February 17, 2022

# C2: INFORMATION REPORT

## Re: 2022 Compliance Program Update

## INTRODUCTION

The purpose of this report is to provide the Commission with an update on the NEC’s Compliance Program. In 2016, the Commission was provided with a detailed program update that contained data on possible violations (“occurrences”) of the Niagara Escarpment Planning and Development Act (NEPDA) and how NEC staff responded to those occurrences.

The data provided in this report will show that the number of occurrences, including those identified as “high risk” has continued to rise since the occurrence tracking system was put in place in 2014-2015. This report also reviews recent program enhancements and provides information on additional enhancements that are being undertaken. This report is being brought forward concurrently with a report that specifies how the NEC’s compliance and enforcement powers under the NEPDA can be enhanced in keeping with modern regulatory principles, and result in improved effectiveness in responding to compliance occurrences.

## SUMMARY RECOMMENDATION

That the Commission receive this report for information.

## NEPDA COMPLIANCE AND ENFORCEMENT ROLES AND RESPONSIBILITIES

The primary role of the NEC’s Compliance Program is to respond to violations under Section 24(1) of the NEPDA: failure to obtain a development permit while undertaking development in the NEC’s Area of Development Control, or undertaking development that fails to comply with an issued development permit.

The NEC’s Compliance Program is currently staffed by two Compliance Program Supervisors (one full-time, one on-call/part-time), a Compliance Specialist (seasonal/42 weeks per annum) and a summer student for the past 4 years. An administrative assistant also provides some support to the Compliance Program. Compliance team members report to the NEC Manager; the NEC Director, Chair and Commission have specific roles in issuing administrative orders—stop work orders and orders to demolish/restore—under the NEPDA.

Ensuring compliance with the NEPDA and its regulations are a shared responsibility of the NEC and the Ministry of Northern Development, Mines, Natural Resources and Forestry (NDMNRF). The roles and responsibilities of NDMNRF and NEC staff are set out in the NEC’s Memorandum of Understanding (MOU) with NDMNRF, and well as through a more detailed Inspections, Investigation and Enforcement (II&E) Protocol (“Protocol”) between NDMNRF’s Enforcement Branch and the NEC. The Protocol was last updated in January 2015. The Protocol describes the respective roles and responsibilities of the NEC and NDMNRF in delivering inspections, investigations and enforcement functions that support the implementation of the NEPDA and its regulations.

Enforcement of the NEPDA is also subject to the Provincial Offences Act (POA), which governs the prosecution and enforcement of provincial legislation and regulations, as well as municipal by-laws. The POA categorizes actions taken for minor offences and actions required for more serious offences, under Parts 1 and 3 accordingly. (Part 2 of the POA deals with traffic offences.) The NEC’s Compliance Program Supervisor(s) and Compliance Specialist are appointed as Provincial Offence Officers with the ability to issue Part 1 offence notices. An offence notice is also referred to as a “ticket,” which brings with it a set fine of $300. While the NEC’s officers do occasionally issue such tickets, the preferred approach is to educate offenders about the Niagara Escarpment Plan (NEP) and the requirement of obtaining a development permit, as well as to encourage voluntarily compliance in rectifying unauthorized development (when supportable) through the submission of an “as-built” development permit application.

