Environmental Liability in the Agriculture Sector

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NOTE TO READERS

This discussion paper is one in a series which focuses on applying the principles of environmental sustainability in the agri-food sector and on how this will change the way we do business. This series is intended to stimulate awareness and discussion of the issues.

No legal opinion nor advice is intended. The listing and discussion of applicable federal and provincial legislation are selective, and the discussion paper should not be interpreted as being the complete guide on the subject of environmental liability. The reader should consult a lawyer with respect to any specific situation.

The views in this discussion paper do not necessarily reflect the views or the policy of the government of Canada. Only public information is provided in this discussion paper.
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Environmental Liability in the Agriculture Sector

EXECUTIVE SUMMARY

Environmental liability is an issue of growing concern for the agriculture sector. Governments, industry, lending institutions and farmers are all grappling with the issue. Section 1 introduces the reader to the topic, sets the stage for the discussion which follows and lays out the structure of the report.

Section 2 examines the source and scope of environmental liability as it relates to producers. Environmental protection legislation, in general, imposes civil and criminal liabilities for a wide range of activities that cause environmental harm. Liability may extend to current or former owners, regardless of fault.

Environmental liabilities that can impact on a farmer's business include fines, stop/control orders, and remediation (clean-up) orders. Environmental protection statutes treat farmers differently than they treat manufacturing and industrial companies. A key component of these general environmental protection statutes is a licensing system for commercial businesses that contaminate, or have the potential to contaminate, the environment. While farming has the potential to pollute the environment through, for example, excess nutrients, odours and noise, the farm sector was exempted from these licensing requirements.

Ontario's Environmental Bill of Rights is discussed in this section. Among its broad objectives, that of increasing access to the courts by reforming public nuisance law is seen as having the greatest possible impact on agriculture. Right-to-farm legislation, now adopted in six Canadian provinces, is also discussed. This type of legislation places guidelines on one type of response (litigation) to conflicts arising between farm uses and other farm / non-farm uses of land.

Section 3 examines the concerns of producers as they relate to liability. Producers have expressed concern over the environmental information requirements that lending institutions impose upon them as a condition of financing. In some cases, these institutions have been burdened with the farm clean-up costs which exceed the value of the security for the original loan. As a result, the environmental criteria that banks employ on their loan applications may make it difficult for some farmers to access capital and operating financing. In the absence of any statutory authority to carry out farming practices, the farming community is likely to face ever increasing scrutiny with respect to environmental performance. In addition, producers are concerned about being taken to court for environmental offences.
**Section 4** looks at the concerns of lenders with respect to environmental liability: the risk that borrowers may not be able to repay loans because of clean-up costs; that environmental damage may reduce the value of the property given as security; and the direct liability of being responsible for clean-up if a borrower defaults.

**Section 5** focuses on how farmers demonstrate due diligence. Farm plans, best management practices, codes of practice and other action plans are generally used by the sector to demonstrate due diligence. Two case studies are examined: the British Columbia Code of Agricultural Practices for Waste Management and the Ontario Environmental Farm Plan initiative.

**Section 6** looks at how lenders demonstrate due diligence. Several mechanisms have been developed, including environmental assessment questionnaires to be completed by farmers when applying for or renewing loans.

**Section 7** reviews a number of options available to the sector to minimize the potential impacts of environmental liability. These include the issuance of certificates of approval to operate a farm business, right-to-farm legislation, farm plans and audits, and education and training.
1. INTRODUCTION

Environmental liability is an issue of growing concern for the agriculture sector. Producers have expressed concern over the environmental information requirements that lending institutions impose upon them as a condition of financing. In some cases, these institutions have been burdened with farm clean-up costs which exceed the value of the security for the original loan. As a result, the environmental criteria that banks employ on their loan applications may make it difficult for some farmers to access capital and operating financing. In the absence of any statutory authority to carry out farming practices, the farming community is likely to face ever increasing scrutiny with respect to environmental performance. In addition, producers are increasingly concerned about the frequency with which they are taken to court for environmental offences.

The purpose of this discussion paper is to raise awareness of, and generate debate on how environmental liability impacts upon producers. It reflects discussions held at a workshop on "Environmental Liability and the Agri-food Sector", held in Ottawa February 17-18, 1994 and co-sponsored by the Canadian Federation of Agriculture, the North American Wetlands Conservation Council and Agriculture and Agri-Food Canada.

The paper is, in part, a response to the participants' call for the need to increase awareness of environmental liability issues among producers and government officials. It is hoped that the paper will help readers from both the agriculture and non-agriculture communities to obtain a better understanding of the environmental issues facing the farm community. The discussion paper makes no attempt to provide all-inclusive summaries of the law or make definitive statements about liabilities.

In particular, section 2 examines the source and scope of environmental liability, and reviews the environmental legislative framework. Sections 3 and 4 focus on the concerns of borrowers (producers) and lenders, respectively, as they pertain to environmental liability. The means by which producers and financial institutions demonstrate due diligence are discussed in sections 5 and 6. Section 7 describes a number of approaches to minimize farmers' environmental liability.

2. ENVIRONMENTAL LIABILITY: ITS SOURCE AND SCOPE

2.1 Background

Modern environmental legislation was developed in the early 1970's in response to public concerns of serious environmental
degradation. The provinces adopted general environmental protection legislation to address specific air, soil and water pollution problems. Most of this legislation replaced general health laws that were found to be inadequate to address serious environmental pollution problems.

However, the environmental impacts of farming practices have come under increasing scrutiny in recent years. From soil erosion and degradation, contamination of wells and waterways from manure, fertilizers and pesticides, to questions regarding human health and safety from exposure to pesticides - agriculture is being viewed more critically than ever before. Agricultural sources of pollution are often non-point source in nature. Therefore, it has traditionally been more difficult for enforcement agencies to trace the source of pollution to the farmer responsible. As a result, agricultural pollution has been difficult to regulate and farm source pollution standards have not been set and enforced as they have been for manufacturing industries. However, as non-point source pollution detection techniques have improved in recent years, farm sources of pollution have increasingly become the focus of attention.

In the Maritimes, for example, specific issues such as the loss of salmon and trout habitat have been the focus of media attention regarding the environmental impacts of agriculture ("Pastoral Pollution," Halifax Mail Star, December 11, 1993). Improper manure storage and application, allowing cows to wander into brooks, and fertilizer and silt run-off through ditches and drainage pipes, through their effects on water oxygen concentration, temperature and acid content, are all cited as likely causes of damage to fish reproduction, development, migration and food supply.

Agriculture is coming under increasing scrutiny in other parts of the country as well. At a recent workshop held in Saskatoon (Haas, 1994) it was reported that there are an increasing number of special interest groups lobbying against farm practices. Many do not understand the relationship between agricultural food production and the environment, nor are they aware of the sector's efforts to minimize its impact on the environment.

Environmental protection statutes treat farmers differently than they treat manufacturing and industrial companies. A key component of these general environmental protection statutes is a licensing system for commercial businesses that contaminate, or have the potential to contaminate, the environment. While farming has the potential to pollute the environment through, for example, excess nutrients, odours and noise, the farm sector considered itself different from small businesses in these other industries and was exempted from these licensing...
requirements. In Nova Scotia, the proposed removal from environmental legislation of the exemption for "normal farming practices" caused considerable concern among the agricultural sector (NSFA, 1994).

As other industries faced ever tougher environmental protection control requirements to renew certificates of approval for licenses, the farm sector was treated as any non-licensed member of the public would be - it was expected to meet pollution thresholds most non-manufacturing members of the community had to meet.

Other industries developed steadily better technologies for pollution abatement to keep pace with tightening regulatory requirements. However, at the same time, environmental agencies developed a better understanding of these industries' operating realities and licensing requirements were customized to be sensitive to their circumstances. In effect, the licensing provided protection from blanket environmental pollution control requirements which set thresholds most licensed companies would have had great difficulty meeting.

Farmers have been exempted from these license requirements. The sector has benefitted from this exemption to the extent that it has avoided the early environmental scrutiny that other industries have experienced. On the other hand, there are no environmental protection nor production standards developed with their operations in mind. Instead, they are captured by "broad brush" legislation intended for non-farm rural or urban property owners. In a number of provinces, and in many U.S. states, right-to-farm legislation has been adopted in order to limit farmers' liability with respect to nuisance. This will be discussed in greater detail later on in this report.

2.2 Environmental Legislative Framework

Environmental liability arises under provincial and federal environmental protection statutes. Environmental protection legislation, in general, imposes civil and criminal liabilities for a wide range of activities that cause environmental harm. Liability may extend to current or former owners, managers or controllers of businesses and to directors and officers of corporations that own or occupy land, including purchasers, vendors, landlords and tenants, as well as secured lenders and mortgagees, receivers and managers and extending to personal liability for corporate directors and employees.

A selective overview of environmental legislation will be presented here. Appendix I provides a more complete list of the environmental legislation in Canada that
may impose some degree of environmental liability on farmers. While municipal zoning by-laws are becoming more important in the control of activities on the farm, in particular with respect to land use, they are beyond the scope of this discussion paper.

The application of environmental regulation across Canada is far from uniform. In 1990, the Ontario government amended the Environmental Protection Act to make all "owners, previous owners or persons in control" liable for environmental clean-up costs, even if they were not responsible for the pollutants. Alberta has a similar provision in its Environmental Protection & Enhancement Act but it only applies to persons responsible for, or in control of, the discharge of the pollutant. In Saskatchewan, under the Environmental Management & Protection Act, the government may, if it deems immediate action is required to protect the environment, take action as required and recover the cost from the land owner or the person responsible for the presence of the pollutant. The provincial Minister of the Environment registers a certificate detailing the costs of remediation with the court and the owner or person responsible must appeal the Certificate and defend the action.

British Columbia's Waste Management Act (1993) casts a wide net of liability. The Act provides that a person who is responsible for remediation of a contaminated site is liable for clean-up costs, whether incurred on or off the contaminated site. The liability is retroactive and compliance with the law at the time the substance was released does not excuse a person from liability, nor does the fact that other persons may have contributed to the problem. Potentially "responsible persons" include: current and previous owners, and operators; producers and transporters of substances that cause a site to be contaminated; and secured creditors.

Contaminated Farms:

The existence of contaminated farms is recognized as a serious problem and has been well documented. For example, contamination of farmland can stem from oil and gas well activities, or from illegal waste dumps. In Ontario, two recent cases have been noted in the farm press. The first case involves the dumping of waste asphalt from nearby road construction sometime in the 1960s. The waste asphalt was dumped around the barn. The issue of contamination impacts on the dairy herd will be determined in the court actions. The farm in its present state has no value and cannot be sold. The cost of clean-up is unknown, but will likely involve costs exceeding several millions of dollars.
In the second case, the previous owner operated an illegal waste dump back in the 60's. The dump received toxic petroleum waste from nearby refineries. Some 40 acres have been heavily polluted. The costs of removing the waste materials could be between 5 and 10 million dollars. Similar to the first case, this farm has no value and cannot be sold. Other cases involving contaminated farms include a pipeline break, salt damage, and industrial contaminate damage. A financial institution with a mortgage on these farm properties may be in a position where it cannot realize sufficient value on the farm asset to secure the mortgage.

