



CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

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Re: EBR Registry Number: RC02E0002
Ministry: Agriculture, Food and Rural Affairs
Type of Posting: Regulation
Date Proposal Loaded 2002/12/02
Status of Posting: Proposal
Comment Period: December 02, 2002 to January 31, 2003

Proposed Stage 2 Draft Nutrient Management Regulations under the Nutrient Management Act

Dear Sir or Madam:

The Canadian Environmental Law Association writes to provide comments regarding the above noted posting.

We wish to express our appreciation for the opportunity to attend the briefing held by Minister Johns on December 2nd. CELA encourages broad consultations with adequate time for response for all EBR postings. Again, as with the phase I regulation posting, we also wish to commend the Ministries of Environment and Agriculture and Food for consulting widely on the proposed regulation, for providing plenty of time for written comment, and for providing extensive background material in the posting and at the consultation sessions.

CELA reiterates its strong support of the need for effective and enforceable legislation and regulation to address the environmental and public health impacts of agricultural operations in Ontario, particularly in relation to nutrient management. In the case of the Nutrient Management Act, many of the most critical aspects of its effectiveness will be found in the regulatory provisions which it enables and it is from this perspective that CELA has reviewed the draft regulation and protocols.

Previous Submissions

The Canadian Environmental Law Association (“CELA”) is a public interest law group founded in 1970 for the purpose of using and improving laws to protect the environment and public health and safety. Funded as a legal aid clinic specializing in environmental law, CELA lawyers represent individuals and citizens’ groups in the courts and before tribunals on a wide variety of environmental protection and resource management matters.

CELA has previously provided various submissions on the subject of nutrient management and on topics of agriculture and environment. In May, 2002, CELA made a submission to the Standing Committee on Governmental Affairs regarding Bill 81, Nutrient Management Act (CELA publication #425). In August, 2001, CELA also made a written submission under the Environmental Bill of Rights regarding the then proposed Nutrient Management Act. In October, 2002, CELA submitted its written comments with respect to phase one of the Nutrient Management Regulations (CELA publication #430).

Over the years, CELA has been particularly active in casework involving agricultural operations, environmental protection, and land use planning. For example, CELA has frequently represented farmers in civil actions and administrative hearings in order to protect the health, safety and livelihood of our farming clients. Similarly, CELA provides summary advice to numerous members of the public who contact CELA with concerns and questions about the environmental and public health impacts of intensive agricultural operations. In addition, CELA has participated in numerous land use hearings in order to protect agricultural lands and specialty crop lands against urbanization. CELA represented the Concerned Walkerton Citizens in both phases of the Walkerton Inquiry, which, among other things, considered various aspects of nutrient management at the local, regional and provincial levels.

With respect to law and policy reform, CELA has submitted numerous briefs to the Ontario government on general land use planning matters, such as the Bill 20 amendments to the *Planning Act* and the Provincial Policy Statement. Similarly, CELA has submitted briefs on various iterations of Ontario’s “right to farm” legislation.¹ More recently, CELA submitted a brief on the OMAFRA/MOE discussion paper on intensive farming operations.²

We understand that the currently proposed Regulation is stage 2 of a three-stage regulatory plan. Since the phase 1 regulation was released for comment, the Safe Drinking Water Act has been introduced and passed and the Sustainable Sewer and Water Act has been amended and passed. In addition, CELA is participating on the government’s advisory committee on watershed based source protection planning. We repeat our comment that, as was stressed by Commissioner O’Connor at the Walkerton Inquiry, **there must be an overall water policy for Ontario, and that policy must be implemented with multi-barrier protection beginning with source**

¹ See, for example, B. Mandelker, “Submission by CELA to the Standing Committee on Resource Development Regarding Bill 83” (Dec. 1988); D. Bigalow, “Submission by CELA to OMAFRA on the Draft Discussion Paper on the *Farm Practices Protection Act*” (Feb. 1997); and P. McCulloch, “Submission by CELA to the Standing Committee on Resources Development regarding Bill 146 (Feb. 1998).

² E. Bruckman, “Submission by CELA to OMAFRA/MOE on the Discussion Paper on Intensive Agricultural Operations in Ontario” (Feb. 2000).

protection. The Nutrient Management Act and its regulations will be of necessity integral to the success or failure of the measures taken by Ontario to better protect our waters.

A. Comments regarding the proposed Stage 2 Regulation

General Comments

- The regulatory provisions that were proposed in phase 1 have been integrated with, and proposed again in phase 2. This improves the ability to understand the scope and working of the anticipated regulations.
- CELA repeats our concern as to integration of the Nutrient Management Act regulations with source protection, which is yet to be determined and does not appear as part of the proposed phase 2 regulations.
- We repeat our recommendation that **the protocols and standards referred to in the draft regulations be themselves part of the regulations.** As will be mentioned below, there are several areas where the regulatory language presently proposed is unclear, but the draft protocols provide additional interpretation. The regulations themselves should be clear and unambiguous.
- CELA encourages consistent standards for the province as whole in a manner that accommodates geographic differences. For example, the provisions concerning winter spreading provide an acceptable balance between providing minimum standards and recognizing the differences arising from geology, soil type, climate and other factors.

