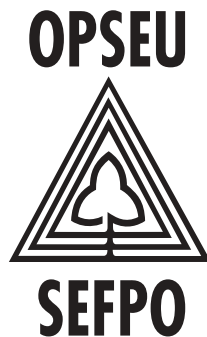


RECOMMENDATIONS AND RATIONALE
CONCERNING
REGULATORY AND TECHNICAL ISSUES
FOR SPECIFIC SOURCES OF
CONTAMINANTS, AND WATER QUANTITY
(FOR WALKERTON INQUIRY, PART II,
PUBLIC HEARING NO. 5)

BY



AUGUST 2001

1. The Ontario Public Service Employees Union (OPSEU) is very pleased to continue its involvement in Part II of the Walkerton Inquiry by offering recommendations and accompanying rationale in respect of agricultural contaminants.
2. OPSEU will not be making specific recommendations concerning other contaminant sources. Instead, OPSEU suggests that those issues be addressed by a strong Ministry of Environment, as advocated by OPSEU in its recommendations to Public Hearings 1, 2 and 3 and 4. Concerning recommendations regarding water quantity, OPSEU refers the Inquiry to the submissions at Public Hearing 4 where it was generally agreed that quantity issues be dealt with through a revitalized Permit To Take Water process integrated with watershed management planning.
3. Returning to the recommendations regarding agricultural contaminants, OPSEU has a number of recommendations which, for each of reference, are set out below. The rationale for those recommendations follows

Recommendation #1

- That the policy responsibility and standards setting function regarding agricultural contaminants be centralized in the Ministry of the Environment (MOE).

Recommendation #2

- That this centralized MOE policy responsibility include lead responsibility for the proposed Nutrient Management Act, 2001 and the regulations thereunder.
- That the Act designate the Minister of the Environment as having lead responsibility.

Recommendation #3

- That the regulatory framework under the Nutrient Management Act, put strong environmental protection into place and include well head protection and minimum distance separation requirements.

Recommendation #4

- That the approvals and inspections process under the Nutrient Management Act not be delegable to the private sector, but be carried out by the Ministry of Environment, and its staff.
- That OMAFRA, and its staff, assist the farming community in meeting compliance requirements.

Recommendation #5

- That agricultural exemptions under the Environmental Protection Act (EPA) and the Ontario Water Resources Act (OWRA) be eliminated and that agricultural practices be fully subject to those Acts, with specific requirements being established through regulations coordinated with any Nutrient Management Act.

Recommendation #6

- That all regulatory requirements regarding agricultural contaminants be sustainably supported through the necessary deployment of additional specialist and generalist staff, and additional training.

Recommendation #7

- That, as a supplement to a strong regulatory and enforcement regime, other tools be used to encourage even better nutrient management practices, such as grants to facilitate better manure handling.

Recommendations #1 and 2: Centralization in the MOE of policy responsibility and standards setting functions regarding agricultural contaminants

4. The need for an overarching policy, clarity of accountability and responsibility, strong central policy and standards setting leadership, the need for a lead Ministry, the reasons why that lead ministry should be the Ministry of Environment – these issues have all been the subject of earlier submissions by OPSEU, comment by many participants in the Inquiry, and prescriptive advice from issue paper authors, including in D’Ombrain, Machinery of Government for Safe Drinking Water in Ontario. That general point applies directly to agricultural contaminants.

5. The history of the environmental approach of the Ontario Ministry of Agriculture, Food and Rural Affairs (“OMAFRA”) has been the subject of some adverse comment in the Environmental Commissioner of Ontario’s Special Report to the Legislative Assembly of Ontario, The Protection of Ontario’s Groundwater and Intensive Farming, July 27, 2000, at pp. 9-11, and in D’Ombrain at paras. 244-246. The concerns have been that agriculture is a major source of environmental contamination, that intensive farming is increasing the risks of environmental impacts, that a strategic plan for the protection of drinking water resources is required and that OMAFRA may not be the best ministry to strike the right balance

between environmental protection and farm /agri-business economics given its historic advocacy role for the agricultural sector.

6. OPSEU represented staff submit that this is a legitimate concern, and indeed that the balance is best struck by having the Ministry of the Environment as the lead agency. It is the experience of MOE staff that the priority of environmental protection is best maintained on inter-Ministry issues if the MOE has the lead role. It must of course be the case that OMAFRA would provide “extensive field expertise and guidance to the process” and that “greater co-ordination and communication between MOE and OMAFRA” is required. (See comments in Expert Meeting Notes, May 31st and June 1st, Section 2.2.). However, that should all take place within a framework of clear lead responsibility for the MOE.
7. That lead responsibility should apply to the policy development process now underway concerning the proposed Nutrient Management Act, 2001. It is currently the government’s position that the development of that Act’s regulatory framework will be done by OMAFRA as a “partner” with MOE and “stakeholders”. (See OMAFRA, June 13 press release, <http://www.gov.on.ca/OMAFRA/english/infores/releases/06/3/01.>)