If the financial institution were to take possession or control of the property, it could then become liable for the clean-up costs. The financial institution would expose itself to this liability while taking possession of a farm asset with no value.

Generally speaking, spills are dealt with in provisions of provincial environmental protection legislation, requiring the person responsible for the spill to report it to their respective provincial Minister of the Environment. In a number of jurisdictions, special 24 hour hotline telephone numbers have been established to receive reports of spills. Farmers are also required to report spills of contaminants. In some provinces farmers have a limited liability under these provisions; for example, to the greater of $500,000 or the limit of the farmer's insurance policies against such risk.

The existence of contaminated farms is the main force behind financial institutions developing environmental management systems to assess the security for their loans. Several past farm practices have contributed to these concerns over contaminated sites on farms. It was common many years ago for farmers to establish their own waste dumps on the farm property, often in marshes or woodlands to avoid the loss of good farmland. These dumps were used to dispose of garbage, obsolete equipment, pesticide containers and dead livestock. Fortunately, this practice has, by and large, been discontinued. The existence of old underground fuel tanks is also a major concern. Liquid manure tanks create major concerns for possible underground pollution.

Water and Watercourses:

The quality of water is protected by most general environmental protection statutes and many provinces have special water management statutes. In Ontario, the discharge of a contaminant into water is an offence under both the Ontario Water Resources Act and the Ontario Environmental Protection Act. However, there is a very important distinction for farmers between the two statutes. The Environmental Protection Act has a partial exemption for the disposal of farm wastes.
under normal farm practices. The Ontario Water Resources Act has no such exemption. Pollution of water, therefore, from disposal of farm waste under normal farm practices can still lead to charges under the Ontario Water Resources Act.

In addition to protecting water quality, the provincial governments, by various statutes, attempt to regulate watercourse modifications. For example, in Ontario the Public Lands Act, the Conservation Authorities Act and the Lakes and Rivers Improvement Act all apply to regulate watercourse modifications. Farm drainage systems are regulated by the Drainage Act. If the watercourse is navigable, the federal Navigable Waters Protection Act also has jurisdiction over any activity that could interfere with navigation. A farmer must apply for the proper permits prior to modifying any watercourse.

Fish and Game:

The laws respecting hunting and fishing, protection of endangered species and fish and wildlife habitat protection are of general application to all members of society. However, farmland is more extensively impacted by these laws as it is used as wildlife habitat as well as a food production resource. Farm practices can also impact on wildlife habitat and wildlife itself.

The federal Fisheries Act is of greatest concern at the moment. It protects fish habitat and prohibits the discharge of deleterious substances into water inhabited by fish.

Transportation:

The transportation of dangerous goods is covered by an extensive combination of federal and provincial law. It is beyond the scope of this Discussion Paper to describe these Acts and Regulations in detail.

Several farm chemicals are covered by the Transportation of Dangerous Goods legislation. In addition, the federal Pest Control Products Act and provincial legislation covers the transportation of pesticides.

Pesticides:

Pesticides are one of the most highly regulated products on the market. Prior to marketing a pesticide in Canada, the manufacturer must register the product with Agriculture and Agri-Food Canada under the Pest Control Products (PCP) Act. The PCP Act divides all pesticide products into three categories:

- Domestic home and garden products;
- Commercial, industrial and agricultural pesticide products;
- Restricted commercial products requiring additional restrictions due to high toxicity or sensitive use.
The Provinces and Territories have all enacted pesticide control legislation. This legislation is predicated on a federal registration being granted first. The provincial pesticide legislation provides varying degrees of complexity with respect to comprehensive wholesaler, retailer and end use licensing systems. Some provinces divide the federal product classes into as many as 8 to 10 different classes of pesticides requiring different types of licences.

The federal government recently introduced a new pesticide import for own use system. Farmers may import pesticides from the United States that are registered under United States law, providing the pesticide product has been approved by Agriculture and Agri-Food Canada and is equivalent to a product registered in Canada. Hopefully this will be a first step in harmonizing Canada's and the United States' pesticide registration systems.

Other Liabilities:

Farmers have unique liabilities as owners of farmland. First, farms tend to be quite large and open to the public. Farmland is also attractive to the public for recreational activities such as hunting, fishing, hiking, boating, snowmobiling, skiing and similar activities. The use of farmland by the public exposes the farmer to extensive occupier liability. A person entering onto a farm is deemed to willingly assume risk and has no action against the farmer. In this situation the farmer must not deliberately create a danger to the person or the person's property. The farmer may still be liable for negligence to the visitor if the farmer's conduct falls below acceptable standards.

Each province has a specific law with respect to occupational health and safety. Most such laws, however, exempt agriculture. It is in farmers' best interest to be aware of, and comply with, the standards of care established under these laws.

2.3 Scope of Liabilities

The list of environmental liabilities that can impact on a farmer's business includes the following:

- fines
- stop/control orders
- remediation/clean-up orders
- legal costs
- civil liabilities
- injunctions

The following is a brief description of how each of these environmental liabilities may impact farmers.

Fines:

The most common penalty when a person is found guilty of an environmental offence is the imposition of a fine. There is a steadily upward trend in the dollar value of
fines. The fine will depend on a number of factors, including the extent of the pollution and the farmer's attempt to prevent or abate the problem. Separate charges can be laid for each day an offence occurs and the laying of multiple offences is quite common. A separate fine can be applied for each offence.

First offence fines are usually in the order of $500 to $10,000. The courts feel a second offence for the same or similar problem requires stern measures. In the event of an accident, second offence fines can range between $10,000 and $30,000 and in situations where the farmer has shown some disregard for the environment, fines in the $80,000 range are possible. There is no insurance protection for fines and the legal costs associated with defending environmental charges.

As part of the sentencing process, some provincial governments can request the court to impose an additional fine equal to any profits the farmer can be shown to have made as a result of not complying with the environmental legislation. The obvious intent of this provision is to prevent the fine from becoming a cost of doing business. In April of 1992, an Ontario waste hauling company, who had repeated violations of its Certificates of Approval, was fined an additional $70,000 as profit stripping.

Stop/Control Orders:

The provincial environmental protection statutes provide the provinces with some power to control or stop pollution discharges or incidents of environmental degradation. The normal process is for the provincial government to issue to the polluter or person in control an "order" that requires the person served to stop some activity or take some means to control the polluting activity.

The procedure for issuing a stop/control order varies considerably across Canada, from very precise prior reports from Environmental Officers to straightforward issuance of the order by the Ministry on the person in charge of the problem. There is usually an appeal process to allow the person so served to question the validity of the issuance of the order. It is a serious offence to breach these orders.

Wherever farm activities are exempt from the operation of the environmental protection statute, farmers will also likely be exempt from stop or control orders against that activity. These exemptions must be reviewed carefully on a case by case basis. For example, the application of farm manure to fields is partially exempt under the general pollution offence of the Ontario Environmental Protection Act and, providing the application stays within the exemption, not subject to a stop or control.
order. If the disposal activity involves entry or possible entry into water, it is also a violation under the Ontario Water Resources Act and subject to the stop/control order provisions of this Act. Stop and control orders may also be used against farmers for activities that involve noise, dust and odours. Stop orders have been used to prevent the use of bird scarers, particularly at night when birds are active. The financial impact of stop or control orders on farmers includes loss of revenue from crops or livestock if normal farm practices are interfered with. It is very unlikely that damages that occur as a result of stop or control order will be covered by insurance, however, each individual policy should be reviewed for possible coverage depending on the circumstances.

Remediation Orders:

Remediation orders, at this time, are the greatest concern to financial institutions. In nearly all provinces, the cost of clean-up of a contaminated site takes priority over registered mortgages. The third basic tenant of lending, sufficiency of the collateral in the event of default, is jeopardized by the environmental liability of clean-up costs taking priority to the mortgage.

The financial institution must assure itself, prior to lending money to a farmer, that there are no existing contaminated sites on the property. In addition, the financial institution must further assure itself that the ongoing activities of the farmer will not result in environmental contamination.

In provinces that make the owner of the land or the person in charge of the pollution responsible for clean-up costs, the financial institution must also guard against becoming the owner or person in charge of the pollutant in order to avoid being held responsible for clean-up costs, in addition to losing the loan.

It is possible that insurance may cover some loss if the remediation order is issued as a result of an insurable risk. Each insurance policy must be reviewed for specific coverage and exclusions.

Legal Costs:

The legal costs of defending environmental offences can also negatively impact farmers' financial planning. Few farmers anticipate legal costs of this nature in their annual operating budget. A simple defence and representation to sentence can cost $3,000 to $10,000. Complex defences can run into hundreds of thousands of dollars, particularly if expert witnesses are involved. The high cost of defending an offence sometimes results in the farmer pleading guilty in return for a reduced sentence. This is unfortunate where the
farmer has a reasonable defence, since it is important to preserve the first conviction if at all possible.

Stop and control orders also have legal cost implications. These orders must be appealed to Environmental Appeal Boards within specified time frames or the orders become permanent and compliance is mandatory. Legal counsel is preferred in dealing with these legal procedures and for developing the evidence to support the case. Due to the potential costs involved, legal representation is even more important in resisting remediation orders.

Civil actions for environmental nuisance or negligence also require the farmer to retain legal counsel. If the claim is for an insurable damage, most insurance policies require the insurer to defend the action on behalf of the farmer.

Civil Liabilities:

The farmer is also liable to neighbours for damages suffered as a result of the escape of the pollution or interference with the enjoyment of their land. The quantum of damages is unlimited. A farm fire involving pesticides could spread a toxic cloud over an adjacent subdivision injuring hundreds of people. The cost of evacuation could be enormous. Similar incidents with feed mill fires involving toxic pesticide smoke have resulted in large civil claims.

The obvious protection against civil liability is adequate insurance. Insurance can protect against both damage claims and defence costs. However, most standard farm insurance policies have pollution exclusion clauses. Coverage is only provided in the event of a sudden unexpected discharge of a pollutant. The slow leakage of underground fuel or manure tanks is not covered under standard insurance policies.

The damage from such events could be very high if an aquifer is contaminated resulting in the pollution of neighbouring wells. Farmers and lenders must both review the farmer's insurance policies carefully to ensure adequate coverage for damages from the kinds of pollution incidences that may occur.

Injunctions:

In addition to monetary damages, plaintiffs under the civil law can also ask the court to issue an injunction prohibiting the farmer from carrying on activities that could result in additional damages. Both preliminary injunctions prior to trial and permanent injunctions as part of final damage assessment are available.
2.4 Notification of a Discharge and Assistance to the Crown

The various environmental statutes create liabilities with respect to allowing inspectors onto the farmer’s premises and providing assistance to the inspector. It is an offence to obstruct an inspector and charges will be laid. These offences are considered very serious by the courts. The inspector can require the release of documentation unless it is privileged or confidential. The farmer does not have to make a statement to the inspector and should only make a statement in the presence of qualified legal counsel. Details on provincial statutes are listed in Appendix II.

