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Ontario

April 15, 2015

Ronald K. Webb
Rachel Godley
Davis Webb LLP
24 Queen Street East Suite 800
Brampton, ON L5V 1A3

# NOTICE OF DECISION

made under the provision of the
*Niagara Escarpment Planning and Development Act*, R.S.O. 1990

H.O. Case No(s).: 13-105
NEC File No.: P/E/2009-2010/242

Dear Mr. Webb and Ms. Godley,

Re: Brampton Brick Limited, appellant against the Niagara Escarpment Commission's refusal of Development Permit application P/E/2009-2010/242 made by Brampton Brick Limited to amend the approved progressive rehabilitation plan of a licensed shale extraction operation to permit the importation of fill at the Cheltenham Quarry in the Township of Caledon in the Regional Municipality of Peel, Ontario.

Pursuant to s. 25 of the *Niagara Escarpment Planning and Development Act*, R.S.O. 1990, c.N.2, as amended, *("NEPDA"),* we have inquired into the merits of the Niagara Escarpment Commission's ("NEC") decision and have taken into consideration the evidence presented before us at the hearing in order to render our report and opinion.

…/2

A copy of our report with reasons is attached. We concur with the NEC's decision not to issue a Development Permit and according to s. 25(12) of the *NEPDA*, the decision of the NEC is, therefore, confirmed.

Yours truly,

*"Justin Duncan"*

Justin Duncan
Hearing Officer

*"Paul Milbourn"*

Paul Milbourn
Hearing Officer

*"Hugh Wilkins"*

Hugh Wilkins
Hearing Officer

Attachment

cc: Hon. Bill Mauro
Minister of Natural Resources
c/o Robert Pineo
Niagara Escarpment Program Team Leader
Natural Heritage and Land Use and
Environmental Planning Section
Ontario Ministry of Natural Resources and Forestry
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…../3

Mr. Michael Baran, Planner
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City of Caledon
Development Approval and Planning Policy Dept.
Town of Caledon
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Al Frost
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**Niagara Escarpment Hearing Office**
Bureau des audiences sur
l'escarpement du Niagara

**ISSUE DATE**: April 15, 2015 **CASE NO.:** 13-105

**Brampton Brick Limited v. Niagara Escarpment Commission**

In the matter of an appeal by Brampton Brick Limited filed August 2, 2013 for a Hearing before a Hearing Officer pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act*, R.S.O. 1990, c. N.2, as amended, with respect to a decision of the Niagara Escarpment Commission dated July 23, 2013 whereby the Commission refused Development Permit application P/E/2009-2010/242 made by Brampton Brick Limited to amend the approved progressive rehabilitation plan of a licensed shale extraction operation to permit the importation of fill at the Cheltenham Quarry in the Township of Caledon in the Regional Municipality of Peel, Ontario.

Heard: October 3, 9, 10, 14, 15 and November 5, 2014 in Caledon, Ontario.

**APPEARANCES**:

| **Parties** | **Counsel/Representatives**[+] |
|---|---|
| Brampton Brick Limited | Ronald K. Webb and Rachel Godley |
| Niagara Escarpment Commission | Demetrius Kappos |
| Regional Municipality of Peel | Robert Maciver and Nathan Muscat |
| Town of Caledon | Judy Bang |
| **Participant** | |
| Cheltenham Area Residents Association | Al Frost[+] and Don Webb[+] |

**REPORT DELIVERED BY JUSTIN DUNCAN, PAUL MILBOURN, AND HUGH S. WILKINS**

## REASONS

### Background

[1] Brampton Brick Limited (the “Appellant”) owns and operates the Cheltenham Quarry (the “Quarry”), which is located in the Town of Caledon in the Regional Municipality of Peel (“Peel Region”). The Appellant was granted a development permit for the site by the Niagara Escarpment Commission (“NEC”) in 1989 and a site plan for the Quarry was granted under the *Aggregate Resources Act*, R.S.O. 1990, c. A.8 (“*ARA*”) to the Appellant in 1990. Based on the site plan, the Quarry will consist of three stages of excavation (Stages 1 to 3), which will be developed, for the most part, sequentially. The question to be determined on this appeal is whether a new proposal for the rehabilitation of Stage 1 of the Quarry is permissible under the Niagara Escarpment Plan (“NEP”) and whether a development permit should be issued.

[2] The current site plan includes a rehabilitation plan for the Quarry, which stipulates that the slopes of each stage of excavation will be graded and planted with trees and other vegetation in preparation for post-excavation uses. The current site plan also contemplates that each stage will be filled with water to create three pond features.

[3] On December 21, 2009, the Appellant filed an application for a development permit from the NEC which would allow the Appellant to apply to the Ministry of Natural Resources and Forestry (“MNRF”) to amend the Quarry’s rehabilitation plan by eliminating the proposed pond for Stage 1 of the Quarry and to instead fill the 17 hectare (“ha”) Stage 1 excavation to a depth of between 20 and 30 metres ("m"), retain a small constructed wetland, and subsequently reforest the site. The Appellant revised its application on May 31, 2011 to permit the importation of fill for the purpose of back-filling the Stage 1 excavation to enable development of a natural upland habitat to restore pre-quarry topography and drainage regimes.

[4] The proposed filling of the Stage 1 excavation will require the importation of 1.8 million cubic meters ("$m^3$") of fill over a period of several years.

[5] Peel Region and the Town of Caledon supported, in principle, the Appellant's proposal. Both levels of municipal government face a need to find locations where fill can be deposited from anticipated development in the region over the next 20 years.

[6] On July 23, 2013, the NEC refused the Appellant's application for a development permit. The NEC cited four reasons for its refusal:

- The proposal is not a permitted use in the Mineral Resource Extraction Area ("MREA") designation of the NEP.
- The proposal conflicts with the Development Criteria under NEP para. 2.2.1(a), (b) and (d), 2.11.5 and 2.11.9(c).
- The proposal is not consistent with s. 1.1.1(c) of the Provincial Policy Statement.
- MNRF would not likely support a site plan amendment to require the filling of Stage 1 to the original grade.

[7] On August 2, 2013, the Appellant filed an appeal of the NEC's decision pursuant to s. 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*").

[8] A pre-hearing conference ("PHC") took place on November 29, 2013 and continued on January 13, 2014. The Niagara Escarpment Hearing Office ("NEHO") granted party status to Peel Region and the Town of Caledon and granted the Cheltenham Area Residents Association ("CARA") participant status. The NEHO ordered that the appeal be heard in two phases, as set out in an order dated February 5, 2014.

[9] The first phase ("Phase 1") is to consider whether the Appellant's proposal is a permitted use within the MREA of the NEP. The Appellant argues that its proposal to import fill for Stage 1 of its quarry is a permitted use under numerous sections of the MREA, that it does not constitute a commercial fill operation, and there is no change in use that would necessitate a NEP amendment. The NEC maintains that the proposal is a commercial fill operation that is not a permitted use or otherwise constitutes an after-use which requires an amendment to the NEP to proceed.

[10] If it is found that the Appellant's proposal is a permitted use, the hearing will proceed to a second phase ("Phase 2") to consider the issues of whether the Appellant's proposal is in accordance with the development criteria of the NEP, in particular the criteria under paras. 2.2.1(a), (b), (d), 2.11.5 and 2.11.9(c), and whether the Appellant's proposal is consistent with the Provincial Policy Statement, 2005, in particular s. 1.1.1(c).

[11] This decision addresses only the Phase 1 issue. As set out below, the Hearing Officers find that the Appellant's proposal is not a permitted use and that the decision of the NEC to refuse the Appellant's development permit application is correct and should not be changed. Given that conclusion, the hearing will not proceed to Phase 2 and the NEC's decision is confirmed pursuant to s. 25(12) of the *NEPDA.*

## Relevant Legislation and Niagara Escarpment Plan Provisions

[12] The relevant legislation and NEP provisions are included in the Appendix to this Report. For ease of reference, the relevant portions of para. 1.9 of the NEP are reproduced below:

> **1.9 Mineral Resource Extraction Area**
>
> The Mineral Resource Extraction Area designation includes pits and quarries licensed pursuant to the *Aggregate Resources Act* and areas where mineral resource extraction may be permitted subject to the policies of this Plan.

**Objectives**

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

**Criterion for Designation**

Existing licensed areas.

**Permitted Uses**

Subject to conformity with Part 2, Development Criteria, and official plans and where applicable, zoning by-laws that are not in conflict with the Niagara Escarpment Plan, the following uses may be permitted:

[…]

3. Mineral extraction operations licensed pursuant to the *Aggregate Resources Act*.
4. Forest, fisheries and wildlife management.

[…]

8. Watershed management and flood and erosion control projects carried out or supervised by a public agency.

[…]

11. Uses permitted in Park and Open Space Master/Management Plans which are not in conflict with the Niagara Escarpment Plan.

[…]

16. Nature preserves owned and managed by an approved conservation organization.

**After Uses**

Prior to a change of land use a Mineral Resource Extraction Area will require an amendment to the Niagara Escarpment Plan. The after use of the excavated area shall be compatible with, and have minimal impact upon, the surrounding uses and the objectives of the Niagara Escarpment Plan.

**After Uses, Permitted Uses and New Lots**

1. Except for progressive rehabilitation, as set out in the Development Criteria for Mineral Resources in Parts 2.11.5, 2.11.6 and 2.11.9 of this Plan, any new lot creation or any change in land use within a Mineral Resource Extraction Area, other than the identified permitted uses, shall require an amendment to the Niagara Escarpment Plan.
2. Except for the identified permitted uses that comply with the provisions of the Development Criteria for Mineral Resources in Part 2.11.5 of this Plan, all after uses shall require an amendment to the

> Niagara Escarpment Plan and shall be subject to a redesignation of the Mineral Resource Extraction Area designation to the applicable Niagara Escarpment Plan designation as determined through the application of the criteria for designation contained in the Niagara Escarpment Plan.

