

ENVIRONMENTAL ISSUES IN AGRICULTURE

PRESENTED BY:

Wendy Baker
Tony Crossman
Sarah Hansen
John Tidball

March 14, 2014



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Straight Talking. Lateral Thinking.

Legal Expertise, Business Sense, Common Sense

Miller Thomson benefits from a unique, no-nonsense business culture. We have always been defined by our people and, as a group, we believe in sticking to the fundamentals. Our lawyers pride themselves on their ability to provide practical, creative and cost-effective advice. That advice is combined with a client service focus based on uniformly held values of responsiveness, transparency and accountability that make Miller Thomson a firm that businesses enjoy working with. Our clients' interests come first, and that starts with understanding your business and objectives. From there, it means "getting the job done right", and handling each of your matters efficiently, transparently and in a timely fashion, regardless of their size or degree of complexity. It is this approach to the practice of law, along with the clients we represent, that have helped us grow to become one of Canada's leading national business law firms.

Canadian Lawyers with Global Perspective

Miller Thomson's professionals are regularly engaged in cross-border and international transactions, and play an active role in a variety of trade organizations. The firm is a proud member of Multilaw – a global network of independent law firms working collectively to support clients' interests internationally. Our long-standing relationships with leading U.S. and other foreign law firms equip us to actively support the expanding reach of Canadian businesses.

Local and Regional Insight

Miller Thomson understands the uniqueness of the local markets we serve. Our growth as a firm has been tied to a commitment to be as accessible as we can to our clients. We offer the advantages of a strong national presence and reputation, but with the all-important local knowledge and perspective that enable us to deliver informed and practical legal services.

Industry and Practice Expertise

Our lawyers collaborate nationally, using a multi-disciplinary approach to identify solutions for clients. Our clients benefit from the experience and expertise that come from the sharing of best practices by our professionals across the country.



Highest Standards of Service

Service excellence is amongst the most important of Miller Thomson's values. We build strong relationships with our clients by listening, and by providing timely, proactive, and strategic advice. These relationships are our most valued assets. A significant part of great service is great communication. We believe in collaboration and teamwork with clients and colleagues. Working individually or in teams, we focus on providing the highest levels of service to our clients.

450+ lawyers focused on your objectives.

ABORIGINAL

AGRICULTURE AND FOOD PRODUCTION

ANTI-CORRUPTION AND INTERNATIONAL GOVERNANCE

BANKING AND FINANCIAL SERVICES

CAPITAL MARKETS AND SECURITIES

CHARITIES AND NOT-FOR-PROFIT

CLEANTECH

COMPETITION / ANTITRUST

CONSTRUCTION AND INFRASTRUCTURE

CORPORATE AND COMMERCIAL

CORPORATE GOVERNANCE

EDUCATION LAW

ENERGY AND NATURAL RESOURCES

ENVIRONMENTAL

HEALTH

IMMIGRATION

INFORMATION TECHNOLOGY

INSOLVENCY AND RESTRUCTURING

INSURANCE

INTELLECTUAL PROPERTY

INTERNATIONAL TRADE, CUSTOMS AND COMMODITY TAX

LABOUR AND EMPLOYMENT

LITIGATION

MARKETING, ADVERTISING AND REGULATORY

MERGERS AND ACQUISITIONS

MUNICIPAL SERVICES

PRIVATE CLIENT SERVICES

REAL ESTATE

REGULATORY

RETAIL

TAX

For more on our wide range of legal services, please visit millerthomson.com

At Miller Thomson, we strive continually to exceed your expectations. With lawyers in more Canadian cities than any other law firm, we can help your business achieve its goals with added experience, clarity and value.

Over 450 lawyers in 11 offices across Canada are dedicated to putting your best interest first.

Connected to your business.

Our Contact Coordinates

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Miller Thomson LLP
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AGRIBUSINESS AND FOOD

OUR GROUP

Miller Thomson's Agribusiness and Food Group has lawyers from various disciplines across Canada offering an in-depth understanding of legal issues and challenges in agriculture and food production. With our knowledge and experience in this complex and unique area of law, we can advise on every client's legal needs in a professional and cost-effective manner.

