

April 19, 2006

## **STAFF REPORT**

**RE: Niagara Escarpment Plan Amendment 150 (Nelson Aggregates)  
Dredging, Draining, Site Alteration and Tree Relocation Activities  
City of Burlington, Halton Region**

---

### **Issue:**

Nelson Aggregate is currently seeking amendments to the Niagara Escarpment Plan (NEP), the Burlington Official Plan, the Halton Regional Plan and a licence under the *Aggregates Resources Act* to expand/open a quarry on about 80 ha (200 acres) in the Escarpment Rural Area of the NEP south of their existing quarry. The NEP amendment was filed October 8, 2004 (Schedule A attached).

As per the practice in the Region of Halton the technical reports associated with the application(s) are being reviewed by a Joint Agency Review Team (JART).

On or around March 14, 2006 during a site visit to the property by agencies it was observed that a wetland on the lands had been dredged and channels established to drain the feature and several butternut trees (*juglans cinerea* listed as an endangered species nationally) were transplanted to the border of the property.

A number of citizen and stakeholder complaints were also received (phone, etc).

As a consequence the Niagara Escarpment Commission (NEC) sent Nelson Aggregates a contravention letter on April 7, 2006 identifying the conflict with the NE Development Control Regulations (Permit for dredging etc. required). The letter also indicated that the relocation of the butternut would be investigated further and the entire matter would be referred to the NEC (see Appendix 1). Concern was expressed about the undertaking of such work when the application was in its review stage.

As well, the Halton Conservation sent a letter respecting the need for approval under its Regulations (see Appendix 2). Staff understands that the JART will

also be sending a letter outlining its concerns with the activities of Nelson Aggregates given the stage the application is at in the JART review process. The wetland and the butternut were critical pieces of the technical evaluation documented in studies and reports before the JART.

Information and anecdotal statements indicate that the wetland was apparently drained for agricultural reasons involving the reopening/maintenance of old field channels, and the butternut relocated possibly on the advice of unnamed Provincial person(s). Pictures of the dredging and tree relocation are attached. Air photos are also provided.

### **Comments/Analysis:**

To date the NEC has reviewed no justification for the work or response to the April 7, 2006 letter.

### The Butternut

In July 2005, Butternut (*Juglans cinerea*) was officially listed as Endangered on Schedule 1 of the *Species at Risk Act* (SARA). However, Sections 32 and 33 of SARA, which prohibit harming or killing listed species, only apply to aquatic and migratory bird species, or species that are on federal land. Since Butternut is a tree and the Nelson property is not considered federal land, SARA does not apply in this case.

SARA does have a "safety net" for protecting other listed species. If the Minister of the Environment does not think that the province's laws are protecting a species, the Lieutenant Governor in Council can order that the prohibitions in Section 32 and 33 apply for a given species in a province.

Butternut was subsequently listed as Endangered (not regulated) under the *Species at Risk in Ontario* (SARO). Therefore it is currently not legally protected under the *Endangered Species Act* (ESA). There are actually very few species at risk that are regulated under the ESA.

The *Provincial Policy Statement* (PPS) indicates that site alteration is not allowed in significant portions of the habitat of endangered species. However, there is no mechanism for penalizing those who decide to transplant trees. Furthermore, it is debatable whether the hedgerows where the Butternut was removed on the Nelson property would be considered "significant portions" of Butternut habitat.

The NE Development Control Regulation (Ontario Regulation 828/90) deals with tree cutting and the removal of trees but not in a manner which would prohibit the cutting or removal of significant individual trees like the butternut. To regulate the cutting or removal of significant, designated or "regulated" trees OR 828/90 would have to be changed. The Regulation would also have to be clarified to

deal explicitly with the relocation of trees as well since the word removal may not capture tree relocation. The determination is therefore that the NE Development Control Regulation would not be triggered by the relocation of the Butternut on these lands. Therefore, the NEC cannot require a Permit.

This type of amendment to the Regulation is one that should be considered when the Regulation is updated, as it is from time to time to prevent this situation from arising in the future, especially where the future development of a site is before the NEC.

