of interior forest within the ANSI will be lost;
- the 30 meter buffers to the wetlands in the Escarpment Natural Area and the 10 meter buffer to the ANSI have not been demonstrated to be adequate; and
- it has not been demonstrated that the impacts of the proposed quarry (both during operations and afterwards) on the SW2 system that supports the Rob Roy 6 wetland will have no negative impacts on the wetland feature and functions.

The findings on this and the immediately following policies are combined in the next section.

(iv) Protection of adjacent Rural Area natural features

The Applicant submits that the proposal is consistent with this policy because adjacent Rural Area natural features (Rob Roy PSW Unit 6) will be protected. The Applicant argues that they will not be removed and mitigation measures will be taken.

The NEC submits that the NEP amendment application is inconsistent with this policy because:

- the evidence of Ms. Grbinicek, adopted in the opinion of Ms. Pounder, is that the application does not effectively protect the features and functions of the Rob Roy 2 wetland (currently designated ERA); and
- the Applicant has not demonstrated that its proposal to reforest areas of largely agricultural lands to the north-east of the proposed quarry, areas designated ERA, is a positive addition to the ecology of the area. (Also, see the "net gain" discussion above.)

Findings on the above two policies

The adjacent Escarpment Natural, Protection, and Rural Areas harbour many of the features, functions, and systems that collectively make the site of the proposed quarry, and land in its vicinity, a unique ecologic area (with the exception of the central and easterly fields). I refer to the above discussions, and repeat the findings, regarding general Objectives 1, 2 and 3.

Regarding the NEC submission on the reforestation in the adjacent Escarpment Rural Area, I refer to the above “net gain” discussion and finding.

I observe that just because some features, functions and systems on the site and in its vicinity are not removed, that does not demonstrate that they will be protected. The submissions of the NEC list a number of reasons why this will not be the case. I find, referring to the Purpose, the Applicant has not met the standard of ensuring that the NEP amendment application for the proposed quarry will protect adjacent Escarpment Natural, Protection, and Rural Areas.

(v) Protection of existing and optimum routes of the Bruce Trail

The Applicant argues that the optimum route of the Bruce Trail south of County Road 91 is not on its lands and, therefore, there will be no impact on the location or the establishment of the optimum route of the Bruce Trail as a result of the proposed quarry.

The NEC submits that the NEP amendment application is inconsistent with this criterion because:

- the development of the optimum route of the Bruce Trail will likely be delayed until the existing quarry is fully rehabilitated – which could take eight years (to accommodate the processing of material from the proposed quarry until 18 hectares of space is cleared at the proposed quarry site), or for an even longer, as yet underdetermined period of time (60 years plus), if the existing and proposed *ARA* licences are amalgamated;
- the development and widening of Side Road 26/27 could remove parking spots for Bruce Trail users, the replacement of which is not assured in light of the constraints associated with that road; and
- although the proposed quarry would not be seen from the existing route of the Bruce Trail, a witness indicated that Bruce Trail users might be impacted by quarry noise.

Findings

I refer to my findings above regarding general Objective 6, and agree with the finding of my colleagues that the existing and optimum route of the Bruce Trail would still be protected by the development proposal.

(vi) Protection of provincially significant wetlands

The Applicant submits that:

- there are no provincially significant wetlands within the proposed licence area;
- the proposed licence area is adjacent to the Rob Roy provincially significant wetland complex, as well as the two unevaluated wetlands, referred to as ANSI "A" and "B", which are not provincially significant wetlands, but were treated as such for the purposes of Stantec's analysis; and
- there will be wetland enhancement as part of the proposed quarry: the relocation of the Millar Pond will create improved amphibian habitat in the adjacent regional ANSI, and wetlands will be created in the northwest portion of the extraction area as part of rehabilitation.

The NEC submits that the application is inconsistent with this policy, based upon the opinion of Ms. Pounder and the evidence of Mr. Neville, Mr. Ruland, Ms. Grbinicek and Mr. Sorensen, that there is potential for negative impacts to both the Rob Roy 2 and Rob Roy 6 wetlands.

Finding

My colleagues find that the pumping of quarry water into Rob Roy 2, and the ANSI "A" and "B" wetlands, is appropriate mitigation. They state, at page 46 of their decision:

> this mitigation measure is well understood, not complicated and can be applied if required to maintain the ecological feature and functions of this wetland, and further that the triggers and monitoring frequencies set out in the Site Plan Notes and draft AMP are appropriate.

However, they also find it necessary to direct that a specific condition be included in the Site Plan that the design of these water control structures be prepared to the satisfaction of the MNR and MOE, in consultation with the GSCA and NVCA, prior to extraction commencing. Even if mitigation measures may be technically feasible, the Applicant must ensure that the proposed development is compatible with the natural environment and, under this policy, will protect provincially significant wetlands.

My colleagues also find that there can be adequate buffer areas, although the ones proposed by the Applicant are not adequate and should be increased.

As with my findings on Parts 1.5.1.a) i), iii), and iv), I refer to my earlier findings regarding Objective 1 and the features and functions identified by the Applicant and the NEC as being within a unique ecologic area that has overlapping natural systems,

including provincially significant wetlands. I find that the NEP amendment application will not ensure their protection.

(vii) Protection of provincially significant ANSIs

The NEC does not submit that any will be impacted.

(viii) Protection of significant cultural heritage features

The NEC does not submit that any will be impacted.

(b) Opportunities for achieving the Objectives of section 8 of the *NEPDA* through the final rehabilitation of the site.

As previously discussed, the Applicant bases its “net gain” arguments on this provision, and also uses it to rationalize the destruction of the significant woodland on-site and the compensatory reforestation off-site. The Applicant describes its rehabilitation, mitigation, compensation, and net gain measures as a “package”. The Applicant’s reliance upon this policy is discussed above in relation to the Purpose, and general Objectives 1 and 2 of the *NEPDA* and the NEP.

The NEC submits that the NEP amendment application is inconsistent with this policy. The NEC observes that this policy relates to "final rehabilitation of the site" (emphasis added) and that the proposed reforestation outside of the *ARA* licence area to compensate for the loss of the significant woodland on the site does not satisfy the meaning of “rehabilitation” in the NEP.

“Rehabilitation” is defined in the NEP as (emphasis added):

> after extraction, to treat land so that the use or condition of the land is restored to its former use or condition, or is changed to another use or condition which is compatible with adjacent uses and the objectives and policies of the Niagara Escarpment Plan (e.g. restoration of land from which aggregate has been extracted).

Findings

As previously discussed, I do not agree with my colleagues’ finding that there is no meaningful distinction in this case between rehabilitation, mitigation and net gain.

I have already found that “net gain” is not valid in relation to the protection of the natural environment in the NEP Area in deciding upon the NEP amendment and development permit applications. A possible exception is the situation where land is added to the NEP Area that can be designated Escarpment Natural Area.

I further find that mitigation and rehabilitation do not have the same meaning in the NEP. They may overlap, but under the NEP, "rehabilitation" deals with the restoration of the land from which aggregate is extracted, whereas "mitigation" is a broader concept that can deal with the aggregate operation at all stages and can apply to both the extraction site and adjacent areas. I find that "rehabilitation", as the term is used in the NEP, means rehabilitation of the site of the aggregate extraction and not a location nearby. Therefore, I find that the final rehabilitation of the site (primarily as an unnatural lake) will make no meaningful contribution to the Objectives of section 8 of the *NEPDA*.

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

The Applicant submits that the quality and character of natural systems and water supplies, including fish habitat, will be maintained and enhanced.

The NEC argues that Ms. Grbinicek identified a complex natural system on this site, with numerous features and functions that overlap, which is also connected to off-site natural heritage features and functions. The NEC submits that the NEP amendment application would not maintain and enhance the natural system on-site because it seeks to remove significant features and functions, such as the significant woodland, that make up that natural system. The NEC further submits that this natural system and its features and functions cannot simply be replaced in another location in the NEP Area. In the alternative, the NEC submits that the Applicant has not demonstrated that the features and functions of this natural system can, and will, be effectively "replaced".

The NEC repeats its submissions as to the meaning of "maintenance and enhancement", previously discussed above. The CCC similarly relies on Mr. Usher's opinion to submit that the NEP amendment application for the proposed quarry does not satisfy this policy because "maintenance and enhancement" mean actively preserving what is there, and, additionally, doing something to make it better.

