February 17, 2022

# C3: STAFF REPORT

**RE: Niagara Escarpment Planning and Development Act – Legislative Modernization of Compliance Methods**

### Purpose of Report

This report is being brought to the Commission, in conjunction with an information report providing a general update on the NEC’s compliance program, as a means of ensuring the Commission is aware of the parameters within which the NEC’s provincial offences officers operate. Furthermore, staff suggests improvements to the compliance and enforcement provisions in the Niagara Escarpment Planning and Development Act (NEPDA) to modernize the program, increase its effectiveness, and better protect the Escarpment environment.

### Summary Recommendation

That the Commission endorse this report, including the recommended changes to the NEPDA to modernize and enhance the effectiveness of the NEC’s compliance program and request the Chair write the Minister to inform him of the recommendations.

### Background

Although there is currently no clear opportunity to amend the NEPDA to improve the NEC’s compliance and enforcement tools, it has been more than five years since compliance program proposed improvements have been brought to the Commission’s attention and 16 years since any changes have been made to the enforcement powers of the NEC. The NEC is experiencing an increase in the number of non-compliance occurrences, as well as an increase in the degree of risk associated with these occurrences. In a constrained fiscal environment, augmenting the number of staff dedicated to compliance issues may not be realistic, but as a first course of action, program improvements, including amendments to legislation, should be pursued. Should an appropriate opportunity arise (e.g., through a government-sponsored bill) it is important that the NEC be prepared with Commission-endorsed proposals ready to move forward.

There are several relevant sections within the NEPDA as well as the Provincial Offences Act (POA) that direct the NEC’s compliance and enforcement actions:

#### NEPDA Section 24

This section states that undertaking development without a permit (where required) is an offence. It also allows for the issuance of stop work orders and orders to demolish/restore to address unauthorized development. A stop work order can only be issued if there are reasonable grounds to believe that a contravention is causing or is likely to cause a risk to public safety or significant environmental damage. Section 24 allows for significant fines for undertaking development without a permit and for failing to comply with an order.

#### NEPDA Section 28(1 through 6): Powers of Entry

Currently, the NEPDA provides five bases for NEC staff to enter property without consent. Four of these relate to planning staff who have need to process Niagara Escarpment Plan (NEP) related applications. Only one allows NEC compliance officers to enter property. For the purposes of enforcing section 24 (i.e., the undertaking of development without a permit), NEC compliance officers can only enter property without consent if they have reasonable grounds to believe that development is causing or is likely to cause significant environmental damage and that the entry is required to prevent or reduce the damage. The use of force is not authorized.

No authorization exists to allow NEC compliance officers or planning staff to enter a property without consent to inspect for the purpose of assessing compliance with a development permit or order issued by the NEC or to respond to a public report or complaint.

#### Provincial Offences Act Part 1:

The Provincial Offences Act (POA) allows a Provincial Offences Officer to issue a certificate of offence and serve an offence notice (ticket) to a person or corporation which the officer believes to be guilty of an offence. The offence notice sets out briefly the nature of the offence and provides for the payment of a set fine to the court without the need for a trial. The NEC currently has two such officers on staff; one seasonal, full-time and one part-time, on-call. When an officer proceeds by way of Part 1 of the POA to a s. 24(1) NEPDA offence (development without a development permit) the set fine is currently $300; the maximum fine is $1000 after trial. Offence notices are typically issued for minor administrative or minimal impact development offences.

#### Provincial Offences Act Part 3:

The Provincial Offences Act also allows a Provincial Offences Officer to issue a summons to a person under Part 3. These summonses are typically issued for more significant offences where the person is a repeat offender or where there is significant environmental damage. When an officer proceeds under Part 3 the full fine structure of the NEPDA is available to the court when sentencing a convicted party. The current fine structure for a first offence is capped at $25,000 for an individual and at $50,000 for a corporation on a s. 24(1) offence, with the potential for greater daily fines in cases of continuing noncompliance of stop work or demolition/restoration orders. While NEC officers occasionally issue offence notices under Part 1 of the POA and are able to issue summonses under Part 3, by agreement with the Ministry of Northern Development, Mines, Natural Resources and Forestry (MNDMNRF), they do not issue Part 3 summonses and these occurrences are referred for investigation to Conservation Officers with the Enforcement Branch of MNDNRF.

### Discussion:

As noted above, no provision exists in law to allow a NEC Provincial Offences Officer to enter onto and inspect a property when a complaint is received from the public or when a development permit or order is issued unless there are reasonable grounds to believe that a contravention of s. 24 on that property is causing or is likely to cause significant environmental damage and that the entry is required to prevent or reduce the damage. This is a very high legal test to meet and requires that evidence is already apparent to the NEC. This high standard very frequently leads to either no action being taken to prevent or reduce environmental damage within the NEC’s Area of Development Control, or significant delays in taking enforcement action. Either way, any environmental damage will continue until the NEC obtains the necessary evidence (if it can be obtained – e.g., by way of a search warrant under the Provincial Offences Act obtained and executed by Conservation Officers pursuant to a request by NEC staff, which from initiation to execution is not a very rapid process). Often by this time “the deed is done” and it is very difficult to remedy the actions of the persons undertaking the illegal activity.

The NEC will occasionally benefit from information sharing arising where other persons or agencies such as the local bylaw officer, a building inspector or the Ministry of Environment, Conservation and Parks (MECP) enter a property for their purposes and after doing so, report back to the NEC what those more empowered agencies may have discovered.