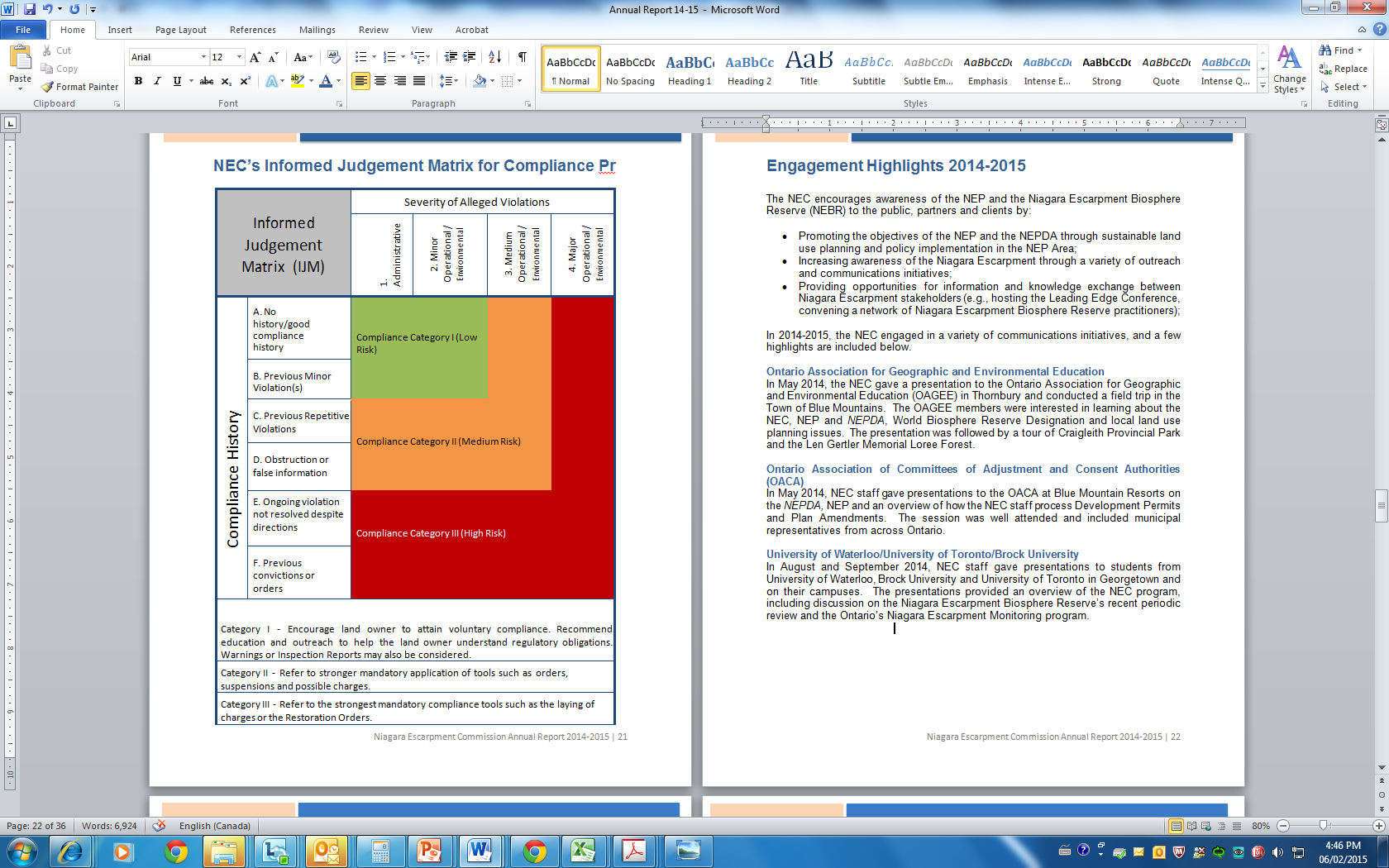
Addressing more significant offences under the NEPDA requires the involvement of NDMNRF Enforcement Branch via Conservation Officers. Conservation Officers are called on for two reasons: to investigate the offence and issue a Part 1 summons that compels the defendant to attend court for a maximum penalty of up to $1000 if found guilty; or to investigate with the intention of initiating a prosecution that could lead to fines of up to $50,000 for each day the contravention continues.

## COMPLIANCE PROGRAM IMPLEMENTATION

All NEC staff apply a risk management approach to compliance activities. A *2013 Guide on Integrating Risk in MNR* articulates how the Risk Management Framework is used to make strategic, risk-informed decisions in response to compliance matters. A new risk-based tool, the Informed Judgement Matrix (IJM, Figure 1 below) provides guidance to NEC staff when evaluating a compliance issue.

When a potential violation is found, the IJM provides the framework to gather and consider information about the occurrence including compliance history and potential environmental impact. NEC staff use this case-specific information to exercise informed judgement when determining the appropriate response from the suite of options in the compliance continuum. The options for response include encouraging voluntary compliance, using a Development Permit to gain compliance, applying an administrative order, a warning, and/or laying of a charge.

### Figure 1: The NEC’s Informed Judgement Matrix



Inspections are most often undertaken in response to information or a complaint from a member of the public, or a partner agency such as a municipality or conservation authority. When resources allow, the NEC compliance team may undertake proactive inspections for high-risk development activities or “repeat offenders.” With the rise in reported occurrences in recent years, it has become increasing difficult to dedicate resources to proactive inspections.

The NEC maintains a system for occurrence reporting and information management to document and track referrals of occurrences, follow-up inspections, investigation and enforcement activities and the results. The OTS documents and tracks: location, type and details of occurrences; risk level (high, medium, low); referrals of occurrences to staff (e.g., NEC, MNRF, or other agencies); follow-up inspection(s), investigation and enforcement activities; and the results of any compliance activity. This information is used to assess the efficiency and effectiveness of compliance operations and to inform any adjustments to priorities in the operational plan. Although separate Compliance Program reports have not been prepared for the last five years, data are included in each NEC Annual Report.

