

WHAT MAKES NUTRIENT MANAGEMENT SO CONTROVERSIAL?

David McRobert
In-House Counsel/Senior Policy Advisor
Environmental Commissioner of Ontario (ECO)
1075 Bay Street, Suite 605 Toronto, Ontario M5S 2B1
E-mail: david.mcrobot@eco.on.ca
and
Lillian Hopkins, Graduate Student, York University

INTRODUCTION

Until recently, nutrient management activities in Ontario were primarily regulated by a complex array of laws and policies, with many gaps and overlaps, supported by provincial and local voluntary farm plan programs. Although these initiatives were positive, the regulatory system did not reflect current and emerging intensive farming practices, or the risks posed to water by new pathogens contained in animal manure such as *E. coli* O157:H7, the pathogen that contaminated the municipal water supply in Walkerton in May 2000. As a consequence of the events in Walkerton, a plethora of changes to law and policy were initiated, including the enactment in 2002 of: the Nutrient Management Act (NMA), the Sustainable Water and Sewage Systems Act and the Safe Drinking Water Act.

Ontario's NMA and the new general regulation under NMA (O. Reg. 267/03) will have an impact on farmers, municipalities and livestock producers. The regulation took effect on September 30, 2003 and is to be phased in over approximately four years. O. Reg. 267/03 contains 122 sections and incorporates four complex and lengthy protocols. However, its current scope is narrow and it applies to a limited number of existing and most new livestock operations. As one observer has noted, the NMA and O. Reg. 267/03 "are not integrated with existing environmental, planning or municipal legislation." They are "one more irregular piece of Ontario's jigsaw puzzle of regulation," challenging government regulators, farmers, lawyers and others to make the pieces fit and raising complex issues wherever livestock farming is carried on or nutrients are spread on farmland.

This paper traces the history of laws and policy related to nutrient management and describes some of the recent controversies in Ontario.

MANURE AND ENVIRONMENTAL MANAGEMENT

While manure and other bio-solids such as sewage sludge are important sources of nutrients for farm operations, particularly of nitrogen and phosphorus, they can also cause harm to soil, water and air quality and have negative health impacts on humans if they are improperly managed.

As documented in the Environmental Commissioner of Ontario's (ECO) July 2000 special report on intensive farming and groundwater protection and in the ECO 2001/02 Annual Report, pollution from farms is a contributing factor to many of today's ground and surface water contamination problems. Contaminants from agricultural operations can enter surface and/or ground water via runoff from fields, direct deposition by grazing animals, discharge from tile drains, flow through soil and cracks in the bedrock, or improperly sealed or poorly maintained wells. Once contaminated, cleanup of surface water and ground water, in particular, can be expensive and difficult and contaminants can persist in ground water for decades.

Using 1996 data, Statistics Canada estimated that five of the ten areas in Canada that produced the most manure per hectare were in southwestern Ontario. The Maitland, Upper Thames and Grand River areas each produced more than 6,000 kilograms of manure per hectare annually; and the Ausable-Bayfield and Saugeen River areas each produced more than 4,000 kilograms per hectare annually. This is in contrast to an annual average per hectare in Canada of 755 kilograms of manure.

Although materials containing nutrients may improve crop growth, an excess of nutrient materials or inappropriate application of them may not only harm the soil and its crops, but also livestock, humans, wildlife and aquatic ecosystems.

- Excess nitrogen and/or phosphorus can increase the amount of dissolved nutrients in surface water causing algal blooms and long-term ecosystem changes.
- Materials containing nutrients may also contain heavy metals, e.g., cadmium, lead, as well as human and animal pathogens, such as *E. coli*, *Campylobacter*, *Cryptosporidium* and *Giardia*; hormones and antibiotics; and pesticides.
- Elevated levels of nitrates/nitrogen, in drinking water can cause a rare, but potentially fatal, condition called methaemoglobinemia in babies and has been linked to bladder cancer.