Findings

My colleagues' finding on this policy, at page 14 of their decision, is repeated here as follows (emphasis added):

> The Joint Board notes that policy 1(c) in the NEP's Development Policies for Mineral Extraction requires the "maintenance and enhancement of the quality and character of natural systems, water supplies, …" (Exhibit 43, Book 1, Tab 3, p. 316). Similarly, as discussed above with regard to water resources and water supplies, the Board assigns no special significance or added level of protection through use of the terms "maintenance" and "enhancement". They are not defined terms in the

> NEP. Furthermore, even if there were some added significance to these terms, policy 1 (c) requires the maintenance and enhancement of the "quality and character" of natural systems. The Joint Board sees no prohibition through this policy against some minor or temporary change to natural systems which can be determined to be acceptable and where impacts can be appropriately mitigated. As noted above, in the Joint Board's opinion the more definitive tests with regard to natural systems are provided by the PPS.

As already discussed, I disagree with my colleagues and find that "maintenance and enhancement" are significant terms that implement the framework established by the Purpose of the *NEPDA* and the NEP. I do agree that there is no prohibition of minor or temporary changes to natural systems. However, there is nothing "minor or temporary" about the proposed development. The complete removal of features and functions such as a significant woodland, spring and portion of a stream are not "minor or temporary".

I refer back to the listing in the Overview, and the discussions of general Objectives 1 and 2, regarding features, functions, and systems, including natural systems and water supplies, that make the site of the proposed quarry and the land in its vicinity a unique ecologic area (the central and easterly fields excepted). In addition to the above findings regarding water features, I find that the NEP amendment application for the proposed development does not maintain and enhance the quality and character of natural systems and water supplies.

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

On the site, there are fields in the northwest corner, central, and easterly areas. The evidence is that these are not prime agricultural lands. The Applicant's witness, Mr. Clarkson, described the poor agricultural quality of the land. However, the NEC points out that he also agreed that this policy is not restricted to prime agricultural lands. The NEC argues that some of the proposed extraction area has productive soils, and portions are being farmed, but there will be no potential for rehabilitation for agricultural uses when the land is physically removed and becomes first a pit and then a lake.

The northwest field was the centre of a great deal of argument during the hearing regarding the destruction of Bobolink habitat. The Bobolink was listed as a threatened species under the *ESA, 2007* during the course of the hearing, just prior to this area of potential habitat being ploughed under at the direction of the Applicant. The Applicant says that it has continued agricultural use of the site during the quarry approval process in order to take advantage of Ontario's Farm Property Class Tax Rate Program. The Applicant also says that if the proposed development is not approved, then there is no

legal requirement to manage the northwest field so that it creates Bobolink habitat, and there is every expectation that the Applicant or any subsequent owner of the property would continue to use the field for agricultural uses.

Findings

"Agricultural Use" is defined in the NEP as:

> the land, building or structure used for the purpose of animal husbandry, horticulture, beekeeping, dairying, fallow, field crops, fruit farming, fur farming, market gardening, maple syrup production, pasturage, poultry keeping, mushroom farming or any other farming use and may include growing, raising, small-scale packing and storing of produce on the premises and other similar uses customarily carried out in the field of general agriculture.

General Objective 4 of the *NEPDA* and the NEP refers to "compatible farming or forestry" as a means to maintain and enhance the open landscape character of the Niagara Escarpment.

Part 1.5.1.d) supplements general Objective 4, but has a different thrust because it is directed at the activity of farming rather than its visual impact. Of note, the Applicant itself submits that the site is suitable for continuing agricultural uses and clearly there will be no potential for rehabilitation of the site for agricultural uses when the land is excavated and eventually becomes a lake. The only factors in the Applicant's favour regarding this policy are that it refers to the "capability of the land for agricultural uses" and this is not a prime agricultural area. Therefore, this policy does not require the "protection", "maintenance", or "enhancement" of the feature as an agricultural use, which is a lower standard than many other *NEPDA* and NEP provisions and policies. While I find that this policy alone does not support the NEP amendment application, I also find that it would not be a barrier to the possible extraction of aggregate limited to the central and easterly fields, as previously indicated.

2. Amendment applications must be accompanied by:…

(c) Information on the ultimate use of the site in conformity with the Escarpment Rural, Protection or Natural Area designations.

The Applicant's *NEPDA* and NEP amendment and development permit applications are vague about the ultimate use of the site. For example, it is not clear what the ultimate uses of the end-lake and privatised County Road 91 area will be, and how they will ultimately be designated as part of the overall scheme of the NEP Area. I find that the Applicant has not provided sufficient information in this regard.

Issue #2: Whether the NEP development permit for the proposed quarry should be approved.

If the *NEPDA* and NEP amendment application is not successful, then it is not necessary to consider the NEP development permit application. However, if the site, or a portion of the site, is redesignated to Mineral Resource Extraction Area, then it is necessary to determine whether the proposed development is in accordance with the NEP (see *NEPDA* section 25(4)) and because it:

A. is a Permitted Use in that designation under Part 1 of the NEP; and

B. complies with the Development Criteria in Part 2.

A. Permitted Use - NEP Part 1 Land Use Policies

In the NEP Part 1.5 Escarpment Rural Area, a new licenced quarry producing more than 20,000 tonnes annually is Permitted Use #21. The use is subject to an NEP amendment, the Part 1.9 policies of the Mineral Resource Extraction Area, and the Part 2.11 Development Criteria for Mineral Resources. As will be discussed in the next section, the Parties disagree as to whether additional development criteria apply, such as the General Development Criteria in Part 2.2.

The provisions of the NEP Part 1.9 – Mineral Resource Extraction Area are tied to there being an *ARA* licence. The sole criterion for this designation is that there is an existing licenced area, which is not the case here. The relevant Permitted Uses in this designation are: #3 “Mineral extraction operations licensed pursuant to the *ARA*”; and #9 “Accessory buildings and facilities normally associated with the mineral extraction operation….”

Objective 2 of the Mineral Resource Extraction Area designation is to “minimize the impact of mineral extraction operations on the Escarpment environment”.

The Mineral Resource Extraction Area designation has reasonably detailed “after uses” and “rehabilitation” policies that dispel the “net gain” approach discussed above regarding general Objective 1. For example, paragraph 5 of the “After Uses” provision in this designation provides (emphasis added):

> The site shall be rehabilitated in accordance with the objectives of the applicable redesignation of the Niagara Escarpment Plan and be compatible with and have minimal impact upon the surrounding natural and visual environment and existing uses.

This provision distinguishes between rehabilitation on the site, and off-site impacts. This is reinforced by the NEP definition of the term “rehabilitation” (set out above), which

requires the restoration of land “after extraction”. There would be absurd results if “rehabilitation” in the NEP Area were to include “net gain” or “compensation” off-site.

Finding

I have already found that the NEP amendment application does not succeed and, therefore, the proposed quarry cannot be a Permitted Use in the Escarpment Rural Area. Also, Permitted Use #21 is subject to Part 1.9 policies and I find that the development proposal does not satisfy the “After Uses” provision.

If the above findings are incorrect, then it must be determined if the Permitted Use satisfies the Part 2 Development Criteria.

B. Development Criteria - NEP Part 2

The Applicant submits that Escarpment Rural Area Permitted Use #21 directs that the NEP development permit application need only satisfy the matters listed in Development Criterion 2.11 relating to Mineral Resources because it does not say that quarries are permitted “subject to Part 2, including Part 2.11”. In the alternative, the Applicant submits that Mr. Clarkson concluded that all of the Development Criteria in Part 2 of the NEP have been satisfied.

The NEC position, based on the opinions of Ms. Pounder and Mr. Usher, is that all of the Development Criteria in Part 2 of the NEP apply to every NEP development permit application, except if the matter is clearly not relevant: for example, if the subject lands did not contain woodlands, then the development criteria related to woodlands would not need to be addressed. The NEC argues that this is supported by the following (emphasis added):

- the Escarpment Rural Area Permitted Uses specifically state: “Subject to Part 2, Development Criteria, the following uses may be permitted”;
- Permitted Use #21 does not indicate that Part 2.11 is the only applicable development criterion, and it does not remove the requirement under this heading that makes all Permitted Uses subject to the Part 2 Development Criteria. Ms. Pounder’s interpretation, and that the reference in Permitted Use #21 to Part 2.11 is merely for emphasis;
- the “Introduction” to the Part 2.1 Development Criteria, which provides: “The development criteria are to be applied to all development within the area of the Niagara Escarpment Plan in conjunction with other policies of the Plan. These

criteria deal with development in a variety of situations, and, therefore, all the criteria will not apply to every development";

- it would not be logical if the Part 2.2 "General Development Criteria" did not apply to all situations. Further, if they apply, then other development criteria should also apply; and
- if the General Development Criteria do not apply, then many important provisions of the NEP would also not apply because they are not found in Development Criterion 2.11, or elsewhere in the NEP, such as Development Criteria 2.2.1(a), (b), (d)), 2.2.4, 2.2.5 and 2.2.8 (see the immediately following discussion of General Development Criteria 2.2).