2.5 Ontario’s Environmental Bill of Rights

The development of a Bill of Rights represents a new generation of environmental management tools. The concept is to empower the public with authority to take action to protect the environment. As governments face financial constraints, the use of public empowering legislation is attractive.

The Ontario government proclaimed the Environmental Bill of Rights into law on February 12, 1994. The purpose of the Bill of Rights is to ensure that the public in Ontario has effective input into government decisions affecting the environment and to promote the accountability of government with respect to its environmental record. The Act (an Act respecting Environmental Rights in Ontario) is sufficiently unique that very little precedent exists to determine how it will be interpreted by the courts. The Task Force that advised the government on the final development and implementation of the Environmental Bill of Rights consulted with agricultural groups but the agricultural sector did not have a direct representative on the Task Force.

The broad goals of the Environmental Bill of Rights are to:

- develop a public participation regime to allow the public to participate in environmentally significant government decisions;
- promote government accountability for its environmental record;
- increase access to the courts by reforming public nuisance law;
- increase and reform employee whistle-blower protection.

It is the third of these goals that has the greatest possible impact on agriculture. The first two goals require regulations and scheduling of agricultural related departments, decisions and instruments. The last goal has limited application to agriculture.

The Environmental Bill of Rights provides the general public with a new access to the courts to enforce environmental laws and to address public nuisance concerns. In the past, only the Attorney General could bring
an action to protect public resources. Unless a private party could show particular damages, he or she was barred from an action in public nuisance. The new Act now provides the private individual with access to the courts to protect public resources.

Section 84 of the Environmental Bill of Rights creates the following new cause of action:

"Where a person has contravened or will imminently contravene an Act, regulation or instrument prescribed for the purposes of Part V and the actual or imminent contravention has caused or will imminently cause significant harm to a public resource of Ontario, any person resident in Ontario may bring an action against the person in the court in respect of the harm and is entitled to judgement if successful."

Section 1 of the Act defines "harm" as "any contamination or degradation and includes harm caused by the release of any solid, liquid, gas, odour, heat, sound, vibration or radiation". In Section 82 the definition of "public resource" includes any parcel of public land that is larger than five hectares and is used for recreation, conservation, resource extraction, resource management, or any plant, animal or ecological system associated with any air, water or land described above.

The person bringing a law suit with respect to an alleged contravention of a prescribed Act or regulation must first request an investigation under Part V of the Act. Under Part V the government must investigate complaints raised by members of the public. If this investigation ends with an unsatisfactory result, the member of the public may then apply to the courts for redress.

Where the contravention of a prescribed Act or regulation involves farm practices resulting in alleged harm by noise, odour or dust, the complainant must first apply to the Farm Practices Protection Board to determine if the problem is the result of normal farm practices; if that is the case, the farmer is protected from the public nuisance suit. ¹

The Environmental Bill of Rights Act establishes an important exemption to these safeguards. Under Section 84(6) an application for investigation under Part V of the Act and an application to the Farm Practices Protection Board is not required if the delay involved would result in significant harm or serious risk of significant harm to a public resource.

¹ In Ontario the farmer enjoys some protection under the Farm Practices Protection Act for claims by neighbours for nuisance that result from noise, dust or odour. The claimant is required to take his or her claim to the Farm Practices Protection Board. In cases where the Board determines there is merit to the claim, the Board may order the farmer to stop or revise his or her practices to avoid the nuisance problem.
The farm community is particularly vulnerable to the new harm to a public resource action. The farm business sector has one of the only businesses in Ontario involved in environmentally sensitive activities that do not have Certificates of Approval issued under the Environmental Protection Act. These Certificates of Approval are statutory authority to conduct a business in a manner that provides for approved emissions into the environment.

Farm activities that could be determined to be harming a public resource include pesticide spray drift, pathogens from raw manure into groundwater or watercourses and fertilizer nutrient run-off in water. If a person could demonstrate that the application of manure and/or fertilizer to farmland for cropping purposes resulted in significant run-off of pathogens or nutrients into the local creek, the farmer could be subject to a public resource harm action. Unlike the farmer’s industrial counterparts, the farmer has no statutory authority to emit these materials into the environment. Properly prepared, such a case against a farmer could be successful.

2.6 Right-to-farm Legislation

Conflicts between farm uses and other adjacent farm and non-farm uses caused by, for example, noise, dust or odour, have been perceived in some cases as being sufficiently objectionable to cause private litigation. These actions and the concerns about the continued viability of farming operations, have led several provinces to develop "right-to-farm" legislation, which favours agricultural uses of land above all others (Lapping, Penfold, Macpherson, 1983).

Right-to-farm legislation is usually concerned with private nuisance, described as unreasonable or undue interference with a person’s use or enjoyment of land or property. The nuisance can take the form of physical injury (e.g. health or crop damage from pesticide spray drift) or inconvenience (e.g. the need to keep windows closed for long periods of time due to noxious odours). In determining what constitutes nuisance, the courts consider whether the land was being used "reasonably" given that there is a neighbour in the vicinity. The courts look at the nature and duration of the harm, and the character of the neighbourhood. For example, what is considered nuisance in a rural residential area, would not necessarily be considered nuisance in an agricultural area.

Once nuisance is established, there are few defences (Penfold et al., 1989). First, there is little or no weight given to the fact that the activity being carried out is of some use or importance to society.

Second, nuisance looks to the harm caused by an action, and not to the conduct causing it. It is not, therefore, a defence to show that reasonable care has been used to prevent the nuisance, or that all relevant
health and environmental regulations have been complied with. Third, it is not a defence to show that the nuisance resulted from the cumulative effects of several people's acts (e.g. where a number of farm operations each emitted "moderate" odours which, in isolation, would not constitute a nuisance). Lastly, it is no defence to show that the plaintiff "came to the nuisance", i.e. that the nuisance was there before the plaintiff became established in the community. The farming community has particular concerns over the rejection of "first in time, first in right".

The origin of right-to-farm laws can be found in the U.S., which has a much longer history of legislative intervention in private nuisance action than does Canada. Statutes have been adopted in nearly all states, and they provide the framework for Canada's legislation. At least six provinces have adopted right-to-farm legislation (Manitoba, New Brunswick, Nova Scotia, Quebec, Alberta, Ontario). The Saskatchewan government has nearly completed right-to-farm legislation.

While the provincial approaches vary, they can be characterized as follows: they protect "agricultural operations" and address, at a minimum, the issue of odour; they require that a farmer comply with other applicable statutes (i.e. public health and environmental protection) and with "normal farming practices" (only Ontario defines these); and, they place the burden of proof of proving non-compliance with relevant standards upon the plaintiff. Ontario and Nova Scotia have put in place a process outside the courts to review complaints (e.g. Ontario's Farm Practices Protection Board). Quebec is the only province to provide a specific clause dealing with "first in time, first in right".

It is difficult to evaluate the strengths and weaknesses of right-to-farm legislation, given that most statutes have only recently been adopted and there have been few judicial decisions (Penfold et al., 1989). Commentators in the U.S. note that private actions of farm-related nuisance have been reduced. In Canada there have been few cases of such litigation against farmers, although this may not be an accurate indicator of the "potential" for litigation. Penfold et al. (1989) noted only twelve farm-related nuisance cases in Canada reported between 1977-1989. Provincial authorities, however, receive approximately 1,000 farm-related complaints each year (although those relating to vandalism, dog control, fence maintenance, etc., outnumber those relating to noise, dust and odour). The perception of nuisance as a farm / non-farm issue is incorrect; approximately one-half the farm-related nuisance complaints are generated by other farmers.
The need for right-to-farm legislation varies among provinces, and may be more evident in provinces without rural planning and zoning controls (Penfold et al., 1989). The U.S. experience seems to bear this out, as right-to-farm legislation was needed most in areas without rural land use policies, and where it is now used to encourage farmers to join agricultural districts. In some provinces the need for this type of legislation is underlined by conflict over intensive agricultural operations in urban and recreational areas. Right-to-farm legislation should be considered as a supplement to rural land use planning policy in that it cannot prevent situations which lead to conflict, it can only place guidelines on one form of response to conflict - private litigation.

3. WHAT CONCERNS PRODUCERS

Much of farmers' concern stems from the difficulty that environmental liabilities pose for them in their dealings with financial institutions. These environmental liabilities affect the availability of capital and operating financing and adequate environmental insurance coverage. For example, lending institutions are asking farmers for environmental information before approving mortgages, or even loans for farm equipment. Lenders ask for this information for their own protection to verify that all potential liabilities are identified to them.

However, farmers are faced with different forms for each bank as each institution assesses risk in its own fashion. Some farmers object to the cost of furnishing this information.

For example, in an area just east of Toronto some 200 farmers have been approved for the application of industrial waste paper sludge to their farmland. This approval comes after an extensive evaluation of the suitability of the farmland to receive waste sludge. A provincial Sludge Approvals Committee reviews the applications for applying waste sludge to farmland and only after compliance with an extensive set of criteria are applications approved. The local municipality where the farms are located must also approve the applications. In addition, it is common in Ontario to apply municipal sewage sludge to farmland under a similar approval process.

Moreover, some question the banks' competence to assess the information and how it is to be used in decision making, and express the concern that banks might turn these documents over to environmental enforcement officials in which event they may face penalties for non-compliance.
A Phase 1 ESA is a systematic process by which an Assessor seeks to determine whether a particular property is or may be subject to contamination. The four principal components are: 1) a records review; 2) a site visit; 3) interviews; and 4) evaluation of information and reporting. It does not involve the investigative procedures for sampling, analyzing and measuring, which form part of a Phase II ESA. This differs from an Environmental (Compliance) Audit, which "evaluates evidence regarding a verifiable assertion about an environmental matter". (CSA, 1994)

Farmers are equally concerned about non-compliance with environmental protection legislation introduced over the last twenty years. Many of these environmental protection statutes establish very low pollution thresholds which trigger the laying of charges. In fact, in some instances no actual pollution needs be demonstrated for charges to be laid; it is sufficient that farm practices "may potentially" cause damage for the farmer to be charged.

In one recent court case, the expert toxicological witness admitted that water samples taken from a river in the area of the point of agricultural discharge were totally unreliable and that no known negative impact had occurred on the flora and fauna in the river. The toxicologist testified that it was possible that fish may be harmed. On the basis of this evidence, the farmer was convicted and fined $3,000.

These liabilities are generating considerable anxiety within the sector. For example, many farmers are being fined for pollution offences today that would have gone unnoticed several years ago. First offences can be costly and, at present, there is no insurance coverage against fines or for the legal costs associated with defending environmental charges. Stop or control orders on farm operations can also...
cause significant financial hardship for farmers if normal farm practices are interfered with.