In his Part 2 Report for the Walkerton Inquiry, Commissioner O'Connor stated that "agriculture can be a significant source of the contaminants in drinking water" and that, as part of a multi-barrier approach to providing safe drinking water, the source of the water must be protected. In 1992, 1,292 farm wells were tested in Ontario and 14% were found to exceed Canadian Drinking Water Quality Guidelines for nitrate/nitrite. Increased damage to the environment and human health caused by nitrogen have largely resulted from the intensification of farming practices on a declining land base, resulting in an increased need for more rigorous regulations to mitigate damages. The NMA and O. Reg. 267/03 are premised on the concept that it is essential to mitigate and prevent damage caused by this kind of nutrient overloading.

HOW THE LAW HAS EVOLVED

Prior to Confederation, the common law governed legal liabilities associated with the application of manure to land. The tests applied by courts to determine liability for pollution associated with manure management and spills were related to the reasonableness of the

farmer's conduct, the utility of the conduct and whether the discharges to air, water or land related to manure were "natural". During this time lawsuits against farmers related to manure management issues were very rare. However, pathogens such as E. coli O157:H7 had not yet emerged, awareness about environmental problems was low, and the concept of a class action lawsuit had not yet been developed by the legislatures and the courts.

In the late 19th century, the federal government enacted the Fisheries Act (FA), one of the most powerful tools available to the federal government to regulate water pollution. Subsection 36(3) of the FA prohibits the discharge of deleterious substances (which can harm fish) into water frequented by fish unless the deposits are authorized by regulation. Farm operations are subject to this provision as well as the prohibition of activities that "results in the harmful alteration, disruption or destruction of fish or fish habitat" under the FA. However, enforcement against the agricultural sector has been lacking in the past and the Department of Fisheries and Oceans (DFO) or Environment Canada has launched very few prosecutions, although February 2004 reports in Ontario Farmer indicate that this might be changing. The reports describe efforts by DFO and Environment Canada to restrict cattle watering in the streams of Huron County.

In the 1950s, the Ontario government enacted a series of laws that provided the basis for the Ontario Water Resource Act (OWRA). The OWRA is the province's primary piece of water legislation and contains water quality provisions, which allow the Ministry of the Environment (MOE) to protect surface and ground water from pollution and sewage discharges. The OWRA also prohibits "discharges or deposits of material of any kind into a water body or watercourse that may impair water quality." However, these provisions have only rarely been used by MOE in relation to agriculture, chiefly restricted to large manure spills.

In 1971, the Ontario government enacted the Environmental Protection Act (EPA). Provisions of the EPA exempt farmers from being held liable for impairment of the quality of the natural environment if animal wastes were disposed of in accordance with normal farming practices. However, farmers can be charged for the disposal of animal wastes if other adverse damage results, including injury to human health or damage to property or to plant or animal life. Despite this, very few charges have ever been laid and little enforcement action has been taken. Furthermore, the EPA also exempts animal wastes from waste management requirements, such as certificates of approval for generating, hauling and the treatment of wastes, legislation that applies to other waste producers and haulers.

For more than a century Ontario municipalities have had powers under various laws that allow them to try to protect agricultural resources and maintain local environmental quality. In Canada, municipalities have no separate constitutional authority; they are authorized to exercise specific regulatory powers granted to them under provincial laws. Key statutes in Ontario that grant municipalities jurisdiction over environmental and land use matters affecting farm operations include: the Planning Act, the Municipal Act and the Building Code Act. The Planning Act gives municipalities the power to adopt official plans, zoning by-laws and the obligation to regard the conservation of natural resources when considering subdivision approvals.

In 1978, the Ontario government announced its "Food Land Guidelines". The Guidelines required municipalities to identify lands with agricultural potential, to rate them in order of priority and to evaluate the impacts that would be caused by alternative uses of the land. The overall goal of the policy was to encourage municipalities and other decision-makers to protect Class 1 and Class 2 agricultural lands when they made planning decisions. In August 1983, the Planning Act was proclaimed in force, clarifying that planning bodies "shall have regard to" policy statements issued by the Ontario government. In effect, the Ontario government decided to permit the Ontario Municipal Board (OMB) to use its discretion to evaluate the merits of land development and to decide land use planning disputes and conflicts involving agricultural lands.

In the early 1980s, a new wave of urban residents began to migrate to rural areas in many parts of Canada searching for a cleaner environment and a different pace of life. This migration generated increasing conflicts with farmers relating to noise, odours and dust from farms. Eventually, some of these new property owners turned to the courts in the hopes of restricting certain farm activities. In response, provincial and municipal governments across Canada began to look at legislation to protect farmers from these lawsuits.