Finding

I agree with the submissions of the NEC, and the finding of my colleagues, that the development permit application is subject to all of the relevant Part 2 Development Criteria.

The NEC submits that Ms. Pounder reviewed the applications against the relevant Part 2 Development Criteria and concluded that they were inconsistent with criteria 2.2.1, 2.2.4, 2.2.5, 2.2.8, 2.6, 2.7, 2.8, 2.11, 2.14 and 2.15. Some of these are considered below.

2.2 – General Development Criteria

The Applicant submits that the proposed quarry will not have a substantial negative impact on Escarpment environmental features and will be in accordance with Development Criteria 2.2.1.

The NEC submits that the Walker proposal does not meet the following General Development Criteria, for the reasons indicated:

- 2.2.1(a) – there are substantial negative impacts to wetlands, springs, streams, downstream fisheries, and the groundwater divide; natural vegetation; wildlife; and visual attractiveness;
- 2.2.1(b) – the "cumulative impact" of the existing quarry and proposed quarry, and possibly the MAQ Highland quarry, on the Escarpment natural environment includes visual/open landscape character, hydrological/hydrogeological, and wildlife related impacts;

- 2.2.1(d) – there are concerns regarding two cold water fishery streams identified along Side Road 26/27, as well as impacts to SW2 and downstream;
- 2.2.4 – the applications fail to preserve the natural, visual and cultural characteristics of the area, according to the opinion of Ms. Pounder and the evidence of Ms.Grbinicek and Ms. Laflamme, and the Unterman Report;
- 2.2.5 – the Road improvements proposed for Side Road 26/27 and County Road 91 are inconsistent with this criterion, in Ms. Pounder's opinion; and
- 2.2.8 – the closure of County Road 91 and the restricted access of a portion of it will make the access point to the Bruce Trail less visible and more difficult to locate. Further, it has not been demonstrated that the present parking that is now available along Side Road 26/27 will continue to be available.

Findings

In addition to my findings elsewhere, I agree with the submissions of the NEC and find that the NEP development permit application does not satisfy General Development Criteria 2.2.1(a) and (b), and 2.2.4. I find that the development permit application would satisfy the other development criteria in this Part as identified by the NEC.

2.6 – New Development Affecting Water Resources

The Applicant submits that Part 2.6 reflects the requirements of the Escarpment Rural Area Part 1.5 Development Policies for Mineral Extraction and Mineral Resources and the Part 2.11 Development Criterion, except that Part 2.6 is less specific and establishes a lower threshold.

The NEC submits that the development proposal does not meet the development criteria regarding water quality (Parts 2.6.1 and 2.6.3), water quality (Parts 2.6.8 and 2.6.9(a)(ii)), wetlands (Parts 2.6.12(a) and 2.6.13), and ponds (Parts 2.6.21(a) and 2.6.23).

Finding

I find, for reasons already provided, that the most important development criteria in this Part that are not met by the development permit application are: changes to the natural drainage will not be avoided (Part 2.6.1), the scale and intensity of the water taking will adversely affect water quality, quantity and the Escarpment environment (Part 2.6.8), possible loss of wetland functions (Part 2.6.12(a)), and the buffers are inadequate (Part 2.6.13).

2.7 – New Development Within Wooded Areas

The Applicant submits that the proposed development needs only to "preserve as much as possible of wooded areas", and that this is a low standard.

The NEC submits that the woodland on the site is within a strong functioning "natural system" and that it is a "significant woodland" in its own right under the PPS. The NEC submits, based on the opinion of both Ms. Grbinicek and Ms. Pounder, that the proposal to remove approximately 31 hectares of this woodland does not "preserve as much as possible" and is inconsistent with this criterion. The NEC further submits that this criterion is more protective than the PPS because it applies to all woodlands, and not just those that qualify as "significant", as is the case with the PPS.

Findings

I repeat my earlier findings made regarding general Objective 1 and the pivotal role of the on-site woodland in this unique ecologic area.

This development criterion uses strong terms, such as "ensure" and "preserve", which set high standards. The phrase "as much as possible" provides some flexibility.

I agree with the NEC submission and find that removing substantially all of the woodland on-site, does not ensure that the proposed development will preserve as much as possible of the wooded area, and results in its no longer qualifying independently as "significant" under the PPS. Neither do the changes in the phasing of the extraction of the aggregate suggested by my colleagues as, ultimately, approximately 31 hectares of woodland will be removed from the site. A possible alternative is to restrict the proposed development to the central and easterly fields on the site, as already discussed, provided that would satisfy the NEP amendment and development permit tests. That approach might ensure the preservation of as much wooded area as possible.

2.8 – Wildlife Habitat

As discussed above, the Applicant submits that the NEP amendment application and development permit are in accordance with Development Criterion 2.8, in that they will not permit development in the identified habitat of the Butternut and will minimize any impacts on the habitat of the Butternut. The Applicant says that General Note 21 of the Site Plans ensures that no development will occur in the habitat of the Butternut as long as there is identified habitat of the Butternut.

The NEC submits that this criterion provides a level of protection to all wildlife, and is, therefore, wider in scope than the PPS. The NEC relies upon the evidence of Ms. Grbinicek, adopted in the opinion of Ms. Pounder, that the application does not adequately address wildlife habitat on the site, including the habitat of the Butternut and the AHTF, the impact to the existing wildlife corridor, interior forest habitat, and amphibian habitat.

The NEC repeats its submissions, referred to above regarding Part 1.5: Development Policy for Mineral Extraction 1(a)(ii), that the *ESA, 2007* has not altered the NEP in terms of the assessment of the principle of the use. The NEC submits that development, conditional or otherwise, in the habitat of an endangered species is contrary to this policy.

Findings

Again, I rely upon my earlier reasons and findings regarding wildlife habitat and Objective 1, and find that as the development permit application would result in the removal of most of the woodland, and the creation of isolated features such as a Butternut island and AHTF peninsula, as well as the reduction and severing of wildlife corridors and linkages with adjacent areas, it does not satisfy the objective of this development criterion of protecting the habitat of endangered and special concern species, and does not minimize the impact of new development on wildlife habitat.

2.11 – Mineral Resources

The Applicant submits that the applications comply with these development criteria, and, in particular, that there is no conflict with Development Criterion 2.11(1)(a), which requires the protection of sensitive ecological areas, because the impact on the Butternut will be minimized.

The NEC submits, on the basis of Ms. Pounder's evidence, that the applications are inconsistent with the following Development Criteria:

- 2.11.1(a) – the protection of sensitive ecological sites or areas;
- 2.11.1(b) – the protection of surface and groundwater resources;
- 2.11.1(d) – the minimization of adverse impact of the extractive and accessory operations on existing agricultural or residential development;

- 2.11.1(e) – preservation of the natural and cultural landscapes;
- 2.11.1(f) – the minimization of the adverse impacts on parks, open space and the existing and optimum routes of the Bruce Trail.

Finding

I have already made findings on some of these matters and will not repeat them here except to confirm the finding that the development permit application does not satisfy Development Criteria 2.11.1(a), (b), and (e), as to the natural landscape, of this Part.

2.14 – Areas of Natural and Scientific Interest (ANSIs)

The objective of this criterion is to "protect provincially and regionally significant elements of the natural landscapes of Ontario."

Part 2.14.1 of the NEP provides: "Development shall be directed to locate outside of Provincially Significant and Regionally Significant Life Science ANSIs." Minor encroachments are to be considered in certain circumstances. The NEC submits that the Millar Pond proposal is inconsistent with this development criterion.

The proposed development will result in the destruction of Millar Pond by extraction, and the establishment of a new pond/wetland within the Duntroon Life Science ANSI, which is designated as Escarpment Natural Area. The NEC submits that the existing Millar Pond cannot be removed because it is a naturalized pond, no longer a farm pond, and a new pond cannot be created in the Escarpment Natural Area. It is the Applicant's position that it is a farm pond that has not yet been fully naturalized, and so can be removed.