OUR EXPERIENCE

We offer in-depth knowledge and practical advice on:

- Marketing boards and commissions
- Livestock and plant production
- Agriculture lending and recoveries
- Commercial transactions involving agriculture & food production
- Litigation on agricultural & food production issues
- Business organization & development
- Land use planning & environmental issues
- Liability of governments & government agencies
- Grain law
- Food Labelling
- Food Safety
- Marketing & transportation
- Intellectual property
- Farm succession planning and estates, tax issues
- Tax issues

OUR EXPERTISE

- Successful federal court administrative challenge of CFIA refusal to compensate livestock owners for value meat products directed to be destroyed as a result of contact with infectious disease
- Litigation of damage claims resulting from recall of food products contaminated with genetically modified materials
- Representation of many of the BC and Alberta poultry associations in disputes and negotiations with provincial and federal regulated authorities
- Advice regarding foreign ownership of agricultural land

- Transactional and competition advice in the acquisition of significant processing facilities
- Representation of producers in disputes under provincial Farm Practices legislation
- Advisors to micro breweries in manufacturing, distribution and licensing matters, including issues with Alcohol and Gaming Commission of Ontario
- Creation and capitalization of agricultural cooperatives including private offerings
- Succession planning for owner-manager of farm equipment manufacturing company, including tax issues related to intergenerational rollover, capital gains exemption, and corporate association rules
- Litigation arising from failure to comply with USDA import standards for food products
- Estate freeze and estate planning for farm family, including tax issues related to intergenerational rollover, capital gains exemption, and attribution rules
- Advice in the creation of farming corporations and holding corporations, and in the sale and purchase of farms and farm assets
- Advice regarding intellectual property issues including certification marks and trade-marks
- Representation of boards and commissions, including the Ontario Bean Producers Marketing Board, the BC Blueberry Council, and the Quebec Maple Syrup Producers
- Advice relating to food safety, including production protocols, labeling, and packaging
- Advice regarding primary and further processing agreements, warehouse agreements, grower agreements, packing and co-packing agreements, and export and distribution agreements
- Environmental advice related to growing and processing operations, including environmental charges, nuisance, and water rights

ENVIRONMENTAL

OUR GROUP

Miller Thomson's Environmental Law Group lawyers are legal planners, negotiators and advocates. Many have experience as professional engineers, regulators, prosecutors and policy makers.

OUR SERVICES

Serving a broad range of clients from many industries, we provide integrated expertise in all areas of environmental law including:

- Contaminated land/brownfield redevelopment
- Defence of environmental and related prosecutions
- Directors and Officers liability
- Emission control and abatement
- Environmental approvals
- Environmental assessment
- Environmental civil litigation
- Environmental compliance
- Environmental insurance
- Land acquisitions, development and sale
- Legislative drafting and interpretation
- Transactional environmental due diligence
- Waste management
- Water and sewage servicing

OUR EXPERIENCE

Our lawyers have cultivated a thorough knowledge of government processes and regulators and continue to maintain excellent relationships with existing personnel.

Because of the size and expertise of our Group, and the relationships our lawyers have with a wide variety of environmental consultants, our partners delegate both internally and also outsource to consultants and paralegals, as needed, to maximize the client's advantage. Thus, we are always able to offer cost-effective and timely legal advice.

REPRESENTATIVE WORK

- Acted as counsel to the municipality in the Walkerton Water Inquiry (including all the attendant regulatory, enforcement and remedial work)
- Advised municipalities regarding compliance with post-Walkerton legislative and regulatory initiatives
- Consulted counsel for the municipality in the North Battleford Water Inquiry
- Litigated a precedent setting contaminated site case in B.C. Supreme Court
- Appeared in the Court of Appeal for Ontario for a major oil company in its appeal of charges laid under the *Environmental Protection Act*
- Resolved significant environmental insurance claims
- Successful defence of companies and directors and officers in environmental prosecutions
- Advised on transactions involving contaminated land and negotiated agreements between land owners dealing with environmental contamination, brownfield redevelopment and brownfield funding
- Mediated a multi-party dispute with various levels of government involving urbanisation and contamination issues



Wendy Baker, Q.C.