### 2.1 Compliance Program Implementation During COVID-19 Pandemic

As with almost all government services, the pandemic has proven challenging for the NEC given the limited ability to interact directly with clients, and the challenges of working remotely. The NEC’s Compliance Program shifted in response to these operational challenges in the following manner:

* Enhanced coordination with compliance staff in municipalities, conservation authorities and other ministries/agencies. This was necessary to optimize responsiveness, coordinate inspections and facilitate action by the most appropriate means.
* Enhanced triaging of occurrences to:
  + focus inspections and compliance action on the highest risk situations
  + optimize use of other compliance tools (e.g., voluntary compliance, compliance notification letters)
  + utilize email and telephone to engage in lower risk situations.
* Increased focus on resolving compliance issues while working from home as opposed to visiting sites. This ultimately reduced the number of hours spent travelling in a vehicle.
* Revised processes relating to requests for compliance updates, handling of new complaints, property information reports, which streamlined processes and more effectively managed public interaction.

## COMPLIANCE DATA ANALYSIS

### 3.1 Number of Occurrence Reports: 2014/15 to 2020/21

As noted earlier in the report, the overall trend is an increase in reported occurrences over the last seven years. Between fiscal year 18/19 and 20/21 alone, there has been a 22 percent increase. As of January 31, 2022, 171 occurrences have been reported for 21/22 fiscal year. Extrapolating to the end of this fiscal year, it is anticipated that approximately 205 occurrences will be reported by March 31, 2022.

The NEC’s response to the increasing number of compliance occurrences is discussed below under program enhancements.

### 3.2 Level of Risk of Occurrences

As noted earlier in the report, the high-risk occurrences have increased over the past several years.

Both medium and high-risk occurrences are trending upwards in number over the last seven fiscal years. An example of a medium-risk compliance issue is the construction of an unauthorized accessory structure for an unknown use. Examples of high-risk occurrences could include tree clear-cutting, diversion of a watercourse, spreading of fill of unknown quality, etc. High-risk occurrences tend to be those that have environmental damage associated with them. A low-risk occurrence commonly dealt with would include the construction of a deck or minor expansion to a dwelling that does not meet the exemption criteria in O. Reg. 828/90, but would otherwise likely be permitted had a Development Permit been applied for.

The implication in the increasing number of medium and high-risk occurrences is that effective implementation of the NEC’s compliance program requires additional resources. A site visit, issuing of a ticket under Part I of the POA, stop work and/or restoration orders, and escalating a compliance issue to NDMNRF for prosecution are extremely time-consuming processes. It is difficult for compliance staff to balance the demands of medium and high-risk occurrences against “nuisance” complaints that may be important to neighbours and concerned citizens locally, but do not rank highly when evaluated against the Informed Judgement Matrix. Managing complainants’ expectations when it comes to the desired level of response on low-risk files is a significant challenge for NEC staff.

Anecdotally, the reasons for the increased level of risk associated with compliance issues can likely be linked to the increasing value of property within southern Ontario, and the need for landowners to supplement income or achieve a greater “return on investment” from their properties. Secondary dwelling units, acceptance of fill for cash from fill brokers, and introduction of commercial and industrial uses on properties are examples of these sorts of occurrences. In addition, more development is being proposed on properties with environmentally sensitive features, or hazardous areas that development should avoid. Essentially, a good number of the remaining vacant lots in the NEP Area have natural heritage or hazard challenges associated with them. Although NEC staff review DP applications with the intent of avoiding or mitigating impacts to such areas, careless construction practices, or relocating development in violation of an approved development, are common reasons for compliance actions.

### 3.3 Breakdown by Occurrence Type

The most common types of occurrences involve tree cutting, fill placement, excavation, grading, second dwelling units, accessory buildings, non-compliance with a DP, and unauthorized changes in use.

### 3.4 Breakdown by Occurrence Location

As expected, the majority of occurrences take place in the more populated municipalities of the NEP Area. The only discernable trend appears to be that the Region of Peel (Town of Caledon) has increased from nine percent of total occurrences in 2014-2015, to 18 percent of total occurrences in 2020-21. So far in 2021-22, 20 percent of all occurrences were located in the Region of Peel.