In 1988, the Ontario government enacted the Farm Practices Protection Act (FPPA). This law was intended to protect farmers from lawsuits launched by neighbours, and required plaintiffs to seek approval of the Farm Practices Protection Board before they could launch a lawsuit. The Farming and Food Production Protection Act, 1998 (FFPPA), replaced the FPPA and strengthened the protection of farmers against lawsuits and complaints from neighbours, legislating in section 6 that farming practices cannot be restricted by municipalities if they are determined to be normal by the Normal Farm Practices Protection Board (NFPPB). Few lawsuits have been approved by the NFPPB in the intervening 15 years; to our knowledge there has not been a single one. However, over the years Ministry of Agriculture and Food (OMAF) staff and the NFPPB have ruled that a number of farm activities are not normal farming practices and this has created a body of rules as to acceptable practices. Moreover, in one case decided in 1999, *Pyke v. TRI GRO*, the lawyer representing the plaintiffs did not apply to the NFPPB and successfully sued a mushroom grower. Despite the express provisions of the FFPPA, two of the Court of Appeal Judges allowed the judgement to stand. The NFPPB also has issued a number of decisions on manure management and the ability of municipalities to restrict new farm operations and some of these are reviewed below.

In the early 1980s, the MOE, the Ministry of Natural Resources and other stakeholders became concerned about non-point source water pollution from farms and the closure of beaches on Lake Huron. In 1986, the MOE established a program called Cleaning Up Rural Beaches (CURB), targeted at cleaning up beaches on Lake Huron. This program operated until early 1996.

OMAF and many of its stakeholders (such as the Ontario Federation of Agriculture) have long promoted a voluntary approach to nutrient management, and spent approximately 15 million federal Green Plan dollars in the early 1990s to support the Environmental Farm Plan Program (EFPP). Since 1993 OMAF has provided technical support to the voluntary EFPP, which encourages farmers to develop Environmental Farm Plans (EFP), including manure

management plans. Some excellent work has been done under this program. However, because participation in these projects has been voluntary, the off-farm ecological impacts caused by manure management are not emphasized and data collection on EFPs was uneven, there was no assurance that the program had changed practices on the majority of farms.

In February 1994, the Ontario government enacted the Environmental Bill of Rights (EBR). This law contains a number of new tools, such as the right to request an investigation if an environmental law such as the EPA or the OWRA is being contravened. The EBR also contains new rights to sue polluters; however, the law also requires that plaintiffs first obtain approval of the NFPPB before they can launch a lawsuit against farmers. These provisions were inserted into the EBR at the insistence of the Ontario Federation of Agriculture and other OMAF stakeholders in 1993. To date, only a handful of lawsuits have been launched using the EBR and no lawsuits relying on the EBR have been launched against farmers.

The EBR also creates the ECO. The ECO has issued eight annual reports and five special reports. In July 2000, the ECO released a special report on groundwater and intensive agriculture. This report helped to spur government action on development of the NMA.

Municipal Powers and By-Laws

In 1996, the Planning Act was amended and the provincial government established a new Provincial Policy Statement (PPS) under the Act. The PPS affirms that prime agricultural areas and normal farm practices will be promoted and protected. The 1996 PPS is currently under review and we expect that a revised version of the PPS will be tabled for public consultation in June 2004.

In 2001, the Ontario government significantly revised the Municipal Act. The new law, which took effect in January 2003, contains a number of provisions to authorize control over specific environmental matters using by-laws. Examples include by-law powers on tree cutting, the adoption of waste management plans and by-laws to curb noise pollution. However, it did not alter municipal powers with respect to regulating farm operations.

One tool that municipalities can use to regulate farm operations is the Building Code Act (BCA). Under the BCA, chief building officials (CBOs) must issue a building permit unless there is a violation of the Act or any other applicable law. In practice, CBOs must make these decisions promptly and applicable law includes municipal by-laws. As noted below, municipalities began to develop site plan controls under the BCA to restrict the siting of new large farms in their boundaries in the late 1990s.