Partner
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PROFILE

Wendy Baker is a Partner in the Litigation group in the Vancouver office. She practices general commercial litigation, with experience spanning many industries and areas of practice including complex commercial disputes, agriculture, construction law, aboriginal law, and administrative law, and has appeared at all levels of court in BC and federally. In 2009 Wendy was appointed Associate Commission Counsel to the Federal Inquiry into the Decline of Sockeye Salmon in the Fraser River (the Cohen Commission).

Wendy is particularly interested in finding creative solutions to complex and challenging problems, and brings a breadth of experience to this task. Examples of some of the areas in which Wendy has focussed her practice are:

- **Complex / commercial litigation:** Wendy has been involved in a wide range of major commercial disputes, including those involving commercial leases and agreements, real estate transactions, breach of contract, shareholder disputes, breach of fiduciary duty claims, and actions against governmental authorities. Wendy has also represented clients in professional negligence claims against architects and lawyers.
- **Agriculture:** Wendy is well versed in the regulations which govern agriculture in Canada, and has acted for many farmers and processors in disputes with regulatory agencies including the BC Hatching Egg Commission, the BC Egg Marketing Board, the BC Chicken Board, the BC Vegetable Commission, the BC Milk Marketing Board, the BC Farm Industry Board, the Chicken Farmers of Canada, and the Canadian Food Inspection Agency. Specific issues have included the scope of regulatory powers, competition, food safety, interprovincial and international trade, and commodity price setting in the province. In this respect Wendy has appeared before arbitrators, mediators, the BC Farm Industry Review Board, and the Canadian Farm Products Council, and has been counsel on appeals to the B.C. Supreme Court and Court of Appeal from decisions of the lower tribunals. Wendy has also represented the BC Blueberry Council.
- **Construction litigation:** Wendy has represented owners, developers, contractors and trades in disputes ranging from breach of contract to negligence, and a large portion of her construction work in recent years has centered on large multi-party litigation.
- **Aboriginal law:** Wendy has been involved in aboriginal rights and title issues, and has represented bands on issues involving reserve lands, resource development, business development, business disputes and governance.

Industry Expertise

Agribusiness and Food
Construction and Infrastructure

Key Practice Expertise

Aboriginal
Administrative Law
Commercial Litigation
Construction Litigation and Dispute Resolution
Shareholder Disputes
Litigation

Areas of Focus

Regulated Marketing
Professional Liability Disputes

Year of Call

British Columbia Bar, 1993

EDUCATION

- LL.B., University of Victoria, 1992
- B.A. (Hon. English), University of British Columbia, 1987

PROFESSIONAL ACHIEVEMENTS

- Awarded Advocate's Prize for Legal Writing, 1992
- BV Rated, Martindale-Hubbell
- Appointed Queen's Counsel, 2009
- Listed in 2013 Canadian Legal Lexpert Directory of leading lawyers for Aboriginal Law

DIRECTORSHIPS

- Chair, Karen Jamieson Dance Company

MEMBERSHIPS

- Member, Law Society of British Columbia
- Member, Canadian Bar Association
- Member, B.C. Trial Lawyers' Association