**Issue**

[13] The issue raised in Phase 1 of this appeal is whether the Appellant's proposal is a permitted use as described in para. 1.9 of the NEP.

**Evidence**

[14] The Appellant tendered evidence of three witnesses during the hearing of the appeal while the NEC had two witnesses testify on its behalf.

[15] Peel Region, the Town of Caledon and CARA decided to observe this phase of the hearing and advised the Hearing Panel that they would tender evidence and submissions should the appeal proceed to the second phase.

[16] The Hearing Officers have considered the totality of the evidence provided by all of the witnesses. What follows are summaries of that evidence.

*The Appellant's Witnesses*

Robert Long

[17] Mr. Long testified on behalf of the Appellant and provided an opinion on whether the Appellant's development permit application is in conformity with the NEP. Mr. Long also provided factual evidence relating to the history of the Quarry. He was qualified by the NEHO to give opinion evidence as an expert in environmental engineering.

[18] Mr. Long testified that having been actively quarried from approximately 1912 to 1964 and then acquired by the Appellant from the Province of Ontario in 1980, the 99 ha Quarry site was designated as a MREA when the NEP was approved in 1985.

[19] Mr. Long provided background information to the Appellant's operations, including:

- The Appellant had applied for a development permit under the *NEPDA* in 1981 and for a Caledon Official Plan Amendment and also a Quarry Licence under the *ARA* in 1983.
- Amendments 12 and 15 to the NEP were made in the late 1980s that changed the designation of parts of the Quarry land from MREA to Escarpment Natural Area, Escarpment Protection Area and Escarpment Rural Area.
- An Ontario Municipal Board ("OMB") hearing was held in 1988 to resolve objections relating to the Quarry's licence under the *Pits and Quarries Control Act* (the predecessor to the *ARA*), including the adequacy of proposed rehabilitation.
- The revised development permit application was granted by way of Notice of Decision provided by the responsible Minister in 1989.
- As required by the Minister's 1989 decision, the Appellant and Peel Region entered into an agreement relating to water issues and truck traffic in 1990.
- As required by the Minister's 1989 decision, the Appellant and the Town of Caledon entered into a development agreement in 1990.
- The MNRF and the NEC approved a northerly expansion of Stage 1 in 2001. The development permit and site plan were amended to allow for this.

[20] In his testimony, Mr. Long described what rehabilitation is currently required under the site plan for Stage 1, including: creation of 3:1 slopes with terracing; planting of native vegetation, including herbaceous plants and trees; and a natural pond formation with bottom outlet structure.

[21] Mr. Long calculated what he believed to be the fill necessary to meet the sloping requirements of the approved site plan. His calculations found that in order to meet the rehabilitation requirements of the existing site plan for Stage 1, the Appellant would have had to import 1.64 million $m^3$ of off-site fill to create the required slopes and terracing.

[22] He also testified that based on the on-site approval of a MNRF officer, the Appellant had imported approximately 200,000 $m^3$ of fill to achieve the contours that currently exist.

[23] Mr. Long testified that sloping of the west half of Stage 1 was completed in 2008 while the east half was completed in 2011 with the prescribed 3:1 slopes, and 6 m wide terraces at 10 m vertical intervals.

[24] According to Mr. Long, the Appellant had completed three of the five to seven years of its tree planting programme between 2010 and 2012 but many of the trees failed to establish as a result of competing groundcover that had already taken root.

[25] Mr. Long also testified that during the period 2011 to 2013, approximately 105,000 $m^3$ of water had accumulated in the pond, from natural precipitation and the Appellant pumping water accumulated in the Stage 2 quarry pit into the pond. He stated that in order to complete Stage 1 rehabilitation, the Appellant would have to dewater the accumulated pond water to install the bottom-draw outlet, install erosion control around the pond and complete slope tree planting and pond filling. In total, Mr. Long estimated that this work would take approximately 20 years to complete.

[26] In relation to the current proposal by the Appellant, Mr. Long explained that it was decided that it was necessary to re-examine the rehabilitation plan in late 2008, based on multiple issues, including:

- Improving public safety as the site will be transferred to a public agency to manage in future for public access;
- NEC plan review proposals to prohibit the create of new ponds in future;
- Developing interpretations of terms in the NEP, including “rehabilitation”;
- The opportunity to create a more compatible final landform of superior ecological and hydrological health; and
- The availability of clean, excess soil from urban development areas has increased since the 1980s.

[27] Mr. Long testified that the site plan had contemplated that the rehabilitation plan would be revisited after Stage 1 had been fully quarried.

[28] Mr. Long opined that the approved site plan is inconsistent with the character and designations for the surrounding areas. He testified that the final landform that the proposal intends to create aligns with the pre-development topography and drainage regime that existed prior to 1912 when quarrying historically began at the site. This land would be planted with trees, grasslands and shrubs and additionally, wetland complexes would be created.

[29] Mr. Long testified that a development permit is needed prior to the Appellant seeking a site plan amendment from MNRF. His opinion was that this does not constitute a change in land use however.

[30] He stated that the proposed backfilling is expected to take five years and initial revegetation would then be completed in two to five years with adaptive forest management taking place at five year intervals into the longer term as natural succession takes place.

[31] Mr. Long was also of the opinion that what the Appellant is proposing can more accurately be described as “final rehabilitation” rather than “progressive rehabilitation” as those terms are defined under the NEP and that forest (NEP para. 1.9.4) and

watershed management (NEP para. 1.9.8) will be applicable permitted uses after mineral extraction is completed.

[32] In cross-examination Mr. Long acknowledged that rehabilitation is substantially completed at Stage 1. Referring to the Quarry's Final Rehabilitation Plan, which he authored in May 2011, Mr. Long also stated that he continues to hold the position that the "Quarry has been substantially rehabilitated in accordance with the site plan".

[33] He also acknowledged that the water level is already within 1 or 2 m of the final elevation of 270 m approved for the pond in the existing site plan. Mr. Long acknowledged that although the pond outlet structure in the site plan is labelled as a "bottom-draw structure", it is not actually shown to be at the bottom of the pond. Mr. Long testified that water drawn from the bottom would be preferred as the water would be cooler and more ideal for preserving water temperatures to the receiving waters of the Credit River when discharged.

[34] Mr. Long acknowledged that the Appellant could have constructed the bottom-draw outlet before the Stage 1 pond area started to fill with water.

[35] He also acknowledged that both the *ARA* permit and the development permit deal with the site as a whole and not merely Stage 1 and that none of the approvals for the site explicitly approved the importation of fill for remediation purposes. Mr. Long explained that it was necessarily implicit that fill importation would be required.

[36] Mr. Long also acknowledged that the 1.64 million $m^3$ of fill that he estimated was necessary to rehabilitate Stage 1 under the existing site plan is more than the 200,000 $m^3$ of fill that was actually imported to rehabilitate the slopes. Mr. Long explained that the difference was due to the fact that the Stage 1 was not fully quarried as originally proposed and that, as a result, not as much fill was required to create the slopes. His evidence was that the implicitly approved importation of 1.64 million $m^3$ of fill was comparable to the 1.8 million $m^3$ that the Appellant now seeks to import.

[37] In re-examination Mr. Long indicated that the Town of Caledon has agreed to monitor the importation of fill at the Appellant's expense.

George McKibbon

[38] Mr. McKibbon was qualified by the NEHO to give opinion evidence as an expert in environmental and land-use planning. He testified on behalf of the Appellant, providing an opinion on whether the Appellant's development permit application is in conformity with the NEP. Mr. McKibbon also provided opinion and factual evidence on the question of whether the importation of fill by the Appellant is a permitted use under the MREA designation of the NEP.

[39] Mr. McKibbon testified that this juncture in the rehabilitation process is an opportune time to pause and consider what the Appellant has learned from its accumulated experience to date at Stage 1 and to consider other rehabilitation opportunities that better reflect the intent of the NEP. It was his opinion that the availability of what he described as clean, inert fill from developing urban areas in Brampton and Caledon presented a superior rehabilitation option.

[40] Mr. McKibbon's opinion was that the Appellant has already made good progress in stabilizing and seeding Stage 1 quarry slopes but rehabilitation is not yet complete. He testified that the remaining work to be undertaken under the existing rehabilitation plan includes: draining the pond; installing an outlet structure; installing erosion controls on the slopes around the pond; refilling the pond; and further re-vegetation and stabilization of the slopes where reseeding has not been successful and erosion gullies have formed. He testified that vegetation establishment has been difficult because of erosion of the slopes at the site.

[41] Mr. McKibbon was of the opinion that the existing slopes may lead to safety concerns due to their steepness and that, as a result, it may be difficult to convey the site to a public authority for management in future.

[42] Mr. McKibbon's opinion was that it is preferable from a planning perspective to restore the pre-quarry drainage regime that had existed by importing fill.

[43] In terms of the difference in timing for the original site plan and development permit and the current proposal by the Appellant, he estimated that the current approved plan will take 17 years and the new proposal will take seven to ten years to complete.

[44] Mr. McKibbon was of the view that whether the filling operation is commercialized or not is not relevant as tipping fees will be required to support the management and operational measures needed to implement the stabilization and restoration successfully whether this is a public or private or combined public-private effort.

[45] Mr. McKibbon's opinion was that the use of imported fill from off-site for the purpose of progressive and final rehabilitation is a permitted use for the following reasons:

- Imported fill (200,000 $m^3$) was used to bring the approved stabilization and rehabilitation of Stage 1 to its current condition.
- The use of imported fill for progressive and final rehabilitation is common industry practice where shale quarries are concerned and is provided for by paras. 2.11.5 and 2.11.6 in the NEP.
- The 1990 development permit, amended in October 2001 for Stage 1, required the importation of fill.
- By comparison, the differences between Mr. Long's projections of imported fill requirements to complete the original approved rehabilitation and the volumes

proposed to be imported to complete the improved rehabilitation plan for Stage 1 are minimal.