The farming exemptions in the EPA and the FFPPA resulted in a nutrient management regulatory gap that was mainly filled by municipalities starting in the mid 1990s. As of May 2003, there were approximately 84 nutrient management municipal by-laws in place. Some of these by-laws have been challenged in courts and at tribunals like the OMB and the NFPPB (some of the court and tribunal decisions are listed at the end of the paper). In *Knip v. the Township of Biddulph*, the FPPB (as it then was) decided in 1998 that a by-law which limited the number of livestock units located on a piece of property, is a restriction of normal farm

practices. The FPPB also ruled that manure management, using a nutrient management plan, instead of adhering to the ratio of one tillable acre for 1.5 livestock units, is a normal farm practice. In *Jansen v. Township of Adelaide-Metcalf*, the NFPPB ruled in 2000 that long-term control of manure did not require a lease for cropping purposes. Another NFPPB decision released in 2000, *Embury v. Township of Stone Mills* dealt with whether a municipality could require a farmer to own at least 40% of the land on which he spread manure. The NFPPB ruled that a 40% ownership level constituted an improper restriction of normal farm practices, even though it acknowledged that a requirement of long-term control of at least 40% of a land base (e.g. through a lease) for spreading manure may comply with normal farm practice. In a supplementary decision, the NFPPB decided that a municipality could use site plan controls as a means of requiring nutrient management planning and this would not contravene section 6 of the FFPPA as a restriction on normal farm practices.

Rob Waters, the former chair of the FPPB between 1990 and 1996, speculates that these types of NFPPB decisions might have encouraged municipalities to try to use interim by-laws and building code site plan controls to restrict large farms. These NFPPB decisions also provided a body of tribunal rulings that shaped the approach OMAF and MOE used to develop the NMA. Other court and tribunal decisions also played a role in the policy development process. In *Ben Gardiner Farms v. West Perth Township*, the Township had passed a by-law imposing a cap of 600 livestock units per site. The farmer appealed the by-law to the OMB and the OMB initially decided in favour of the Township. When the OMB decision was challenged at Divisional Court, the judge ruled that the by-law restricted normal farm practice by prohibiting farm operations above a certain size and granted leave to appeal to the farmer.

Municipal powers to regulate the environment were given a major boost in June 2001 when the Supreme Court of Canada ruled in *Spraytech v. Town of Hudson*, finding that it was within the scope of a local government in Quebec to prohibit the use of nonessential pesticides. After the *Spraytech* decision was reached, there was concern that a glut of by-laws relating to “environmental concerns” would be passed by municipalities, including more by-laws on manure management. Some feared that these by-laws would further exacerbate what the agricultural community considered an unfair advantage to those operations that are not subject to restrictions. It is unclear if this has happened but, to date, it doesn’t appear to have.

In *Faux v. Township of Havelock-Belmont-Methuen*, the issue was whether an interim control by-law freezing the development of intensive livestock operations would restrict normal farm practices. Prior to the NFPPB hearing in February 2002, the Minister of Agriculture, Food and Rural Affairs issued a directive under s. 9(1) of the FFPPA stating that “...a proposal for an agricultural operation shall be deemed not to be carried on as a normal farm practice until a by-law providing for nutrient management planning, minimum distance separation and manure storage has been passed”. This provided municipalities with breathing room, allowing them to regulate new operations, and might have been a tip of the hat to the *Spraytech* decision. However, this directive has now been superceded by provisions in O. Reg. 267/03.

In summary, the proliferation of nutrient management by-laws has been attacked on the basis that they restrict normal farm practices and are an unfair advantage to operations that are not

subject to them. Moreover, farming operations that span more than one municipality may be subject to different by-laws leading to confusion about which requirements apply. This was one of the main reasons why the Ontario government felt compelled to develop a clear regulatory system under the NMA. It is expected that, over time, most of these by-laws will be replaced by NMA regulations such that agricultural operations would no longer be subject to differing standards across the province.

The Impact of the Nutrient Management Act

The NMA was given Royal Assent in June 2002 with the purpose to establish province-wide standards to regulate farm practices relating to nutrient management. The purpose of the NMA is “to provide for the management of materials containing nutrients in ways that will enhance protection of the natural environment and provide a sustainable future for agricultural operations and rural development.”