PRESENTATIONS

- Expert Evidence, CLEBC course, 2013
- Aboriginal Rights to Fish & Environmental Law, Pacific Business and Law Institute conference, 2013
- The Role of Public Inquiries in Resolving Public Interest Disputes, UBC Centre for Law and the Environment, 2012
- Negotiation: Top 10 Tips for Women, CBABC forum: "Power Negotiation and Communication Strategies for Women Lawyers", 2012
- Resolution of Construction Disputes, CLEBC course: "Construction Law", 2010
- Self-Help Remedies, BC CLE course: "Construction Law", 2009
- Pre-Negotiation Strategy in Multiparty Litigation, CLEBC course: "Let's Talk Construction Law", 2008
- Aboriginal Law - Mining, BC CLE course: "Aboriginal Law and Natural Resource Use", 2005
- The Case Against Municipalities - the Post Delta Blues. Where do we go from here?, Pacific Business & Law Insititute seminar: "Pushing the Envelope: The State of Leaky Building Litigation", 2003
- Water Law in BC: An Overview, Insight: "Water Forum", 2001
- Emerging Trends in Toxic Tort Litigation, Canadian Institute conference: "The Changing Face of Environmental Law & Regulation in B.C.", 1996

PUBLISHED WORKS

- Co-authored chapter: "Commercial Real Estate Disputes", D. Owen, ed., *British Columbia Business Disputes*, looseleaf, Continuing Legal Education Society of British Columbia, 2011

PUBLICATIONS

- Consultation and Relationship-Building between First Nations and Business, *Aboriginal Law Update*, November 2005
- Still Exposed? There are No Easy Ways to Determine When Liability Ends, *Canadian Consulting Engineer*, 2004
- Applications for Leave to Appeal and other Pre-Appeal Matters, *The Verdict*, 1994



Tony Crossman

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PROFILE

Tony Crossman has over 25 years experience and advises on all aspects of environmental law, from corporate compliance and due diligence through to regulatory, civil and criminal matters, with a focus on Western Canada and the Yukon. His environmental work covers many sectors of the economy including manufacturing, energy, real estate, municipal, mining, natural resources, waste management, forestry, and transportation.

In his practice, Tony advises about the maze of environmental regulations. He gets involved with permit applications, when orders are issued (or threatened to be issued) by environmental regulators and represents those involved in litigation involving environmental issues.

Tony is a recognized leading environmental lawyer, named in the Chambers Global Guide of the World's Leading Lawyers, International Who's Who of Environmental Lawyers, Who's Who Legal: Canada, the Canadian Legal Lexpert Directory, and Best Lawyers in Canada.

He is a past Chair of the Canadian Bar Association's National Environment, Energy and Resources Law section, and is admitted to practice in Australia (1985), British Columbia (1996), Nova Scotia (1996), Yukon (2000), and Nunavut (2013).

Tony is the author of the BC & Yukon chapters of *Canadian Environmental Law* (LexisNexis), the BC chapter of *The Law of Climate Change in Canada*, and the Environmental chapter of *Business Laws of Canada*. He is a contributor to the *BC Contaminated Sites Handbook*, and *Halsbury's Laws of Canada*.

Tony has extensive experience in identifying and managing environmental risks, providing strategic advice on day-to-day issues about how best to navigate the processes to obtain the required results. He has worked for private companies (multinational, national and local), governments (national, provincial and local) and the regulators themselves.

Industry Expertise

CleanTech
Energy and Natural Resources
Real Estate
Construction and Infrastructure
Real Estate
Transportation

Key Practice Expertise

Environmental
Litigation

Areas of Focus

Manufacturing
Natural Resource Development (Mining, Forestry, Oil & Gas)
Land & Infrastructure Development
Chemical Manufacturing & Handling
Waste Management
Environmental Emergencies & Investigations
Climate Change / Greenhouse Gas Regulation
Contaminated Sites
Environmental Assessment
Environmental Approvals

Year of Call

South Australia Bar, 1985
Nova Scotia Bar, 1996
British Columbia Bar, 1996
Yukon Bar, 2000
Nunavut Bar, 2013

EDUCATION

- LL.M. (Environmental), University of Adelaide, Australia, 1995
- LL.B., University of Adelaide, Australia, 1985

PROFESSIONAL ACHIEVEMENTS

- Chambers Global Guide of the World's Leading Lawyers - Environmental Law, 2013
- International Who's Who of Business Lawyers
- International Who's Who of Environmental Lawyers
- Who's Who Legal: Canada
- Who's Who Legal, Special Report on Canada, 2013
- Canadian Legal Lexpert Directory of leading lawyers - Environmental Law
- Best Lawyers® in Canada - Environmental Law, since 2006