The Part 1.3 Escarpment Natural Area Permitted Uses, applicable to the ANSI, do not include construction of "ponds"; only "farm ponds" are permitted and they must be an "accessory use" to a principal farming use, which will not be the case in the ANSI. On the other hand, if the relocated Millar Pond would serve a "wildlife management" function, then it would be a Permitted Use in the Escarpment Natural Area designation.

The NEC also points out that the NEP contains a prohibition against the creation of ponds within Life Science ANSIs (Part 2.6.21(a)), and that is what the application calls for. The NEC also argues that it is uncertain whether the new pond would succeed as amphibian habitat, and support a population of the federally threatened Western Chorus Frog and the other species of amphibians and vegetation currently supported by Millar Pond.

Part 2.14.2 of the NEP provides for the establishment of setbacks for these features and that “the setback shall be established by the implementing authority in consultation with the Ministry of Natural Resources.” The NEC relies upon the opinion of Ms. Pounder, adopting Ms. Grbinicek’s evidence, that there is an insufficient setback of 10 metres from the ANSI, and 30 metres from the wetlands within the ANSI. Ms. Grbinicek also testified that the proposed quarry will result in a 2 hectare reduction of the interior forest habitat within the ANSI itself. It was Ms. Pounder's evidence that the existing Millar Pond, and the 1 hectare seepage area upland from it, should have been included in the ANSI, or removed from the proposed extraction area.

Finding

My colleagues find, at page 47 of their decision, that the Millar Pond, with its amphibian habitat, can be relocated and successfully reestablished in the ANSI, relying on the “net gain” approach. They find that this is a Permitted Use in the Escarpment Natural Area as wildlife management.

I have already found that the “net gain” approach is generally not available in the NEP Area in regards to the natural environment, and, therefore, the question here is whether the removal of the Millar Pond complies with the water and wildlife habitat policies of the NEP. I have also indicated that, subject to further submissions and satisfying the various tests, the only area of the site where a quarry might possibly be located is the central and easterly fields. The Millar Pond is on the edge of the easterly field. In the circumstances, I refrain from making a finding on this development criterion without further submissions.

2.15 – Transportation and Utilities

The objective of this development criterion is that new and expanded transportation and utility facilities be designed and located “so the least possible change occurs in the environment and the natural and cultural landscape.”

The NEC makes the following submissions that the applications are inconsistent with the following Development Criteria:

- 2.15.1 – the proposed closure of County Road 91 and development of Side road 26/27 are inconsistent with the requirement to “minimize impact on the Escarpment Environment and be consistent with the objectives of the Plan”;
- 2.15.1(e) – Ms. Pounder gave the opinion, relying upon Ms. Laflamme's evidence, that the applications do not minimize visual impact; and

- 2.15.1(i) – Ms. Pounder gave the opinion, based on Ms. Laflamme's evidence, that the applications are inconsistent with this criterion because the proposed quarry is not sited and designed to avoid or minimize the impacts on parks, open space and the Bruce Trail.

Finding

For reasons already given regarding the various road issues, and because the impacts would be minimal, I find that, on balance, the applications would comply with the above Development Criteria.

Issue #3: Whether the NEP development permit for the existing quarry to use the existing processing plant and accessory buildings for the proposed quarry, for an interim period of time, should be approved.

NEP Part 2.11.8 provides: “All accessory uses to the Mineral Resource Extraction Area operation shall be discontinued and be required to vacate the property as soon as the site is depleted, and on-site processed material has been transported from the property.” The Joint Board in *Nelson, supra,* found that a NEP amendment and development permit would be required for the Applicant to use the existing processing plant and accessory buildings for the proposed quarry, for an interim period of time.

While the NEC is concerned that allowing processing of the aggregate to continue at the existing quarry will delay the end of operations and rehabilitation of the existing quarry, the NEC also submits that “this would be preferable to above-ground processing at the Proposed Quarry.” However, the NEC opposes the "amalgamation" option proposed by the Applicant.

As noted by my colleagues, and without deciding whether such a development permit should issue, the Joint Board has previously decided to allow the Applicant “to amend the Notice of Undertaking and to require a NEC development permit for the use of the existing processing equipment located in the existing quarry to process on an interim basis material from the proposed new quarry” (see Appendix “C”).

Finding

As the result of my findings on Issues #1 and #2, I find that Issue #3 is moot. In the alternative, I agree with my colleagues that this Joint Board should not be deciding if the licences for the existing and proposed quarries could be amalgamated to resolve this issue.

Issue #4: Whether the Township of Clearview Official Plan should be amended to implement the Road Settlement Agreement.

Finding

I refer to the discussion of *NEPDA* and NEP general Objective 7, and my findings, above regarding the need for official plan amendments.

If some version of the proposed development proceeds, then I agree with my colleagues' findings that TCOP amendments are required for the Township to accept the downloading of County Road 91, and to undertake public works on Road 91 after the downloading, but not for the public works on Side Road 26/27. However, I disagree with their findings that a SCOP amendment is not required to download County Road 91 from the County to the Township, and that a TCOP amendment is not required for the closing of a portion County Road 91 by the Township.

Issue #5: Whether the Minister of Natural Resources should be directed to issue a Category 2 – Class A licence subject to the ARA Site Plans.

Finding

As I have found that the NEP amendment and development permit applications should not be allowed, in my view the *ARA* licence application cannot be allowed either.

I note that my colleagues overrule the objection of the NEC to Condition 5 of the Proposed NEP Development Permit Conditions (Exhibit 388), which condition provides that "Development shall take place …, or in accordance with any revision or other change to the Plans as may be recommended and approved by the Ministry of Natural Resources." In doing so, they find, at page 99 of their decision:

> The Joint Board's role in an *ARA* appeal is to provide directions to the Minister. However, the final approval of the *ARA* license and its conditions vests with the Minister and the NEC Development permit conditions should not in any way fetter the discretion of the Minister. The Joint Board finds the wording of Condition 5 as set at Exhibit 388 to be appropriate and consistent with the *ARA* and directs no change.

I disagree with the above findings for the following reasons:

- the Minister does not have final approval of the *ARA* licence in this proceeding. The decision of the Joint Board is final by virtue of sections 5 and 15 of the *Consolidated Hearings Act*, R.S.O. 1990, Chapter C.29;
- the NEC Development Permit conditions do not fetter the discretion of the Minister because the Minister has no discretion in regard to the decision of the

Joint Board, either in respect of the NEP development permit conditions or the *ARA* licence conditions; and

- the test is not whether this NEP development permit condition is consistent with the *ARA*, rather, the test is whether the decision to issue the development permit, including this condition, is in accordance with the NEP.

Additional Matters

Existing quarry has limited value as a "case study"

The Applicant submits that the existing quarry on the south side of County Road 91 is a "case study", claiming that it has caused little in the way of impacts to ground and surface water resources.

The NEC submits that the existing quarry is of limited value as a "case study", primarily because there is no base line data. It argues that the existing quarry began operations in 1964, which predates provincial aggregate resources approval processing and pre-dates the *NEPDA*. It was not until 1996 that Jagger Hims Limited initiated a surface and groundwater monitoring program in the existing quarry. There is no hydrogeological data prior to the 1990's. The NEC argues that there is no hydrogeological data for the first quarter century of the existing quarry's operations, and there is no assessment as to any impacts the quarry may have had on the adjacent Rob Roy 6 of the provincially significant wetland complex, or on wells, streams, seeps and springs in the area during that period.

My colleagues accept the Applicant's submission and find, at pages 4 and 5 of the decision, that:

> 1. The proposal represents the continuation of a long established land use in the area in view of the existing quarry owned by the Proponent located directly opposite the site on the south side of County Road 91, which has been operating for over 40 years without significant negative impacts to surrounding uses[.]
>
> …
>
> the proximity of the proposal to the existing quarry and evidence related to the existing quarry's performance have significantly influenced the Join Board's Decision … the positive history of the existing quarry, the lack of its negative impact on the use of water supplies, the continued presence of natural heritage features in close proximity, and the proposed continued use of the established haul route were all factors in the Joint Board's support of the proposal.

I disagree with the above assessment of the facts and findings by my colleagues.

While the existing quarry has operated for over 40 years, data was not collected over that period. That did not start until 1996. There is no quantitative or qualitative assessment of the impacts of the first 25 years of the quarry operation. Therefore, the pre-quarry status of the natural environment of the Niagara Escarpment and its vicinity in this area was never identified and measured. For example, it is not possible to find that there has been no impact on water supplies because it is not known what the pre-quarry water supplies were. I agree with the submissions of the NEC and find that the data on impacts of the existing quarry is of limited value as a case study for impacts of the proposed quarry on the natural environment of the Niagara Escarpment and land in its vicinity because the baseline for the data is an existing quarry and not a pre-quarry baseline.

