

Special Edition Stepping Stones



THE DUNTRON QUARRY EXPANSION NEWSLETTER

May 4, 2011

Message from Walker Aggregates' Vice-President

Walker Aggregates' lawyers continued their cross examination of the planner for the Niagara Escarpment Commission (NEC), Kathryn Pounder, over the previous two weeks of proceedings of the Consolidated Hearings Board.

Due to the sheer volume of material the NEC has introduced into testimony, our lawyers Wayne Fairbrother and Mary Bull divided up the areas of questioning for Ms. Pounder. The questioning has related to testimony the planner has provided and documentation the NEC has given the board to support its position of opposing the quarry expansion.

During the week of May 2, Ms. Bull will continue her cross examination of the planner, followed by cross examination by the lawyer for Clearview Township Ian Rowe. Next up is testimony in chief by the planner

for the Clearview Community Coalition, Tony Usher.

As always, we'll keep our neighbours and friends updated on the developments of the hearing with future special editions of Stepping Stones. Please feel free to contact me with any questions about the quarry expansion or the hearing process at 705-445-2300 extension 224, or in Niagara at 905-227-4142, or visit our website at <http://walkerind.com/walker-aggregates/duntron-expansion.html>.

A handwritten signature in black ink, appearing to read "Ken Lucyshyn".

Ken Lucyshyn

NEC Planner Challenged on Justification for Quarry Opposition

A proposed quarry expansion project near Owen Sound was one area of focus in proceedings into the proposed Duntron Quarry expansion, when the planner for the Niagara Escarpment Commission (NEC) was asked how she could support one project and not the other.

Kathryn Pounder was responding to questions under cross examination by one of Walker Aggregates' lawyers, Wayne Fairbrother.

He asked about a statement the planner had made in her witness statement to the board about the proposed Duntron Quarry expansion, which noted, "There is always the concern with regard to very lengthy rehabilitation as it is proposed here that once the aggregate is removed from the site the operator will

have no incentive to continue to rehabilitate the site in accordance with the site plan."

Mr. Fairbrother asked if Ms. Pounder had any evidence that Walker had ever not lived up to its obligations. She replied "no," but added there were other aggregate operators who were deficient.

Mr. Fairbrother then introduced into evidence an NEC staff report, co-authored by Ms. Pounder, in which support is expressed for a Niagara Escarpment Plan amendment to permit the development of the Keppel Quarry application, near Owen Sound. The report includes a listing of nine violations by the proponent under the Aggregate Resources Act and other regulations, between 1977 and 2010. Mr. Fairbrother

Continued on page 2

asked how Ms. Pounder could support this application but not the Walker proposal.

"It's a different situation," she replied, adding that the Duntroon Quarry expansion plan has nearby wetlands that need to be supported after rehabilitation.

Mr. Fairbrother also asked the planner about a reference in the NEC staff report that mentions, as one of the justifications for the Keppel Quarry, that "the 'need' for the development of the resource in this location has been supported by local municipalities, and employees, and business associates of the applicant." He noted that the evidence and testimony demonstrates that the Duntroon Quarry expansion proposal enjoys the same level of support, but that Ms. Pounder did not mention this in her opposition to the project. She countered that the municipalities had not yet taken a position on the project when she wrote her staff report.

Under further cross examination Ms. Pounder did concede that some of the issues she raised in opposition to the Duntroon Quarry expansion are "picky, little, points."

The lawyer queried Ms. Pounder about a request by the NEC commissioners, at a meeting in November 2009, that she provide a report on the range of conditions that might lead to an approval of the application. She refused to provide such draft comments, stating that this would need to be done by another planner contracted as an external consultant to the NEC.

"You flatly told the commission 'no.'...So it's your position 'take it or leave it,' as far as the NEC is concerned?," Mr. Fairbrother asked.

"Yes, sir," Ms. Pounder replied.

Another lawyer for Walker Aggregates, Mary Bull suggested to the planner that she mislead the commission on water impacts of a proposed Duntroon Quarry expansion.

In one of several challenges to Ms. Pounder's testimony, Ms. Bull pointed to a statement in her position paper to the NEC about the results of Walker's hydrogeology modelling, in which she wrote "The model indicates that the impacts to the Escarpment springs in the dry summer months may be more than in the spring months... The impact may be such that springs that were once perennial will then be only

intermittent, so that the natural environment around the springs that was sustained by the low summer flows will be deprived of that function."

Ms. Bull asked Ms. Pounder how, as a planner, she could come to such a conclusion when Walker's hydrogeologists and the NEC's own hydrogeology consultant did not.

Ms. Pounder replied, "It was my opinion, as a planner, from my experience with other springs."

Ms. Bull then took the board to the NEC hydrogeologist's report which stated "We have not identified any substantive flaws [in ground water modelling] in our final peer review report." She also pointed to a section of the peer review report which noted "Our review of the model predictions suggests that the proposed quarry will not have extensive negative effects on local water resources... In our opinion, the potential impacts of the proposed extension can be managed effectively."