The number of farm-related pollution charges is still relatively small. For example, for 1992 the Ontario government reported (MOE, 1993) some 21 farm-related convictions out of a total of 399 convictions obtained. There may have been several other cases involving farm activities, however, the information is inadequate to make a proper identification. In 1991 (MOE, 1992), 34 out of 485 convictions can be identified as involving farm activities. To illustrate, a sample of the activities and fines are listed here (many are repeat offences).

In British Columbia, the bi-annual Summary of Environmental Charges and Penalties (B.C. Environment, 1994) highlights charges, convictions and penalties imposed under the provincial Waste Management Act, the Water Act, the Pesticide Control Act, and environmental protection provisions of the federal Fisheries Act. While more than 400 charges were laid in a 12-month period, it is difficult to properly identify cases involving farm-related activity.

<table>
<thead>
<tr>
<th>Activity Description</th>
<th>Fine Amount</th>
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<tbody>
<tr>
<td>Discharging Liquid Manure into Watercourse</td>
<td>$1,000</td>
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<tr>
<td>Discharging Pesticide Causing Injury &amp; Damage</td>
<td>$1,000</td>
</tr>
<tr>
<td>Illegal Use of Pesticide</td>
<td>$500</td>
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<tr>
<td>Discharging of Sound Causing Adverse Effects</td>
<td>$3,500</td>
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<tr>
<td>Discharging Herbicide Causing An Adverse Effect</td>
<td>$1,200</td>
</tr>
<tr>
<td>Discharging Pig Manure Causing Adverse Effect</td>
<td>$1,300</td>
</tr>
<tr>
<td>Failing to Prevent Animal Life from Access to Sewage</td>
<td>$253</td>
</tr>
<tr>
<td>Discharging Waste in Ditch Draining to River</td>
<td>$5,000</td>
</tr>
<tr>
<td>Using Pesticide Not In Accordance with Licence</td>
<td>$1,500</td>
</tr>
<tr>
<td>Discharging Manure Entering Rideau River</td>
<td>$3,000</td>
</tr>
<tr>
<td>Discharging Manure Into Drain</td>
<td>$1,000</td>
</tr>
<tr>
<td>Liquid Manure Leaked to Adjacent Property</td>
<td>$2,000</td>
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<tr>
<td>Dumped Unused Pesticide Which Entered Ditch</td>
<td>$875</td>
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<tr>
<td>Highly Odorous Manure Spill</td>
<td>$5,000</td>
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<tr>
<td>Sprayed Pesticide Causing Adverse Effect</td>
<td>$15,000</td>
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<tr>
<td>Failed To Notify of Discharge of Manure Into Stream</td>
<td>$700</td>
</tr>
<tr>
<td>Manure Saturated Soil Entering River</td>
<td>$750</td>
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Source: MOE, 1992
4. WHAT CONCERNS LENDERS

Financial institutions lend money on the basis of the clients' ability to service the interest, repay the debt and the value of the underlying assets in the event of default. The assessment of a client's management and character is based on his or her financial plans, management ability, training, adequate equipment and history of good money management. The value of the underlying assets are determined by an independent appraisal institutions recognize that a part of that is produced under recognized appraisal standards. Loans to farmers must also meet these principles of lending.

In simple terms, the banks are concerned that should a farmer be faced with a costly clean-up, one which might exceed the value of the property, the farmer may opt to default on the loan. Financial institutions recognize that a part of their loan portfolio will not be repaid. Of greater concern to financial institutions is the possibility of becoming responsible for clean-up costs simply because they took steps to protect their security (unless they were involved in the control or management of the polluting operation) (Sinclair, 1993). In situations where the polluter cannot pay, or cannot be found, clean-up costs should become social costs.

The Canadian Bankers' Association supports the enforcement of the "polluter pays" principle, and feels that lenders should not be held responsible for clean-up costs simply because they took steps to protect their security (unless they were involved in the control or management of the polluting operation) (Sinclair, 1993). In situations where the polluter cannot pay, or cannot be found, clean-up costs should become social costs.

The banks are also concerned that the farmer has no long-term vision for how he/she will deal with changing environmental standards. In the absence of national standards for farm production, they recognize that each individual bank can assess the environmental risk of a farm operation in its own way - and that contributes to farmers' anxiety.

The financial institution will want to assess the likelihood that the farmer's ability to service the debt is eroding as a result of impacts identified above. However, the use of environmental assessment questionnaires completed by the farmer may create more liability for the financial institutions than if no information was obtained. Thousands of acts, regulations, policies, guidelines, informal internal rules, municipal by-laws and industry standards exist that apply to farming operations. If
the financial institution is put on notice of an environmental problem and its staff fails to recognize the importance or relevance of the information, the financial institution may have greater liability for clean-up damages on the basis of contributing to an enterprise that was bound to violate the law. The financial institutions have started to provide their staff with environmental training. However, this is a very complex and technical field. At present, many financial institutions do not have adequate staff resources at the branch level with appropriate training to evaluate farm environmental questionnaires.

Standard Farm Insurance Coverage

The standard farm insurance policy has inadequate pollution coverage. Fines, legal fees for defence of offences, and stop/control order impacts are not covered. Damages to a policy holder's own property by environmental pollution are generally not covered.

Most standard farm policies cover sudden / accidental escapes or discharges into the environment with respect to property damage. A slow leak over time may not be considered "sudden and accidental".

The insurance industry is calling on the federal and provincial governments to adopt national environmental standards to protect the environment and improve the climate for insuring environmental risks. The Insurance Bureau of Canada (IBC, 1994) is recommending that national standards be developed for aboveground and underground storage tanks, management of hazardous wastes, remediation of hazardous waste sites, wastewater management and pollution prevention. In addition, the IBC recommends that insurers adopt a set of environmental hazard guidelines for commercial general liability insurance to address deficiencies in the measurement of environmental risk. Most farming operations (poultry, beef, hog, dairy, etc.) would be considered "medium hazard". Businesses in this category pose a moderate level of environmental risk and may sometimes cause significant environmental damage. Crop spraying would be considered "high risk".

5. ADDRESSING LIABILITY: HOW FARMERS DEMONSTRATE DUE DILIGENCE

Generally, legal onus is on the accused to prove that, on a balance of probabilities, it was duly diligent in its effort to prevent the offence. Due diligence, or all reasonable care, involves considering the steps a reasonable person could have taken in the circumstances.

The criteria applied by the courts when determining the level of care required to demonstrate due diligence include:
any general industry standard common to the business activity;
- the degree of knowledge or skill expected of the person;
- the location of the operation (vulnerability of the environment);
- the gravity of the potential harm;
- the degree of known potential or expected harm;
- the extent to which the underlying causes of the offence were beyond the control of the accused (difficulty and cost of prevention); and,
- the alternatives (what was done versus what could have been done).

The essence of the defence of due diligence is that the accused has taken all possible precautions to avoid or prevent the occurrence of the offence. The degree and kind of inquiry to establish due diligence will vary for different properties and different purposes and may also be dependent on the jurisdiction within which a property is located (FCC, 1993). While there are no prescribed standards for the defence of due diligence, reported cases provide some guidance as to what is accepted by the courts.

The sector's approach to demonstrating due diligence relies on farm plans, best management practices and other, mostly voluntary action plans or codes of environmental practice. For example, Alberta's Code of Practice for the Safe and Economic Handling of Animal Manures (ILOC, 1994) encourages environmentally sustainable manure management practices. It is intended to assist producers in minimizing the potential for environmental problems related to livestock operations by providing practical alternatives for manure storage and use.

Environmental farm planning is a process that involves preparing an environmental plan, giving participants the opportunity to identify where effective environmental management is already taking place, to establish goals and develop work plans for addressing potential risk areas. This involves an assessment of existing farm resources, the physical setting and production methods. Typical considerations include soil erosion and water pollution, methods and rates of chemical application, disposal of chemical containers, livestock waste storage and handling, fuel storage and energy use.

In Ontario, for example, where the environmental farm planning program started, plans were used by some 2500 farmers in 1994. In the Prairie provinces, the wheat pools have developed guides to environmental farm planning to be used in conjunction with other on-farm conservation planning processes. In the Atlantic provinces, an environmental farm planning initiative has been formed in Prince Edward Island and the Atlantic Farmers' Council has also promoted the initiative.
Two case studies serve as cases in point of contrasting approaches to the development of environmental action plans: the British Columbia Code of Agricultural Practice for Waste Management, and the Ontario Environmental Farm Plan initiative.

The British Columbia Code of Agricultural Practice for Waste Management (the B.C. "Code") is an example of a type of environmental action plan that was developed cooperatively by farmers with agriculture and environment ministries. A farmer following the Code is exempted from needing a permit with specified conditions to dispose of waste. Producers trained as inspectors make the first visit to the site when a complaint is received. This peer review and report is usually all that is needed to correct a problem, and the exemption from needing a permit remains. If the farmer refuses to take reasonable action in a reasonable time frame, however, the Code has the force of law and that farmer must then get a permit from the appropriate authorities. It was developed by farmers because they believed that it was an effective way to implement responsible environmental stewardship throughout their industry. It was also developed, in part, to protect farmers from nuisance claims by neighbours concerning odour, noise and dust concerns.

In British Columbia, the sector's response to liability concerns has been to work with environmental authorities to develop environmental standards that are tough and that have the force of law but which recognize the industry's right to find its own means of achieving pollution prevention objectives. They establish strict environmental standards for waste management and, in the process, are effective in addressing water and other forms of environmental degradation.

In effect, the B.C. Code is a special regulation under the province's Waste Management Act, tailored to issues of importance to the industry. It addresses the concerns of environmental agencies and, for the most part, the environmental community, regarding the need for environmental protection measures which mitigate environmental damage caused by less responsible farm operators. At the same time, it allows farmers to operate their farms without concern for actions by neighbours or local governments against them so long as they meet the requirements of farm production standards itemized in the Code.

In Ontario, a coalition of all major farm organizations has adopted a different strategy to address environmental concerns in the sector. The Ontario Farm Environmental Coalition (OFEC, 1994) worked with government agencies to develop a self assessment environmental...
review system for Ontario farmers. This coalition, led by the Ontario Federation of Agriculture, the Christian Farmers' Federation of Ontario, AGCare, and the Ontario Farm Animal Council has initiated an environmental farm plan program for the province. It calls on farmers to develop and maintain an environmental farm plan for his or her enterprise. It is expected to result in the creation of between 10,000-12,000 individual farm plans by 1997.

The farm planning initiative is deliberately established as a non-legislated requirement. This approach is based on the principle that regulation is a poor substitute for peer assistance and cooperative approaches to achieving environmental progress in the sector. The Coalition suggests that the more successful approach to encouraging land and environmental stewardship involves education, individual initiative, and the encouragement of the environmental ethic among farmers.

The basic element of the Ontario Environmental Farm Plan initiative is that the farmer will conduct an assessment of his or her own farm with the use of material and assistance provided by the Coalition. The farmer has access to technical expertise from government, the Coalition and the University of Guelph. The farmer prepares a draft Environmental Farm Plan and this is reviewed by a local peer review group. The intent is to make farmers more aware of potential environmental concerns and to develop a management plan with a time schedule to upgrade their farms in order to avoid problems.

