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SUBMISSIONS BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE ONTARIO MINISTRY OF AGRICULTURE, FOOD, AND RURAL AFFAIRS RE: THE *NUTRIENT MANAGEMENT ACT, 2001* (BILL 81)

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PART I – INTRODUCTION

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.

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. Finally, CELA currently represents the Concerned Walkerton Citizens in the ongoing Walkerton Inquiry, which, among other things, has focused on 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.[2] More recently, CELA submitted a brief on the OMAFRA/MOE discussion paper on intensive farming operations.[3]

Based on this experience and background, CELA has reviewed the proposed *Nutrient Management Act, 2001* ("NMA"). 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.

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[1] Counsel, Canadian Environmental Law Association.
[2] 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).
[3] E. Bruckman, "Submission by CELA to OMAFRA/MOE on the Disccussion Paper on Intensive Agricultural Operations in Ontario" (Feb. 2000).

However, there are two reasons why CELA submits that the NMA should not proceed any further in the legislative process at this time.

First and foremost, this very issue is currently being considered by Mr. Justice O'Connor at the Walkkerton Inquiry (especially in the context of Part II of the Inquiry's mandate), and nutrient management matters will undoubtedly be addressed in his report expected by the end of 2001. Upon the release of the report, the proposed NMA can be reviewed and/or amended to address the findings and recommendations made by Mr. Justice O'Connor in relation to nutrient management. Indeed, it would be highly advantageous for the Standing Committee on Justice and Social Policy to defer its clause-by-clause review of the NMA until after the Walkerton Inquiry Report has been released to the public.

Second, the NMA is, for the most part, enabling legislation that gives the Ontario government the regulatory authority to pass nutrient management standards. However, the NMA itself, as currently drafted, does not actually prescribe any standards. In the absence of such standards, it is impossible at this time to assess the scope or effectiveness of the proposed legislation. Accordingly, CELA submits that the NMA should not proceed any further in the legislative process until the Ontario government releases draft regulations so that interested parties can determine if the proposed regime is actually going to address the environmental and public health issues arising from nutrient management.

Having said this, CELA does not suggest that it will be necessary for the Ontario government to prepare and release drafts of each and every regulation that will be required to implement the NMA (eg. prescribed forms). Nevertheless, CELA submits that,. at the very least, draft regulations concerning the key issues (eg. nutrient storage, building specifications, transportation, timing/manner of application, approvals, nutrient management plans/strategies, separation distances, etc.) should be released as soon as possible so that the public can determine upfront if the scope and content of the new regime will be sufficiently protective of the environment and public health and safety.

RECOMMENDATION #1: The NMA should not proceed any further in the legislative process until the Walkerton Inquiry Report has been released to the public.

RECOMMENDATION #2: The NMA should not proceed any further in the legislative process until the key draft regulations have been released in relation to proposed nutrient management standards (especially standards to be promulgated under subsections 5(2)(a), (g) to (j), (p), and (s) of the NMA).

Aside from these general concerns, CELA has a number of specific comments involving the interpretation and application of the proposed NMA, as described below.

PART II – SPECIFIC COMMENTS ON BILL 81

1. Definitions and Adminstration (Part I of Bill 81)

Who is the "Minister"?

At this time, CELA's primary concern about the proposed definitions (section 1) focuses on which Ministry will actually administer the NMA. The term "Minister" is simply defined as "the Minister responsible for the administration of this Act", and a corresponding (and equally vague) definition is provided for "Ministry".

On this point, CELA notes that the NMA was introduced by Agriculture Minister Brian Coburn, and further notes that the bulk of explanatory materials and background information about the NMA appear to have been prepared by OMAFRA. If the ultimate intent is to have OMAFRA serve as the lead agency for the NMA regime, then CELA must strongly object to this administrative arrangement.

In CELA's view, it is the MOE – not OMAFRA – that is best positioned to oversee, implement and enforce the NMA. In particular, the MOE has over 30 years' experience in matters involving environmental planning, approvals and licencing, monitoring and inspections, mandatory abatement measures, and enforcement activities. In comparison, OMAFRA has considerably less experience in such matters, all of which are critically important to the successful implementation of the NMA.