### The Wetland

The NEC since Development Control was established in June 1975 has required Permits for channelization, ditching and other topographic changes related to the alteration or destruction of water features like wetlands. The drainage or dredging of wetlands is an activity which relates closely to the environmental purpose and objectives of the NEPDA and the Plan and is considered development.

Staff understands that Nelson Aggregate has apparently advanced the argument that the works undertaken to drain the wetland were for the purpose of facilitating agriculture on the lands. Additionally the works constituted the building of a farm drain or the maintenance of a farm drain, which may have been located on the lands but ceased to function over time. O.R. 828/90 does contain exemptions for "general agricultural development" including the installation of farm tile drains, and the repair maintenance and cleaning of farm drains. These exemptions exist for farmers to allow the operation of bona fide farms and cultivation of the soil. The word drain is not defined but it has a certain meaning under the *Drainage Act*.

The wetland and surrounding area in question (although treed and in part reforested) is not currently used for agricultural production nor is Nelson Aggregate (as far as NEC staff aware) in the business of managing or operating farms. It is a mining company.

The NEC is responsible for administering and interpreting the Development Control Regulation. Exemptions are granted by the NEC once they have been justified. If there are question such questions are referred to the NEC solicitors for legal advice and/or confirmation by the Commission itself where there are disagreements with proponents. Landowners do not administer the Regulation and determine whether or not they will grant themselves an exemption. This similar to how a municipality administers it's zoning bylaws.

It is very unusual for a sophisticated landowner, with access to professional planning and technical advisors, like the aggregate operator in question, to undertake work (which may be controversial) without acting with due diligence by

checking with relevant authorities for a written determination on the need for permits/licences/approvals. Nelson Aggregates has applied for Permits from the NEC in the past for much less innocuous development (Buildings and structures in the existing north quarry). Nelson Aggregates is very familiar with the NEP and its Regulations having been located in the Plan area since the inception of the NEPDA in 1973.

If NEC staff had been asked, Nelson Aggregates would have been told to submit a Development permit Application since the company would not, on the face of the facts known to the staff, been eligible for an agricultural exemption. If Nelson disagreed there were other avenues open to the proponent to challenge this request, including consulting directly with the NEC or asking for a determination by the courts, which has been done in the past where the meaning of the Regulation was at issue.

A further disturbing facet of the works undertaken is that for over a year the company has been dealing with the JART to obtain advice on their quarry expansion. The JART is looking at the studies and technical information filed by Nelson Aggregates on the property in support of the Amendment. The wetlands (and Butternut trees) were a critical component of the environmental evaluation/justification submitted as part of the application. As such they were being actively considered by the JART. The impact on the justification would seem to be significant since the works have, by all accounts, now changed the environmental situation being weighed on the lands.

It should also be noted that directly on the heels of this wetland alteration work, the Company has served written notice that it wishes to proceed immediately with the processing of applications under the *Planning Act* and the *Aggregate Resources Act*. The clock is now ticking on the eventual referrals to the Consolidated Joint Board.

The optics of the whole situation cast a very poor light on the works undertaken, without the expected and usual consultation or notice from a knowledgeable land owner familiar with Ontario planning approval processes.

**Recommendation:**

That the Niagara Escarpment Commission request an explanation from Nelson Aggregates as to why the development activities took place at a time when the environmental characteristics of the site were being discussed with public agencies (including JART) and the Company and its consultants.

That the Niagara Escarpment Commission consult with its solicitors (and where appropriate) its agency partners on the best course of action to see the situation corrected, including possible site restoration, an order to restore and legal action.

Legal action can be commenced as an enforcement function without any direct involvement of the Commission should legal council be in agreement that the facts warrant such action.

That the Niagara Escarpment Commission request that the environmental studies supporting the quarry be redone to account for the changed environmental and planning situation before any further planning processing is considered. Such studies must be resubmitted for full review and evaluation.

---

Ken Whitbread  
Manager

C/KW/ Nelson Quarry NEPDA Contravention 2006