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PETER PICKFIELD
SHANNON DeLESKIE

NUTRIENT MANAGEMENT: The Changing Municipal Role

The effect of agricultural practices on the environment has been a hot issue since May 2000 when a small town in Southwestern Ontario made headlines. Even before Walkerton the government of Ontario was in the process of developing legislation that would regulate how farmers and farm communities would cope with increased farm pressures related to the intensification of farm practices and the ramifications of these practices, including the need to manage nutrients.

In June of 2001 the Government of Ontario introduced Bill 81 - *Nutrient Management Act, 2002*¹. The Bill was touted to “provide for province-wide standards to address the effects of agricultural practices on the environment, especially as they relate to land-applied materials containing nutrients”² With respect to municipalities:

Municipal responsibilities would be clarified under the bill. New standards would replace the patchwork of municipal bylaws regarding nutrient management. Municipalities would have this as support for their continued responsibility for land use planning and building code approvals. It would also allow for the creation of local advisory committees to promote awareness of the new rules, and mediate local nutrient management noncompliance related issues.³

Bill 81 has not yet received third reading; however there is a renewed push to pass this Bill following the release of the part two of the Walkerton Report. Bill 81 was designed to create clarity and consistency in the regulation of nutrient management in Ontario. Much of the criticism of the bill concerns the fact that the regulatory powers contained in the Bill are permissive and may not actually come to fruition. The details of the provinces nutrient management model have not yet been established. This will come, it is believed, through the implementing regulations. Municipalities are presented with an interesting hypothetical framework but no real meat to the bone. How can Municipalities manage their nutrient management by-laws when faced with uncertainty about the effect and development of Bill 81?

WHAT AUTHORITY DID MUNICIPALITIES HAVE TO ACT IN THE PAST

There is no specific legislation empowering municipalities to regulate in the field of nutrient management. Many Municipalities have taken on the power based on their general authority under the *Municipal Act*⁴ and the *Planning Act*⁵. Municipalities can regulate in this area pursuant to the general powers to make by-laws

for the health, safety, morality and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act and for governing the conduct of its members as may be deemed expedient and are not contrary to law⁶

In addition to this general provision Municipalities have more specific powers to regulate “the location, erection and use of stables, garages, barns, outhouses and manure pits”⁷ and “...for restricting, within the municipality or defined areas thereof, the number of animals or any class thereof that may be kept by any person”⁸.

The new *Municipal Act, 2001* contains the same general power to regulate in relation to health and welfare⁹, and a general power to regulate animals¹⁰. The new *Municipal Act, 2001*, however, it does not contain the power to regulate manure pits.

The *Planning Act* provides Municipalities with the power to address some nutrient management issues. Section 2 of the *Planning Act* directs Municipalities to have regard to protection of ecosystems, agricultural resources and public health and safety¹¹.

Arguably, some power to regulate nutrient management falls within the general zoning powers of s. 34 (1) of the Act.

In summary, the present legislative framework in Ontario appears to allow Municipalities some general latitude to create and implement by-laws regarding nutrient management. Many Municipalities have taken advantage of this and acted to create by-laws to address nutrient management issues in their communities. In May 2001 there were as many as 54 local by-laws addressing this issue.¹²

MUNICIPAL VERSUS PROVINCIAL AUTHORITY

The case of *Ben Gardiner Farms Inc. v. West Perth (Township)*¹³ addresses the issue of a Municipalities authority to enact a by-law for the purpose of protecting agricultural resources and the environment that is more rigorous than the provisions in the provincial and federal statute. A by-law placing a cap on permitted animal units and requiring the completion of a nutrient management plan was supported by the Divisional Court based on Madam Justice L’Heureux-Dubé’s reasoning in *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*¹⁴ that the mere existence of provincial legislation does not oust municipal prerogatives to regulate the subject matter.

The Divisional Court also focused on s.2 of the *Planning Act*, which created a balance between the need to protect agricultural resources and the need to protect ecological systems and public health and safety.