- The development permit sought by the Appellant will substantially improve the stabilization and rehabilitation of Stage 1 and establish a firmer foundation for the after uses permitted by the NEP and proposed by the Appellant.
- The environmental advantages that accrue from flattening the slopes and filling the Quarry with imported fill as opposed to creating a pond are significant and provide a better opportunity to achieve the objectives of s. 8 of the *NEPDA* and the NEP through final rehabilitation of Stage 1.

[46] In providing his opinion that the Appellant's proposal is a permitted use under para. 1.9 of the NEP, Mr. McKibbon referenced the fact that the Appellant intends to restore and rehabilitate the Stage 1 excavation for forestry/wildlife management and watershed management/erosion control purposes, which are permitted uses in the MREA. Mr. McKibbon also stated that upon completion of rehabilitation, the Appellant intends to transfer ownership of Stages 1, 2 and 3 to a public organization. As a result, it was Mr. McKibbon's view that the following MREA permitted uses in para. 1.9 of the NEP are applicable:

- Mineral extraction operations licensed pursuant to the *ARA* (para. 1.9.3).
- Forest, fisheries and wildlife management (para. 1.9.4).
- Watershed management and flood and erosion control projects carried out or supervised by a public agency (para. 1.9.8).
- Nature preserves owned and managed by an approved conservation organization (para. 1.9.16).

[47] Mr. McKibbon testified that there would be no practical benefit to the proposal being allowed by way of an amendment to the NEP as compared to being approved by way of a development permit.

[48] Mr. McKibbon also made reference to the fact that portions of the licensed area are designated under the NEP as Escarpment Natural, Protection and Rural Areas, unlike many other mineral aggregate licensed areas. As a result, it was his opinion that the Appellant's application is preferable to the approved rehabilitation plan because it is a better fit with the NEP designation policies that apply to the Appellant's licensed areas and to lands adjacent to the licensed area. He opined that Objective 5 of the MREA designation criteria which is "to encourage, where possible, the rehabilitated after uses of pits and quarries to be integrated into the Niagara Escarpment Parks and Open Space System" would be met better through the Appellant's proposal.

[49] Mr. McKibbon referenced Part 2 of the NEP in his testimony and in particular, para. 2.11 on mineral resources. He referenced para. 2.11.9(b), which indicates that slopes are to be rehabilitated to a slope of 3 to 1 or less except in regions where topsoil and fill materials are scarce. He viewed the grading requirements of para. 2.11.9(b) as providing for a range of grading steepness with 3 to 1 slopes being the minimum requirement and allowing for the import of fill to allow for more gradual slopes as proposed by the Appellant.

[50] Mr. McKibbon testified that the original development permit implied that 1.64 million $m^3$ of fill importation would be needed to grade the slopes as required by the rehabilitation plan and that the additional fill to be imported under the Appellant's proposal would involve a minimal additional amount of fill by comparison.

[51] Mr. McKibbon made reference to the development agreement between the Town of Caledon and the Appellant, which was required under the original development permit as support for his opinion. He was of the view that since the Town of Caledon has provided provisional approval to the Appellant's current proposal, the objective of the NEP to support municipalities in their planning functions lends support to his opinion that the application is consistent with the NEP.

[52] Mr. McKibbon was further of the view that the definitions of “progressive rehabilitation” and “rehabilitation” are relevant. His view was that the Appellant’s application is consistent with both definitions for several reasons:

- The site’s rehabilitation is incomplete and it would be a mistake to leave the site in its current condition.
- The current approved rehabilitation plan may prejudice successful and timely stabilization and rehabilitation and planned after uses of the site after rehabilitation is complete.
- The agreement between the Town of Caledon and the Appellant allows for reconsideration of rehabilitation after extraction is complete.

[53] In conclusion, Mr. McKibbon testified that the proposal is, in his opinion, good planning.

[54] Under cross-examination, Mr. McKibbon acknowledged that there is no written authorization permitting the importation of fill for rehabilitation in the Appellant’s existing development permit or site plan, but he said it is needed as a practical matter and is necessarily implied as a result. Mr. McKibbon also acknowledged that he had relied on Mr. Long’s assessment for his estimates of the amount of fill importation that would be required to accomplish rehabilitation under the approved development permit and site plan and under the Appellant’s proposal. He also acknowledged that he relied upon Mr. Long for his estimates of how long the rehabilitation will take under the approved plan and the Appellant’s proposal.

[55] Mr. McKibbon also acknowledged that if a NEP amendment is required, additional considerations and steps would be required to be taken, including additional public consultation. He was, however, of the opinion that there is nothing preventing the NEC from requiring any such steps from being taken in the context of the Appellant’s development permit application.

[56] In relation to NEP para. 2.11.5 on after uses, permitted uses and new lots, Mr. McKibbon testified under cross-examination that determining what are “minimal amounts of off-site material required to stabilize and revegetate disturbed areas” requires a consideration of the context and the actual project at issue. Additionally, Mr. McKibbon opined that the prohibition in para. 2.11.5 on importation of fill to allow for “any major regrading toward a planned after-use with the deposition of off-site material” does not apply in this context as the definition of “after-use” in the NEP excludes permitted uses which he believes are applicable in this instance through para. 1.9 of the NEP.

[57] Finally, Mr. McKibbon also acknowledged that it would take seven to ten years before fill operations are completed and only after that would forest management or watershed management be able to take place under the proposal.

Frederick Johnson

[58] Mr. Johnson was retained by Mr. Long and called by the Appellant to provide expert opinion evidence in relation to whether or not the Appellant’s proposal is consistent with the intent of the NEP and provincial policy in general. Mr. Johnson also testified as to whether importation of fill is a permitted use in the NEP, including whether an amendment to the NEP is required and whether or not the Appellant will receive compensation for receiving and placing fill on site is a factor that needs to be considered.

[59] Mr. Johnson was qualified by the NEHO as an opinion witness with expertise in environmental planning.

[60] Mr. Johnson testified that the Appellant’s original rehabilitation plan in 1989 was prepared at a time when the science of pit and quarry rehabilitation was in its infancy and there was no ready source of clean material that would allow one to consider restoring the site to its original topographic condition. He stated that the existing

rehabilitation plan represents 30-year-old thinking that is out of step with current rehabilitation and natural heritage system design approaches and that the existing rehabilitation plan represents a minimalist approach to site restoration.

[61] Mr. Johnson testified that many factors have changed that make reconsideration of the existing rehabilitation plan not only desirable but necessary, including: the need to address opportunities to enhance the recreational, ecological and hydrological value of the site; the identification of a public agency willing to accept long-term ownership and management of the site necessitating upgrades to the site to make it more suitable as a park within the Niagara Escarpment Parks and Open Space system; and the availability of sources of clean fill of a similar textural and structural character to the shale that originally existed at the site prior to extraction.

[62] Mr. Johnson agreed with Mr. McKibbon and Mr. Long that the proposed rehabilitation plan and associated importation of fill is an activity that is a normal and necessary part of quarry rehabilitation. He stated that although the NEP is largely silent on the issue of fill importation, there are many sections of the NEP where the need for importation of fill is implied or more importantly essential to the achievement of some of the more central objectives of the NEP, including:

- Objective 4 of the NEP which seeks to “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 NEP’s definition of forest management supports restoration or enhancement of environmental conditions which presumably could include restoration of lost natural landscapes by importation of fill.
- The NEP’s definition of rehabilitation favours rehabilitation that would restore lands to former conditions which is an objective that would be almost impossible to achieve without importation of fill.

- Paragraphs 2.11(e) and (f) encourage “The preservation of the natural and cultural landscapes as much as possible during extraction and after rehabilitation” and “[t]he minimization of the adverse impact of extractive and accessory operations on parks, open space and the existing and optimum routes of the Bruce Trail”. He said importation of fill could in some situations be required to meet the intent of these policies.
- The NEC generally discourages creation of ponds and therefore it would be presumed the NEC is generally supportive of efforts to remove ponds from the landscape where possible.
- The NEP explicitly limits the importation of off-site material in para. 2.11.5 where restrictions are applied that limit the importation of fill to ensure that it cannot be used to accommodate after uses. This restriction does not apply to the proposed rehabilitation since the proposed use of the final rehabilitation is a permitted use in para. 1.9 of the NEP and not an “after use”. If the intent of the NEP were to prohibit or restrict importation of fill in other parts of the NEP area, one could reasonably presume the NEP would have explicit policies to that effect, similar to those in the specific circumstances of para. 2.11.5.

[63] It was Mr. Johnson’s opinion that an amendment to the NEP is not required to permit the proposed rehabilitation plan because the final uses that will result from the rehabilitation constitute uses that are already permitted uses in the MREA designation.

[64] Mr. Johnson was of the opinion that paras. 1.9.1 and 1.9.2 on after uses, new uses and new lots in the MREA are inapplicable since, in his view, the proposal is a permitted use.

[65] In relation to whether compensation for importation of fill is a relevant consideration, Mr. Johnson was of the opinion that whether or not the Appellant receives compensation for accepting and depositing off-site fill is irrelevant. In that regard, Mr. Johnson indicated that he is not aware of any provincial policy that states that the ability of a proponent to reduce costs or actually profit from activities leading to

the establishment of a final permitted use is a legitimate basis for refusing a planning application. Mr. Johnson indicated that the main consideration ought to be whether the proposal meets the intent of the NEP and associated provincial policies.