Moreover, OMAFRA is widely perceived within the environmental community (and by many members of the public) as being "too close" to the industrial agriculture sector, and that OMAFRA too often serves as an advocate (or apologist) for "agri-business" in Ontario. Therefore, CELA submits that OMAFRA should not be designated as the lead agency for the purposes of the NMA, particularly since OMAFRA would not be viewed as a credible and independent regulator of the agricultural sector.

For this reason, CELA submits that the definition of "Minister" (and "Ministry") should be amended to specify that it is the Minister of the Environment who administers the NMA, and who is ultimately accountable for its implementation and enforcement.

However, it goes without saying that the MOE must be properly resourced and fully staffed in order to carry out the various duties and responsibilities under the NMA. Accordingly, the extensive budget and staff cuts suffered by the MOE since 1995 must be reviewed and reversed in order to reinstate the MOE's institutional ability to administer and enforce the NMA and other environmental laws and regulations.

RECOMMENDATION #3: The NMA's definition of "Minister" (and "Ministry") should be amended to specify that it is the Minister of the Environment who administers, implements, and enforces the NMA and regulations.

RECOMMENDATION #4: The MOE must be properly resourced and fully staffed in order to carry out the various duties and responsibilities under the NMA.

Despite the foregoing recommendations, CELA acknowledges that regulating nutrient management activities may require a certain degree of agricultural expertise that is not adequately possessed by the MOE at the present time. This is particularly true as nutrient management regulations (including prescriptive standards) are being drafted for the purposes of the NMA. To address this need, CELA submits that two options are available: first, qualified OMAFRA staff could be transferred (or seconded) to a new (or existing) branch of the MOE for the purposes of the NMA. Second, where necessary, certain parts of the NMA could be amended to ensure that nutrient management regulations are jointly developed by both the MOE and OMAFRA. Such an arrangement would be analogous to the *Canadian Environmental Protection Act*, where the federal Environment Minister is given the lead responsibility, but the Minister of Health also plays a key role in the assessment and regulation of toxic substances.

Of these two options, CELA has a slight preference for the first suggestion, which would see the MOE itself acquire the agricultural expertise to administer the NMA, and to promulgate rigorous regulatory standards. It goes without saying that the regulation-making process under the NMA should be open, accessible and transparent, and should be subject to the public notice and comment requirements of Part II of the *Environmental Bill of Rights*, as described below.

RECOMMENDATION #5: The MOE must acquire the requisite degree of agricultural expertise to properly administer the NMA and to promulgate stringent nutrient management regulations.

Designation of Non-Ministry Employees

CELA notes that sections 2 and 3 of the NMA purport to enable the Minister to appoint as "Directors" or "Provincial Officers" persons who are *not* employees of the Ministry. Indeed, the permissive language in these subsections would appear to allow the Minister to delegate authority to persons who are *not* even employees of the provincial government. Accordingly, it seems as if the NMA is attempting to establish the groundwork for delegating authority to a private sector agency or corporation (eg. an entity like the TSSA) or even an industry association eg. the OFA?).

If this is the intent, then CELA must register its strong objection to such delegation. It is beyond the scope of this brief on the NMA to review the full litany of problems associated with so-called "alternative delivery strategies", such as using private entities to administer or enforce public laws. Suffice it to say that there is little empirical evidence to suggest that such alternative approaches result in faster, better or more efficient administration or enforcement of legislative requirements. In addition, there are numerous concerns about the political, legislative, administrative and fiscal accountability of using private entities to administer or enforce public laws.[4] Unless these fundamental concerns can be adequately addressed, CELA submits that it

[4] See, for example, M. Winfield, *The "New Public Management" Comes to Ontario: A Study of Ontario's Technical Standards and Safety Authority and the Impacts of Putting Public Safety in Private Hands* (CIELAP, 2000).

is, at best, premature to include provisions in the NMA which permit the delegation of authority to non-MOE employees or private entities.

For these reasons, CELA recommends that section 2(1)(c) and 3(1)(c) must be deleted so as to eliminate the possibility of delegating authority to non-Ministry employees and/or non-governmental entities.

RECOMMENDATION #6: The NMA must be amended to ensure that administrative authority cannot be delegated to non-Ministry employees or to non-government entities.