INTERACTION BETWEEN NUTRIENT MANAGEMENT AND NORMAL FARM PRACTICES

Municipalities’ power to exercise the powers created under the *Planning Act* is subject to Policy Statements issued under the Act. The Policy Statements affirm that prime agricultural areas will be protected and that in prime agricultural areas agricultural uses and normal farm practices will be promoted and protected.¹⁵

In addition to the *Planning Act* requirement to protect normal farm practices, the *Farming and Food Production Protection Act, 1998*¹⁶ gives farmers the ability to challenge by-laws that restrict normal farm practices. The test for a normal farm practice was

established in *Pyke v. TRI GROEnterprises Ltd.*¹⁷ The test involves consideration of many relevant factors including the proximity of neighbours and the use they make of their lands.

Bill 81 would amend the *FFPPA* to provide that any practice that is inconsistent with that Bill would not be considered a normal farm practice¹⁸. This amendment would provide the province with some protection against challenge under the *FFPPA*.

Municipalities may also receive some interim protection from challenges under the *FFPPA*. Brian Coburn, the former Minister of Agriculture, Food and Rural Affairs, released a proposed directive¹⁹ under *FFPPA* to address by-laws and interim-bylaw created by Municipalities pending the implementation of Bill 81. This directive would protect Municipal by-laws from challenge where the by-laws require a mandatory nutrient management plan including features such as tillage base requirements, setbacks from features such as wetlands and wells, and specific timing of manure application.

It is unknown at this time whether this directive will be approved. The renewed interest in Bill 81 may well postpone or side line this attempt to give municipalities an extra measure of interim control. That being said for the reasons outlines below it may still be important to pass the directive to allow Municipalities some security even after Bill 81 is passed.

THE MUNICIPAL ROLE AFTER *BILL 81*

As indicated above, Bill 81 creates a comprehensive framework for nutrient management in Ontario. This framework will be fleshed out by regulations which have not yet been drafted. The Bill appears to limit Municipal Authority and replace it within a provincial scheme. Section 60 of Bill 81 states:

By-law superseded

60. (1) 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.

By-law inoperative

(2) A by-law or a provision of a by-law that is superseded under subsection (1) is Inoperative while the regulation is in force.

On first blush it would appear that Bill 81 is removing nutrient management from the realm of municipal jurisdiction. The language used in s.60 is quite strong. Use of the word “supersede” may override the analysis developed by Madam Justice L’Heureux-Dubé in *Hudson*²⁰ and prevent Municipalities from developing by-laws that would

restrict nutrient management practices beyond the levels established by Bill 81. There are still a number of situations in which the province may intend that municipalities retain some control.

First and foremost Municipalities will retain control over land use planning. Bill 81 does not contain powers to regulate where agricultural and related activities will take place. Municipal control over land use planning will remain subject to the *Planning Act Policy Statements* and the need to protect agricultural lands.

In addition while the potential scope of the regulations proposed by Bill 81 is broad the actual regulations created by Bill 81 may be more measured in both scope and timing. The former Minister of Agriculture, Food, and Rural Affairs, Brian Coburn, indicated that the bill would provide a framework to phase in standards over time, depending on the size of the operation and the kinds of practices that are carried out²¹.

A phased approach to implementing Bill 81 will result in the exclusion (at least temporarily) of many farming operations from the Nutrient Management Act Regulations. It may be that some areas, such as smaller farm operations will not be covered by the regulations. It may be viewed as prudent and appropriate that Municipalities maintain control over nutrient management in these areas. Similarly, while the Province waits to enact regulations such as the requirement to submit a nutrient management plan prior to the issuance of a building permit it would be reasonable for Municipalities to continue to regulate these areas.

By regulating larger operations first, the province will be targeting livestock operations which are most prepared to deal with the new regulations based on current management practices²² without threatening their economic viability. This would leave Municipalities the toughest part of the job – dealing with smaller operations, which may be less prepared and economically able to address nutrient management concerns. These smaller farms should be encouraged to adopt appropriate nutrient management practices to allow them to survive in the changing agribusiness environment. Smaller family run farms are often important to the character of rural communities and it would be wise for municipalities to consider how their by-laws can allow these farmers to make the transition to optimal nutrient management practices. Without threatening their economic viability.