Ms. Bull asked Ms. Pounder why she did not include the NEC hydrogeologist's conclusions in her position paper to the commission. She went on to suggest that by including her own interpretation of the water modelling evidence – and not that of the NEC's own hydrogeology peer reviewer – Ms. Pounder left the commission with the impression that the peer reviewer had serious reservations with the model.

Ms. Pounder replied that she did not believe she provided an incorrect impression and defended the contents of her position paper, but did say the section in question was "poorly written."

In another series of questions, Ms. Bull pointed to a discrepancy between Ms. Pounder's reporting to the commission of the outcomes of a karst study and the conclusions of the NEC's own karst expert. He had indicated that "I think the outstanding issues can be dealt with in the form of the [Adaptive Management Plan]....," yet Ms. Pounder did not share this conclusion with the commission.

Ms. Pounder agreed to withdraw from her testimony a statement in her position report that indicated impacts to a group of springs to the east of the property would be larger than predicted.

Under further cross examination, she conceded that an allegation she made in the position report is incorrect.

In her November 2009 report, Kathryn Pounder said "...Walker Aggregates has no intention to preserve the Hart's Tongue Fern within the licensed area."

Ms. Bull took the planner to a letter sent to her by Walker's planner in September 2009 which indicated, "The proposed extraction area is modified to exclude the AHTF (American Hart's Tongue Fern) Colony 1 and the 50 metre setback." Ms. Bull also pointed to e-mail correspondence Ms. Pounder received from the Walker planner in October 2009, which included an operations plan indicating the exclusion of the fern from the licensed area.

"The language in your report is misleading in the extreme," Ms. Bull charged. "I would suggest that this kind of language has no place in a fair and balanced report."

Ms. Pounder agreed and said that her error was an obvious one, but noted Walker could have corrected the error when it received the report. Ms. Bull countered there was so much misinformation in the report that it would have required a complete rewrite.

Under questioning Ms. Pounder also admitted that during the NEC's review of the application, issues brought to her attention by the commission's natural heritage consultant were not shared with Walker's experts to address.

She was also asked about her decision to dismiss the NEC's Processing Guide (for applications proposing to change lands from escarpment rural to mineral resource extraction) when considering the Duntroon Quarry expansion proposal. Ms. Pounder said this was because the guide was out of date and should have been removed from the Niagara Escarpment Plan when it was revised in 2005.

Ms. Bull then introduced evidence to demonstrate the Processing Guide was actually added to the plan in 2005, at the specific request of the commission. The guide provides a checklist of conditions that applications must meet in order to undergo further review by the NEC.

Kathryn Pounder later admitted to an error in testimony she previously presented.

She had told the board that Walker Aggregates' planner Brent Clarkson did not address the issue of the expansion application being compatible with the natural environment, as outlined in the purpose of the

Niagara Escarpment Plan.

Under cross examination by Walker lawyer Mary Bull, Ms. Pounder was taken to documentation that demonstrated that Walker's planner had in two instances addressed this point – his original 2005 planning report and his witness statement for the hearing.

"I was incorrect in my conclusion that Mr. Clarkson did not include compatibility..." she responded.

Ms. Bull then challenged Ms. Pounder's assertion that she did not receive a letter addressed to her by the Ministry of the Environment (MOE), which read in part "We have not identified any issues or concerns regarding water resources that are unacceptable to the MOE and cannot be addressed through implementation of appropriate mitigation measures."

Ms. Bull introduced evidence that Ms. Pounder had received the letter from the MOE via e-mail on June 24, 2009.

"So you did receive the letter but chose not to put it in your planning report?," Ms. Bull asked.

Ms. Pounder said she did not recall the correspondence.

Mary Bull expressed frustration with indirect responses Ms. Pounder provided to further questioning, including how the application does or does not meet the objectives and development criteria of the Niagara Escarpment Plan.

"I cannot seem to get direct answers to my questions," she told the board. Among her questions, Ms. Bull asked about the provisions of the Niagara Escarpment Plan, wondering if the policies of the plan help to further define the plan's overall objectives when it comes to assessing quarry applications. Ms. Pounder provided a qualified "yes" to the question, but added the policies cannot be used to limit the overall objectives.

During later cross examination, Ms. Pounder, was accused of setting up a Catch 22 in testimony about protecting butternut trees on the lands proposed for an expanded Duntroon Quarry.

Ms. Bull pointed out the no-win situation that Ms. Pounder had set out in her testimony about the butternut tree issue.

The Ministry of Natural Resources (MNR) can issue a permit to allow for the removal of these trees – designated as Species at Risk under the Endangered Species Act – after a development permit is obtained.

However Ms. Pounder testified that the NEC would not issue a development permit without first issuing an amendment to the Niagara Escarpment Plan. She further said the amendment itself would not be permitted because of the existence of the butternut trees.