CELA further notes that section 4 similarly empowers the Minister to appoint as "analysts" persons who are *not* Ministry employees or even government employees. CELA has no objection in principle to the use of private laboratory staff as "analysts", provided that such labs are properly certified or accredited to do such testing (eg. microbiological water sampling) as may be required under the NMA. Accordingly, CELA recommends that section 4 should be amended to provide that only accredited laboratories (public or private) may be appointed as analysts under the NMA.

RECOMMENDATION #7: Section 4 of the NMA should be amended to ensure that only staff from properly accredited public and private laboratories may be appointed as "analysts" under the NMA.

As described below, CELA also strongly objects to the proposed delegation provisions set out in Part VII of the NMA, which purports to authorize "delegation agreements" between the Minister and virtually any individual, partnership or corporation in respect of certain powers under the NMA.

Lack of a Purpose Statement

Incredibly, the current draft of the NMA contains neither a preamble nor a statement of legislative purpose or objective. The absence of a purpose statement is particularly conspicuous when one considers that most of Ontario's environmental laws – such as the *Environmental Protection Act*, *Environmental Bill of Rights,* and *Environmental Assessment Act* – contain purpose statements.

In CELA's view, the NMA should be amended to include a purpose statement that, among other things, can serve as an interpretive aid to resolve the questions of statutory interpretation that will invariably arise under the NMA. At a minimum, the purpose statement should clearly articulate that the purpose of the NMA is to protect Ontario's environmental health and public health from the impacts of nutrient management, and other agricultural activities that may adversely affect the natural environment or public health.

RECOMMENDATION #8: The NMA should be amended to include a public interest purpose statement that provides that the purpose of the Act is to protect the natural environment and public health in Ontario from adverse effects caused by nutrient management and other agricultural activities.

2. Nutrient Management Regulations (Part II of Bill 81)

For the most part, the success (or failure) of the NMA will be dependent on the strength (or weakness) of the various standards that will be set by regulations under the NMA. Significantly, however, there is no mandatory duty to pass *any* regulations whatsoever under the NMA, nor is there any deadline or timeframe for the passage of standards under the NMA.

Instead, section 5(1) of the NMA merely states that the Lieutenant Governor "may" make regulations regarding various aspects of nutrient management. Similarly, section 6(1) of the NMA merely states that the Lieutenant Governor "may" pass regulations in relation to farm animals and other agricultural matters. In CELA's view, leaving standard-setting to the unfettered discretion of the Lieutenant Governor (eg. the Cabinet) is unacceptable, and represents a sure-fire recipe for delay and inaction regarding nutrient management standards. On this point, CELA notes that the *Ontario Water Resources Act* has long authorized the Lieutenant Governor to pass "potable water" standards, but no such standards were enacted until *after* the Walkerton Tragedy, presumably because successive governments preferred to address drinking water matters through the unenforceable Ontario Drinking Water Objectives.

CELA submits that similar delay and discretion cannot be countenanced with respect to nutrient management standards under the NMA. Accordingly, CELA recommends that sections 5 and 6 should be amended to place a positive or mandatory duty upon the Lieutenant Governor to pass regulatory standards within 6 months of the Act's coming into force (see below).

RECOMMENDATION #9: Sections 5 and 6 of the NMA should be amended to impose a mandatory duty upon the Lieutenant Governor to pass regulatory standards regarding nutrient management and farm animals within 6 months of the NMA's coming into force.

In addition, CELA notes that sections 5 and 6 of the NMA confer complete discretion upon the Lieutenant Governor in terms of the scope, nature and content of standards relating to nutrient management and farm animals. In other words, the NMA fails to include any substantive criteria or guiding principles (eg. precautionary principle, paramountcy of protecting human health and the environment, etc.). Moreover, as described below, the NMA also lacks a purpose statement, which could provide further guidance in the standard-setting process.

Without such substantive direction in the NMA, CELA is concerned that the resulting standards may be unacceptably weak, particularly if the economic interests of the agricultural sector can be used to "trump" or dilute requirements that are otherwise necessary to safeguard public health and the environment. In CELA's view, formal cost-benefit analysis should not form part of the standard-setting process under the NMA. Accordingly, CELA recommends that sections 5 and 6 of the NMA should be amended to include substantive criteria that shall guide the standard-setting process under the NMA.