[66] In support of his opinion, Mr. Johnson cited the OMB decision relating to a mineral aggregate operation in *Re: 555816 Ontario Inc.*, [2006] 53 O.M.B.R. 10 ("*Campbellville Sand and Gravel Supply*") where the Board found that the profitability of a fill operation was insufficient alone to determine whether it met the overall intent of the NEP.

[67] Mr. Johnson testified that para. 2.11.5 of the NEP does not apply to the current proposal because the proposal is not part of a progressive rehabilitation plan but, rather, is an amendment to the existing final rehabilitation plan.

[68] Even if the provision does apply, Mr. Johnson was of the opinion that the proposed new rehabilitation plan would comply with para. 2.11.5 since on-site material is not available in sufficient quantities to meet the requirements of the proposed rehabilitation plan, the amounts of material are minimal when considered in the context of the total fill that has already been approved for the site, and the amount of material is limited to the amount required to restore environmental conditions as permitted in the MREA and not to prepare the site for any major re-grading required for an after use.

[69] Mr. Johnson was of the opinion that the application by the Appellant represents a significant improvement over the existing rehabilitation plan, though he did recognize that the reasons for his opinion were more relevant to the second phase of the hearing.

[70] In summary, Mr. Johnson opined that the importation of fill is a permitted use as it is a normal and necessary part of restoration and rehabilitation efforts contemplated throughout the NEP and para. 1.9 in particular. He stated that the application by the Appellant represents a significant improvement over the existing rehabilitation plan and

the NEP contains no provisions that would serve to prohibit the consideration of the proposed rehabilitation plan on its planning merits.

[71] Under cross-examination, Mr. Johnson indicated that in coming to his opinion that the proposal is a permitted use he relied on subparas. 3, 4, 8, 11 and 16 of the permitted uses listed in para. 1.9 of the NEP.

[72] Mr. Johnson also clarified under cross-examination that he considers the fill at issue to be minimal as it is only to the level that is necessary to establish the previously existing contours of the landscape and no more.

[73] Mr. Johnson also acknowledged that the issues before the OMB in *Campbellville Sand and Gravel Supply* did not involve any specific NEP matters and that he was not aware of any development permits issued by the NEC for backfill in the NEP area. Mr. Johnson stressed however that every site is unique and must be assessed on its own merits. He stated that, in this instance, fill would have similar characteristics to the material excavated from the site and it would be rare to find other quarry sites with the characteristics of a shale quarry.

[74] In response to questions about the NEHO decision in *Livingston v. NEC*, 2014 CarswellOnt 1441 (NEHO) (*"Livingston"*), Mr. Johnson expressed the opinion that the proposal in that case was not comparable to what the Appellant has proposed for several reasons: the site in *Livingston* was an agricultural operation seeking to increase productivity; the proposal did not contain sufficient information to facilitate approval; and it appeared aimed at altering natural land forms on the site rather than restoring them.

[75] In response to questions about the apparent lag time of five to seven years for the import of fill before permitted uses are to occur, Mr. Johnson responded that the time involved as compared to the 100 years it has taken to degrade the site should not be of concern and that permitted uses in NEP paras. 1.9.4, 1.9.8, 1.9.11 and 1.9.16 are applicable.

[76] Mr. Johnson stated that his testimony and report is based on the assumption that any fill will be clean, inert, and of high quality that meets the highest standards set by MNRF, the Ministry of the Environment and Climate Change, or others.

*NEC's Witnesses*

Steven Strong

[77] Mr. Strong is the District Planner for the Aurora District of the MNRF. He testified under summons served upon him by the NEC. The Aurora District of the MNRF has oversight of the Appellant's operations at the Quarry under the *ARA*.

[78] Mr. Strong was qualified by the NEHO to give opinion evidence as an environmental planner with particular expertise in aggregate resource planning.

[79] Mr. Strong is the author of the MNRF's comment letter to the NEC on the Appellant's development permit application.

[80] Mr. Strong is familiar with the site plan for the Quarry and expressed the view that the current operations are at Stage 2A in the site plan where excavation has begun at Stage 2 while Stage 1 rehabilitation is taking place. He testified that Stage 2A in the site plan depicts progressive rehabilitation at Stage 1 as development shifts into Stage 2. Mr. Strong testified that the site plan allows for concurrent progressive and final rehabilitation.

[81] Mr. Strong expressed the opinion that rehabilitation has gone well at Stage 1 to date. In reference to the site plan and his knowledge of the site, Mr. Strong testified that he believes the Appellant has met the sloping requirements of the site plan and that trees have been established. In Mr. Strong's estimation, the Appellant has completed

75-80% of rehabilitation for Stage 1 to date. He indicated that MNRF has decided not to enforce further requirements under the site plan until the present appeal has been resolved.

[82] Mr. Strong opined that it would have made sense to install the outlet structure when contours and sloping were created, although no timing is stipulated in the site plan for the construction of the outlet structure.

[83] In relation to the fill that has already been imported, Mr. Strong was unable to identify a paper trail on this particular issue but surmised that an MNRF inspector approved importation orally as there appears to be insufficient material on site to complete the sloping. Mr. Strong testified that importation of fill was not approved under the site plan.

[84] Under cross-examination, Mr. Strong testified that the site plan constitutes a progressive rehabilitation plan where rehabilitation and extraction are occurring on the entire site. He expressed the view that although the three stages of the Quarry are each separate, they are integrated in terms of rehabilitation.

[85] Mr. Strong acknowledged that MNRF has a memorandum of understanding with the NEC whereby the Ministry provides expert assistance to the Commission. He stated that, in this instance, MNRF had held discussions with the NEC relating to traffic concerns, permitted uses, volumes of fill and whether a change was even needed.

[86] Mr. Strong indicated under cross-examination that the MNRF cannot grant a site plan amendment until the NEC issues the development permit.

[87] Mr. Strong expanded upon his testimony in terms of what was additionally required to complete rehabilitation of Stage 1. He stated that additional vegetation and tree planting are still required, that minor grading is needed to address erosion, and the

water outlet must be created. It was his view that this amount of work was minimal in comparison to what has already been completed.

[88] Mr. Strong expressed concerns under cross-examination about the experience of the MNRF with fill operations to date. Mr. Strong indicated that MNRF has had problems with the quality and quantity of fill at backfilling sites outside of the NEP area. He indicated that even if these concerns could be addressed that the Ministry was unwilling to allocate significant staff resources to monitor backfilling operations without the prospect of achieving substantial ecological improvements on site.

[89] Mr. Strong indicated that although he understands that the Town of Caledon may be willing to take on the role of inspecting the quality of fill, the Town does not have delegated authority under the *ARA* and does not have inspectors experienced in quarry operations.

Michael Baran

[90] Mr. Baran is employed as a land-use planner with the NEC. He is the planner who reviewed the Appellant's application and provided the staff report recommending that the NEC refuse it. Mr. Baran was qualified by the NEHO to give opinion evidence as a land-use planner with particular expertise with respect to the NEP. Mr. Baran provided both opinion and factual evidence.

[91] Mr. Baran provided an overview of what has been approved at the Quarry. He testified that the site plan for the Quarry's *ARA* licence stipulates that the Stage 1 to 3 sites be progressively rehabilitated with a pond feature for each.

[92] Mr. Baran testified that backfilling as currently proposed by the Appellant is not a permitted use under para. 1.9 of the NEP.

[93] Mr. Baran testified that since the permitted uses relied upon by the Appellant are predicated on a use that is not permitted, namely backfilling, that the permitted use categories relied upon by the Appellant do not apply in this situation. For example, Mr. Baran testified that it was his opinion that para. 1.9.4 of the NEP relating to forest management cannot apply as it is not the primary purpose of the application, nor a likely near-term outcome, given that backfilling will have to occur for many years before any forest is established. It was Mr. Baran's opinion that para. 1.9.4 assumes that a forest already exists that is to be managed.

[94] Similarly, Mr. Baran was of the view that para. 1.9.8 relating to watershed management, para. 1.9.11 relating to park and open space master/management plans, and para. 1.9.16 relating to nature preserves owned and managed by conservation organizations do not apply as each of these uses would have to be preceded by at least five years of backfilling.

[95] Mr. Baran made reference to the after use provisions in NEP para. 1.9 and to paras. 2.11.5, 2.11.6 and 2.11.9 in support of his opinion that rehabilitation must be progressive as extraction proceeds and that the use of off-site fill for that purpose, if necessary, is to be minimal as required in para. 2.11.5. He also relied on these NEP provisions to support his opinion that the Appellant is required to obtain a NEP amendment for its proposal given the volume of material proposed to be used in backfilling and the nature of the operation.

[96] Mr. Baran referenced multiple policies within the NEP that allow for the creation of ponds under certain conditions in support of his opinion that the creation of a pond as a component of rehabilitation does not run contrary to the NEP.

[97] Mr. Baran expressed the view that the Stage 1 of the Quarry has been largely rehabilitated already, notwithstanding the need for MNRF rehabilitation orders to move things along and the need for additional tree planting. Mr. Baran noted that the existing

features and habitat that has been created and which is being used by wildlife would have to be displaced if the proposal were to proceed.

[98] Relying on MNRF correspondence commenting on the proposal, Mr. Baran highlighted that it would take several hundred years to re-establish a “pre-settlement, old-growth forest ecosystem” as proposed. Mr. Baran also testified that MNRF has stated that it is unlikely to be supportive of a site plan amendment under the *ARA* licence should the Appellant’s application for a development permit be granted.

[99] Mr. Baran expressed the opinion that what the Appellant proposes is actually a commercial fill operation and is not permitted under the NEP. He made reference to several municipal by-laws in Ontario that have defined what constitutes a commercial fill operation.