8. Recognizing that Nutrient Management Plans (“NMP’s”) will be a strong point of focus in the final regulatory framework, it is worth recalling that NMPs are a tool, developed by OMAFRA, that is largely agronomically based, with subsidiary regard for environmental concerns and mitigating measures. It has not been primarily environmentally based, and it is likely that a different NMP would be developed under an MOE led and more environmentally focused process.
- 9 Concerning the wording of the proposed Act itself, it reposes a wide range of powers and responsibilities in the “Minister”, but the Act does not define who that is. In the definition section of the Act, the “Minister” is only defined as “the Minister responsible for the administration of this Act, unless the context indicates otherwise” (OMAFRA, proposed Nutrient Management Act, 2001, s.1 http://www.gov.on.ca/OMAFRA/english/agops/nutrient-management_act-2001.pdf). The responsible Minister should be named and it should be the Minister of the Environment.

Recommendation #1

- That the policy responsibility and standards setting function regarding agricultural contaminants be centralized in the Ministry of the Environment (MOE).

Recommendation #2

- That this centralized MOE policy responsibility include lead responsibility for the proposed Nutrient Management Act, 2001 and the regulations thereunder.
- That the Act designates the Minister of the Environment as having lead responsibility.

Recommendation #3: Development of strong environmental protection standards under the Nutrient Management Act.

10. The Nutrient Management Act 2001 describes processes and authorities but does very little to prescribe requirements or standards. In effect, the legislation enables the creation of regulations/standards related to land applied materials containing nutrients. The legislation lists a number of issues likely to be subject to regulation including NMPs, manure management standards such as separation distances, adequacy of manure storage, winter spreading, fencing etc. But, the “proof of the pudding” will be in the standards themselves and whether they adequately safeguard the environment or merely enshrine existing “best management practices”.

11. It is crucial that the regulations strongly protect the environment and drinking water sources. In order to ensure needed protection, the regulatory framework should include wellhead protection zones and minimum distant separation requirements. (See OPSEU, Renewing the Ministry of the Environment, paras. 134-138).
12. While OPSEU staff have further views on the details of that regulatory framework, those views should be put forward in the context of a ministry led policy development process.

Recommendation #3

- That the regulatory framework under the Nutrient Management Act, 2001 put strong environmental protection into place and include well head protection and minimum distance separation requirements.

Recommendation #4: Approvals, inspection and enforcement should be carried out by the MOE.

13. Just as with the policy setting and standards development process, the actual carrying out of the regulatory functions should be done by the MOE. In earlier public hearings, submissions and Issue papers including those of D'Ombrain and Winfield et al, Drinking Water

Protection in Ontario: A Comparison of Direct and Alternative Delivery Models , there has been discussion of the importance of:

- an integrated approach to environmental protection,
- the interconnection between policy and approvals/enforcement, and
- the advantage of having all those functions carried out by one entity.

Multi-ministry “shared” responsibility can lead to no-one taking full responsibility (See D’Ombra, paras. 426-436). As for delegation to the private sector, there are a series of arguments against such “Alternative Service Delivery” which have already been presented to the Inquiry (See OPSEU, Public Hearing 2 and 3 Submission, paras. 19-20). With one entity carrying out integrated functions, there is greater policy coherence and clarity of responsibilities and accountability.

14. Integrated policy and regulatory functioning is not the current intention of the structural scheme under the Nutrient Management Act 2001. In particular, there are two structural problems:

- (1) No one Minister has primary responsibility: as mentioned above,

(2) Under s.55 of the Act, the powers of the Minister and Ministry staff (save enforcement powers) are made delegable to the private sector, without restriction other than the requirement to contract with the private sector entity. For example, “The Minister may enter into an agreement with an individual, partnership or corporation delegating... any of the powers and duties relating to:

- The review of any nutrient management plans or nutrient strategies;

- The issuing, amending, suspending or revoking of certificates, licenses or approvals”.

15. This statutory ambiguity will be put to fragmented use. In a “Backgrounder” the government has said that “administratively, the legislation would provide for alternate delivery of the review and approvals of NMPs”, but, for the first two years,

- MOE would co-ordinate and approve NMPs for large operations, while
- OMAFRA would co-ordinate and approve NMPs for mid-size operations. (OMAFRA, Backgrounder to June 13 press release, “What’s in the legislation?”).

16. This overall lack of clarity about ongoing leadership and responsibility is not conducive to carrying out a strong environmental protection agenda. The MOE should co-ordinate and approve NMPs on an ongoing basis, subject only to functionally sensible delegation of particular responsibilities to subordinate public bodies with the clear mandate and capacity to take on any such responsibility.

Recommendation #5: the Environmental Protection Act and Ontario Water Resources Act should not exempt agricultural contaminants.