RECOMMENDATION #10: Sections 5 and 6 of the NMA should be amended to include substantive criteria (eg. precautionary principle, paramountcy of protecting public health and the environment, etc.) to guide the standard-setting process under the NMA.

On its face, Part II of the NMA makes no explicit provision for public input into the standard-setting process under the NMA. CELA submits that meaningful public review and comment on proposed nutrient management standards is important and necessary to ensure that the standards are sufficiently stringent and credible. Accordingly, the NMA should, at a minimum, be made subject to the provisions of Part II of the *Environmental Bill of Rights,* which includes a self-contained code for public participation in environmental standard-setting. Not only will prescribing the NMA under the *Environmental Bill of Rights* enhance public participation in making nutrient management standards, but it will also result in greater accountability since the standard-setting process under the NMA would be under the scrutiny of the Environmental Commissioner of Ontario.

RECOMMENDATION #10: The standard-setting process under sections 5 and 6 of the NMA should be made subject to the public review/comment provisions of Part II of the *Environmental Bill of Rights*.

With respect the phase-in of nutrient management standards (assuming such standards are passed in a timely manner), CELA notes that the OMAFRA background material regarding the NMA suggests that the standards will first target intensive operations, then mid-sized operations, and then all farms within 5 years. Aside from retroactivity concerns that may be raised by the agricultural sector (eg. imposing new standards against pre-existing operations), CELA notes that there are no explicit timeframes or deadlines in the NMA, as described above. Accordingly, if Ontario legislators intend to roll out NMA requirements over a 5 year timeframe as indicated by OMAFRA, then the NMA should be amended to expressly provide for this implementation framework. However, CELA makes no particular recommendation in this regard, other than to say that the NMA should be fully implemented as expeditiously as possible.

In terms of the subject matter of proposed regulations under sections 5 and 6, CELA has two concerns at this time. First, both sections seem to be completely silent on the issue of financial assurance that may be necessary to secure the long-term performance, monitoring and maintenance of works and facilities described in nutrient management plans, approvals or orders.

Second, section 5(2)(r) of the NMA contemplates the preparation of "geophysical" studies that identify only "soil type" and "direction of groundwater flow". In CELA's view, such studies would be excessively narrow in scope and would provide little information that could be used to prevent or avoid situations such as the Walkerton Tragedy. Instead, the standard should require the preparation of environmental impact studies ("EIS") to identify and evaluate potential impacts to air, land and water. With respect to water, the EIS should include comprehensive hydrogeological investigations that, among other things, identify the nature and source of groundwater and surface water in the area, assess the nature and extent of the overburden, assess the vulnerability of the groundwater and surface water to contamination, and identify measures to mitigate the threat of contamination.

RECOMMENDATION #11: The regulatory authority under the NMA should be amended to include explicit reference to financial assurance, and to require environmental impact

studies (EIS) that include detailed hydrogeological assessments by qualified and competent persons.

3. Tribunal Hearings (Part III of Bill 81)

For the most part, the provisions of Part III of Bill 81 – which contemplate certain appeals by farmers to the Environmental Review Tribunal ("ERT") – are unexceptional and unobjectionable. In CELA's view, the ERT is the proper forum for resolving disputes over the issuance or non-issuance of (or amendments to) certificates, approvals, or orders under the NMA.

However, to ensure that neighbours and other interested parties have an opportunity to review, comment and/or appeal such instruments, CELA strongly recommends that the NMA should be amended to expressly provide for public notice, comment and appeals of instruments under the NMA. In the alternative, the instruments under the NMA should be subject to the mandatory public notice, comment, and third party appeal provisions under Part II of the *Environmental Bill of Rights*.

RECOMMENDATION #12: The NMA should be amended to expressly provide for public notice, comment and appeal in relation to instruments under the NMA. In the alternative, NMA instruments should be made subject to the public notice, comment and third-party appeal provisions under Part II of the *Environmental Bill of Rights*.

4. Inspections and Orders (Part IV of Bill 81)

For the most part, the inspection and order provisions in Part IV of the NMA are typical of those commonly found in Ontario's environmental statutes. Accordingly, CELA has no particular comments or concerns about Part IV in general, other than to say that the MOE will have to be properly resourced and staffed in order to carry out (or follow up) inspections, or to make and enforce orders, as described above.