[100] In reference to *Livingston*, Mr. Baran expressed the opinion that the considerably larger-scale fill operation proposed by the Appellant as compared to that in *Livingston* suggests what the Appellant proposes is a commercial fill operation. Mr. Baran was of the view that deciding whether a proposal is a commercial fill operation is not dependant on the activity being financially profitable.

[101] Mr. Baran also referenced two cases where courts had found that the real purpose of operations were not as represented, but rather were commercial fill operations (*Uxbridge (Township) v. Corbar Holdings Inc.*, 2012 CarswellOnt 9262 (Ont. S.C.), aff’d in 2013 CarswellOnt 12673 (Ont. C.A.) (“*Corbar Holdings*”) and *Scugog (Township) v. 2241960 Ontario Inc. (c.o.b. Earthworx Industries)*, [2011] O.J. No. 2445 (Ont. S.C.) (“*Earthworx Industries*”)).

[102] Mr. Baran referenced the Appellant’s application for an *ARA* licence for the Norval Quarry, which lies outside of the NEP, where the Appellant has indicated that it may elect to surrender its *ARA* licence upon creation of a pond and then import fill from urban development areas to backfill the excavation.

[103] To conclude, Mr. Baran testified that rehabilitation in accordance with the *ARA* licence and site plan and the existing NEC development permit is nearly completed and that what is now proposed is a commercial fill operation that is not a permitted use under the NEP. His opinion is that the Appellant's proposal is a change in use necessitating a NEP amendment.

[104] On cross-examination, Mr. Baran acknowledged that he is aware that some quarries in the Greater Toronto Area have received fill, but clarified these are more in the urban context rather than in the NEP area.

[105] Mr. Baran testified under cross-examination that based on a single NEC staff report on discouraging pond creation, it is premature to conclude that the NEC is moving away from approving the creation of ponds in the NEP development-controlled area.

[106] Mr. Baran acknowledged that rehabilitation is not set out as a permitted use, but testified that it is contemplated as a requirement under para. 2.11.5 and further articulated in para. 2.11.9 of the NEP.

[107] Mr. Baran stated that he is not in agreement that the pond would have to be drained to install an outlet structure to maintain pond elevation. He did not dispute the volume of fill necessary to fill the quarry to pre-development topography as calculated by Mr. Long.

[108] In being questioned about the timing requirements for rehabilitation, Mr. Baran testified that the site plan under the *ARA* and the NEP contemplate that rehabilitation take place in a timely manner and that they do not contemplate that there be an interim land use, such as the backfilling proposed here, before rehabilitation takes place.

**Submissions**

*Submissions of the Appellant*

[109] The Appellant argues that its proposal is a permitted use under NEP para. 1.9. It states that it fits under the following permitted use categories: mineral extraction operations; forests management; watershed management; park and open space; and nature preserve.

[110] Regarding the NEP para. 1.9.3 mineral extraction operations permitted use, the Appellant submits that its proposal to backfill is a part of mineral extraction operations licensed pursuant to the *ARA*. It states that backfilling is a standard form of quarry rehabilitation and fits within the definition of “rehabilitate” in s. 1(1) of the *ARA* and the definition of “rehabilitation” in the NEP, both of which aim to return land to its former use or condition or to another use or condition which is compatible with adjacent uses. The Appellant submits that backfilling is commonly used as a form of rehabilitation and refers to the OMB decision in *Campbellville Sand and Gravel Supply* where the Board ordered that a gravel pit be backfilled as part of its rehabilitation.

[111] The Appellant states that while "rehabilitation" is not listed as a permitted use under para. 1.9 of the NEP, it is an integral part of a mineral extraction operation. The Appellant argues that the *ARA* licence for the Quarry indicates that the licence was issued pursuant to the *ARA*, which requires at s. 48(1) that every licensee perform “progressive rehabilitation and final rehabilitation on the site in accordance with the *ARA*, the regulations, the site plan and the conditions of the licence or permit to the satisfaction of the Minister”. The Appellant contends that, although the licence does not contain specifics on the required rehabilitation, it does contain site plan drawings which show rehabilitation “concepts”. It also argues that the term “rehabilitate” in the *ARA* and the term “progressive rehabilitation” in the NEP incorporate the requirement that the land be restored to its former use or condition or another use or condition that is or will be compatible with the use of the adjacent land.

[112] The Appellant argues that fill importation is essential to the achievement of the NEP's objectives, including 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 Appellant argues that the NEP objectives and policies "can only be fully contemplated if the importation of clean off-site material is a possibility". It states in its written submissions that:

> … mineral extraction is a use that by its nature constitutes major landscape disruptions that cause significant departures from natural conditions that existed prior to the extraction. In order to achieve the NEP objectives of returning the site to a more natural condition in many cases the importation of fill would be a necessary activity if in fact the basic intent of the NEP is to be achieved.

[113] The Appellant states that Stage 1 of the Quarry is undergoing final rehabilitation and that its proposal to import fill is not an after use. It submits that NEP para. 2.11.5, which restricts the importation of fill during the rehabilitation of quarry sites, does not apply because it only applies where grading is directed at a planned after use, whereas here, it is argued, the import of fill is for a permitted use. The Appellant argues that "if the intent of the NEP was to prohibit or restrict importation of fill in other parts of the NEP area one could reasonably presume they would have clearly done so through explicit policies."

[114] The Appellant argues that the Quarry's current rehabilitation plan is "out of step with current rehabilitation or natural heritage system design approaches" and that the site plan, the OMB decision that approved it and the development agreement executed by the Appellant and the Town of Caledon regarding the Quarry all anticipate that there be a pause prior to the final rehabilitation of the Quarry site to allow for adjustments. The Appellant submits that the approved rehabilitation plan was conceptual in nature and it was always the intention that the plan be revisited in light of changing conditions, policies and practices. The Appellant argues that its proposal is an amended form of rehabilitation, which is required under the NEP and the *ARA*.

[115] The Appellant argues that to complete the Stage 1 rehabilitation, construction of an outlet structure and the planting of more vegetation is required. The Appellant states that this will take as many as 20 years to complete, while rehabilitation based on the Appellant's proposal will take seven to ten years.

[116] Regarding the existing rehabilitation plans, the Appellant states that pond perimeter erosion control and slope stabilization that will be required and that the pond will have to be drained in order to build a bottom-draw outlet.

[117] The Appellant states that it sent a letter on May 13, 2011 to MNRF in which it requested that it surrender its licence for Stage 1 of the Quarry site in order to have its proposal approved. The Appellant states that the request to surrender the licence should not be seen as an indication that rehabilitation is complete.

[118] The Appellant also argues that there is inherent authorization in the site plan to import large quantities of fill as part of the Quarry's rehabilitation. It states that 200,000 $m^3$ of fill has already been imported to the Quarry site with the express knowledge of both the NEC and the MNRF and that while all parties knew of this importation, no written approval or documentation was required as the site plan implicitly anticipates this importation. It argues that the NEP implies importation of fill in its preference for the restoration of natural topographies for final rehabilitation as reflected in NEP para. 2.11.1(e), which states that impacts should be minimized and extractive operations shall not conflict with "the preservation of the natural and cultural landscapes as much as possible during extraction and after rehabilitation". The Appellant further submits that NEP para. 1.9.4 provides that the objective is to ensure that after uses and rehabilitation are compatible with the applicable Plan designation, the surrounding environment and existing uses. The Appellant concludes that in both the NEP and the site plan, the importation of fill for rehabilitation is implicitly permitted and encouraged as part of the MREA permitted uses.

[119] The Appellant states that its proposal is permitted under the NEP and does not constitute a commercial fill operation. It states that there is no "change of use" and that a NEP amendment is not required.

[120] Regarding the application of its proposal to the forests management, watershed management, park and open space and nature preserve permitted uses listed in NEP para. 1.9, the Appellant states that its proposal aims to undertake these uses and that its proposed rehabilitation work is necessary to meet those aims.

*Submissions of the NEC*

[121] The NEC submits that the Appellant's proposal would result in the conversion of Stage 1 of the Quarry into a commercial fill operation. It states that the proposal would delay final rehabilitation and set a poor precedent under the NEP. The NEC states that there has never been a NEC development permit of this type granted before and the NEP does not contemplate backfilling as rehabilitation. The NEC submits that given these circumstances, the Appellant's proposal requires a NEP amendment.

[122] The NEC argues that the *Aggregate Resources of Ontario Provincial Standards* ("*AROPS*") requires site plans to be prescriptive. It states that *AROPS* requires that if any fill importation is of top soil or inert fill material to facilitate rehabilitation of a site, it must be set out in the relevant site plan.

[123] The NEC submits that the *ARA* licence, site plan and development permit cover all three stages of the Quarry's development and the current state of progressive rehabilitation for the site is set out in Stage 2A in the site plan. It states that there is nothing in it that speaks to the authorization of the importation of fill. The NEC argues that items 5 and 9 of the site plan speak only to the use of saved overburden and a berm. The NEC states that there are also no conditions in the development permit that authorize the importation of fill.

[124] The NEC states that the importation of fill to the site has never been authorized by the NEC and there is no requirement in the *ARA* licence, the site plan or in any of the development permit for a “pause” in rehabilitation. It submits that the agreement between the Appellant and the Town of Caledon does not call for a “pause” and, in any event, if it did, it would not change the rehabilitation requirements in the NEC development permit and the site plan.

[125] The NEC states that Stage 1 is largely completed and rehabilitated in accordance with the site plan and the development permit. It states that extraction has been completed, the side slopes have been appropriately established and seeding has taken hold with grassy vegetation.

[126] The NEC submits that to determine whether the Appellant’s proposal is a permitted use under NEP para. 1.9, one has to look at the true nature of the proposal. The NEC states that it amounts to a request to authorize a change in the use of the site from an *ARA* licensed aggregate operation with nearly finalized rehabilitation to a commercial filling operation. It argues that this constitutes an after use, which requires a NEP amendment. As such, the NEC argues that the Appellant’s proposal does not fall under para. 1.9.3 of the NEP for mineral extraction operations as rehabilitation is nearly completed in accordance with the existing site plan.