Ontario's Draft Policy on Access to Environmental Evaluations (MOEE, 1994) states that the provincial government will not, as a matter of course, request access to environmental evaluations. The draft policy, developed in conjunction with the farm community and environmental groups, applies to environmental farm plans.

Under MOEE's current compliance policy a person may submit a program to prevent, reduce or control the discharge of any contaminant into the natural environment. Once approved, the business is allowed a period of time to implement its environmental plan. A person who complies fully with the plan is likely to be immune from prosecution for matters dealt with in the program. Where an environmental evaluation discloses pollution problems, for example, it may be submitted together with a plan for approval. In this way, businesses whose environmental evaluation disclose potential environmental risks are encouraged to reduce pollution by entering into an agreement to address the source of the problem while protecting the business from prosecution. Providing the farmer has not ignored any deficiency in
his/her management practices, an environmental farm plan may actually strengthen the due diligence argument even if the problem was identified but not scheduled for immediate action.

The farm planning initiative has the advantage of providing farmers with a flexible tool to assess possible environmental liability and to prioritize his/her environmental mitigation plans accordingly. It does not have the force of law and, therefore, allows farmers to participate on a voluntary basis. On the other hand, it provides farmers with little protection from nuisance claims from neighbours or from court action based on standards in environmental protection legislation which have little regard for the realities of farm businesses.

While the environmental farm plan does not have the force of law, it incorporates regulatory requirements (about 50 of the 250 ratings) into the plan, e.g. separation distance between potential pollutants and water sources, emergency spills plans, etc. The B.C. Code can have the force of law but is narrower than the Ontario initiative in scope, dealing only with waste management. The B.C. approach does not include farmers declaring their problems publicly either. Rather, there is simply a report on a specific issue in response to a public complaint (e.g. timing of manure application). The system is more "reactive", with peer inspectors going to the farm only to deal with the specifics of that complaint.

6. ADDRESSING LIABILITY: HOW LENDERS DEMONSTRATE DUE DILIGENCE

The financial institutions in Canada have developed several due diligence mechanisms to attempt to avoid being held responsible for the environmental liabilities of their clients. It is now fairly common for loans over a set amount to require a Phase I Environmental Site Assessment (ESA) and further assessments if any potential problem is identified. For certain types of business, i.e. gas stations and dry cleaning establishments or major building developments, a Phase I ESA may be required for all loans. The Canadian Standards Association has developed standards for a Phase I ESA (CSA, 1994), and is in the process of developing a standard for a Phase II ESA.

To date, the financial institutions have not required Phase I ESAs for farm loans, notwithstanding the environmentally risky nature of farming and the lack of statutory authority for farm operations. Instead, the financial institutions have developed environmental questionnaires to be filled out by farmers applying for or renewing loans. An example of an environmental assessment questionnaire, used by the
Farm Credit Corporation (FCC), is provided in Appendix III (FCC, 1993).

While questionnaires may vary from one institution to another, they all generally try to establish the potential for environmental damage through, for example: improper storage and handling of pesticides, herbicides and commercial fertilizers; improper disposal of wastes; and unauthorized dumps.

7. STRATEGIES TO MINIMIZE FARMERS' ENVIRONMENTAL LIABILITY

It is important for farmers to take the initiative in developing protective systems in order to reduce the potential for financial hardship due to the sudden unexpected impact of environmental liability. Several options to address this concern are proposed here. Implementing some of these options will require the introduction of legislation and a political will by all levels of government to provide farmers with the required protection.

Statutory Authority:

This system will require farmers to play catch-up with their industrial counterparts. Farmers would receive Certificates of Approval to operate their farm business. This could be achieved by eliminating the farm exemption in most provincial environmental protection statutes. This would require a provincial Ministry of the Environment to evaluate the farm operation for sound environmental practices prior to issuing the Certificate of Approval.

The staff of Environment Ministries have insufficient experience in evaluating farm operations, due to the current prevailing exemptions. Most of this farm expertise is in the provincial Agriculture Ministries. It may be preferable, from the farm perspective, to amend or pass new legislation as part of farm practices protection or right-to-farm legislation in order to provide for the issuance of Certificates of Approval / Compliance by Agriculture Ministries.

To make this kind of legislation more effective, regulations are required to establish farm production standards that clearly prescribe the parameters and conditions under which farmers can operate their farms without concern for actions by neighbours or the government against them. The development of these regulations must be by the agricultural sector with input from a wide range of stakeholders. Specific local policy, with different standards, may be required in different agricultural zones.
**Right-to-farm Legislation:**

While many farmers and advocates call for right-to-farm legislation, the need for it is not clear - given the rather limited scope of this legislation. Right-to-farm legislation does not allow farmers to create nuisances. Farmers must still comply with all applicable environmental and development requirements as well as "normal farming practices" - a concept dependent upon context. Most provinces' environmental protection statutes prohibit a wide range of activities that pollute the environment, including those that produce odours likely to interfere with the normal enjoyment of life. In some provinces, these statutes essentially prohibit farmers from creating nuisances. Elsewhere, the protection afforded by the right-to-farm legislation is in addition to immunities provided by environmental protection legislation, e.g. where environmental legislation sets out different standards for livestock producers.

There are arguments both for and against right-to-farm legislation. On the negative side, right-to-farm legislation addresses only a specific form of conflict - private litigation against farmers stemming from nuisance - a relatively minor problem faced by farmers. The protection it provides is that of shifting the burden of proof (that the farmer has not complied with requirements) from the farmer to the complainant. It may also create a false impression, that farmers are free to do as they please, intensifying nuisance and environmental issues. On the positive side, given that it appears to reduce nuisance actions, the very existence of right-to-farm legislation may change the understanding of what are "normal" farm practices. It may also improve farmers' and non-farmers' perceptions of farming in terms of the sector's importance to the rural fabric of Canada. Either way, for right-to-farm legislation to be most effective it must be consistent with existing policies or legislation which control or restrict non-farm rural land use.

**Farm Plans / Environmental Site Assessment / Environmental Audits:**

One of the most effective strategies a farmer can employ is to develop and implement an environment farm plan as part of a larger farm business management program. Environmental farm planning and conservation planning initiatives are taking hold in many Canadian provinces. They present farmers as being proactive, enhance their role as stewards of the land, and minimize the possible conflicts that may result from misunderstandings related to enforcement of environmental regulation applied to agriculture. In addition, participating farmers may have the opportunity to realize the economic benefits that may result from changes in management practices.

Environmental Liability in the Agriculture Sector
A standardized approach to environmental questionnaires distributed by banks and other lending institutions may also be an option. As discussed earlier, each institution has its own form; some require information from as far back as 25 years. A standardized form may "level the playing field" for accessing farm credit.

A number of legal and financial authorities are calling for farmers to have an environmental site assessment carried out before purchasing new land. This would confirm that the property is free of contamination and meets environmental standards imposed by existing legislation.

There is some consideration being given to developing the specialty of farm environmental auditor within the profession of agrologists. In Ontario, for example, the proposed College of Professional Agrologists would allow for the establishment of specialty categories of agrologists. One of the first specialists under consideration is the farm environmental auditor. This individual could certify that the farmer receiving a loan is operating his or her farm within recognized farm practices (and standards, if developed) and in compliance with all environmental legislation. This could also provide financial institutions with protection from clean-up liability.

**Education & Training:**

The development of educational courses on management of the environment and the standards of care required by legislation would be useful in preventing environmental problems. The increased contact between farmers and environmental issues has made many farmers realize the importance of knowing this area of the law. The professional agrologists serving farmers will also need to update their knowledge on environmental legislative standards. The attendance at courses and seminars on the subject will bolster the farmer's ability to build a solid due diligence defence in the event of environmental charges. Farm organizations, farm suppliers and government need to continue the dialogue on the development of new strategies to assist farmers in resolving environmental liability issues.

The importance of pollution prevention must continue to be stressed to the farming community. Equally important, the sector needs to recognize that farming is increasingly being subjected to the same environmental scrutiny as other industries. The urban population must also be educated with respect to the realities of agricultural production and the progress made on agri-environmental issues.
8. CONCLUSIONS

This discussion paper is intended to raise awareness of, and to assist producers in responding to the challenges posed by environmental liability. It is also hoped that the paper will foster a better understanding of farm environmental issues by the non-farm community.

It is important for farmers to recognize that, while there are tough environmental laws in place and that their consequences can be severe, the situation is not totally bleak. The exercise of due diligence, through a variety of available mechanisms, maybe a mitigating factor should they ever face legal action in response to environmental matters.

The discussion paper gives farmers a general idea of the types of environmental laws that exist, the range of potential liabilities and an indication of how they might protect themselves. It is likely too general, however, to address specific problems or issues facing farmers as conditions and statutes vary from province to province. The provincial governments, farm-related industries and associations can provide more immediate and directly applicable information. In this respect, farmers are encouraged to seek expert advice to deal with their specific concerns.
REFERENCES


Environmental Liability in the Agriculture Sector


Appendix I

TABLE OF STATUTES AND SELECTED ENVIRONMENTAL LEGISLATION
**APPENDIX I**

**TABLE OF STATUTES**

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<thead>
<tr>
<th>Canada</th>
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<tbody>
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<td>Canada Water Act</td>
<td>Waste Management Act</td>
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<td>Canadian Environmental Assessment Act</td>
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Environmental Liability in the Agriculture Sector
SELECTED ENVIRONMENTAL LEGISLATION

This section will review selected environmental legislation from all jurisdictions across Canada. It will provide examples of some of the environmental liabilities that could impact on the financial well-being of farmers.

The description of the sections of the legislation are paraphrased and edited and the specific legislative text must be consulted for proper interpretations with respect to the application of the law to a specific case.

- **CANADA**

Canadian Environmental Protection Act (CEPA)

The purpose of this Act is established in the declaration:

"It is hereby declared that the protection of the environment is essential to the well-being of Canada."

and for the purpose defined in the preamble.

"WHEREAS the presence of toxic substances in the environment is a matter of national concern;

WHEREAS toxic substances, once introduced into the environment, cannot always be contained within geographic boundaries;

WHEREAS the Government of Canada in demonstrating national leadership should establish national environmental quality objectives, guidelines and codes of practice;

WHEREAS it is necessary to control the dispersal of nutrients in Canadian waters;

WHEREAS some of the laws under which federal lands, works and undertakings are administered or regulated do not make provisions for environmental protection in respect of federal lands, works and undertakings;

AND WHEREAS Canada must be able to fulfil its international obligations in respect of the environment;"
Part II of the Act controls toxic substances. Most toxic chemicals controlled under Part II are not used on farms. Pesticides are regulated by the Pest Control Products Act.