However, with respect to section 28 of the NMA, CELA submits that there is no compelling policy reason to limit a Director's preventitive order to persons who currently own or occupy lands or premises from which nutrients may be discharged. Under section 7 of the *Environmental Protection Act*, for example, the Director can issue control orders against the owner or previous owner, the occupier or previous occupier, or the person who has or had charge, management or control of the relevant property. In CELA's view, section 28 of the NMA should be similarly amended to permit the issuance of preventitive orders against persons who own (or owned), occupy (or occupied), or have (or had) charge, management or control of land or premises.

RECOMMENDATION #13: Section 28 of the NMA should be amended to authorize the Director to issue preventitive orders against persons who own (or previously owned), occupy (or previously occupied), or have (or had) charge, management or control of lands or premises from which nutrients may be discharged into the natural environment.

5. Remedial Work Done by Ministry (Part V of Bill 81)

In CELA's view, the provisions of Part V of Bill 81 – which authorize the Ministry to undertake work required under Directors' orders (and to recover the cost thereof) – are substantially similar to current provisions in the *Environmental Protection Act*. Accordingly, CELA has no particular concerns or comments about Part V.

6. Enforcement (Part VI of Bill 81)

With respect to enforcement matters, CELA has a number of concerns and recommendations regarding Part VI of the NMA.

First, CELA notes that section 39 sets out a procedural code for the issuance of "administrative penalties" under the NMA. Given that administrative penalty provisions also exist in other environmental statutes in Ontario, their presence in the NMA is neither surprising nor unprecedented. However, CELA submits that the MOE should prepare (with public input) an NMA-specific enforcement/compliance policy to provide guidance to Directors as to when administrative penalties are appropriate under the NMA, and when they are not (eg. contraventions that cause, or will likely cause, adverse effects to human health or the environment). Otherwise, CELA fears that giving complete discretion to Directors regarding administrative penalties will result in a further decrease in the use of prosecutions to ensure compliance with Ontario's environmental laws.

RECOMMENDATION #14: The MOE should prepare (with public input) an enforcement and compliance policy under the NMA, particularly in relation to the use of administrative penalties.

Second, CELA notes that the NMA statutorily empowers the Minister to seek injunctive relief in the civil courts to restrain contraventions (section 40(1)). While this provision is undoubtedly important, it should be accompanied by "citizens' suit" provisions that allow members of the public (eg. neighbours) to also seek injunctive relief, particularly in situations where the MOE may be unwilling to go to the civil courts. In addition, the NMA should include a new civil cause of action to allow persons harmed by contraventions under the NMA to go to court to recover damages and other forms of relief from the responsible parties, such as cleanup or restoration orders. Such civil liability provisions exist in other environmental laws (eg. *Fisheries Act* and *Canadian Environmental Protection Act*), and would offer Ontarians an important supplement to their common law rights and remedies.

In the alternative, in order to more fully involve the public in investigation and enforcement matters, the NMA should be made subject to Parts V (request for investigation) and VI (right to sue to protect public resources) of the *Environmental Bill of Rights*.

RECOMMENDATION #15: The NMA should be amended to include "citizens' suit" provisions as well as a new civil cause of action for harm caused by contraventions under the NMA. In the alternative, the NMA should be prescribed for the purposes of Parts V and VI of the *Environmental Bill of Rights*.

Third, CELA notes that the director/officer liability provision of the NMA (section 42(2)) creates a *mens rea* offence for corporate officials who "knowingly concur" with the commission of offences under the NMA. Aside from the difficulty of proving *mens rea* offences in the environmental context, CELA notes that this provision is more reactive than preventitive in the sense that corporate officials are punished for offences *ex post facto*, rather than be given a positive incentive to prevent such offences in the first place. For this reason, CELA submits that section 42(2) of the NMA should be replaced by provisions analogous to section 194 of the *Environmental Protection Act* and section 116 of the *Ontario Water Resources Act*, both of which impose an enforceable duty on corporate officials to take all reasonable care to prevent unlawful discharges.

RECOMMENDATION #16: Section 42(2) of the NMA should be replaced by provisions which impose a mandatory duty on corporate directors and officers to take all reasonable care to prevent contraventions under the NMA.