Further, that there are still natural heritage features in close proximity to the existing quarry does not justify the removal of natural features and functions to create another large quarry.

In my view, and subject to the discussion above regarding the central and easterly fields on the site, the existing quarry is not a factor that favours the proposed development of another quarry. The more compelling argument is that the flexibility in the Purpose of the *NEPDA* and NEP that allows "only such development … as is compatible with that natural environment" has already been almost totally exhausted in this location in the NEP Area.

Designations

I agree with the NEC's submissions, and the finding of my colleagues, that the designation of the setbacks within the licence boundary should not be changed to Mineral Resource Extraction Area.

I also agree with the submission of the NEC, and find that should the applications be approved, then the Rob Roy 2 provincially significant wetland and the setback to the ANSI should be redesignated Escarpment Natural Area. As discussed above, I would add to that designation the areas of the Butternut island and the AHTF Colony 1 peninsula.

Quarry not an "interim" use

The Applicant's Rehabilitation Plan is contained in the *ARA* Site Plans. The Applicant intends to rehabilitate the extraction site of the proposed quarry by letting the open pit that will be created fill with water to create a lake. The existing quarry will also be

allowed to fill with water so that two lakes will be created, on both sides of County Road 91. The future lake-filling is expected to take at least 30 years after extraction of the aggregate, which is expected to take at least 28 years. Depending on the amount of water that is required for mitigation of impacts on surrounding features, the lake-filling period could take up to 50 years. Therefore, the total time required to extract the dolostone, fill the proposed lakes, and complete rehabilitation, is estimated to be at least 58 years, and possibly 75 to 80 years.

I agree with the evidence of local residents and the Environmental Commissioner of Ontario, and the submissions of the CCC, and find that the length of time of the quarry operation and its rehabilitation cannot realistically be called an “interim use”.

Noise

My colleagues find, at page 77 of their decision:

> The Joint Board is satisfied that the Proponent’s noise consultants have appropriately modelled the haul route sound level changes consistent with established industry practice, and while it might be convenient for Mr. Coulter’s “Null” hypothesis (Exhibit 229) to exclude existing Walker quarry truck traffic in the determination of future sound impacts, it does not reflect the existing condition found in the area and does not reflect the current required practice of the acoustical industry when considering sound level changes from a proposed undertaking.

I disagree with this finding. A major justification for the proposed quarry, as stated by the Applicant and agreed to by my colleagues, is that the existing quarry has come to the end of its life. The Applicant cannot have it both ways: if it is applying for the proposed quarry on the basis that the existing quarry will soon run out of aggregate and have to cease operations, then it does not make sense to base the noise parameters on an increase in the noise of an operation that will cease to exist. I find that there is merit in the “Null” hypothesis and that consideration should be given to the increase in noise from the proposed quarry while the existing quarry is still operating, the total noise from the operation of the existing and proposed quarries, and the increase in noise from the proposed quarry on its own when the existing quarry will likely have ceased operating.

MNR and MOE

The MNR and the MOE elected to not participate or provide any direct evidence in the hearing, except for evidence by one witness from the MNR limited to the Bobolink habitat and the *ESA, 2007*. If the development proposal proceeds, further approvals and monitoring will be required from the MOE and the MNR.

My colleagues state (at page 5) that their decision has been significantly influenced by the MNR and the MOE not having objected to the development proposal. In my view this is a neutral factor as it is equally consistent with the MOE and MNR simply providing comment within the realm of their own jurisdictions, thereby respecting the jurisdiction and role of the NEC to make decisions within the NEC's mandate as the development control authority with primary responsibility to oversee the protection of the Niagara Escarpment.

Nevertheless, there is one area where it would have been very useful to have heard direct evidence from an MNR witness, and that is regarding whether the MNR does in fact have the capacity to monitor and enforce the proposed AMP. The NEC has the jurisdiction and the obligation to enforce the conditions of any development permit and any other infringements of the NEP. The MNR is responsible to monitor and enforce the terms and conditions of the *ARA* Site Plan.

Ordinarily, MNR's capacity would be accepted at face value. However, the capacity of the MNR was raised by the Parties in this proceeding, and was a significant issue in the recent *James Dick* decision by the OMB, which refused a quarry proposal that was not in the NEP Area, and is discussed above. In *James Dick* the OMB found, at paragraphs 268 and 270, that:

> Even if the Board accepted, which it does not, that MNR has the resources to fulfill the requirements of the AMP, the Board cannot leave the matter of protection of the natural environment to MNR staff who deal with aggregate applications. …
>
> The Board will not approve an aggregate proposal which leaves an issue like the protection of the natural environment to be dealt with by a third party with demonstrably inadequate resources, like MNR.

Given that the above finding is very recent, and in light of the evidence of the Environmental Commissioner of Ontario as to the MNR's lack of capacity, referred to in my colleagues' decision, it would have been helpful for the Joint Board to have heard evidence directly from an MNR witness on this issue. In my view it was incumbent upon the Applicant, and in the interest of the MNR, to rely on more than scanty hearsay evidence on the important issue of monitoring and enforcing the AMP and making changes in the quarry operation.

The Applicant, and my colleagues, seek to distinguish the *James Dick* decision because in that case, they state, there were substantial mitigation measures required to prevent major impacts to groundwater resources, no independent third party to take responsibility for the oversight of the AMP, and no financial securities to ensure its implementation. With respect, the case before us is very similar in these respects:

substantial mitigation is required, there is no agreed upon third party, and there is no evidence that the proposed financial security is sufficient to ensure the implementation of the AMP.

I disagree with the following finding of my colleagues regarding the capacity of the MNR, made at page 85 of their decision:

> The administration of the *ARA* is a fundamental legislated requirement of the MNR. In this regard, the Joint Board accepts the position of the Ministry Staff that they have the capacity and resources to carry out their legislated responsibilities as set out in their correspondence (Exhibit 37, Vol. 13, Tab 179 and Exhibit 93).

The references for the above finding are: a letter from the MNR, dated March 5, 2010 (Exhibit 37, Tab 179), advising that the MNR's issues had been addressed to its satisfaction and it was, therefore, withdrawing its objection to the application; and a one line e-mail dated April 30, 2010 (Exhibit 93), from a different individual at the MNR that states: "Your understanding is correct with respect to the content of your April 30, 2010 email as attached below." The attached e-mail was from Mr. Clarkson, on behalf of the Applicant, and his e-mail states, as the last of seven bullet points that:

> Based on several previous conversations with MNR and in light of the ARA site plan notes above, it is my understanding that:…
>
> - MNR will provide all necessary resources to appropriately administer and enforce the ARA in general and the Walker AMP in particular.

In my view, the evidence of the Environmental Commissioner of Ontario (Mr. Gord Miller), regarding the MNR, that: "The number of inspectors in the field currently is wholly inadequate. … The complexity of these AMPs are often beyond the capability of the Aggregate Technical Specialist", which evidence was obtained by a summons to witness and was subject to cross-examination, in addition to the considered findings of the OMB in *James Dick* that the MNR does not have capacity to enforce the *ARA* and the AMP, is much more compelling than the above correspondence from the MNR, which is hearsay, self-serving, and untested by cross-examination. The Joint Board heard similar concerns regarding the capacity of the MNR and the MOE from Mr. Ruland, Ruth Grier (a former provincial Minister of the Environment), Ms. Pounder and Mr. Usher. Nevertheless, my colleagues suggest that the Parties opposed to this application should have called an MNR witness on this issue. I do not agree with my colleagues that the onus was on the opposing Parties to provide what would, in essence, be reply evidence to their own case.

The NEC further argues that the local regulators, and the Applicant and its consultants, lack experience implementing an AMP.

While I agree with the Applicant's submission that: "The allocation of resources to MNR is policy[,] a matter within the exclusive purview of the Government of Ontario who delegates authority and provides the necessary financial resources to its various Ministries", and that the Joint Board does not have jurisdiction to direct how MNR allocates its resources, the Joint Board does have to consider whether a proposed development will be properly administered and enforced in relation to the decision of the Joint Board. The Joint Board should not confirm, or impose, conditions that cannot be implemented. The Applicant specifically assigns various roles to the MNR in the AMP and the development permit conditions. These are in addition to its ARA role. It is clear from the MNR's own letter that capacity is an important issue, yet the Applicant declined to call any compelling evidence on the issue and the MNR withdrew from the proceeding. I find that the Applicant has not demonstrated that there is a third party with "all necessary resources to appropriately administer and enforce the … Walker AMP in particular."