If the NEC or another potentially cooperative agency has no authority to enter onto a property to inspect for compliance, a NEC officer must try to make observations from a public roadway or an adjacent property where access has been permitted. However, it is often true that ‘peering over the fence’ yields either no vantage or a very poor vantage of the development or activity and so the efforts of the NEC to correct the activity are often stymied.

In addition and given the above, the lack of inspection power also means that when the NEC issues a development permit with conditions, or a stop work or restoration order, the NEC has essentially no authority to inspect a property to determine whether the person to whom a permit or order has been issued is in compliance with the legal requirements set out within the document.

This lack of inspection authority frustrates both staff of the NEC and perhaps most importantly, citizens who may have reported environmental damage or a violation to the NEC.

The NEPDA has been amended in the past, usually as part of larger government efficiency bills. Significant changes took place in 1999 and 2000 but since then, no significant changes have been enacted. The Commission should consider recommending to the Minister further changes based on the NEC’s ongoing experience with administering the NEP and enforcing the NEPDA. The objective would be to ensure that the NEPDA remains current and administratively efficient and effective, and keeps pace with more contemporary approaches.

The following NEC staff proposals are similar to provisions that exist within legislation enforced by other planning and environmental approval agencies, including NDMNRF, MECP, municipal building officials, and conservation authorities.

The legislative proposals set out in Appendix A to this Report would result in:

* The ability of an NEC officer to access any lands affected by the NEP and NEPDA for inspection and compliance purposes;
* The enhanced protection of the environment within the NEP area;
* More efficient exchange of information and hand-off of files between NEC officers and NDMNRF Conservation Officers when Part 3 of the POA is invoked;
* Greater assurance that permits and orders issued by the NEC are complied with and that information submitted to the NEC is true and accurate;
* More timely and effective handling of public complaints leading to vastly improved public satisfaction in respect to their reports of alleged wrong-doing;
* Improved safety of officers who enforce the NEPDA;
* Time savings therefore cost savings and other efficiencies.

### Summary

At present, the powers conferred upon a NEC officer are severely lacking, which is leading to frustration on the part of the public and NEC staff. The powers being suggested would require amendments to section 24 of the NEPDA and are being used by other provincial, municipal, commission and authority entities which have mandates similar to the NEC. If adopted they would allow for quicker response to public concerns, provide greater assurance that the persons to whom permits and orders are issued conduct their activities in compliance and lead to cost savings through efficiencies. Most importantly, it would allow for more effective implementation of the Niagara Escarpment Plan Purpose and Objectives.

### Recommendations

1. That the Commission approves the proposals for legislative amendments to the Niagara Escarpment Planning and Development Act as outlined in this Report.

2. That the Chair write to the Minister of Northern Development, Mines, Natural Resources and Forestry and provide these legislative proposals to the Minister for his information and consideration.

**Prepared by: Approved by:**

ORIGINAL SIGNED BY: ORIGINAL SIGNED BY:

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Appendix: Legislative Proposal to Improve Compliance and Enforcement Functions

### APPENDIX:

### Legislative Proposals to Improve NEC Compliance and Enforcement

### Functions Under the NEPDA

The enforcement and compliance amendments to the NEPDA that are recommended by NEC staff include:

* A new definition creating a term or name for a NEC officer, for example, “Enforcement Officer”. **Reason:** Creates a class of persons to enforce the NEPDA and allows the new requested powers below to be assigned to that class.
* The inclusion of a provision indicating that all NEC development permits issued include a condition permitting an Enforcement Officer to inspect the property subject to the permit, with the exception of dwellings or parts of buildings being used as dwellings, during reasonable hours if 72 hours written notice has been provided to the landowner or occupant. **Reason:** Allows the NEC to enforce the requirements of a permit or order.
* The inclusion of a provision enabling an Enforcement Officer to make application to a Justice of the Peace to enable entry to inspect any land or other place, other than a dwelling or part of a building being used as a dwelling, where there are reasonable grounds to believe the inspection would assist in determining whether there is compliance with s. 24 of the NEPDA (Development without a DP) and anywhere in the Area of Development Control. **Reason:** Adds a further means of inspection of properties in the Area of Development Control, even where no DP has been issued for that property, through judicial authorization.
* A requirement that when an Enforcement Officer attends a property he or she shall provide identification and state the purpose of the visit upon demand. **Reason:** Reduces chances of persons impersonating a NEC officer for nefarious purposes.
* A provision clearly establishing the inspection powers of an Enforcement Officer which sets out that the officer may take photographs, recordings, measurements, conduct tests and make reasonable inquiries of any person. **Reason:** Allows an officer to get information required to come to an informed decision concerning the compliance status of a property or a development during an inspection.
* A provision making it an offence to submit false or misleading information to any employee of the NEC. **Reason:** Makes it an offence to provide false information within an application for a development permit for example, thereby providing greater assurance that the information obtained by the NEC may be relied upon to come to reasonable decisions.

In addition, it is recommended that the power to issue a stop work order under s. 24 (6.1) of the Act be delegated internally to an Enforcement Officer to allow the officer to immediately stop persons from working on an undertaking if the officer has grounds to believe that the work poses a risk to public safety or may cause significant environmental damage, thereby enhancing the protection of the public and the sensitive nature of the Niagara Escarpment.