Ontario Public Service
Employees Union

OPSEU

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Syndicat des Employé-e-s
de la Fonction Publique
de l'Ontario

October 29, 2001

The Honourable Dennis O'Connor
Commissioner
The Walkerton Inquiry
180 Dundas Street West
22nd Floor
Toronto, Ontario
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Dear Mr. Commissioner:

Re: OPSEU Submissions on Whistleblowing and Groundwater Monitoring

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On behalf of OPSEU, I am pleased to make further submissions on two topics in which you had expressed some interest:

1) Whether the "whistleblowing protection" in the Environmental Protection Act and the Environmental Bill of Rights addresses the concerns of front-line public servants about their ability to bring important issues to public attention (our view being that these provisions do not adequately address the issue); and

2) An update on the views of OPSEU represented staff concerning groundwater protection measures and, in particular, their reaction to the criticisms contained in the recent report of the Environmental Commissioner of Ontario (our view being that the Environmental Commissioner's criticisms are well taken).

Our detailed comments on both of these issues are set out below.

1) Whisteblowing Protection

Neither the Environmental Bill of Rights (EBR) nor the Environmental Protection Act (EPA), nor their combined effect, protect public servants when they bring issues to public attention.

While the Environmental Bill of Rights, Part IV, sections 104 to 116 and the Environmental Protection Act, s. 174 prohibit "reprisals" against employees who advance certain environmental concerns in particular ways, neither Act deals with the interaction of that legislation with the Public Service Act and the confidentiality obligations of public servants. This raises an unresolved

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concern for public servants contemplating bringing forward environmental concerns through channels other than those acceptable to their employer. If they bring such concerns forward, and are disciplined, will the discipline be viewed as taken because they were seeking to advance environmental concerns, or because they had violated the oath of secrecy? The Ministry of the Environment could claim that it is disciplining an employee, not because he or she was seeking environmental protection, but because he or she violated their oath of secrecy in the process of doing so. It is far from clear how that argument would be dealt with by the Ontario Labour Relations Board in the process of adjudicating those issues.

OPSEU can certainly advise the Inquiry that front-line public servants, operating in the environmental area, are far from clear that they have any statutorily protected right to bring forward environmental concerns to the public, even where those environmental concerns are of the kind covered by the EPA and the EBR anti-reprisal provisions.

Furthermore, the detailed provisions of the two Acts do not protect the full range of "whistleblowing".

Under the Environmental Protection Act, employees are protected from reprisal when they are complying with environmental protection statutes "or because the employee has sought or may seek the enforcement of one of those Acts…". The Ontario Labour Relations Board has decided in the case of Varnicolor Chemical Ltd. [1991] OLRB Rep. May 711 that persons may seek enforcement of environmental legislation through indirect means. In other words, an individual can seek enforcement of an environmental statute through the means of public debate and will be protected by the Environmental Protection Act in so doing.

However, this protection does not cover bringing matters to public attention where the concern is other than the enforcement of a specific Act. Public servants may have a range of questions or concerns that need to be brought to public attention. For example, in respect of safe drinking water, one concern may be the failure of the government to enforce environmental legislation but other concerns may include insufficient protocols governing needed inspections or other criticism of ministerial management and resourcing. In those circumstances, the Environmental Protection Act would not apply.

The scope of the Environmental Bill of Rights is somewhat broader but still not broad enough. Individuals are protected from reprisal in respect of a series of actions, but none of those enumerated actions, as set out in section 105(3) 1 through 6, include bringing matters to public attention. For example, No. 1 "participate in decision making about a Ministry statement of environmental values, a policy, an Act, a regulation or an instrument" is limited by the words "as provided in Part II" which normally refers to

providing comments to the Ministry. This does not necessarily result in the comments coming to public attention.

As such, it is far from clear that the EBR provides blanket protection to individuals who are seeking to bring environmental concerns to the attention of the public. It protects them in respect of the list of matters, i.e. participation in decision-making about matters on the environmental registry, or other statutory proceedings or seeking enforcement. It does not cover bringing forward unenumerated or general concerns.

In sum, it is not clear that the EPA or EBR protects public servants. In any case, the EPA and EBR only protect certain "whistleblowing" activities and do not generally protect public servants bringing environmental concerns to public attention.

2) Groundwater Monitoring

OPSEU represented front-line staff of the Ministry of the Environment agree with the comments of the Environmental Commissioner of Ontario in his recent report. Front-line staff would reiterate their previous submissions about the lack of an overall groundwater protection policy. A number of initiatives have now been started to protect groundwater but there is a severe lack of integration of these programs. This lack of direction leaves groundwater protection and well head protection apparently up to the municipalities and local planning authorities.

Future groundwater protection programs and associated policies should be led by the province based on an ecosystem approach. Groundwater protection must be based on sound scientific principles and ongoing verification to allow those people living in the ground watershed to understand the process. This concept is no different than dealing with air sheds or watersheds. (Perhaps we need policies that set out limits for groundwater degradation, similar to the concept for designated policy 1 and policy 2 surface water bodies receiving sewage discharges.)

It can be noted that the proposed Nutrient Management Act will not fill the gap. It does not take an ecosystem/placed based approach to groundwater protection. There does need to be a "one-size fits all approach" for certain requirements, but in addition, there needs to be some site specific assessment, perhaps through Certificate of Approval requirements similar to those used under the Ontario Water Resources Act. The Nutrient Management Act does not include clear provision for site specific waste related approvals (other than septage and biosolids), so there will be no way to regulate the cumulative impacts of nutrient loading (i.e. nitrates) on a groundwater shed. Aquifers deemed to be highly susceptible to contamination require a more place based approach.

In order to fuel a more ecosystem-based approach, there needs to be a strong base of information and accessible data about the state of the province's groundwater. This need is not going to be fulfilled by the current level of initiatives being put forward by the government.

The Provincial Groundwater Protection Monitoring Network (PGWMN) is poorly conceived and implemented. It will only provide limited data on groundwater levels over the short six year time span of the programme. The PGWMN collects data on water quality that will be of insufficient use in determining aquifer quality issues. A full understanding of groundwater quality requires groundwater surveys of larger numbers of wells, particularly for bacteriological review. All groundwater surveys must also address the impact of poor well construction.

The first round of studies funded to date have been useful in assisting interested municipalities and raising the awareness of groundwater issues and may be of some value in the development of official plans and by-laws. However, the studies do not give enough attention to long-term aquifer impact from contaminants such as nutrients.

The second round of studies are geared more to well-head protection but they are insufficient in scope and depth. Additionally, municipalities are not sure what to think of well-head protection, or how well-head protection can be enforced. Section 33 of the OWRA has given Directors the power to protect water intakes, both surface and groundwater intakes, but it has been seldom used. It can be said that section 33 of the OWRA is "missing link" between a Section 34 OWRA Permit To Take Water and a section 52 OWRA waterworks approval, but its potential has yet to be seriously addressed. Use of that missing link for the purposes of properly protecting groundwater would involve a major policy initiative, which in turn must be based on a strong understanding of the groundwater itself. The current initiatives are not sufficient to produce that understanding.

I hope these submissions are of some assistance to the Inquiry. Thank you very much for your continuing attention.

Yours truly,

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