Other limiting factors

- CELA agrees with the rationale to arrive at a definition of nutrient units that also covers non-animal sources. CELA also notes that the regulation proposes determining limiting factors based on constituents other than phosphorous or nitrogen for non-agricultural source material. **The list of potential limiting factors should be expanded.** To give only one example, the federal proposed Municipal Waste Water Effluent regulation will require municipalities and other to reduce the ammonia loadings to water bodies and watercourses. On a watershed planning basis, agriculture is an important source of ammonia.

Individual Farm Plans

- CELA recommends that Justice O'Connor's recommendation for the development of Watershed Source Protection Plans and for approval of individual farm plans, consistent with those Source Protection Plans, would be the best way to both deal with local variation and to recognize and protect water sources against impacts from farming operations. In the course of developing these Plans, public input should be sought. Furthermore, sensitive and high-risk lands should be designated as contemplated in the Walkerton Inquiry Recommendations. These provisions are not yet included in the

Nutrient Management Act regulations and presumably are awaiting further developments concerning source protection planning. It will be essential to integrate source protection planning and the development of individual farm plans as envisioned by Justice O'Connor.

Vegetated Buffers

- **The definition of “vegetated buffer” should be extended to a width of at least 10 metres and there should be provision for a greater vegetated buffer in appropriate circumstances including steep slopes, type of soil, and depth to bedrock.** Similarly, section 8.22 should be expanded to provide for a vegetated buffer strip of at least 10 metres or more in appropriate circumstances.

Biosolids

- Provisions concerning application of biosolids are contained in the phase 2 regulation. CELA reiterates that Certificates of Approval for biosolids application must be consistent with Watershed Based Source Protection Plans (Walkerton Part II Recommendation 10). Accordingly, we repeat and stress that **the province must initiate the development of the Watershed Based Source Protection Plans as soon as possible so that the framework for individual decisions in the watershed is in place before those decisions are made.**
- Because of the immense nuisance impacts of biosolids spreading, all set-backs provided in the draft regulation regarding nuisance protection should be increased. **Accordingly, the closer set-back rules provided in section 6.18 should be eliminated and only the more distant set-back rules should be used.** (The same set-back rules (i.e. the distances specified in the more distant set-back rules) should be provided for nutrient units in new or expanding high-density seasonal areas (section 7.11).)
- **Temporary in-field nutrient storage site setbacks (section 8.23) should also be increased** such that 450 metres protection is provided to all residences, whether a residential area or not, and regardless of the type of bio-solids.
- Furthermore, if municipalities and conservation authorities take the lead for elements of source protection as recommended by Justice O'Connor, these entities must also have the tools necessary to protect the most vulnerable parts of their watershed. **Municipalities must be expressly allowed to exceed (provide more protection) Nutrient Management Act standards for relevant areas of their watershed.**

Matters requiring clarification

- The process of determining farm units should be clarified in the regulation. It is unclear in the regulation what level of choice as to determining farm units a farmer has. Will farmers be able to delay the applicability of relevant provisions of the regulation by declaring several small farm units within their holdings?

- There are some provisions in the regulation that require clarification.
 - Section 3.5.2.ii may be too general to be enforceable.
 - The definition of “agricultural leachate” is too general.
 - The definition of “contaminant” is not broad enough
 - The phrase “input stream” in the definition of “approved treatment system” requires a definition.
 - The term “small” in the definition of “earth” should be defined.
 - Under the definition of “frozen soil”, there is ambiguity as to whether the “layer with a minimum thickness of 2 centimetres” refers to the thickness of the layer of ice or the thickness of the layer of soil.
 - The definition of “outdoor confinement area” appears to contain an inconsistency in that paragraphs three and four are contradictory.
 - The definition of “surface water” appears to have a phrase missing in subsection (c).
 - Section 8.15(b) should refer to section 8.11.
 - Section 8.22(f)(ii) should specify what the contingency plan is to accomplish – the provision set out is too vague.
 - The role of certifiers is unclear in the draft regulation, but is more clear in the protocol; the regulation should be more specific, particularly as to whether it is mandatory or not for farmers to use a certifier where no director’s approval is required.
 - Section 6.4 should specify the type of monitoring which is being conducted. What is the monitoring looking for? If the explanation is contained elsewhere, there should be a cross-reference to this section.