[127] The NEC states that NEP para. 1.9 requires conformity with NEP paras. 2.11.5, 2.11.6 and 2.11.9, which tightly restrict the use of off-site fill during quarry rehabilitation. The NEC argues that the Quarry is in the midst of progressive rehabilitation and must comply with the para. 2.11.5 requirement that the volume of added fill be minimal. In addition, it argues that under para. 2.11.6 of the NEP, the proposal must be supported by MNRF, which it is not.

[128] The NEC also argues that the Appellant’s proposal does not constitute forest management under the para. 1.9.4 permitted use of forest, fisheries and wildlife management because for it to apply, a forest or similar feature must already exist, which

it does not. The NEC states that forest management is also not the primary purpose of the application and the proposed permitted use of "forest management" is premature and speculative. The NEC refers to *Earthworx Industries* where a proposal to deposit fill in an exhausted gravel pit was deemed to be a commercial fill operation and not for the construction of an aerodrome. The NEC submits that the Court found that it was premature to exclude provincial law applicable to managing commercial fill operations by invoking federal law applicable to aerodromes.

[129] With respect to the Appellant's arguments that its proposal falls within the NEP para. 1.9.8 permitted use of watershed management and flood and erosion control projects carried out or supervised by a public agency, the NEC takes the position that this proposed use is premature and speculative as it must be preceded by a significant new use or after use (a commercial filling operation) in order to provide the conditions for watershed management and flood and erosion control.

[130] Regarding the Appellant's argument that its proposal falls within the NEP para. 1.9.11 permitted use of park and open space management and the para. 1.9.16 permitted use of nature preserves, the NEC states that these are also premature and speculative as the conditions for these permitted uses do not exist.

[131] The NEC submits that the proposal is for a change in land use under NEP para. 1.9 and requires a NEP amendment. The NEC states that the Appellant's proposal has all the indicia of a commercial fill operation which is not a permitted under para. 1.9 of the NEP. It submits that the primary indicators are the significant volume of fill material to be imported and the duration of the activity with an estimated 1.8 million $m^3$ of fill is to be introduced over a period of five years or more. The NEC states that the NEP does not have a definition of a "commercial fill operation" as it is not a permitted use.

[132] The NEC states that a similar proposal was denied by the NEHO in *Livingston* where it found that the importation of fill is not a permitted use in the NEP Rural

Escarpment designation. It also refers to *Corbar Holdings*, where the importation of fill was found not to be a normal farm practice.

[133] The NEC states that that there is no wording in the NEP that requires that a site be restored to its former use or condition. It does not dispute that backfilling may be a form of site rehabilitation for exhausted quarry sites, but argues that it has never been done before in the NEP development control area and in this case it does not conform with para. 2.11.5 of the NEP.

[134] The NEC argues that rehabilitation at Stage 1 of the Quarry is "effectively very nearly completed" and the Appellant's proposal amounts to an "after use" as defined in the NEP. It argues that the Appellant's proposal requests a change in use from an "aggregate operation of nearly finalized rehabilitation into a commercial filling operation" and that such after uses require a NEP amendment and cannot be authorized by a development permit.

**Analysis and Findings**

[135] The question for the Hearing Officers to determine in Phase 1 of this appeal is whether the Appellant's proposal is a permitted use under para. 1.9 of the NEP.

[136] The Appellant's proposal is to obtain a NEC development permit that will allow the Appellant to apply to the MNRF to have the rehabilitation provisions in the Quarry's site plan amended. Section 24 of the *NEPDA* requires that a development permit must be issued prior to the granting of an approval, permission or other decision relating to a proposed development in the NEP development control area. This includes permission or approval to amend a site plan.

[137] The Appellant argues that its proposal aligns with the following permitted uses described in NEP para. 1.9:

> 1.9.3. Mineral extraction operations licensed pursuant to the *ARA*;
>
> 1.9.4. Forest, fisheries and wildlife management;
>
> 1.9.8. Watershed management and flood and erosion control projects carried out or supervised by a public agency;
>
> 1.9.11. Uses permitted in Park and Open Space Master/Management Plans which are not in conflict with the Niagara Escarpment Plan; and
>
> 1.9.16. Nature preserves owned and managed by an approved conservation organization.

[138] To determine whether the Appellant's proposal is a permitted use, each of the NEP para. 1.9 permitted use categories relied upon by the Appellant is analysed below.

***Mineral extraction operations licensed pursuant to the ARA***

[139] Paragraph 1.9.3 of the NEP states that mineral extraction operations licensed pursuant to the *ARA* are a permitted use. Rehabilitation is a component of quarry operations licensed pursuant to the *ARA*. However, s. 48 of the *ARA* states that such rehabilitation must be to the satisfaction of the Minister of MNRF. The section states:

> 48. Every licensee and every permittee shall perform progressive rehabilitation and final rehabilitation on the site in accordance with this Act, the regulations, the site plan and the conditions of the licence or permit to the satisfaction of the Minister.

The parties do not dispute that a quarry is a mineral extraction operation.

[140] To determine whether a proposed amendment to the rehabilitation provisions of a site plan facilitates a permitted use under the para. 1.9 mineral extraction operations category, the NEHO must determine whether the uses facilitated by the proposed amendment constitute "rehabilitation" and, if they do, whether they conform to s. 48 of the *ARA*. It is not contested by the parties that the existing *ARA* site plan contains a plan for rehabilitation that meets the requirements of the NEP and the *ARA* and is satisfactory to the Minister of MNRF. What is at issue is whether the Appellant's proposed amendment to the site plan to allow importation of fill is permitted as part of

the Quarry's rehabilitation or whether it is a distinct use of land that is not permitted under the NEP.

[141] The term "rehabilitation" is defined in Appendix 2 of the NEP. It states:

> **Rehabilitation** – 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).

The question is whether the importation of fill as proposed by the Appellant will restore the land "to its former use or condition" or to change it "to another use or condition which is compatible with adjacent uses and the objectives and policies of the NEP". Under Ontario Regulation 44/97, enacted under the *ARA*, the operation of quarries must be in accordance with the Aggregate Resources of Ontario Provincial Standards. Those standards require that, where the importation of fill is proposed, site plans for below groundwater quarries must show "details on the importation of topsoil or inert material to facilitate rehabilitation of the site". This applies to both progressive and final rehabilitation of a quarry. It suggests that the importation of fill may be permitted for rehabilitation of mineral extraction operations licensed pursuant to the *ARA*.

[142] The NEC argues that this is not permitted. It refers to para. 2.11.5 of the NEP, which appears to limit the amount of fill that may be imported for progressive rehabilitation. It submits that the Appellant's proposal is not for rehabilitation, but rather is for a "commercial fill operation". In other words, it constitutes a use that is not included in the para. 1.9 category of mineral extraction operations. The NEC refers to *Livingston* where the NEHO found, at para. 50, that the nature of a development proposal amounted to a commercial fill operation and was not a permitted use under the NEP Rural Escarpment designation. The NEHO stated:

> The Hearing Officer accepts the opinion of Mr. Baran that the proposal is more akin to a commercial fill operation than a normal part of agricultural operation. This finding is made on the basis that there is no mention of the application of fill (or topsoil) within the NEP definition of agricultural

> use. The Hearing Officer has further considered that the Town has determined that the proposal constitutes a commercial fill operation, and on that basis lists significant requirements for engineering studies, grading plans, and the like. This finding aligns with *Township of Uxbridge v. Corbar, supra*, which found that large scale fill importation is not a normal agricultural practice.

[143] The reasoning in *Livingston* included that a commercial fill operation cannot be part of an agricultural operation as the NEP's definition of "agricultural use" does not mention the application of fill. In terms of the present appeal, the term "mineral extraction operations" is neither defined in the NEP nor the *ARA*. The Hearing Officers therefore must look elsewhere for guidance.

[144] As noted by Mr. Baran, "commercial fill operation" is defined in several municipal bylaws enacted in the province. He referred to bylaws passed in the Town of Uxbridge, Township of Brock, and Township of East Luthur Grand Valley. They suggest a broad definition with a defining characteristic that the operation in question involve remuneration. They each define "commercial fill operation" as:

> The placing or dumping of fill involving remuneration paid, or any other form of consideration provided, to the owner or occupier of the land, whether or not the remuneration provided to the owner is the sole reason for the placing or dumping of the fill.

[145] It is undisputed that the Appellant's proposal would involve the "placing or dumping of fill" and that the Appellant would charge a tipping fee and receive remuneration. Noting that the bylaws are not binding in relation to this appeal, the Hearing Officers find that the Appellant's proposal fits within the definition of "commercial fill operation" in those bylaws.

[146] As noted by the Appellant, each of the bylaws referred to by the NEC exempts quarries from prohibitions against backfilling. This does not mean that they are not commercial fill operations; rather it indicates that these commercial fill operations are exempt from the prohibitions in the bylaws. In other words, quarries can facilitate commercial fill operations under those rules. As noted by the OMB at page 47 of

*Campbellville Sand and Gravel Supply*, it is not a significant factor whether the "operator can financially benefit while effecting the proper rehabilitation of the site". The key point is that the commercial fill operations result in the proper rehabilitation of the site and do not hinder rehabilitation.

[147] Referring back to the NEP definition of "rehabilitation", the proposal must ensure the restoration of the site "to its former use or condition" or change it "to another use or condition which is compatible with adjacent uses and the objectives and policies of the NEP". The rehabilitation must be to the satisfaction of the Minister of MNRF as required in s. 48 of the *ARA*. Additional "rehabilitation" beyond that required by the Minister could, in essence, constitute an after use.