Fourth, with respect to general offence provisions under the NMA, CELA notes that the NMA does not appear to require the self-reporting of contraventions under the NMA. Such reporting requirements exist throughout the *Environmental Protection Act* (eg. sections 13, 15, and 92), and should be incorporated into the NMA:

RECOMMENDATION #17: The NMA should make it an offence for persons not to self-report contraventions under the NMA to the MOE.

Fifth, with respect to the penalty provision of the NMA (section 47) – which contemplates maximum fines of $5,000 to $10,000 for individuals, and $10,000 to $25,000 for corporations – CELA submits that the fine structure is far too low for punishment and deterrence purposes. Indeed, the NMA (unlike Ontario's other environmental laws) fails to prescribe heavier fines for contraventions that cause actual harm to public health or the environment. In fact, the NMA's proposed fines pale in comparison to the much larger fines (eg. multi-million dollar fines for certain offences) and other penalties (eg. jail terms) now available under the *Environmental Protection Act* and *Ontario Water Resources Act.*

Given the potentially fatal consequences of improper nutrient management, CELA strongly recommends that section 47 be amended to bring it into line with the maximum fines and other penalties currently available under Ontario's environmental laws.

RECOMMENDATION #18: Section 47 of the NMA should be amended to make its penalty provisions consistent with the large penalties currently available under the *Environmental Protection Act* and *Ontario Water Resources Act.*

Finally, for meaningful enforcement activities to occur under the NMA, CELA submits that the MOE must be properly resourced and staffed, as described above.

7. General Provisions (Part VII of Bill 81)

For the most part, Part VII of the NMA sets out some unexceptional and unobjectionable provisions on various general issues and transitional matters.

However, CELA notes that section 51 properly stipulates that the NMA does not oust the jurisdiction of the *Environmental Protection Act*, *Ontario Water Resources Act,* or *Pesticides Act* in situations where those Acts may be applicable. CELA strongly supports this provision, but it begs the question of whether – and to what extent – those other Acts actually apply to agricultural operations in light of the numerous exemptions and exceptions built into those Acts in relation for certain farm practices. As described below, the NMA attempts to remove some – but not all – such agricultural exceptions under Ontario's environmental laws. Unless and until all such exceptions are reviewed and/or repealed, the application of Ontario's other environmental laws to the agricultural sector will remain uneven and uncertain.

In addition, CELA notes that section 53 attempts to extend the binding effect of NMA orders and approvals to persons other than those named in the orders or approval. CELA supports this attempt, but submits that the Director's "net" under section 28 should be broadened so as to catch more orderees under the NMA, as described above.

Arguably, the most alarming provision in Part VII is section 55, which purports to authorize "delegation agreements" between the Minister and virtually any non-government individual, partnership or corporation. For example, the Minister is empowered to delegate to a private organization significant matters such as issuing, reviewing, suspending and revoking of certificates, licences and approvals under the NMA. Similarly, the Minister is empowered to delegate to a private organization the critically important responsibility of reviewing nutrient management plans or nutrient management strategies under the NMA.

In effect, section 55 enables the Minister to potentially off-load most key duties and responsibilities under the NMA, except in relation to inspection/orders, remedial work, and enforcement. Incredibly, the NMA then goes on to include an immunity clause (section 56) which is apparently intended to keep aggrieved persons from suing the Minister if loss or damages arise in the context of a delegated power or responsibility. This arrangement strikes CELA as inherently contradictory – if the government believes that delegation is desirable and workable through contractual terms and conditions, then why does the Crown then require an immunity clause in case something goes wrong?

More importantly, there are fundamental questions of accountability associated with the attempted delegation of public powers to private entities (eg. does provincial FOI legislation apply to such private entities?), as described above. Accordingly, CELA recommends that sections 55 and 56 be deleted from the NMA.

RECOMMENDATION #19`: Sections 55 and 56 of the NMA should be deleted.

Section 60 of the NMA provides that its regulations supersede municipal by-laws which deal with the same subject-matter. In CELA's view, this provision makes sense where municipal

requirements are less rigorous than the provincial standards, but it makes no sense in situations where, due to local circumstances or conditions, the municipality has established requirements that are tougher or more extensive than the provincial standards.