Agricultural operations have been defined in the NMA as the growing of livestock, production of crops, and operations such as aquaculture, horticulture and silviculture. It specifically includes activities such as: the cultivation of greenhouse crops, nursery stock and tobacco; aquaculture; the production of maple syrup; husbandry of deer, elk, game animals and birds; and the growing of mushrooms, trees and turf grass. The NMA identifies “nutrients” as fertilizers, organic materials, biosolids, compost, manure, septage (i.e., human waste from septic tanks), pulp and paper sludge, and other material applied to land for the purpose of improving the growing of agricultural crops.

Each agricultural operation will be classified into one of nine categories based on the nature of the operation and on the amount of nutrients generated and received. The agricultural operation would then be required to comply with the regulations specific to its category - intensive farming operations will be expected to comply with more stringent regulations than small, family farms.

Over 26 specific subject matters may be regulated, including:

- The size, capacity, location and construction of buildings that store materials containing nutrients, or house farm animals;
- The amount of materials containing nutrients that may be applied to lands, the quality of the materials, and the type of land to which they may be applied;
- The time and manner in which materials containing nutrients may be applied to lands;
- Preparation, approval and revision of nutrient management plans (NMPs) for agricultural operations, and nutrient management strategies (NMSs) for municipalities and generators of materials containing nutrients;
- Establishment of a registry containing the NMPs and NMSs;
- Collection and chemical analysis of materials containing nutrients;
- Studies of soil type, topography of the land on which the nutrients are to be applied, and of the risk of contamination of water located on, in or under those lands;
- Restricting access of farm animals and persons to lands on which materials containing nutrients have been applied, and to water and watercourses; and

- Establishment of local committees to assist in the management of materials containing nutrients and mediation of disputes.

Under the NMA, any municipal by-law addressing the same topic as a regulation becomes inoperative, thereby establishing uniform province-wide standards.

Under the regulatory system that preceded the NMA, MOE required generators of biosolids (e.g., sewage treatment plants, pulp and paper mills), haulers of septage, and managers of sites onto which biosolids are applied to have and follow certificates of approval under the EPA. In early 2003, OMAF and MOE stated that the current system of approvals for untreated septage would be phased out within five years. Under the NMA, regulations may also require:

- Farmers/applicators of materials containing nutrients to land to pass an examination;
- Persons in the business of applying materials containing nutrients to obtain a license;
- Sites onto which said materials will be applied to have an approved NMP;
- Generators of biosolids to prepare a NMS; and
- Persons preparing or approving NMPs and NMSs to meet designated qualifications.

Similar to the EPA and the OWRA, the NMA provides for the designation of Provincial Officers, who may enter and inspect an agricultural operation without a warrant; and who may issue an order to prevent, decrease or eliminate an adverse effect due to the discharge of materials containing nutrients to the natural environment. Orders may also be issued requiring work to be done or requiring a person to comply with the Act, the regulations, or with their certificate, license or approval. However, unlike the EPA, orders can only be issued to current owners and operators – previous owners and operators are exempt. If an operator fails to comply with the NMA, a MOE official may issue an administrative penalty to a maximum of \$10,000 per day for each offence. If the person pays the penalty, the person will not then be charged with an offence.

Operators can appeal decisions regarding the approval/denial of a certificate or a license issued by OMAF, or an administrative penalty to the Environmental Review Tribunal within 15 days.

A corporation convicted of an offence under the NMA may be fined a maximum of \$10,000 per day for the first offence, and \$25,000 per day for a subsequent offence. However, corporate officers can only be convicted of an offence if they knowingly concur with the commission of the offence. An individual may be fined a maximum of \$5,000 per day for the first offence, and \$10,000 per day for a subsequent offence. These maximum fines apply to any offence, including offences that result in impairment to the environment.

There is no requirement for farmers to self-report non-compliance with the NMA. In contrast, under the EPA and OWRA, non-compliance must be reported immediately and maximum fines related to impairment of water start at \$250,000 per day and rise to \$10,000,000 per day. The amount of the fine depends on whether or not an individual or a corporation committed the offence, and whether or not it is a first or subsequent offence. Individuals convicted under the EPA or OWRA may also be imprisoned and corporate officers must exercise reasonable care to prevent the offence from occurring.