Precautionary Principle

The Parties made submissions regarding the Precautionary Principle (see *114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Town),* [2001] 2 S.C.R. 241, and the MNR SEV). Under section 11 of the *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, for designated provincial ministries, such as the MOE and the MNR:

> The minister shall take every reasonable step to ensure that the ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the ministry.

The *Spraytech* statement of the Precautionary Principle and the relevant clause in the MNR SEV are quoted in the decision of my colleagues.

While the Applicant disagrees with the submissions of the NEC and the CCC that the MNR SEV incorporates the Precautionary Principle, the Applicant does not dispute that the SEV is a general principle about exercising caution in the face of uncertainty. The Applicant also submits that its AMP is a site specific application of the Precautionary Principle and that this is reflected in the structure of the mitigation and monitoring programs.

I agree with the finding of my colleagues that the SEV must be applied by ministries when they make decisions on individual applications, as was found in *Dawber v. Ontario (Director, Ministry of the Environment)* (2008), 36 C.E.L.R. (3d) 191 (Ont. Div. Ct.).

While I agree with the statement of my colleagues at page 16 of their decision that: "Particularly in view of the environmental focus of the NEP, the Joint Board in making this decision will 'exercise caution and special concern for natural values' in the face of uncertainty", this is a minimum standard and one must look to the provisions and policies of the *NEPDA* and NEP to determine the standard in this case.

The Precautionary Principle was recently considered in *Erickson*, *supra*, the first case regarding a Renewable Energy Approval decided by the Environmental Review Tribunal. The proposal involved the construction, installation, operation, use and retiring of eight wind turbine generators located in the Municipality of Chatham-Kent, Ontario. The Tribunal found, at paragraph 524:

> the precautionary principle does not act to change the nature of the clearly worded test set out in section 145.2.1(2) [of the *Environmental Protection Act*]. It is, however, an important principle for environmental decision-makers such as the Director or Tribunal. For statutory provisions that are more discretionary and/or subject to different interpretations, the precautionary principle is an important source of guidance, as noted in *Spraytech*. In this case, however, the legislation clearly establishes a different test that must be met before the Tribunal may take measures.

The Purpose and Objectives of the *NEPDA* and the NEP establish a different test in the case before us as well. I find that the word "ensure" in the Purpose and Objectives of the *NEPDA* and the NEP sets a higher standard for the protection of the natural environment of the Niagara Escarpment than either the Precautionary Principle or the MNR SEV. While the latter still apply, they are a minimum standard. The NEP amendment and development permit applications do not meet the higher standard of ensuring that the proposed quarry is compatible with the natural environment of the Niagara Escarpment and land in its vicinity. Moreover, I disagree with my colleagues that the standard of the Precautionary Principle, or approach, has been met in this case for the reasons set out above.

Appendix "C"

I agree that Appendix "C" to my colleagues' decision accurately reflects the various determinations made during the course of the hearing, but I do not agree with some of the reasons given for those determinations.

Counsel for the Parties and Witnesses

Finally, I would like to commend all Counsel for the high quality of their work throughout the hearing, including their submissions on the many legal and policy issues, as this has been of great assistance to the Joint Board.

The evidence of the experts and lay witnesses was well-considered and sincere, and has also been very helpful. Again, in my view, most of the differences in the evidence and opinions of the witnesses that are relevant to the matters that I have discussed are the result of differing interpretations of the applicable statutes, plans and policies, which are matters that the Joint Board has also had to wrestle with.

Conclusion

The proposed development underscores the need for development control as a planning tool to protect the natural environment of special areas in the province, such as the Niagara Escarpment.

With respect, my colleagues' decision incorrectly elevates the importance of aggregate extraction in the Escarpment Rural Area designation of the NEP Area from development that might be accommodated, where it is compatible with the natural environment of the Escarpment and land in its vicinity, to development that must be accommodated if it might be feasible, even at the cost of removing, or permanently altering, Escarpment natural features, functions, and systems. This is not in keeping with the NEP being an "environmentally focused" and "environmental conservation" plan. The majority decision in this matter sets a perilous course for increased development in the NEP Area that is not compatible with the natural environment of the Niagara Escarpment and land in its vicinity.

A review of the conclusion of my colleagues, at page 25 of their decision, illustrates the fundamental differences in our analyses of the issues (emphasis added):

> It is the Joint Board's finding in this case that the Proponent's revised application has achieved the appropriate balance between these two equally important policy objectives and that the revised proposal is in the public interest, represents good planning within the policy framework in place and should be approved subject to the changes being directed by the Joint Board. The Joint Board in this regard is satisfied that the local Municipalities and the Provincial Ministries have had appropriate regard for the policy directions of the PPS, the NEP, and the local Municipal Official Plans and have found the appropriate balance of the public interest consistent with good planning required by these planning policy documents.

My colleagues' conclusion uses terminology such as "appropriate balance", "represents good planning", "appropriate regard", and "consistent with good planning", which are not elements of the *NEPDA* and NEP tests for NEP amendment and development permit applications. An NEP amendment application has to pass the three-part test in Part 1.2.1 of the NEP. As well, under section 25(4) of the *NEPDA* the Joint Board has to determine whether the development permit application is in accordance with the NEP and a development permit should be issued.

Of note, section 3 of the *Planning Act* only requires that decisions affecting planning matters "shall be consistent with" the PPS, whereas they "shall conform with" provincial plans such as the NEP. Nevertheless, at page 5 in their decision, my colleagues find that the development proposal, with their amendments, is "consistent with" the requirements of the *NEPDA*, the NEP and the PPS. This is only one requirement of the third branch of the three-part NEP amendment test, regarding other relevant provincial policies. "Consistent with" is not as high a standard as the first and second branches of the more demanding *NEPDA* and NEP amendment test (the Purpose and Objectives must be "met" by an amendment, and an amendment must "be justified"), nor is it as high a standard as the *NEPDA* and NEP development permit test (the decision must be "in accordance with" the NEP).

The findings and conclusion of my colleagues reject the development control approach, and fail to analyze crucial aspects of this development proposal through the lens of the statutory provisions of the *NEPDA* and the policies of the NEP. The practical result is that the specific provisions and policies of the *NEPDA* and the NEP that protect the natural environment of the Niagara Escarpment and land in its vicinity are either wrongly equated with the PPS requirements, or given little, or no, legal effect, and the more general province-wide policies of the PPS are applied by default.

Applying the *NEPDA* and NEP amendment test to the proposed development, even as the development proposal has been modified by my colleagues' decision, I have found that the proposed NEP amendment does not meet the Purpose and Objectives of the *NEPDA* and the NEP, is not justified, and is not consistent with other relevant provincial policies. As well, I have found that the designation of a new Mineral Resource Extraction Area for the proposed development cannot be accommodated by an amendment to the NEP, and the proposed NEP amendment does not satisfy the Escarpment Rural Area Development Policies for Mineral Extraction.

If the NEP amendment application does not succeed, then the proposed quarry is not a Permitted Use in the Escarpment Rural Area and a development permit should not be issued. I have also found that the proposed development permit application does not satisfy the Development Criteria in Part 2, in its own right, and a development permit should not be issued for the proposed quarry as it would not be in accordance with the NEP.

In my view, and subject to further submissions, the central and easterly field area is the only possible area of the site where the designation of a new Mineral Resource Extraction Area might be accommodated by an amendment of the NEP, and where the proposed development might be compatible with the natural environment of the Niagara Escarpment and land in its vicinity.

In the final result, I have also found that the applications for a development permit to use the processing plant in the existing quarry for the proposed quarry, the amendment of the Township of Clearview Official Plan, and the *ARA* licence, cannot succeed either.