Section 115 of the CEPA creates the offence of causing an environmental disaster. The elements of this offence are:

a) contravention of a provision of CEPA;

b) intentionally or recklessly causes a disaster that results in the loss of the use of the environment; OR

c) shows wanton or reckless disregard for the lives or safety of other persons and thereby causes a risk of death or harm to another person.

With respect to farmers, violation of the toxic chemical regulations and biotechnology Section present the greatest danger to causing an environmental disaster. Disaster is not defined in CEPA and the usual dictionary definition of the word applies.

**Criminal Code**

**Section 444**  Injury To Cattle

Everyone who wilfully kills, maims, poisons or injures cattle is guilty of an indictable offence and liable for a term of imprisonment not exceeding five years.

**Section 445**  Injury To Other Animals

Everyone who wilfully and without lawful excuse kills, maims, wounds, poisons, or injures dogs, birds or animals that are not cattle and are kept for lawful purposes is guilty of an offence punishable by summary conviction.

**Section 446**  Cruelty To Animals

Everyone commits an offence punishable on summary conviction who:

- wilfully causes unnecessary pain, suffering or injury to an animal or a bird;
- by wilful neglect causes damage or injury to animals or birds during transport;
- abandons any domestic animal or bird or a wild animal or bird in captivity by failing to provide adequate food, water, care and shelter;
- encourages or assists in the use of animals or birds for fighting or baiting;

**Environmental Liability in the Agriculture Sector**
wilfully administers, without reasonable excuse, any poison or injurious drug to any
domestic animal or bird or any wild animal or bird kept in captivity;

promotes or takes part in any activity that releases wild birds for the purpose of being
shot when liberated;

permits his or her premises to be used for the release of wild birds for the purpose
of being shot.

The judge in addition to any other penalty may order the person found guilty under Section
446 to prohibit the person from owning or having custody or control of animals or birds for
a period not to exceed two years. Violation of such an order is also an offence punishable
on summary conviction.

Section 787 Punishment On Summary Conviction

Any person found guilty of any of the above charges on summary conviction is liable for a
fine not exceeding $2,000 or a period of imprisonment of up to six months or both. Default
of payment of the fine can lead to imprisonment for up to six months.

Navigable Waters Protection Act

Section 2 Definition of Navigable Waters

Navigable waters includes, in addition to normal dictionary definitions of navigable waters,
canals or any other body of water created or altered as a result of the construction of any
work. This definition could include a drainage ditch constructed under the drainage laws of
the provinces.

The more traditional definition of "navigable" involved the ability of the watercourse to be
used in commerce. The term now encompasses the use by a watercourse for recreational
boating, including canoes and kayaks. This broadens the definition substantially.

Section 5 Approval Required For Work

No work shall be built or placed in, upon, over, under, through, or across any navigable
water unless approved by the Minister of Transport. The work must be built and maintained
in accordance with the terms of the approval.
YUKON

The Yukon does not have a comprehensive environmental protection ordinance.

NORTHWEST TERRITORIES

Environmental Protection Act

Section 4 Environmental Protection

Where the Chief Environmental Protection Officer is of the opinion, based on reasonable and probable grounds, that it is necessary for the protection of the environment he may by order direct any person to install safeguards to prevent a discharge of a contaminant into the environment, to site, transport or store any contaminant in an manner prescribed in the order, and to have on hand adequate equipment and material required to alleviate the effects of any discharge into the environment.

Section 5 Prohibition of Discharge

No person shall discharge or permit the discharge of any contaminant into the environment that:

a) causes or contributes or is likely to cause or contribute to substantial impairment of the quality of the environment; or
b) adversely affects or is likely to adversely affect the health, safety or comfort of any person.

Where permissible levels of contaminants are established by regulation, a discharge below such standards is not an offence.

Section 6 Stop or Control Order

An inspector may by order require a person who discharges a contaminant into the environment to stop the discharge or reduce the discharge as specified in the order.

Section 7 Repair of Damage

An inspector may order a person who has discharged a contaminant into the environment to repair or remediate any injury or damage to the environment as a result of the discharge. Such person is also liable to the government for the cost of cleanup incurred by the

Environmental Liability in the Agriculture Sector
government.

Section 9 Unsightly Land

No person shall permit premises owned or occupied by him to be unsightly by permitting to remain on the premises any unused dilapidated buildings, rubbish or discarded materials, vehicles, machinery or equipment. The Chief Environmental Protection Officer may order clean up and undertake the clean up if it is not completed in accordance with the order at the owner's expense.

Section 12 Offences

Any persons who contravenes Section 5 or fails to comply with an order under Section 6 is guilty of an offence and on conviction subject to a fine not to exceed $1,000 or to imprisonment for a term not exceeding 6 months or both.

Any person who fails to comply with an order given under Section 4 or fails to clean up unsightly premises is guilty of an offence and on conviction subject to a fine not to exceed $200,000 or to imprisonment for a term not to exceed 6 months or both.

BRITISH COLUMBIA

Environmental Management Act

Section 4 Environmental Protection Order

The Act defines detrimental environmental impact as a change in the quality of the air, land or water that substantially reduces the usefulness of the environment to support life. The Minister may, with written reasons, declare that an existing or proposed work, undertaking, product use or resource use has or potentially has a detrimental environmental impact. The Minister may make an interim order restricting, modifying or prohibiting the activity or generally requiring the farmer affected to take any steps to remedy the problem. The interim order cannot exceed 15 days. The Lieutenant Governor in Council makes a final order directing the same things and this order does not expire in 15 days.
Section 5  Environmental Emergency Measures

The Minister, where he or she considers an environmental emergency exists and that immediate action is required, may declare an environmental emergency. The Minister has the authority to require farmers and other persons to provide services and equipment to attend to the environmental emergency. The environmental emergency expires after 15 days unless extended by the Cabinet.

Section 6  Recovery of Costs

The Minister may recover the costs involved in responding to an environmental emergency from any farmer whose act or neglect caused or who authorized the events that caused the environmental emergency.

Section 14  Offences

A farmer who fails to comply with an environmental order under Section 4 is liable on conviction to a fine not exceeding $100,000 and under Section 5 to a fine not exceeding $10,000. The Directors or Officers of a corporation who authorized or acquiesced in the illegal activity are subject on conviction to the same fines.

ALBERTA

Agricultural Chemicals Act

Section 5  Limited Use

An agricultural chemical is defined as any chemical sold or represented as a fertilizer, pesticide, plant growth regulator or soil supplement, but does not include drugs used to control pests or promote or control plant growth, or any chemical prescribed by regulation to be an agricultural chemical. A farmer who uses an agricultural chemical contrary to its intended use has committed an offence under Section 26. (see below).

Section 6  Storage & Handling

A farmer must store and handle agricultural chemicals in such a manner to prevent the agricultural chemical from coming into contact with food or drink for humans, animals and plants. The contamination of food, feed or drink by an agricultural chemical is a violation of Section 26.
Section 7  Custom Pesticide Application

The application of pesticides for reward or hire requires a license under Regulation 214/80 Pesticide Applicator Licensing Regulation. This Regulation establishes a number of classes of applicator licences:

Class A  general applicator of pesticides to agricultural or rural areas;

Class B  application of pesticides while in the employ of government, government agencies or local authorities; the person also requires the appropriate Class licence to cover the activity involved;

Class C  application of seed treatment pesticides;

Class D  application of pesticides for vegetation control to power lines, roadsides and rights-of-way;

Class E  application of pesticides from an aircraft; also requires other appropriate licence to cover specific activity;

Class F  application of pesticides to structures;

Class G  general outdoor use or application of pesticides to parks, tree nurseries, recreation areas, rights-of-way and industrial sites;

Class H  control of aquatic vegetation;

Class J  application of pesticides in greenhouses;

Class K  control of pests in stored grain or animal feeds, grain elevators, granaries or grain transporting vehicles;

Class L  control of biting flies or aquatic pests, such as leaches and snails;

Class M  application of a pesticide in any situation not covered by above licences.

The Regulation establishes standards and conditions for applying, obtaining and holding licences and the conditions of their use. It exempts a farmer who applies pesticides to his own land or neighbouring farms without charge from Section 7. The Regulation also establishes record keeping requirements for licence holders. A licence holder is required to

Environmental Liability in the Agriculture Sector
post a bond or hold insurance acceptable to the Minister for a minimum of $250,000 for bodily injury and death and a minimum of $50,000 for property damage. The violation of this Section or any of the provisions of Regulation 214/80 is an offence under Section 26.

Section 8 Applying Pesticides to Open Water

A farmer shall not deposit or permit the deposit of a pesticide into or over an open body of water or within 30 horizontal metres of an open body of water. Regulation 213/80 confirms the 30 horizontal metres unless the farmer has an appropriate licence, i.e., Class H. The farmer must then conform with label instructions. The application of pesticides within 30 horizontal metres of an open body of water or contrary to the pesticide label if the holder of a licence is an offence under Section 26.

Section 9 Containers and Storage

A farmer shall not store a pesticide other than in the original container or a container bearing a proper label and approved by the manufacturer. Pesticides in holding tanks or sprayers are exempt. The storage of pesticides in non-approved containers is an offence under Section 26.

Section 10 Disposal

A farmer shall dispose of pesticides and pesticide containers at a site or in a manner approved by Regulation or where there is no Regulation in accordance with the manufacturer's directions. Any improper disposal of a pesticide is an offence under Section 26.

Section 11 Notification and Clean-up

Section 11 requires notification to the Minister of any discharge of a pesticide into the natural environment and provides the authority for the Minister to issue an order requiring clean-up of any such spill. See Section 20 below.

Section 12 Equipment

A farmer may not wash pesticide application equipment in an open body of water or in a well, cistern, dugout, or reservoir controlled by a local authority. A farmer may not wash pesticide application equipment, including an aircraft, within 30 horizontal metres of the said
bodies of water. A farmer drawing water from an open body of water must have equipment fitted with a back-flow prevention device. Any activity contrary to this Section is an offence under Section 26.

Section 15

Prohibition of Sale of Contaminated Food Minister of the Environment based on evidence he considers adequate, may by order prohibit or restrict the sale, handling or use of any crop, food, feed, livestock, plants, water, produce or other matter that is contaminated by an agricultural chemical. The Minister may also order the destruction or disposal of any contaminated matter without compensation to the owner. The owner is allowed an appeal to the Agricultural Chemical Advisory Committee.

Section 17 Suspension

If an inspector is of the opinion that the use, handling, storage, sale, disposal, display, method of application or transportation of any agricultural chemical is or may be dangerous to the health of persons or animals or contrary to the Certificate of Registration under the federal Pest Control Products Act, the inspector may by order suspend the activity involved for 7 days. See Section 20 below. The farmer affected may appeal to the Agricultural Chemicals Advisory Committee.

Section 18 Chemical Control Order

The Director of Pollution may make a Chemical Control Order directed at the person responsible for the agricultural chemical if in his opinion the use, handling, storage, sale, disposal, display, method of application or transportation of the agricultural chemical:

- causes or is likely to cause injury, damage or impairment of the quality of the natural environment;
- causes or is likely to cause injury or damage to property or plant or animal life;
- adversely effects or is likely to adversely effect the health or safety of any person;
- renders or is likely to render, directly or indirectly, any property or plant or animal life unfit for use by humans.