17. The Environmental Protection Act s. 6 (2) exempts agriculture as follows:

Prohibition:

6. (1) No person shall discharge into the natural environment any contaminant, and no person responsible for a source of contaminant shall permit the discharge into the natural environment of any contaminant from the source of contaminant, in an amount, concentration or level in excess of that prescribed by the regulations.

Exception

(3) Subsection (1) does not apply to animal wastes disposed of in accordance with normal farming practices.

In effect the standard need for all emissions to the natural environment to have Ministry approval does not apply to agriculture, thus removing the opportunity to assess the potential impacts or adverse effects of siting a livestock facility. Nor are farmers required to notify the Ministry when spreading manure. From this reactive position, MOE can only proceed with enforcement, as long as an adverse effect is verified.

Manure mismanagement can result in charges being laid under the EPA, for adversely effecting a neighbour's land or damaging vegetation.

However the exemption prevents pro-active regulation of facilities and practices.

18. The Ontario Water Resources Act s.34 exempts agriculture as follows:

34. (1) In this section, reference to the taking of water for use for domestic or farm purposes means the taking of water by any person other than a municipality or a company public utility for ordinary household purposes or for the watering of livestock, poultry, home gardens or lawns, but does not include the watering or irrigation of crops grown for sale.

(2) In subsection (4), the reference to the taking of water for the watering of livestock or poultry does not include the taking of surface water into storage for the watering of livestock or poultry.

(3) Despite any general or special Act or any regulation or order made thereunder and subject to subsection (5), no person shall take more than a total of 50,000 litres of water in a day,...without a permit issued by a Director.

(5) Subsection (3) does not apply to the taking of water by any person for use for domestic or farm purposes or for firefighting.

In effect, the OWRA exempts farming from the need to obtain a Permit To Take Water (PTTW) for direct livestock watering of any volume and the need for a sewage works approval for farm drainage. Farmers must notify MOE in case of a discharge or spill of manure or other materials and they are guilty of an offence if the discharge is into water and may impair that water. The mis-management of liquid manure resulting in spills/discharges from manure spreading activities or storage is the classical scenario involving livestock farms and the OWRA. Generally speaking, MOE's after the fact reaction to such discharges has been moderately successful. However there is no pro-active regulation through conditions on PTTWs or sewage works approvals.

19. The position of the OPSEU represented front line staff is that a properly protective regime should not include these “loopholes” (See Renewing the Ministry of the Environment, para. 123). These “loopholes” prevent proactive attention to agricultural contaminants. The Acts in question should be made applicable to agricultural practices. Regulations should then be used to set out requirements for agricultural operations.

Recommendation #5

- That agricultural exemptions under the Environmental Protection Act (EPA) and the Ontario Water Resources Act (OWRA) be eliminated and that agricultural practices be fully subject to those Acts, with specific requirements being established through regulations co-ordinated with any Nutrient Management Act

Recommendation #6: New regulatory requirements for agricultural contaminants must be supported by the necessary resources.

20. If additional regulatory requirements are to be applied to agricultural contaminants, matching resources must also be deployed. This is crucial at the beginning of a new regulatory initiative. In order for the farming community to be encouraged and assisted to comply with new

requirements, and for them to see that the non-compliant operator will indeed be identified and enforced against, the regulatory framework must be properly resourced from the start.. Staff advisors, investigators and enforcers are needed.

21. In particular, there is a need to increase the level of staffing, and expertise in the Ministry of the Environment concerning agricultural contaminants. There must be a sufficient number of MOE agricultural experts centrally, and located in each of the regions. The effect on abatement and enforcement workloads must be calculated and additional necessary staffing put into place. Non-specialist staff must be fully trained and functional work assignments determined.

Recommendation #6

- That all regulatory requirements regarding agricultural contaminants be sustainably supported through the necessary deployment of additional specialist and generalist staff, and additional training.

Recommendation #7 Supplement a strong regulatory and enforcement regime with other tools to support even better practices.

21. A strong regulatory and enforcement regime must accompany any legislation. Such a regime is a general encouragement to full compliance.

Groups representing farmers have acknowledged this. (See comments in May 3-4 Expert Meeting Notes, Point 9 about the need for strong enforcement and the following, from the January 10, 2001 submission of the Ontario Cattle Feeders Association, page 16:

While most farmers voluntarily act in an environmentally responsible fashion, there will always be individuals who try to cut corners. The OCFA does not wish to have an entire industry slandered by the actions of a small minority and we recognize that review and vigorous enforcement of standards is the only method of governing groundwater protection.

23. Once a strong enforcement regime is in place, then it can be appropriately supplemented to encourage even better practices. OPSEU staff recall the Clean Up Rural Branches (CURB) program, supervised by the MOE and administered locally through conservation authorities. The CURB program directed payments to farmers who agreed to upgrade their manure handling facilities. This was an effective program that successfully augmented the regulatory framework.

Recommendation #7

- That, as a supplement to a strong regulatory and enforcement regime other tools be used to encourage even better nutrient management practices, such as grants to facilitate better manure handling.