## COMPLIANCE PROGRAM ENHANCEMENTS

### 4.1 Additional Staffing

In 2018, NEC introduced seasonal compliance specialist to provide support during busy times of the year. Seasonal staff generally work for a 42-week term, and then take a 10-week “hiatus.” Within NDMNRF, seasonal employment is somewhat common for natural resource workers. Prior to the introduction of the seasonal compliance specialist, the NEC’s compliance program had only one full-time staff member, supported by limited administrative help. The role of the seasonal compliance specialist is to deal with low-risk occurrences, as well as to ensure compliance data and files are kept up to date. The seasonal compliance position is also important to succession planning. The compliance program supervisor is currently on a leave of absence, and the presence of the seasonal compliance specialist (who started with the NEC as a summer student) allowed for continuity in program implementation. Without such continuity, it would have been a significant program setback to onboard a new compliance professional with no prior knowledge of the NEC.

In 2021, to provide additional compliance support while the compliance program supervisor is on leave, an additional compliance professional was introduced on a part-time, on-call basis. This position provides additional site inspection capacity and is playing an important role in mentoring compliance staff and advising on compliance program improvements. The NEC was fortunate to recruit a retired compliance manager from the Ministry of Environment, Conservation and Parks to fill this position.

The NEC also recruits one summer student each year to support the compliance program, which is also an important source of succession planning. The NEC’s current acting compliance program supervisor started as a summer student in 2020, and then served as the seasonal compliance specialist. Likewise, the 2021 summer student is now servicing as the seasonal compliance specialist.

### 4.2 Information Management/Information Technology (IM/IT) Modernization

In 2021, the NEC received funding from the Ontario Onwards Acceleration Fund/Smart Regulation Strategy to engage in a “discovery” process to identify the best IM/IT that will enable the NEC to modernize its business processes. The intent of the government’s Smart Regulation Strategy is to re-engineer Ontario’s regulatory processes to be modern, more effective and responsive to the needs of business, while protecting the public interest. The discovery phase of the project will take a user-focused approach to identify opportunities to improve and implement lean business processes and lay out a roadmap for business transformation supported by strategic IT investments. Modernized business processes and an appropriate digital platform for client interactions could eventually facilitate changes to the NEC’s regulations and how they are implemented.

The needs of the NEC’s compliance program are an important consideration as this project unfolds. A project manager from the Land and Resources I+IT Cluster (one of eight clusters in the Ontario Public Service that provides groups of ministry partners with IM/IT support) has been assigned to the project to ensure cross-pollination of ideas and lessons learned from other program areas with similar IM/IT needs.

### 4.3 NDMNRF Enforcement Branch Initiatives

For several years, NDMNRF has been operating below its full conservation officer (CO) capacity in many parts of the province. This has had an impact on their ability to provide support to the NEC. However, there were multiple recruitment campaigns in 2020 and 2021 that have added a significant number of COs across the province, including within the Aurora, Guelph and Midhurst District Offices that support the NEP Area. The NEC compliance team has had several opportunities to engage with CO and area enforcement managers over the past year, and looks forward to building strong, cooperative relationships based on NDMNRF’s improved capacity to respond to NEC compliance issues.

## FUTURE OPPORTUNITIES

As the 2021-2022 fiscal year comes to an end and looking forward to 2022-2023, it is hoped that the program improvements noted above, as well as fewer restrictions associated with COVID-19, will enable the NEC compliance team to focus its efforts on the following:

1. Revisiting the Inspection, Investigation and Enforcement Protocol in partnership with NDMNRF Enforcement Branch staff, to reflect changes made to both NDMRF and NEC procedures, as well as lessons learned. The Protocol has not been updated since 2015.
2. Continuing to build positive, cooperative relationships with municipal and agency partners, through working groups, outreach opportunities and other means of building efficient and effective processes to address compliance issues of mutual interest.
3. In collaboration with NDMNRF Policy Division, continuing to identify opportunities for legislative and regulatory changes that will enhance delivery of the NEC compliance program, including those identified in the “NEPDA Legislative Modernization of Compliance Methods” report, also before the Commission this month.
4. Working with the Land and Resources Cluster and consultants to integrate the compliance program’s IM/IT needs into the NEC’s digital service solution in a manner that allows for future program changes.
5. Further building on compliance staff capacity through training, especially through the Regulatory Compliance Ontario Centre of Excellence.
6. Improving record-keeping so that compliance outcomes are documented, and decision-making and resource allocation (e.g., decisions to defer low-risk occurrences due to resource constraints) are traceable.

## RECOMMENDATION

That the Commission receive this report for information.

## Prepared by:

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