The Chemical Control Order may prohibit, suspend or control the use of the agricultural chemical. A "person responsible" is defined as the owner or person having charge, management or control of the agricultural chemical at the time in question. This would
include the farmer who owns or rents the farm, the farmer's employees, including family members, custom applicators applying pesticides or fertilizers on his farm or rented land, and anyone else managing or controlling the agricultural chemicals. It would also likely include a bank, a receiver and a trustee in bankruptcy if such people had taken control of the farm. See Section 20 below. An appeal is provided to the Agricultural Chemical Advisory Committee.

Section 20  Cost of Compliance with Order

If the farmer or person to whom the order under Sections 11, 17 or 18 is issued fails to comply with the order, the Director may take whatever action is required and charge the cost of compliance to the person to whom the order was directed.

Section 26  Offence

This section makes it an offence to breach any other section of the Act or Regulations. On finding of guilt by the court, the farmer is liable to a fine of up to $1,000, imprisonment for 90 days with no fine or to imprisonment and fine. Charges must be laid within 2 years of the date of the occurrence.

Department of the Environment Act

Section 15  State of Emergency

The Minister of the Environment may report to the Lieutenant Governor in Council (Cabinet) that a natural resource has been, is being or likely will be destroyed or polluted and that urgent coordinated action is required to prevent, stop or alleviate the problem. The Cabinet may by order declare a state of emergency. Once the state of emergency is declared, the Minister of the Environment may require any provincial employee, municipal employee or private citizen, (unless exempt by regulation) to provide services to the Minister to assist in attending to the emergency.

Section 17  Stop Orders

The Minister, on satisfying himself that a farmer has or will likely violate the Act, Regulations or any other Act, and that the violation would result in damages to the environment, may issue a stop order to the farmer requiring the farmer to cease contravention of the Act or regulation or to stop any activity related to the violation for a specified period. The reasons for the stop order must be given to the farmer.

Environmental Liability in the Agriculture Sector
Failure to comply with the stop order is an offence. In addition, the Minister may apply to the Court of Queen's Bench for a court order directing the farmer to comply with the stop order. Failure to comply with the court order would be contempt of court. The Minister can recover the costs for obtaining these orders from the farmer. The farmer can appeal to the Minister for a review of a stop order and the appeal is referred to the Environment Council. The Environment Council holds an inquiry and makes recommendations back to the Minister who shall then rescind, vary or confirm the stop order.

**SASKATCHEWAN**

**Environmental Management & Protection Act**

**Section 3  Investigation into Discharge**

The Minister of the Environment may make any investigation deemed necessary with respect to a discharge of a pollutant into the environment. The cost of the investigation is a debt owed to the Crown and may be recovered from the farmer or person having control of the pollutant. The farmer or person in control of the pollutant may raise the defence of due diligence in resisting the Crown's claim for recovery of investigation costs.

**Section 4  Restoration Order**

Subject to the terms of any licence, permit or privilege granted under the Act, where the Minister of the Environment is of the opinion a pollutant is being discharged into the environment or is present in circumstances that is harmful or potentially harmful to the environment, the Minister may issue an order to a farmer or person in control of the pollutant or person responsible for the presence of the pollutant directing the farmer or person to take any measures required to protect or restore the environment.

**Section 7  Minister to Carry Out Order**

When a person who has been directed to protect or restore the environment fails to do so, the Minister may carry out the order and recover the costs as a debt owed the Crown.

Environmental Liability in the Agriculture Sector
Section 8  Power to Take Immediate Action

Where the Minister considers it in the public interest to take immediate action or cannot identify the person in charge of the pollutant, the Minister may take any measures required to protect or restore the environment. The cost may be recovered as a debt owed to the Crown as per Section 7.

MANITOBA

Environment Act

Section 10  Licence Required for Development

No person shall emit, directly or indirectly, any contaminate into the air, into or upon the soil, or contaminate any body of water or leave any contaminant on the ice of any body of water without a valid licence.

Section 33  Penalties

A person who violates any provision of this Act or the regulations pertaining thereto, or fails to comply with any order by the Clean Environment Commission is guilty of an offence and upon conviction is liable, in the case of an individual, to a fine not exceeding $50,000 or to imprisonment for not more than 6 months or to both. Each day the contravention occurs is a separate offence.

ONTARIO

Conservation Authorities Act

Section 21  Power of Conservation Authority

The Conservation Authority has the power to control the flow of surface waters in order to prevent floods or pollution or to reduce the adverse effects thereof, alter the course of any watercourse, and to develop programs whereby the natural resources of the watershed may be conserved, restored, developed and managed.
Section 28  Power to Make Regulations

The Conservation Authority has the power to make regulations:

- restricting and regulating the use of water from waterbodies, including artificially constructed depressions in rivers and streams;
- controlling the alteration and construction of any watercourse;
- regulating the use of ponds used as a source of water for irrigation;
- regulating the building of any structure on flood lands;
- regulating the dumping of fill on flood lands.

Sub-section 28(2) preserves the rights of farmers to use water for domestic or livestock purposes. Sub-section 28(7) provides the court with the power upon entering a conviction to order the guilty person to remove any building or fill placed on flood lands in contravention of the regulations.

Section 28(6)  Offence

The contravention of any regulation is an offence and a person on conviction is subject to a fine of not more than $1,000 or a term of imprisonment of not more than 3 months.

The application of the Conservation Authorities Act in Ontario has become contentious with farmers in some areas. Some Conservation Authorities are requiring fenced watercourses with substantial grassed set backs to keep livestock out of the watercourse. A farmer with several streams on his farm may find his ability to farm severely restricted. To date, no compensation has been offered to farmers. Court action may be required to obtain such compensation.

Environmental Protection Act

Section 3  General

Section 3 of the Act states that "the purpose of the Act is to provide for the protection and conservation of the natural environmental". "Natural Environment" is defined as the "air, land and water, or any combination or part thereof, of the Province of Ontario". All activities of the government in enforcing provisions of the Act must be confined to this purpose and occur in the natural environment. It is important to note that actual environmental damage is not a prerequisite to government intervention. The Act empowers the government to protect the environment and prevent environmental damage.
Section 6   Discharge in Excess of Regulations

Section 6(1) prohibits the discharge into the natural environment of any contaminant in excess of levels prescribed by regulation. Sub-section 6(2) exempts animals wastes disposed of in accordance with normal farming practices. Most regulations also have offence sections that create offences if the regulation is exceeded. The exemption in Sub-section 6(2) is often not available in the regulation created offences.

Section 7   Control Order

The Regional Director of MOEE may issue a control order when the Director receives a report from a provincial officer containing a finding that a contaminant discharged into the natural environment is prohibited by the regulations or is in violation of Section 14 and Section 6. The control order may be issued to an owner or previous owner, who is or was in occupation of the discharge or had the charge, management or control of the source of the contaminant. A control order under Section 7 may only be issued if illegal pollution has occurred. The control order may require the person to stop or reduce the discharge and take steps to manage the situation.

Section 8   Stop Order

Where the discharge of a contaminant is an "immediate danger to human life, the health of any person or to property" the Regional Director of MOEE may issue a stop order requiring the discharge to stop immediately. It should be noted that a control order under Section 7 can also require cessation of the discharge.

Section 9   Air Emission Control

Section 9 requires a Certificate of Approval for any construction or alteration of any business or system that may result in a discharge of a contaminant into the natural environment. Sub-section 9(4) exempts "any plant, structure, equipment, apparatus, mechanisms or thing used in agriculture". The term used in this exemption is "agriculture" and not "farming". The exemption may apply to agricultural related structures, i.e. feed mills.

Section 14   General Pollution Prohibition

Section 14 prohibits the discharge of a contaminant that causes or is likely to cause an adverse effect. Section 1 defines adverse effect to be one or more of:

- impairment of the quality of the natural environment for any use that can be made
of it;
• injury or damage to property or to plant or animal life;
• harm or material discomfort to any person;
• an adverse effect on the health of any person;
• impairment of the safety of any person;
• rendering any property or plant or animal life unfit for human use;
• loss of enjoyment of normal use of property; and,
• interference with the normal conduct of business.

QUEBEC

Environmental Quality Act

Section 20 Prohibition Against Discharge

No person may emit or discharge or allow the discharge of a contaminant in excess of amounts established by regulation, prohibited by regulation or where the contaminant is likely to effect the life, health, safety, welfare or comfort of human beings, or to cause damage or to otherwise impair the quality of the soil, vegetation, wildlife or property.

Section 25 Stop Order

When the Minister determines a contaminant in the environment, he/she may order the person responsible for the source of the contamination to cease temporarily or permanently the discharge of the contaminant into the environment or order such other measures as determined necessary.

Division V Water Management

Any farmer establishing a waterworks or waste treatment system must obtain authorization from the Minister of the Environment.
NEW BRUNSWICK

Clean Environment Act

Section 5 Control Order

The Minister may issue a control order requiring the person to whom it is directed to:

a) stop, limit or control the rate of discharge of any contaminant into the environment, permanently or for a specified period of time in accordance with the terms of the order;

b) alter the manner of discharge of a contaminant in accordance with the terms of the order;

c) alter the procedures to be followed in the control or elimination of the discharge and the installation of equipment to control or eliminate the discharge of a contaminant.

A single order may deal with several contaminants. Subject to appeal, the control order shall remain in effect until rescinded by the Minister.

NOVA SCOTIA

Environmental Protection Act

Section 23 Permit for Polluting by Facility

No person shall own, occupy, operate or be responsible for the operation of a plant, structure, facility undertaking or thing that discharges or threatens a discharge a waste into the environment that causes pollution without a permit.

PRINCE EDWARD ISLAND

Environmental Protection Act

Section 7 Investigation of Pollution

The Minister of the Environment may investigate pollution caused by some person's act or omission. Where the investigation determines that the person's acts or omission will cause
or is likely to cause pollution, the Minister may order the person to take remedial action to control, eliminate or investigate the pollution. A person who fails to comply with the order is liable to a fine of not less than $200 and not exceeding $10,000 or 90 days in jail, or both. Each day of non-compliance is a separate offence.

Section 7 Combatting Pollution

The Minister of the Environment may by order take any remedial action to control, eliminate or mitigate a cause of pollution. Where the Minister must act due to failure of a person to comply with an order, the Minister may recover costs from that person.

Section 9 Prohibition Against Pollution

No person shall deposit or discharge any material onto land, into air or water or any place that may cause pollution or impair the quality of the land, or water. Any person that violates any provision of this Act is liable on conviction to a fine between $200 and $10,000 or in default 90 days imprisonment.