CELA submits that the provincial standards should be viewed as the minimal "floor", and municipalities should be free to set standards that exceed the provincial requirements. Indeed, the Supreme Court of Canada has recently ruled in the *Hudson* case that municipalities are free to do so, at least with respect to pesticides. Accordingly, CELA submits that section 60 should be amended to provide that municipal by-laws may include provisions that are more stringent than the applicable provincial standard. Given that provincial standards are likely to be somewhat generic and apply broadly across Ontario, municipalities should be free to decide whether local circumstances (eg. exclusive municipal reliance upon groundwater as a drinking source) mean that more restrictive provisions should be included in a nutrient management by-law.

RECOMMENDATION #20: Section 60 of the NMA should be amended to provide that municipal by-laws may include provisions that are more stringent than the applicable provincial standard.

8. Amendments to Other Laws (Part VIII of Bill 81)

Part VIII of the NMA contains a number of proposed amendments to other provincial laws. For example, section 61 of the NMA amends section 6(2) of the *Environmental Protection Act* so as to provide that the section 6 prohibition does not apply to animal wastes disposed of in accordance with both normal farming practices and regulations made under the NMA. While this kind of clarification is welcome, it begs the question of why the other agricultural exceptions under the *Environmental Protection Act* have not been similarly amended by the NMA. More fundamentally, it begs the question of why these agricultural exceptions still remain within Ontario's environmental laws.

In CELA's view, it is incumbent upon the Ontario government to formally review, amend and/or repeal all agricultural exceptions that currently exist under Ontario's environmental laws. In fact, when questioned at the Walkerton Inquiry about the rationale for such exceptions in the first place, a government official was unable to answer why this sector has received special exceptions not enjoyed by other industrial or commercial sectors in Ontario.[5]

RECOMMENDATION #21: The Ontario government should formally review, amend and/or repeal all agricultural exceptions or exemptions that currently exist under Ontario's environmental laws.

The NMA also proposes to amend the *Farming and Food Production Protection Act, 1998* ("FFPPA") by specifying that a practice that is "inconsistent" with a NMA regulation is not a normal farm practice. While this amendment is well-intentioned and supportable, CELA does not agree with the need for the FFPPA in the first place. Accordingly, rather than pass piecemeal amendments that attempt to reconcile the NMA with the FFPPA, CELA recommends that the

[5] Transcript, Keith West (June 20, 2001), at pages 43-44.

FFPPA should be repealed in its entirety on the grounds that it is unjustified and is growing increasingly redundant. If comprehensive provincial standards are passed under the NMA (and every farmer in Ontario is obliged by law to comply with these standards), why do we need the Farm Practices Board worrying about whether a particular practice is "normal" or not, or whether a practice is "consistent" or not with provincial standards. Questions of compliance with regulatory standards should be dealt with by the courts, not the Board. Similarly, if no provincial standards exist, but a particular practice is creating an actionable nuisance, the aggrieved persons should be entitled to seek judicial redress without sojourning to the Board.

RECOMMENDATION #22: The *Farming and Food Production Protection Act* should be repealed in its entirety.

9. Proclamation (Part IX of Bill 81)

CELA notes that the NMA contains a typical "coming into force" provision which specifies that the Act comes into force "on a day to be named by proclamation by the Lieutenant Governor" (section 66). To ensure that the NMA actually comes into force in a timely manner, CELA submits that there should be a deadline for proclamation (eg. within 6 months of Third Reading and Royal Assent). Otherwise, CELA fears that proclamation may be delayed for prolonged period of time, perhaps on the grounds that additional time is needed to finalize the implementing regulations. To avoid such foot dragging, CELA submits that a fixed deadline should provide sufficient incentive to pass the necessary regulations.

RECOMMENDATION #23: The NMA should be amended to provide that the Act comes into force on a day by proclamation of the Lieutenant Governor, or 180 days after the Act has received Third Reading and Royal Assent, whichever is the earliest.

PART III – SUMMARY AND CONCLUSIONS

As described above, CELA supports the need for effective and enforceable legislation to address the environmental and public health impacts of agricultural operations, particularly nutrient management.

However, given the pending release of the Walkerton Inquiry Report, and given the current absence of proposed regulatory standards under the NMA, CELA submits that the NMA should not proceed any further in the legislative process at this time. Once the Walkerton Inquiry Report has been released, and after proposed NMA regulations have been released, then the NMA should be reviewed and/or amended accordingly.