B. Comments regarding anticipated Stage 3 Regulations under the Nutrient Management Act

- We are advised that public comment and participation will be dealt with in the Stage 3 regulations. **CELA recommends that the approvals mandated by the Nutrient Management Act regulations be classified and designated under the Environmental Bill of Rights in order to allow the public participation rights accorded by the EBR.**
- Another very important aspect of public participation will be access to the data bases that are to be established regarding nutrient application. **CELA recommends that the regulations providing for the data bases and access to the data bases include public access to information such as loadings on a geographic basis.**

C. Comments regarding Walkerton Inquiry Recommendations not covered by the proposed Regulations

- Justice O’Connor recommended that all large or intensive farms and all farms in areas designated as sensitive or high-risk by the applicable Watershed Source Protection Plan develop binding individual water protection plans consistent with the Source Protection

Plan. (Part II Recommendation 13). It is not apparent that the proposed Nutrient Management Act regulations will implement this recommendation. Although we are aware of the provincial advisory committee regarding a framework for watershed based source protection planning (in which we participate), we repeat the request made in our comment on the phase 1 regulations **that the government outline its time frame and process for developing the Watershed Source Protection Plans so as to provide assurance that this recommendation will be implemented and will be consistent with the Stage 1 and Stages 2 and 3 regulations.**

- Justice O'Connor also recommended that a provincial framework be created for developing individual farm water protection plans that would go beyond nutrient issues. **These plans should deal not only with manure management, spreading of biosolids or septage, but also with chemical fertilizers, ways of dealing with stormwater runoff, including tile drainage, and pesticide use and fuel management. (Recommendation 15, Part II Report).** These types of issues have not been included in the Nutrient Management Act proposed regulation. Again, as requested in our phase 1 comment, we would ask that the government outline its time frame for implementing this recommendation.
- Municipalities and conservation authorities must have lead roles in source protection. There is no indication in the regulations so far proposed, and as anticipated, that municipal and conservation authority roles in nutrient management plan approval, or in other approvals to be dealt with in future stage regulations, such as biosolids application. This is contrary to the Walkerton Inquiry recommendations that would see these bodies take the lead role for source protection through the Watershed Source Protection Plans. We would ask that the government outline its time frame for implementation of the Watershed Source Protection Plans. **CELA recommends that municipal and conservation authority roles in nutrient management plan approvals, nutrient management strategy approvals, and other approvals relevant to the quality of source waters in the watershed be established and that municipalities be expressly permitted to exceed Nutrient Management Act standards in order to provide greater levels of source protection.**

CELA looks forward to the government's response to the specific concerns outlined herein which are summarized below:

- a. **There must be an overall water policy for Ontario, and that policy must be implemented with multi-barrier protection beginning with source protection.**
- b. **CELA recommends that the protocols and standards referred to in the stage 1 regulations be themselves part of the regulations.**
- c. **Provision should be made for determining limiting factors based on constituents other than phosphorous or nitrogen.**
- d. **CELA recommends that Justice O'Connor's recommendation for the development of Watershed Source Protection Plans and for approval of individual farm plans,**

consistent with those Source Protection Plans, would be the best way to both deal with local variation and to recognize and protect water sources against impacts from farming operations. In the course of developing these Plans, public input should be sought. Furthermore, sensitive and high-risk lands should be designated as contemplated in the Walkerton Inquiry Recommendations.

- e. Accordingly, CELA stresses that the province must initiate the development of the Watershed Based Source Protection Plans as soon as possible so that the framework for individual decisions in the watershed is in place before those decisions affecting farming operations are made.
- f. The definition of “vegetated buffer” should be extended to a width of at least 10 metres with the potential for increase in appropriate circumstances
- g. With respect to bio-solids, the closer set-back rules provided in section 6.18 should be eliminated and only the more distant set-back rules should be used.
- h. Municipalities must be expressly allowed to exceed (provide more protection than) the Nutrient Management Act standards for relevant areas of their watershed.
- i. CELA recommends that the approvals mandated by the Nutrient Management Act regulations be classified and designated under the Environmental Bill of Rights in order to allow the public participation rights accorded by the EBR.
- j. CELA recommends that the regulations providing for the data bases and access to the data bases include public access to information such as loadings on a geographic basis.
- k. CELA asks that the government outline its time frame and process for developing the Watershed Source Protection Plans so as to provide assurance that the recommendation (that all large or intensive farms and all farms in areas designated as sensitive or high-risk by the applicable Watershed Source Protection Plan develop binding individual water protection plans consistent with the Source Protection Plan) will be implemented and will be consistent with the Stage 1 and Stages 2 and 3 regulations.
- l. Farm Water Protection Plans plans should deal not only with manure management, spreading of biosolids or septage, but also with chemical fertilizers, ways of dealing with stormwater runoff, including tile drainage, and pesticide use and fuel management. CELA asks that the government outline its time frame for implementing this recommendation.
- m. CELA recommends that municipal and conservation authority roles in nutrient management plan approvals, nutrient management strategy approvals, and other approvals relevant to the quality of source waters in the watershed be established and that municipalities be expressly permitted to exceed Nutrient Management Act standards in order to provide greater levels of source protection.

Yours truly,
CANADIAN ENVIRONMENTAL LAW ASSOCIATION

A handwritten signature in black ink, appearing to read 'Theresa A. McClenaghan', written in a cursive style.

per
Theresa A. McClenaghan
Richard Lindgren
Ramani Nadarajah
Paul Muldoon

Counsel

cc. Gord Miller, Environmental Commissioner of Ontario