Cabinet may delegate functions related to the registry created by this legislation; the review of NMPs and NMSs; and the issuance, amending, suspending or revoking of certificates, licenses and approvals to an individual, partnership or corporation.

NMA also clarifies that compliance with the NMA is to be considered a “normal farm practice” for the purposes of the Farming and Food Production Protection Act. This means that neighbours will not normally be able to sue farmers who comply with the NMA for disturbances such as odour or dust, and must first seek pre-approval from the NFPPB for such a lawsuit.

OMAF and MOE have stated that a central registry of NMPs and NMSs will be created to provide registry users and government with information on sources (generators) and destinations (receivers) of nutrients, and the type, quality and quantity of nutrients generated and applied. This information could then be analyzed to determine volumes and trends, proximity of application sites to watercourses and other sensitive areas, and potential locations for soil and water quality testing. Without this information, it would be difficult for OMAF, MOE and other agencies to assess the impact of the nutrients on watercourses, or to design monitoring programs that can differentiate between agricultural sources and other dischargers, e.g., industry and sewage treatment plants.

In June 2003, O. Reg. 267/03, the first NMA regulation, was filed. The regulation requires building permit applications for establishment and expansion of large livestock operations, regulates manure management on all new farms and many existing farms by 2005, and municipal sewage treatment facilities by 2008.

The regulation introduces two new terms to Ontario agriculture – the farm unit and the nutrient unit (NU). The farm unit defines the agricultural operation in terms of the land that it encompasses. An agricultural operation can be defined as multiple farm units if the conditions in the regulation are met. Each farm unit is required to individually comply with O. Reg. 267/03. For the purpose of this decision review, an agricultural operation is assumed to be one farm unit and will be referred to as a farm.

A nutrient unit is a measure of the size of a farm based on the amount of manure generated or could be generated based on the housing capacity of the farm unit, allowing OMAF, MOE and other stakeholders to compare hog farms with poultry farms. One NU is the amount of manure that gives the fertilizer replacement value of the lower of 43 kg of nitrogen and 55 kg of phosphate. There are four NU thresholds: 300 NU or more, 150 NU or more but less than 300 NU, more than 5 NU but less than 150 NU, and 5 NU or less. The NU threshold determines which rules in O. Reg. 267/03 will apply. There is no restriction in the NMA or O. Reg. 267/03 on the number of animals that a farm can have. This regulation requires new or expanding farms producing over 300 nutrient units (NU) (equivalent to 300 milking Jersey cows, 45,000 laying hens or 1800 finishing pigs) to produce and have approved a NMP and a NMS. New farms producing more than five nutrient units established after September 2003 must submit an approved NMP and NMS when applying for a building permit.

The majority of the rules are being phased in over five years. O. Reg. 267/03 applies first to new livestock farms and existing livestock farms expanding to 300 NU or more, followed by large sewage treatment plants and then existing large agricultural operations. A few rules in the regulation apply to all farms regardless of the NU. An implementation date of 2008 has been proposed for other farms but this matter has been referred to the Provincial Nutrient Advisory Committee for further consideration. Municipal by-laws, if they exist, continue to be applicable to farms not under O. Reg. 267/03.

O. Reg. 267/03 consists of 13 parts including rules on:

- Nutrient management strategies and plans
- Land application standards
- Outdoor confinement areas
- Siting and construction standards
- Sampling, analysis and quality standards
- Application methodology standards
- Licensing and certification
- Monitoring, compliance and enforcement.

The regulation also makes reference to four protocols: Nutrient Management, Construction and Siting, Sampling and Analysis, and Local Advisory Committee which provide additional details and are legally enforceable. The rules described below only apply to farms when they become regulated, i.e., phased-in. It should also be noted that farms with OMAF-approved nutrient management plans developed under an EFP are grandparented for five years until at least 2008.

One of the original objectives of enacting nutrient management legislation was to provide consistent, province-wide rules so that farmers in one municipality are not subject to different rules than farmers in another municipality. Although O. Reg. 267/03 has the potential to fulfil that objective, consistency has not been achieved. Since only large livestock operations, numbering about 1100 according to Statistics Canada Census 2001 data, and new livestock operations or operations expanding to 300 NU or more are covered by the regulation, the majority of the 53,000 farms in Ontario remain subject to municipal bylaws until at least 2008. As noted above, there are currently about 85 municipal by-laws in place. The Provincial Nutrient Management Advisory Committee has been asked to make recommendations to OMAF on whether the remaining 51,900 farms should be brought under O. Reg. 267/03 and, if so, when.