If the overall municipal objectives are to maintain and preserve the rural character of the community, protect the family farm, and protect the rural landscape and lifestyle from unacceptable impacts a challenge will be finding a balance which serves all these goals.

ADDITIONAL AREAS OF MUNICIPAL ACTIVITY

Section 55 of Bill 81 allows the Minister to enter into agreements with corporations in order to delegate powers and duties such as maintenance of registers, reviewing nutrient management plans, issuing of licenses and doing proscribed works. Commentators have observed that these agreements may involve municipalities²³. The opportunity for Municipalities to continue to have input into the nutrient management practice of their

residents, even after the province has assumed control, will permit Municipalities to address localized issues, which may be of specific regional importance. Municipalities may wish to actively encourage these relationships. Agreements may provide Municipalities with opportunities to insure consideration of important local issues such as groundwater protection and municipal character.

CONCLUSIONS

The regulation of nutrient management in Ontario is a very complex process. Understanding the municipal role in that process is made all the more difficult by the uncertainty which currently exists regarding the status and implementation of Bill 81. Regardless of this uncertainty Municipalities do currently have the tools and experience to address nutrient management in their localities. Additional tools such as the *FFPPA* Ministerial Directive would allow municipalities flexibility in addressing this emerging area of regulatory concern, while awaiting the final form of the new provincial regime. Whatever the outcome of the regulation-making process it seems likely that intensive livestock farming and nutrient management will be a matter requiring sufficient municipal care and attention for years to come.

1 Bill 81, *Nutrient Management Act, 2002* 37th Legislature, 3rd Session Ontario

2 BACKGROUND Proposed Nutrient Management Act 2001 -

<http://www.gov.on.ca/OMAFRA/english/infores/releases/2001/061301.html#background>

3 News Release, June 13, 2001 -

<http://www.gov.on.ca/OMAFRA/english/infores/releases/2001/061301.html>

4 Municipal Act, R.S.O. 1990, c. M.45

5 Planning Act, R.S.O. 1990, c. P.13

6 *Supra* Note 4 Municipal Act s.102 as amended by S.O. 1994, c. 23, s. 54

7 *Ibid* Municipal Act s.210 (144)

8 *Ibid* Municipal Act s.210 (1)

9 Municipal Act, 2001 S.O. 2001, c. 25, s. 130.

10 *Ibid* s.11(1)p. 9 and s.11(2) p 9.

11 *Supra* Note 5 Planning Act s.2(a)(b) and (o).

12 Wayne J. Caldwell “Ontario’s *Draft* Nutrient Management Act (Bill 81): Strengths, Weaknesses and Implications” paper presented at the Ontario Institute of Agrologists Seminar: “Regulating Agriculture: How Much Can Farmers Cope With?” February 22, 2002 Aberfoyle Ontario.

13 unreported decision of Ontario Superior Court of Justice – Divisional Court [2001] O.J. No. 4394.

14 (2001), D.L.R. (4d) 419. (hereinafter “Hudson”)

15 This Provincial Policy Statement was issued under Section 3 of the Planning Act and came into effect on May 22, 1996, section 2.1 Agricultural Policies.

Approved by the Lieutenant Governor in Council, Order in Council No. 764-96.

16 S.O. 1998, c.1 (Hereinafter *FFPPA*)

17 [2001] O.J. No. 3209 (Ont. C.A.)

18 *Supra* Note 1 s. 62(1)

19 The proposed directive is posted on the Ministry’s website at:

<http://www.gov.on.ca/OMAFRA/english/agops/directive.htm>

20 *Supra* Note 14

21 Statement to the Legislature by Brian Coburn, Minister of Agriculture, Food and Rural Affairs, for first reading of Bill 81 Proposed Nutrient Management Legislation, Wednesday June 13, 2001 1:30pm.

Available at http://www.gov.on.ca/OMAFRA/english/about/state_jun1301.html.

22 Cher Brethour, Peter MacGowan, Al Mussell and Holly Mayer “Proposed New Environmental Legislation Affecting Canadian Agriculture” A special report of the George Morris Centre released January 28, 2002.

23 *Supra* Note 12 at pg 13.