[148] As set out above in the summary of the evidence, there is no dispute that the existing site plan is in effect and its rehabilitation provisions are presently being implemented to the satisfaction of the Minister. The pond and the current grading have been in place for several years. The Appellant has completed the grading and contouring of the former quarry slopes required by the rehabilitation provisions in the site plan. Some off-site fill was imported and used to stabilize and revegetate the quarry slopes with the oral approval of an MNRF inspection officer. Apart from the need to plant additional trees and revegetate some erosion on the slopes, vegetation has been established across the site.

[149] Although it is disputed as to how erosion control and the outlet structure should be installed for the pond, it is not disputed that the Appellant allowed the pond to be filled almost to the final elevation required by the site plan and development permit (both by pumping water from its Stage 2 excavation operations and by allowing the pond to fill over time through precipitation). The Appellant submits that completion of rehabilitation based on the provisions in the existing site plan will take up to 20 years to complete. While the NEC has not provided a time estimate, it disagrees with the Appellant's assessment. According to the Appellant, the required work includes, among other things, the installation of an outlet structure at the bottom of the pond requiring that the

pond be drained and then re-filled. The Hearing Officers note, however, that the existing site plan does not envision the extent of work suggested by the Appellant. The final rehabilitation grades set out in the existing site plan show that the outlet structure is to be installed at an elevation near the top of the pond, not the bottom. The complete draining and re-filling of the pond therefore may not be necessary. Moreover, the staging and progressive rehabilitation requirements in the site plan state that rehabilitation of Stage 1 of the Quarry is to be completed within two years of the completion of the Stage 1 extraction.

[150] Despite the Appellant's submissions, Mr. Long acknowledged that rehabilitation of Stage 1 as currently approved has been "substantially completed". This was stated in his Final Rehabilitation Plan, dated May 2011, and affirmed under cross-examination. Mr. Long also stated in his Final Rehabilitation Plan that "the Quarry has been substantially rehabilitated in accordance with the site plan". The evidence of Mr. Strong and Mr. Baran is that most of the rehabilitation work for Stage 1 is complete.

[151] Based on this evidence, the Hearing Officers find that the rehabilitation requirements in the site plan relating to Stage 1 of the Quarry have been substantially completed. There may be site maintenance required, including erosion control and tree and vegetation cultivation, but these will be ongoing activities. The outlet structure is the only significant outstanding feature that needs to be completed. It has not been installed only because of the sequencing of work that the Appellant has elected to take.

[152] Furthermore, the Hearing Officers are not convinced that the site plan requires a "pause" in rehabilitation in order to allow for changes to be considered at this late stage as proposed by the Appellant. Similarly, the development agreement executed by the Appellant and the Town of Caledon regarding the Quarry does not override the site plan or development permit and cannot require that there be such a pause in rehabilitation.

[153] The Hearing Officers find that, although some work remains to be done, the existing rehabilitation plan has reached a stage of rehabilitation that is substantially

complete and it is consistent with the requirements for rehabilitation under the *ARA* and NEP. The Hearing Officers find that the existing rehabilitation plan treats the lands in question so that the use or condition of the land will be changed to another use or condition, which in the words of the NEP, will be "compatible with adjacent uses and the objectives and policies of the NEP" (see NEP Appendix 2). The Hearing Officers find that the existing site plan is also to the satisfaction of the Minister as mandated in s. 48 of the *ARA*.

[154] The Hearing Officers find that in the circumstances of this case, where the site plan is substantially completed to the satisfaction of the Minister for Stage 1, the Appellant's proposal would be an after use and is not a permitted under NEP para. 1.9.3.

***Forest, fisheries and wildlife management***

[155] The Appellant submits that its proposal falls within the "forest, fisheries and wildlife management" category of permitted uses described at para. 1.9.4 of the NEP. Mr. McKibbon testified for the Appellant that the proposal will provide a better foundation to manage forests and wildlife. He did not elaborate on the issue other than to provide his opinion that the lapse of time between backfilling and forest management was not particularly relevant to assessing whether the proposal is a permitted use.

[156] "Forest management" is defined in the NEP. It states:

> The sustainable management of forests for the production of wood and wood products, and to provide outdoor recreation, to maintain, restore or enhance environmental conditions for wildlife, and for the protection and production of water supplies.

[157] Mr. Baran gave evidence that for forest management to take place, there must first be a forest. At page 2 of his reply witness statement, he states:

> … I wish to emphasize that forestry management, particularly the NEP's definition of forest management, presupposes that a forest in some form or other already exists and that the various functions or measures to restore and enhance such functions are associated with an existing forest feature. There is no forest feature located within any part of the proposed development site.

[158] The NEC argues that a permitted use must not be reliant on an "after use" in order for it to be made possible. Mr. Baran states at page 2 of his witness statement:

> Since the [Appellant's] proposal includes a second component that is entirely dependent on the non-permitted backfilling component (detailed works required to establish specific topographic/surface drainage features and vegetation), the overall proposal cannot be permitted in the MREA.

[159] In *Earthworx Industries*, the Divisional Court addresses a similar issue regarding the backfilling of an exhausted gravel pit in order to prepare the site for a future use (in that case an aerodrome). The Divisional Court states, at para. 33:

> The applicant submits that it is operating the landfill so as to prepare the site for ultimate construction of a runway and the operation of an aerodrome. That may be its intention for the use of the land some years down the road. However, at the moment, it is engaged in the commercial activity of a landfill site.

[160] Based on these considerations, the NEC submits on pages 11-12 of its written submissions that the Appellant's reliance on the permitted use of "forest management" is "premature and speculative given the intervening significant fill operation use proposed".

[161] The Hearing Officers agree with the NEC and find that as there are presently no trees, vegetation or any soil at the location of the proposed forest to be managed, its proposal does not fall under NEP para. 1.9.4. The forest proposed for management will only be planted after years of backfilling. The Appellant's proposal is not a permitted use described under para. 1.9.4 of the NEP.

***Watershed management and flood and erosion control projects***

[162] The Appellant argues that its proposal falls within the "watershed management and flood and erosion control projects" category of permitted uses described in para. 1.9.8 of the NEP. Paragraph 1.9.8 stipulates that these activities must be carried out or supervised by a public agency. "Public agency/body" is defined in NEP as:

> A federal or provincial government, a municipality, or municipal agency, including any commission, board, authority or department, established by such government or agency exercising any power or authority under a Statute of Canada or Ontario. The Bruce Trail Conservancy shall be treated as if it were a public agency/body with respect to the role of the Association in securing and managing the Bruce Trail Corridor under Part 3 of the Niagara Escarpment Plan.

[163] "Watershed Management" is also defined in the NEP. It states:

> The analysis, protection, development, operation and maintenance of the land, vegetation and water resources of a drainage basin.

[164] Mr. McKibbon testified that the Appellant's proposal will provide for better erosion control and water management on and off site, but did not elaborate further, other than to provide his opinion that the gap in time between backfilling and watershed management was not important in his view to considering whether the proposal is a permitted use.

[165] Evidence was led by the Appellant that a public agency may be willing to take over management of the site once rehabilitation is complete, but no public agency has yet agreed to carry out or supervise watershed management activities at the Quarry site. Additionally, the water courses and wetlands proposed to be engineered on the site must be predicated on years of backfilling.

[166] Similar to its submissions regarding forest management, the NEC states that the Appellant's argument that its proposal falls in the watershed management category

under para. 1.9 of the NEP is premature and speculative. In his reply witness statement, Mr. Baran states at page 2:

> The development … is not for the purpose of watershed management. Even if there is some degree of flood and erosion control integrated with the final rehabilitation of the quarry site, such activities would not be carried out or supervised by a public agency for the duration of the filling operation and there is no certainty at present that a public agency would have any role in the long term use of the site.

[167] The Hearing Officers find that the Appellant's proposal does not fit in the watershed management category under NEP para. 1.9.8. Absent the public agency committed to manage the watershed on this specific site, the Appellant's proposal is not a permitted use under para.1.9.8.

***Uses permitted in Park and Open Space Master/Management Plans***

[168] The Appellant argues that its proposal falls within the "uses permitted in Park and Open Space Master/Management Plans" category of permitted uses described in para. 1.9.11 of the NEP.

[169] "Park and Open Space Plans" is a defined term under the NEP. It is defined as:

> Master/management plans for parks and open space within the Niagara Escarpment Parks and Open Space System which are not in conflict with the Niagara Escarpment Plan.

[170] As is the case for the Appellant's proposed forest and watershed management activities, the NEC submits that the applicability of the Appellant's proposal to this category under NEP para. 1.9.11 is speculative and premature. The NEC states that there is no evidence that the Quarry site after it has been backfilled would qualify as a component of the Niagara Escarpment Parks and Open Space System. The Hearing Officers note that Part III of the NEP sets out the objectives and policies relating to the Niagara Escarpment Parks and Open Space System. Under para. 3.5 of the NEP, new parks and open space areas may be added provided that the MNRF and NEC are

satisfied that the addition would satisfy the applicable objectives set out in para. 3.1.1 of the NEP.

[171] Without the site being qualified by MNRF and the NEC under the Niagara Escarpment Parks and Open Space System and absent any evidence that such a process has commenced for this particular site, the Hearing Officers are unable to find that the Appellant's proposal is a permitted use under the Park and Open Space Master/Management Plans category in para. 1.9.11 of the NEP.