In sum, it appears that approximately 95-98% of current livestock producers will not be subject to O. Reg. 267/03 until 2008 or later. Thus, some commentators have suggested that the NMA will have little effect in the near term on farm practices and environmental damages, although the NMA and O. Reg. 267/03 are important first steps in the development of a comprehensive regulatory system for Ontario.

SOME CONTROVERSIES IN NUTRIENT MANAGEMENT

The Nutrient Management Act is a Compliance and Enforcement Maze

One of the sources of controversy has been described as the nutrient management compliance and enforcement maze created by the NMA. As reported in the ECO's recent annual report, one of the most contentious issues raised by commenters on Bill 81 related to whether OMAF or MOE should be accountable for ongoing enforcement of the NMA and associated regulations. For the most part, agricultural organizations took one of two positions: (a) OMAF should be wholly accountable since the NMA is about nutrient management by farm operations and since OMAF has expertise on farms and a positive, co-operative relationship with farmers; or (b) a MOE inspection unit should be seconded to OMAF. Many farm groups stressed that the approach to compliance and enforcement should be positive and cooperative rather than punitive. For the most part, environmental groups recommended that MOE be wholly accountable for enforcement due to its independence and its expertise in enforcement. In his Part 2 Walkerton Inquiry report, Commissioner O'Connor stated that OMAF may not be sufficiently independent to both promote agriculture and enforce the regulations and he recommended that MOE oversee all compliance requirements of the NMA.

Up until November 2003, it appeared that compliance and enforcement would be multi-layered. OMAF officers would have been responsible for the first line of enforcement. The MOE would only be called in after multiple violations, repeat offences or refusal to admit an OMAF Agricultural Officer. MOE would also have been called in for spills or other incidents that may have a major impact on human health or the environment.

In theory, this plan sounded reasonable; however, the ECO has found that shared responsibilities and limited government resources in the area of Fisheries Act enforcement has sparked jurisdictional turf wars, and can result in "enforcement inertia" and other complications. For this reason, the ECO has argued that it would be logical to assign MOE the lead role in enforcement of the NMA.

The ECO was pleased when Environment Minister Leona Dombrowsky and Agriculture and Food Minister Steve Peters announced in late November 2003 that MOE would be overseeing most compliance requirements of the NMA, consistent with the recommendation of the Walkerton Inquiry report.

Does the Nutrient Management Act Supersede Other Laws?

Section 61 of the NMA states that: "A regulation supersedes a by-law of a municipality or a provision in that by-law if the by-law or provision addresses the same subject matter as the regulation." A provision of a by-law that is superseded will be inoperative so long as the regulation is in force.

Chief Building Officers (CBOs) will have to decide whether a local by-law has been superseded by NMA regulations as explained by one commentator. OMAF has argued that O. Reg. 267/03 will supersede by-laws made under the Planning Act. However, this

interpretation is open to question; indeed, section 71 of the Planning Act states that where there is a conflict between the Planning Act authority and other general and special Acts, the Planning Act is paramount. Whether O. Reg. 267/03 supersedes a by-law made pursuant to the Municipal Act will also require interpretation to determine which provisions of the by-law "address the same subject matter" as NMA regulations.

Some legal commentators also argue that unless the legislation is clarified, many of these CBO decisions will be challenged in the courts. For a preview of this kind of litigation, see the *City of Ottawa v. City of Ottawa, Chief Building Official*, (2003). This decision grants the appellant city a stay of a decision by the city's own CBO to issue a building permit for a livestock farm, pending an appeal to the Ontario Court of Appeal. In December 2003 a Divisional Court panel upheld a ruling that the CBO had to give the producer a building permit, but did not have to designate his newly acquired dairy farm as a legal non-conforming use. The Divisional Court panel of Justices also determined that the trial judge was correct in concluding that a proper interpretation of the term "other applicable law" in the Building Code Act excluded three environmental statutes, the OWRA, the EPA and the Fisheries Act. However, the trial judge did not comment on the applicability of the NMA since the application for the building permit was received before O. Reg. 267/03 came into force.

