



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

PUBLICATION #430

October 18, 2002

Policy Advisor
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Re: EBR Registry Number: RC02E0001
Ministry: Agriculture, Food and Rural Affairs
Type of Posting: Regulation
Date Proposal Loaded 2002/08/20
Status of Posting: Proposal
Comment Period: August 20, 2002 to October 19, 2002-10-17

Proposed Stage 1 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 in Caledonia and the meeting with MoE staff and OMAF staff in Toronto with CELA. 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.

At the outset, it should be noted that CELA strongly supports the need for effective and enforceable legislation to address the environmental and public health impacts of agricultural operations in Ontario, particularly in relation to nutrient management.

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.

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

Although we understand that the currently proposed Regulation is only stage 1 of a three-stage regulatory plan, and we also anticipate a Safe Drinking Water Act and other initiatives as indicated in recent government press releases, it is difficult to effectively review the stage 1 regulation in isolation from the as yet unseen initiatives to follow. 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 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 1 Regulation

- Despite the concern as to integration of the Nutrient Management Act regulations with source protection, CELA supports the initiative to enact the Nutrient Management Act regulations and agrees with the necessity to require Nutrient Management Plans and Strategies. CELA also supports the proposed contents of the plans in so far as the stage 1

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).

proposed regulation has outlined these requirements. CELA also agrees with the approach to phase in the requirements and to categorize the farms as proposed. **However, CELA recommends that the protocols and standards referred to in the stage 1 regulations be themselves part of the regulations.**

- CELA agrees with the rationale to arrive at a definition of nutrient units that also covers non-animal sources. **However, provision should be made for determining limiting factors based on constituents other than phosphorous or nitrogen.** 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.
- Section 8 of the proposed regulation provides that the Ministry may establish protocols to set out standards such as applicable limiting factors; separation distances from watercourses; minimum depth to groundwater or bedrock, prevention of flows to tiles, restriction on winter application and other relevant standards. What is not clear, is how these standards will take into account local soil, geology, sub-surface, and hydrogeology conditions, and other issues of susceptibility that vary from place to place. On the other hand, CELA does encourage consistent standards for the province as whole. **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.**

B. Comments regarding anticipated Stage 2 and 3 Regulations under the Nutrient Management Act

- We understand that biosolids are to be dealt with in the Stage 2 regulations. We wish to reiterate that Certificates of Approval for biosolids application must be consistent with Watershed Based Source Protection Plans (Walkerton Part II Recommendation 10). **Accordingly, we 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.**
- 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. **We would ask 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). There is no indication so far in the outline of the proposed and anticipated regulations that this recommendation is to be implemented. 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.**

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

1. **There must be an overall water policy for Ontario, and that policy must be implemented with multi-barrier protection beginning with source protection.**
2. **CELA recommends that the protocols and standards referred to in the stage 1 regulations be themselves part of the regulations.**
3. **Provision should be made for determining limiting factors based on constituents other than phosphorous or nitrogen.**

4. **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.**
5. **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 are made.**
6. **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.**
7. **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.**
8. **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.**
9. **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.**
10. **CELA asks 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.**

Yours truly,

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cc. Gord Miller, Environmental Commissioner of Ontario