“So you could never get a permit to remove those trees?,” Ms. Bull asked. Ms. Pounder confirmed that this is the case, according to the Provincial Policy Statement and the Niagara Escarpment Plan.

The Walker lands have 23 retainable butternuts identified on the site. The company is proposing to not extract within 25 metres around the trees, unless it can obtain a permit to remove the trees and plant new, healthy ones on another location on the site.

Ms. Bull then took Ms. Pounder to a statement made by the Minister of Natural Resources in the legislature in March 2007, where he states that a sensible solution to dealing with development issues can be to remove butternut trees and replace them with more trees for a “win-win” net gain approach.

Ms. Bull also questioned Ms. Pounder about her testimony that Walker's strategy for dealing with the trees is inconsistent with the province's recovery strategy.

“Do you understand that there is no recovery strategy – or even a draft strategy – for the butternut under the Endangered Species Act?,” Ms. Bull asked.

Ms. Pounder replied that she “must have misunderstood” the earlier testimony of NEC ecologist Lisa Grbinicek, upon which she relied for her testimony about the butternut.

Ms. Bull also pointed the planner to a proposed amendment to the MNR's general regulation that outlines compensation planting as a management strategy for dealing with butternut trees that may need to be removed to allow for land development.

Walker Aggregates' plan to relocate a man-made cow pond to make way for an expanded Duntroon Quarry was another issue in cross examination of the NEC planner.

Ms. Bull asked Ms. Pounder about her opposition to moving the pond, which is no longer used for agriculture and has now become naturalized.

“If the application is not approved there is nothing in the Niagara Escarpment Plan to prevent the re-use of the pond for livestock grazing, correct?,” she asked the planner. Ms. Pounder conceded this is so. Under questioning she also agreed that a landowner could remove vegetation and dig out the pond.

Ms. Bull then asked Ms. Pounder to agree that the purpose of Walker's plan to relocate the pond was not to re-create a farm pond, but a wetland feature for wildlife management. Ms. Pounder said the plan would create wildlife habitat but would not be considered a wetland.

Ms. Bull then asked Ms. Pounder about her opinion that water removed from the quarry and redirected to the pond, nearby wetlands and local springs should always be drawn from the bottom of quarry water to ensure it is as cold as possible. “You have been given technical advice from the Ministry of Natural Resources that amphibians are very sensitive to temperature variations, so should you not leave it to the experts to decide when to pump cold water?...Do you not agree there should be flexibility to do the right thing, ecologically?”

“No, Ms. Bull,” Ms. Pounder replied.

In later questioning about plans for the rehabilitated quarry, Ms. Bull asked the planner if she agreed with the testimony of the NEC's landscape architect that the side slopes should be constructed at a three-to-one ratio. Ms. Pounder said the desired slope construction should be at a ratio of three to one or less.

Ms. Bull then took Ms. Pounder to the provisions of the Niagara Escarpment Plan and pointed out that the three-to-one ratio is required for pits and not quarries. Ms. Bull asked whether, in fact, quarries are permitted to have open faces. “You can have no slopes, correct?”

Ms. Pounder admitted this is the case under the plan's provisions.

She was later asked about her decision not to provide comments on the draft Adaptive Management Plan (AMP) for the quarry expansion.

The planner conceded that she was asked for

Continued from page 4

comments on the AMP by Walker in July 2009 and responded that the NEC would provide them once she received comments from the Ministry of Natural Resources (MNR).

“But you did not provide comments prior to the commission's consideration of the [quarry expansion] application, did you?” Ms. Bull asked.

Ms. Pounder replied that she had not, adding, “We were expecting more detailed comments from the MOE [Ministry of the Environment] and the MNR.”

In earlier testimony, Ms. Pounder expressed criticism of the AMP – which is designed to monitor and mitigate any unexpected negative impacts of the quarry expansion – including the fact that it is in draft form.

“You would agree with me that the AMP could not be finalized unless Walker took the position that the NEC's comments were irrelevant,” Ms. Bull inquired.

Ms. Pounder replied that while the NEC did not provide written comments, it did provide comments about the AMP in meetings with Walker and various government agencies.

Ms. Bull also asked Ms. Pounder why the NEC had recommended a quarry application in the former Keppel Township, north of Owen Sound, but not the Walker application.

Through questioning, Ms. Pounder admitted the Keppel Quarry application did not have a finalized AMP, and was recommended by NEC staff for approval by the commission without comments from the MNR. Also, unlike the Duntroon application, Ms. Pounder conceded that she recommended the Keppel application without a hydrogeology peer review.

As for a concern Ms. Pounder raised about the MNR not having the staffing capacity to monitor the Duntroon Quarry operations, Ms. Bull wondered why she did not raise this in the Keppel application.

Ms. Pounder said the Keppel application is very much different from the Duntroon Quarry application.

“We determined there would be no negative impacts and no planning reasons not to approve the application,” she responded.

The Duntroon Quarry is operated by Walker Aggregates Inc., a division of Walker Industries.

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