Funding

A third concern surrounding the NMA is one of funding. In early 2003, OMAF and MOE acknowledged that implementation of the NMA regulations will require training and funding for farmers. Small agricultural operations are expected to need the most assistance. Provincial Officers will also need to be trained in agricultural practices, including biosecurity, to ensure fair and appropriate enforcement and to prevent transmission of disease from farm to farm.

The ECO was delighted to learn in late 2003 that the federal and provincial governments have agreed to renew funding for farm plan work through the Agricultural Policy Framework (APF). One media report in December 2003 suggested that more than \$6 million of APF funds would be made available to help farmers comply with the NMA. In May 2004, the Ontario government announced as part of its 2004 Budget that it would provide more than \$20 million in funding for work on NMPs.

Public Access to Nutrient Management Plans and Strategies

Since OMAF plans to store NMPs and NMSs in an electronic registry, there is the potential for public access. A number of farming organizations, such as the Dairy Farmers of Ontario, have opposed this access, arguing at the Bill 81 hearings that only "verification of compliance and a short summary of nutrient management plans should be public documents. Full plans should not be available to the public in consideration of sensitive and/or protected information. Plans should be audited by the auditor and not audited by public complaint." In contrast, the Canadian Environmental Network indicated that NMPs should be public documents so that the public has the opportunity to verify for themselves whether or not agricultural operations are following their plans.

The ECO believes that the proposed central nutrient management (CNM) registry is a critical component and that it should include all NMPs and NMSs. Moreover, the ECO believes that it is essential that much of the data on the new CNM registry be publicly accessible so that decision-making remains transparent and ministries are held accountable for their decisions on NMPs and NMSs. The ECO also recognizes that some of the NMPs and NMSs may contain confidential information and would support allowing farm owners and operators to make requests to MOE and OMAF regarding the validity of posting only summary information on the CNM registry in some cases. The opportunity already exists under MOE policies and procedures for instrument-holders under the EPA and other Ontario environmental laws to make claims under the Freedom of Information and Protection of Privacy Act (FIPPA) to protect confidential information from public viewing. Disputes about these claims are subject to appeal to the Information and Privacy Commissioner. Our view is that the current FIPPA regime could be adapted so that agencies developing watershed plans at a local level would still have access on the CNM registry or on the Internet to descriptions of loadings of nutrients in their watersheds.

Prescribing the Nutrient Management Act under the Environmental Bill of Rights

The ECO is particularly concerned that the NMA may not be subject to the EBR and does not believe that the public concerns regarding water quality will diminish unless the public feels it can participate and the regulatory system is transparent.

The ECO commends OMAF and MOE on the extensive public consultations that took place during the development of Bill 81 and the NMA regulations. The ECO has repeatedly urged OMAF to prescribe the NMA under the Environmental Bill of Rights. If it is not, certain EBR rights may not be available to the public, including applications for review, investigation or leave to appeal, as well as the right to sue for harm to a public resource. In 2002, OMAF indicated that it needed more time to understand the implications of prescribing the Act under most sections of the EBR. In the interim, the ECO urges OMAF to prescribe the NMA under s.16 of the EBR so that the Act's regulations are subject to notice and comment on the Environmental Registry.

The EBR also provides a means for instruments, such as certificates, licenses, orders, NMPs and NMSs to be classified, and posted on the Environmental Registry created by the EBR so that the public can be advised of and participate in decisions on NMSs and NMPs that may affect them. The ECO believes that all instruments related to nutrient management for large agricultural operations should be prescribed under the EBR. This would also include biosolid application sites, which are currently exempt. Again, in order to ensure that public participation opportunities under the EBR are maximized, it would be important to provide adequate information about proposed instruments on the Registry.

CONCLUSIONS

The intensification of farming practices can result in considerable environmental damage, damage that must be mitigated and prevented. Despite the controversy surrounding the NMA

and O. Reg. 267/03, they are important first steps as we begin the journey of developing a coherent system for managing nutrients in Ontario and filling in the pre-Walkerton tragedy gap in law and policy.

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