In summary, CELA's recommendations regarding the NMA are as follows:

RECOMMENDATION #1: The NMA should not proceed any further in the legislative process until the Walkerton Inquiry Report has been released to the public.

RECOMMENDATION #2: The NMA should not proceed any further in the legislative process until the key draft regulations have been released in relation to proposed nutrient

management standards (especially standards to be promulgated under subsections 5(2)(a), (g) to (j), (p), and (s) of the NMA).

RECOMMENDATION #3: The NMA's definition of "Minister" (and "Ministry") should be amended to specify that it is the Minister of the Environment who administers, implements, and enforces the NMA and regulations.

RECOMMENDATION #4: The MOE must be properly resourced and fully staffed in order to carry out the various duties and responsibilities under the NMA.

RECOMMENDATION #5: The MOE must acquire the requisite degree of agricultural expertise to properly administer the NMA and to promulgate stringent nutrient management regulations.

RECOMMENDATION #6: The NMA must be amended to ensure that administrative authority cannot be delegated to non-Ministry employees or to non-government entities.

RECOMMENDATION #7: Section 4 of the NMA should be amended to ensure that only staff from properly accredited public and private laboratories may be appointed as "analysts" under the NMA.

RECOMMENDATION #8: The NMA should be amended to include a public interest purpose statement that provides that the purpose of the Act is to protect the natural environment and public health in Ontario from adverse effects caused by nutrient management and other agricultural activities.

RECOMMENDATION #9: Sections 5 and 6 of the NMA should be amended to impose a mandatory duty upon the Lieutenant Governor to pass regulatory standards regarding nutrient management and farm animals within 6 months of the NMA's coming into force.

RECOMMENDATION #10: Sections 5 and 6 of the NMA should be amended to include substantive criteria (eg. precautionary principle, paramountcy of protecting public health and the environment, etc.) to guide the standard-setting process under the NMA.

RECOMMENDATION #11: The regulatory authority under the NMA should be amended to include explicit reference to financial assurance, and to require environmental impact studies (EIS) that include detailed hydrogeological assessments by qualified and competent persons.

RECOMMENDATION #12: The NMA should be amended to expressly provide for public notice, comment and appeal in relation to instruments under the NMA. In the alternative, NMA instruments should be made subject to the public notice, comment and third-party appeal provisions under Part II of the *Environmental Bill of Rights.*

RECOMMENDATION #13: Section 28 of the NMA should be amended to authorize the Director to issue preventitive orders against persons who own (or previously owned),

occupy (or previously occupied), or have (or had) charge, management or control of lands or premises from which nutrients may be discharged into the natural environment.

RECOMMENDATION #14: The MOE should prepare (with public input) an enforcement and compliance policy under the NMA, particularly in relation to the use of administrative penalties.

RECOMMENDATION #15: The NMA should be amended to include "citizens' suit" provisions as well as a new civil cause of action for harm caused by contraventions under the NMA. In the alternative, the NMA should be prescribed for the purposes of Parts V and VI of the *Environmental Bill of Rights*.

RECOMMENDATION #16: Section 42(2) of the NMA should be replaced by provisions which impose a mandatory duty on corporate directors and officers to take all reasonable care to prevent contraventions under the NMA.

RECOMMENDATION #17: The NMA should make it an offence for persons not to self-report contraventions under the NMA to the MOE.

RECOMMENDATION #18: Section 47 of the NMA should be amended to make its penalty provisions consistent with the large penalties currently available under the *Environmental Protection Act* and *Ontario Water Resources Act*.

RECOMMENDATION #19`: Sections 55 and 56 of the NMA should be deleted.

RECOMMENDATION #20: Section 60 of the NMA should be amended to provide that municipal by-laws may include provisions that are more stringent than the applicable provincial standard.

RECOMMENDATION #21: The Ontario government should formally review, amend and/or repeal all agricultural exceptions or exemptions that currently exist under Ontario's environmental laws.

RECOMMENDATION #22: The *Farming and Food Production Protection Act* should be repealed in its entirety.

RECOMMENDATION #23: The NMA should be amended to provide that the Act comes into force on a day by proclamation of the Lieutenant Governor, or 180 days after the Act has received Third Reading and Royal Assent, whichever is the earliest.

August 13, 2001