Unsightly Property Act

Section 2 Clean-Up Order

Where an inspector appointed by the Minister of the Environment considers any real property to be an unsightly property, the inspector may issue a clean-up order. An unsightly property is defined as "any real property upon which there is litter, dilapidated buildings, structure or parts thereof that cause the real property to look unsightly. The order is served on the owner or person in control and may require the person to clean up the property. The person may appeal the order to the Land Use Commission.

Section 12 Failing to Comply

Where the person so served with the order fails to comply, the inspector may carry out the directives in the order.

Section 13 Recovery of Costs

Where the Inspector is required to carry out the directive of the order in Section 12, the costs are a debt due to the Crown and may be recovered as such.
Section 17  Offence

Every person who fails to comply with a clean-up order under Section 12 is punishable on conviction to a fine between $100 and $1,000 or imprisonment in lieu thereof. Each day of non-compliance is a separate offence.

NEWFOUNDLAND

The Department of the Environment & Lands Act

Section 21  Property in Water

The property and right to use water in the Province vests with the Crown in right of the Province.
Appendix II

NOTIFICATION OF A DISCHARGE AND ASSISTANCE TO THE CROWN
APPENDIX II

NOTIFICATION OF A DISCHARGE AND ASSISTANCE TO THE CROWN

Notification:

Alberta: Agricultural Chemicals Act

Section 11 requires that any person who deposits an agricultural chemical into the natural environment that causes or is likely to cause impairment of the quality of the natural environment or injury or damage to animal or plant life shall forthwith notify the Minister of the Environment. The person must take all measures prescribed by the Director of Pollution Control (MOE) to remediate the contamination.

Ontario: Environmental Protection Act

Section 13(1) requires every person who discharges a contaminant into the natural environment or is responsible for a source of contaminant that is discharged into the natural environment to notify the Minister. Sub-section 13(2) does not apply to animal waste disposed of in accordance with normal farming practices.

Quebec: Environmental Quality Act

Section 21 requires that any person who accidentally discharges a contaminant into the environment must notify the Minister of the Environment of the discharge.

Saskatchewan: Environmental Protection & Management Act

Section 9 requires the owner of a pollutant, person having control of a pollutant, any person on whose property a pollutant is located or any person having knowledge relating to the discharge of a pollutant to notify the Minister of the Environment forthwith.

Assistance To The Crown:

Northwest Territories: Environmental Protection Act

Section 9 provides an inspector with the powers to enter onto private property, except a private dwelling, for the purpose of conducting an investigation or inspection thereof. The owner or person in charge must provide reasonable assistance.

Environmental Liability in the Agriculture Sector
Alberta: Agricultural Chemicals Act

Section 22 provides an inspector with authority to, at any reasonable time, enter onto or inspect any land, premises, vehicle, equipment, record, document or other property for purposes of administering the Act. The inspector can inspect and take any samples required for administration of the Act. With respect to a private dwelling the inspector requires a search warrant.

British Columbia: Environmental Management Act

Section 8 provides authority for the Minister, members of the Environmental Appeal Board, conservation officers and other persons designated by the Minister to enter any property except a private residence. Obstructing an officer is an offence and subject to a fine not exceeding $100,000.

Prince Edward Island: Environmental Protection Act

The Minister of the Environment or his agents, under the authority of Section 7, may enter any premises, land, plant, or establishment and make necessary investigations to carry out the purposes of the Act. Obstruction of a Ministry official is an offence punishable on conviction with a fine of between $200 and $10,000 or 90 days in jail in lieu thereof.

Prince Edward Island: Unsightly Property Act

Under Section 14 the inspector has the right of entry onto private property to investigate the alleged unsightly property for purposes of the Act. Obstruction of an inspector is an offence punishable on conviction to a fine between $100 and $1,000.

Quebec: Environmental Quality Act

Section 119 provides the inspector with the right to enter private land, except a dwelling, to investigate and collect samples for purposes of implementing the provisions of the Act.

Section 121 provides authority for the inspector to seize any product that the inspector has reason to believe contains a contaminant in excess of regulatory standards. If the level of contamination is confirmed, the Ministry has the power to order confiscation and destruction of the contaminated product.
FARM CREDIT CORPORATION'S ENVIRONMENTAL ASSESSMENT QUESTIONNAIRE
# Environmental Assessment

This form is to be completed by the loan applicant or the undersigned to provide the lender with information on potential environmental contamination of properties offered or given as security.

## Loan Number:

<table>
<thead>
<tr>
<th>Name(s):</th>
<th>Property Address(es) (if different) / Legal description:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Address:</td>
<td></td>
</tr>
<tr>
<td>Legal description attached</td>
<td>YES ______ NO _______</td>
</tr>
</tbody>
</table>

(Complete all of Section I and other sections as directed)

## Section I

1. Have any of the following ever been buried, dumped, stored, or disposed of either in or on the land, surface waters or in buildings on any of the property:  
   - Chemical or industrial waste  
   - Sludge from waste water treatment plants  
   - Waste oil/petroleum products  
   - Other hazardous material: liquid or solid waste (including off-site, abandoned vehicle equipment or garbage of any kind)

   If yes, provide details: 

2. Are you aware of any contamination of soil, streams, ponds, or groundwater caused by the disposal and/or storage of such substances? YES ______ NO ______ To explain: 

3. Do you obtain your drinking water from a well? YES ______ NO ______ If yes, have you ever submitted a sample of the well water for testing? YES ______ NO ______ If yes, what year? Results: 

4. Have you received notice from any governmental authority concerning any toxic or hazardous material on the property?

   YES ______ NO ______ To explain: 

5. Is there a natural gas or oil well located on the property? YES ______ NO ______ If yes, who owns the well?

6. Are there pesticides, herbicides, or fertilizers being stored or will they be stored, used, or disposed on the property?

   YES ______ NO ______ If yes, complete Section III

7. Does the pledged property contain above or underground storage tanks?

   YES ______ NO ______ If yes, complete Section III

8. Are there any animal feeding operations on the property?

   YES ______ NO ______ If yes, complete Section III

9. Is there a processing operation on the property?

   YES ______ NO ______ If yes, complete Section III

10. Are you aware of any environmental enforcement orders (complaints/violations) concerning the property?

    YES ______ NO ______ If yes, explain:

11. Are you aware of other potential environmental hazards connected with the property or the operation on the property? (E.g.: contaminated wells, past manufacturing or industrial site, asbestos, radon, PCB’s, area formaldyhyde insulation, or unexplained features, etc.)

    YES ______ NO ______ If yes, explain:

## Certification

I hereby certify that the information provided is a true and accurate statement concerning any potential environmental hazards connected with the above property and the operations of the undersigned.

<table>
<thead>
<tr>
<th>Signature</th>
<th>Date</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Signature</th>
<th>Date</th>
</tr>
</thead>
</table>
Handling of Fertilizers, Herbicides and Pesticides

A Please explain (1) where the products are/\text{or} will be stored, (2) the length of time these products are/\text{or} will be generally stored, (3) a description of the containers in which these products are/\text{or} will be stored, and (4) whether these chemicals will be used in the production of crops in the future.

B Please briefly describe how you discard empty containers and unused portions of herbicides, pesticides, or fertilizers.

C When mixing chemicals or cleaning chemical application equipment, does the discharge flow into surface water such as a stream, pond, ditch or a leach field? YES ___ NO ___ If yes, describe the body of water into which it flows.

Underground and Above Ground Storage Tanks

A List all above ground and underground storage tanks

<table>
<thead>
<tr>
<th># of tanks</th>
<th># of litres</th>
<th>Age of tanks</th>
<th>Tank material</th>
<th>Above or underground</th>
<th>Substance stored</th>
<th>Distance from well</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

B Have all of the tanks described in Question A been registered? YES ___ NO ___ If no, explain why not.

C Have the underground storage tanks been tested to ascertain if any leaks have occurred? YES ___ NO ___ If yes, what were the results?

D Have you had any leaks from any storage tanks? YES ___ NO ___ If yes, please specify the month and year when the leak was discovered, the kind of substance leaked (e.g. petroleum) and the estimated volume of substance leaked, if known.

E Do you have a residential septic tank with drainage bed? YES ___ NO ___ Has it been approved by the local authorities? YES ___ NO ___

Animal Operations

A Dairy ___ Poultry ___ Beef ___ Hogs ___ Other (please specify) ___

B Please specify the kind of manure management system you employ:

<table>
<thead>
<tr>
<th>Manure Storage</th>
<th>Type</th>
<th>Capacity (in months)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

C Is there any runoff from your manure storage into surface waters? YES ___ NO ___ If yes, please describe.

D For dairy operations, does the milkhouse wash water flow into an approved disposal system? YES ___ NO ___

E List any permits or certificate of compliance for your manure disposal system:

<table>
<thead>
<tr>
<th>Type of permit/Certificate</th>
<th>Date issued</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Processing Operations

A Please specify kind:

B Is the waste from the operation discharged into an approved disposal system? YES ___ NO ___ If no, please describe where the waste water is discharged.

C List permit(s) for waste water discharge, waste registration and/or air emission and indicate date(s) acquired:

<table>
<thead>
<tr>
<th>Permits</th>
<th>Date acquired</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

FCC's Environmental Assessment Supplement

Borrower/Applicant Name:

This form relates to security inspection on form 4916 for this loan.

Appraiser Confirmation

If there are no environmental concerns, please complete section A, otherwise complete B.

A  ❑ Based on an inspection and other relevant inquiry, the undersigned has determined that the environmental conditions and information disclosed in the Environmental Assessment, Form 4916, dated ______________, reasonably reflects the conditions observed on the property.

❑ Adjacent Properties. There are no practices or activities which could affect the environmental assessment on the property offered as security.

B  ❑ List any kind of limiting conditions that may have restricted your inspection:

____________________________________________________________________

____________________________________________________________________

Based on an inspection of the subject property and other relevant inquiry, the undersigned submits the information below to amend, clarify or supplement environmental information contained in the Environmental Assessment Form, 4916, dated __________ for the following:

(Check applicable topics)

❑ 1 - Regulatory Compliance
❑ 2 - Pesticide, Fertilizer, and Herbicides Application and Use
❑ 3 - Material Use, Storage and Disposal
❑ 4 - Surface and Ground Water Quality
❑ 5 - Storage Tanks
❑ 6 - Animal Operations
❑ 7 - Processing Operations
❑ 8 - Stressed Vegetation
❑ 9 - Other Real Estate Owned or Operated by Applicant
❑ 10 - Adjacent Properties
❑ 11 - Other

Details: Please provide your recommendations as to the corrective measures and the estimated cost to cure. (Use attachments if necessary)

____________________________________________________________________

Appraiser's Signature

Appraiser's Number

Date

Risk Codes

<table>
<thead>
<tr>
<th>Code</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>None</td>
</tr>
<tr>
<td>2</td>
<td>Negligible</td>
</tr>
<tr>
<td>3</td>
<td>Moderate</td>
</tr>
<tr>
<td>4</td>
<td>Severe</td>
</tr>
<tr>
<td>5</td>
<td>Identified</td>
</tr>
</tbody>
</table>

Greening The Farm