Applications Dismissed, Subject to Further Submissions

"Robert V. Wright"
Robert V. Wright, Panel Member

Appendix D – Map showing Natural Heritage Features

Appendix E – Map showing Natural Heritage Features, with central and eastern fields outlined

Appendix F – Map showing width of NEP Area in relation to proposed development

Appendix D

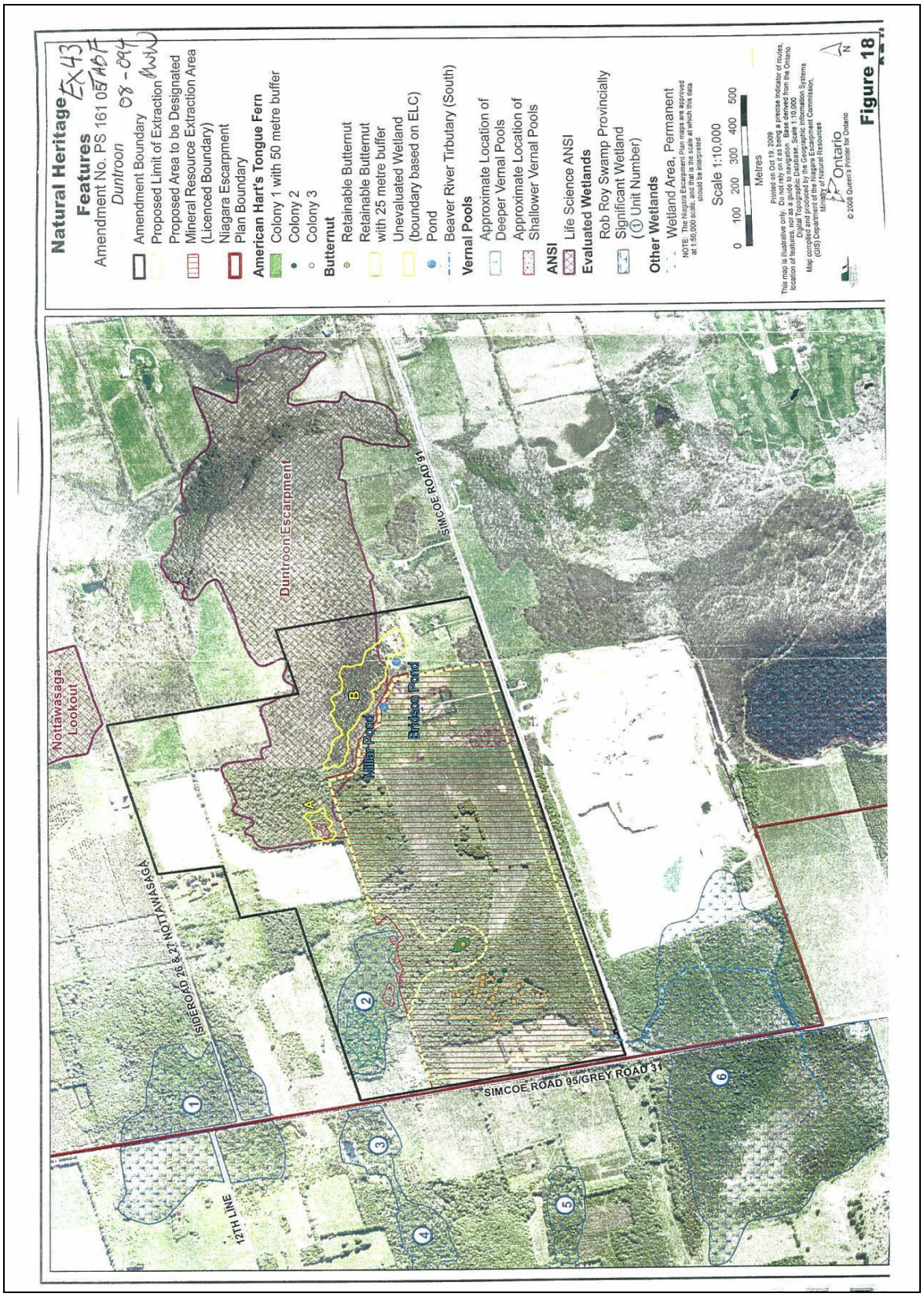
Natural Heritage Features
Amendment No. PS 161 05
Duntroon
Amendment Boundary
Proposed Limit of Extraction
Proposed Area to be Designated Mineral Resource Extraction Area (Licenced Boundary)
Niagara Escarpment Plan Boundary
American Hart's Tongue Fern
Colony 1 with 50 metre buffer
Colony 2
Colony 3
Butternut
Retainable Butternut
Retainable Butternut with 25 metre buffer
Unevaluated Wetland (boundary based on ELC)
Pond
Beaver River Tirbutary (South)
Vernal Pools
Approximate Location of Deeper Vernal Pools
Approximate Location of Shallower Vernal Pools
ANSI
Life Science ANSI
Evaluated Wetlands
Rob Roy Swamp Provincially Significant Wetland (1 Unit Number)
Other Wetlands
Wetland Area, Permanent
NOTE: The Niagara Escarpment Plan maps are approved at 1:50,000 scale, and that is the scale at which this data should be interpreted
Scale 1:10,000
0 100 200 300 400 500
Metres
Printed on Oct 19, 2006
This map is illustrative only. Do not rely on it as being a precise indicator of routes, location of features, nor as a guide to precise areas. Base derived from the Ontario Digital Topographic Database, Scale 1:10,000
Map compiled and produced by the Geographic Information Systems (GIS) Department of the Niagara Escayment Commission, Ministry of Natural Resources
Ontario
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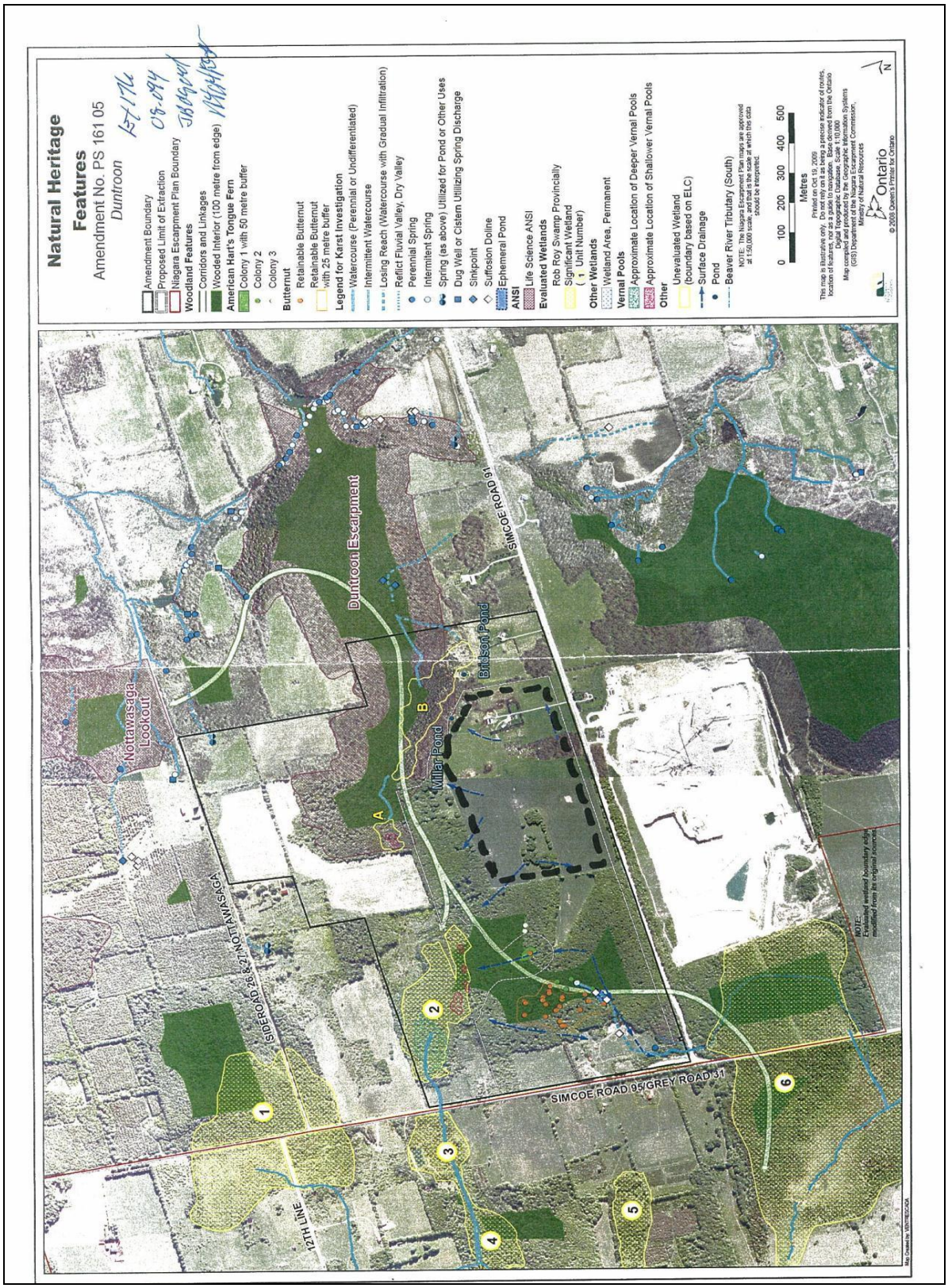
Figure 18
Nottawasaga Lookout
Duntroon Escarpment
SIMCOE ROAD 91
Bridson Pond
Miller Pond
A
B
SIDEROAD 26 & 27 NOTTAWASAGA
SIMCOE ROAD 95/GREY ROAD 31
12TH LINE
1
2
3
4
5
6