***Nature preserves***

[172] The Appellant argues that its proposal falls within the "nature preserves" category of permitted uses in para. 1.9.16 of the NEP. It did not elaborate in any detail on its rationale regarding how its proposal does so however. This provision requires that the nature preserve be owned and managed by "an approved conservation organization". The NEP defines "conservation organization" as follows:

> A non-government conservation body including a land trust, conservancy or similar not-for-profit agency governed by a charter or articles of incorporation or letters patent, and with by-laws and objectives that support the protection of the natural environment of the Niagara Escarpment. Such an organization must have registered charitable status. A conservation organization shall be considered to have an "approved" status under this Plan once the Ministry of Natural Resources and Niagara Escarpment Commission have been satisfied that a conservation organization has an environmental purpose consistent with the purpose, objectives and policies of the Niagara Escarpment Plan. This would include commitment, public support, organizational ability, sustained activity in the interests of conservation over several years and a legally binding arrangement to ensure that all lands acquired or held as nature preserves remain protected should the organization cease to exist.

[173] In his reply witness statement at page 2, Mr. Baran states:

> The subject site is not a nature preserve that is owned and managed by an approved conservation organization, nor is there any certainty at present that an approved conservation organization would own and manage the site/property.

[174] The Hearing Officers accept this evidence, which was uncontested, and find that the Appellant's proposal is not a permitted use under the nature preserve category of permitted uses in para. 1.9.16 of the NEP.

***Conclusion***

[175] The Hearing Officers find that the Appellant's proposal does not fit into any of the categories of permitted uses described in para. 1.9 of the NEP and that the Appellant's proposal is therefore not a permitted use under the NEP.

[176] As a result of the above findings, this appeal will not proceed to Phase 2 and the appeal is dismissed.

**DECISION**

[177] The Hearing Officers find that the decision of the NEC of July 23, 2013 to refuse development permit application P/E/2009-2010/242 is correct and should not be changed. The NEC's decision is therefore confirmed pursuant to s. 25(12) of the *NEPDA.*

*NEC Decision Confirmed*
*Appeal Dismissed*

*"Justin Duncan"*

JUSTIN DUNCAN
HEARING OFFICER

*"Paul Milbourn"*

PAUL MILBOURN
HEARING OFFICER

*“Hugh S. Wilkins”*

HUGH S. WILKINS
HEARING OFFICER

Appendix A – Relevant Legislation and Niagara Escarpment Plan Provisions

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

**Appendix A**

## Relevant Legislation and Niagara Escarpment Plan Provisions

### *Niagara Escarpment Planning and Development Act*

**Objectives**

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

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

**By-laws, etc., to conform to Plan**

13. (1) Despite any other general or special Act, when the Niagara Escarpment Plan is in effect,

(a) no municipality or local board as defined in the *Municipal Affairs Act* having jurisdiction in the Niagara Escarpment Planning Area, or in any part of the Area, and no ministry, shall undertake any improvement of a structural nature or any other development or undertaking within the Area if the improvement, development or undertaking is in conflict with the Niagara Escarpment Plan; and
(b) no municipality having jurisdiction in the Niagara Escarpment Planning Area, or in any part of the Area, shall pass a by-law for any purpose if it is in conflict with the Niagara Escarpment Plan.

### *Aggregate Resources Act*

**Definitions**

1.(1) In this Act,

“final rehabilitation” means rehabilitation in accordance with this Act, the regulations, the site plan and the conditions of the licence or permit performed after the excavation of aggregate and the progressive rehabilitation, if any, have been completed;

"progressive rehabilitation" means rehabilitation done sequentially, within a reasonable time, in accordance with this Act, the regulations, the site plan and the conditions of the licence or permit during the period that aggregate is being excavated;

"rehabilitate" means to treat land from which aggregate has been excavated so that the use or condition of the land,

(a) is restored to its former use or condition, or
(b) is changed to another use or condition that is or will be compatible with the use of adjacent land;

**Licences required**

7. (1) No person shall, in a part of Ontario designated under section 5, operate a pit or quarry on land that is not land under water and the surface rights of which are not the property of the Crown except under the authority of and in accordance with a licence.

**Site Plans for Licences**

8. (1) Every application for a licence shall include a site plan in accordance with the regulations.

**Duty to rehabilitate site**

48. (1) Every licensee and every permittee shall perform progressive rehabilitation and final rehabilitation on the site in accordance with this Act, the regulations, the site plan and the conditions of the licence or permit to the satisfaction of the Minister.

## Niagara Escarpment Plan

**Objectives**

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 Plan Area in their exercise of the planning functions conferred upon them by the Planning Act.

**1.9 Mineral Resource Extraction Area**

The Mineral Resource Extraction Area designation includes pits and quarries licensed pursuant to the Aggregate Resources Act and areas where mineral resource extraction may be permitted subject to the policies of this Plan.

***Objectives***

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

***Criteria for Designation***

1. Existing licensed areas.

***Permitted Uses***

Subject to conformity with Part 2, Development Criteria, and official plans and where applicable, zoning by-laws that are not in conflict with the Niagara Escarpment Plan, the following uses may be permitted:

…

3. Mineral extraction operations licensed pursuant to the Aggregate Resources Act.
4. Forest, fisheries and wildlife management.

…

8. Watershed management and flood and erosion control projects carried out or supervised by a public agency.

…

11. Uses permitted in Park and Open Space Master/Management Plans which are not in conflict with the Niagara Escarpment Plan.

…

16. Nature preserves owned and managed by an approved conservation organization.

…

***After Uses***

Prior to a change of land use a Mineral Resource Extraction Area will require an amendment to the Niagara Escarpment Plan. The after use of the excavated area shall be compatible with, and have minimal impact upon, the surrounding uses and the objectives of the Niagara Escarpment Plan.

***After Uses, Permitted Uses and New Lots***

1. Except for progressive rehabilitation, as set out in the Development Criteria for Mineral Resources in Parts 2.11.5, 2.11.6 and 2.11.9 of this Plan, any new lot creation or any change in land use within a Mineral Resource Extraction Area, other than the identified permitted uses, shall require an amendment to the Niagara Escarpment Plan.
2. Except for the identified permitted uses that comply with the provisions of the Development Criteria for Mineral Resources in Part 2.11.5 of this Plan, all after uses shall require an amendment to the Niagara Escarpment Plan and shall be subject to a redesignation of the Mineral Resource Extraction Area designation to the applicable Niagara Escarpment Plan designation as determined through the application of the criteria for designation contained in the Niagara Escarpment Plan.
3. After uses of the Mineral Resource Extraction Area shall be in conformity with the objectives and permitted uses of the applicable redesignation of the Plan as determined through subsection 2 above.
4. Where the rehabilitation is being undertaken by reforestation, the after use shall aim to re-establish a functioning ecosystem similar in condition to the natural ecosystems in the region.
5. he 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.

…

7. After uses shall be subject to conformity with Part 2, Development Criteria.

**2.11 Mineral Resources**

The objective is to minimize the impact of new mineral extraction operations and accessory uses on the Escarpment environment.

[…]

5. Wherever possible, rehabilitation shall be progressive as the extraction proceeds. Progressive rehabilitation may include the use of off-site material, and where on-site material is not available, minimal amounts of off-site material required to stabilize and revegetate disturbed areas, but shall not include any major regrading toward a planned after-use with the deposition of off-site material.
6. The use of off-site material for progressive rehabilitation must also be acceptable to the Ministry of Environment and the Ministry of Natural Resources.

[…]

9. Rehabilitation shall incorporate the following:
   a) Excess topsoil and overburden are to be retained and stabilized for future rehabilitation.
   b) All excavated pit walls are to be regraded to a slope of 3 to 1 or less except in regions where topsoil and fill materials are

scarce. In such areas finished slopes may be no steeper than 2 to 1. Exposed sections of pit or quarry faces may be left unrehabilitated for aesthetic or educational purposes as incorporated into an approved after use plan.

c) Vegetation, including seeding, crops or trees and shrubs, shall be planted as soon as possible following finished grading.

**NEP Appendix 2 – Definitions**

**After Uses** – the changed use of any land, building or structure within a Mineral Resource Extraction Area to a use other than that which is permitted under the Permitted Uses.

**Aggregate** – means gravel, sand, clay, earth, shale, stone, limestone, dolostone, sandstone, marble, granite, rock other than metallic ores, or other prescribed material under the *Aggregate Resources Act*.

**Conservation Organization** – a non-government conservation body including a land trust, conservancy or similar not-for-profit agency governed by a charter or articles of incorporation or letters patent, and with by-laws and objectives that support the protection of the natural environment of the Niagara Escarpment. Such an organization must have registered charitable status.

**Forest Management** – the sustainable management of forests for the production of wood and wood products, and to provide outdoor recreation, to maintain, restore or enhance environmental conditions for wildlife, and for the protection and production of water supplies.

**Mineral Resources** – sand, gravel, shale, limestone, dolostone, sandstone, and other mineral materials suitable for construction, industrial, manufacturing and maintenance purposes, but does not include metalliferous minerals, fossil fuels, or non-aggregate industrial minerals such as asbestos, gypsum, nepheline syenite, peat, salt and talc or mine tailings.

**Pit** – means land or land under water from which unconsolidated aggregate is being or has been excavated, and that has not been rehabilitated, but does not mean land or land under water excavated for a building or other work on the excavation site or in relation to which an order has been made under sub-section 1(3) of the *Aggregate Resources Act.*

**Progressive Rehabilitation** – rehabilitation done sequentially, within a reasonable time, in accordance with the *Aggregate Resources Act*, its regulations, the site plans and the conditions of the license or permit during the period that aggregate is being excavated and in accordance with the provisions of the Niagara Escarpment Plan.

**Quarry** – means land or land under water from which consolidated aggregate is being or has been excavated and that has not been rehabilitated, but does not mean land or land under water excavated for a building or other work on the excavation site or in relation to which an

order has been made under sub-section 1(3) of the *Aggregate Resources Act*.
**Rehabilitation** – 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).

**Watershed Management** – the analysis, protection, development, operation and maintenance of the land, vegetation and water resources of a drainage basin.