Appendix E


Natural Heritage Features
Amendment No. PS 161 05
Duntroon
Amendment Boundary
Proposed Limit of Extraction
Niagara Escarpment Plan Boundary
Woodland Features
Corridors and Linkages
Wooded Interior (100 metre from edge)
American Hart's Tongue Fern
Colony 1 with 50 metre buffer
Colony 2
Colony 3
Butternut
Retainable Butternut
Retainable Butternut with 25 metre buffer
Legend for Karst investigation
Watercourse (Perennial or Undifferentiated)
Intermittent Watercourse
Losing Reach (Watercourse with Gradual Infiltration)
Reflict Fluvial Valley, Dry Valley
Perennial Spring
Intermitent Spring
Spring (as above) Utilized for Pond or Other Uses
Dug Well or Cistern Utilizing Spring Discharge
Sinkpoint
Suffosion Doline
Ephemeral Pond
ANSI
Life Science ANSI
Evaluated Wetlands
Rob Roy Swamp Provincially Significant Wetland (1 Unit Number)
Other Wetlands
Wetland Area, Permanent
Vernal Pools
Approximate Location of Deeper Vernal Pools
Approximate Location of Shallower Vernal Pools
Other
Unevaluated Wetland (boundary based on ELC)
Surface Drainage
Pond
Beaver River Tributary (South)
NOTE: The Niagara Escarpment Plan maps are approved at 1:50,000 scale and any use at a scale which this data should be interpreted.
0 100 200 300 400 500
Metres
Printed on Oct 19, 2009
This map is illustrative only. Do not rely on it as being a precise indicator of routes, location of features, nor as a guide to navigation. Base derived from the Ontario Base Map (OBM) compiled at 1:10,000.
Map compiled and produced by the Geographic Information Systems (GIS) Department of the Niagara Escarpment Commission, Ministry of Natural Resources
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Duntroon Escarpment
SIMCOE ROAD 91
Nottawasaga Lookout
Bidson Pond
Millar Pond
SIDEROAD 26 & 27/NOTTAWASAGA
SIMCOE ROAD 95/GREY ROAD 31
12TH LINE
A
B
1
2
3
4
5
6
NOTE:
Evaluated wetland boundary edge modified from its original source

Appendix F

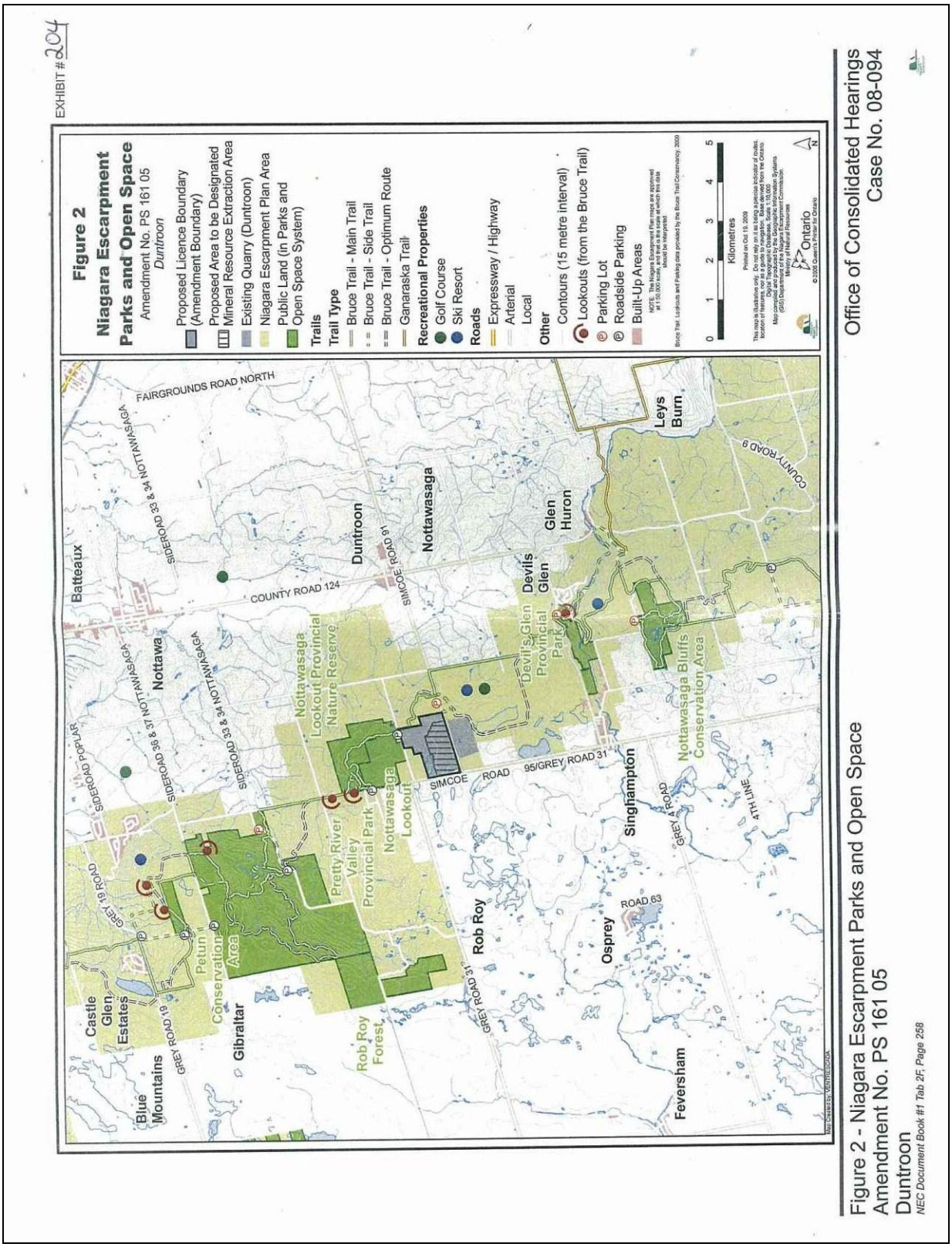
EXHIBIT # 204
Figure 2
Niagara Escarpment
Parks and Open Space
Amendment No. PS 161 05
Duntroon
Proposed Licence Boundary (Amendment Boundary)
Proposed Area to be Designated Mineral Resource Extraction Area
Existing Quarry (Duntroon)
Niagara Escarpment Plan Area
Public Land (in Parks and Open Space System)
Trails
Trail Type
Bruce Trail - Main Trail
Bruce Trail - Side Trail
Bruce Trail - Optimum Route
Ganaraska Trail
Recreational Properties
Golf Course
Ski Resort
Roads
Expressway / Highway
Arterial
Local
Other
Contours (15 metre interval)
Lookouts (from the Bruce Trail)
Parking Lot
Roadside Parking
Built-Up Areas
Kilometres
Ontario
Office of Consolidated Hearings
Case No. 08-094
Figure 2 - Niagara Escarpment Parks and Open Space
Amendment No. PS 161 05
Duntroon
NEC Document Book #1 Tab 2F, Page 258
FAIRGROUNDS ROAD NORTH
SIDEROAD 33 & 34 NOTTAWASAGA
COUNTY ROAD 124
SIMCOE ROAD 91
COUNTY ROAD 9
SIDEROAD POPLAR
SIDEROAD 36 & 37 NOTTAWASAGA
SIDEROAD 33 & 34 NOTTAWASAGA
GREY ROAD 19
GREY ROAD 31
SIMCOE ROAD 95/GREY ROAD 31
GREY 4 ROAD
4TH LINE
ROAD 63
Batteaux
Duntroon
Nottawasaga
Glen Huron
Leys
Burn
Nottawa
Devils Glen
Castle Glen Estates
Blue Mountains
Gibraltar
Petun Conservation Area
Pretty River Valley Provincial Park
Nottawasaga Lookout Provincial Nature Reserve
Nottawasaga Lookout
Rob Roy Forest
Rob Roy
Devil's Glen Provincial Park
Nottawasaga Bluffs Conservation Area
Singhampton
Osprey
Feversham