DIRECTORSHIPS

- Vice-President & Secretary, Canada Australia New Zealand Business Association
- Committee Member, British Columbia Environment Industry Association – Brownfields Committee
- Past-Chair, Canadian Bar Association, National Environment, Energy and Resources Law Section
- Past-Chair, Canadian Bar Association – Environmental Law Section (BC Branch)

MEMBERSHIPS

- Member / Past Executive Member, Canadian Bar Association – Environmental Law Section (BC Branch)
- Member, American Bar Association – Environmental, Energy and Resources Law Section
- Member, Canadian Environmental Industry Association
- Member, Environmental Managers Association
- Member, Waste Management Association of BC

PUBLISHED WORKS

- Authored chapter: "Environmental", *Business Laws of Canada*, Thomson Reuters Westlaw, 2009 (updated annually)
- Co-authored chapter: "British Columbia", *The Law of Climate Change in Canada*, Canada Law Book, 2010
- Authored chapters: "British Columbia" and "Yukon", *Canadian Environmental Law*, Butterworths
- Authored chapter: "Environment, BC", *Halsbury's Laws of Canada*, Butterworths



Sarah Hansen

Partner
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PROFILE

Sarah Hansen is a Partner in the Litigation group in the Vancouver office. She has experience and expertise in environmental and aboriginal law, including contaminated site litigation.

In her practice, she represents clients in complex commercial litigation matters relating to environmental matters and focusing on regulatory and administrative law, extra-provincial regulatory regimes, industry standards, sustainable energy practices, climate change, and environmental compliance issues. She also has experience in aboriginal law and practice including consultation and accommodation with First Nations, consultation protocols, environmental assessment, judicial review, injunctions and various other issues concerning consultation and accommodation with First Nations in relation to energy projects (wind, forestry, mining, oil and gas, run-of-river) and rights and title claims.

Her environmental law experience includes representing parties on cost recovery claims for the remediation of contaminated sites, representing companies in contamination claims caused by leaking storage tanks (residential and commercial properties), appeal of orders before the Environmental Appeal Board, and working with the Ministry of Environment to secure various approvals/compliance issues.

Sarah has represented clients in litigation and environmental defence matters under the *Canadian Environmental Protection Act*, the *British Columbia Contaminated Sites Regulation*, and the *Federal Fisheries Act* including working with municipalities, government and First Nations. She has worked on complex regulatory matters including: a mine expansion project and mining generally, environmental assessments and First Nations consultation and accommodation; the Mackenzie Valley Pipeline Project before the National Energy Board; and an electricity project before the British Columbia Utilities Commission.

Sarah is an executive member of the Canadian Bar Association (BC Branch)'s Environmental Law Section, Co-Chair of firm's National Environmental Law Group and Chair of the National Environmental Sustainability Committee.

Industry Expertise

CleanTech
Forestry
Mining
Electricity Generation, Transmission and Distribution

Key Practice Expertise

Aboriginal Law
Environmental Law
Administrative Law
Commercial Litigation

Areas of Focus

Energy Law
Climate Change Law
Environmental Compliance and Defence

Year of Call

Alberta Bar, 2000
British Columbia Bar, 2005
Yukon Bar, 2010

EDUCATION

- LL.M. (Public International Law, focusing on International Environmental Law), London School of Economics and Political Science, 2005
- J.D., University of Calgary, 1999
- B.A., University of Calgary, 1995

PROFESSIONAL ACHIEVEMENTS

- Recipient, Viscount Bennett Fellowship Award, 2004
- Recipient, Campbell McLaurin Achievement Award, 1999

REPRESENTATIVE WORK

- Successfully appealed a reassessment made under the *Income Tax Act* for an aboriginal business located on reserve. The Court concluded that the appellant's business income was personal property having a strong connection to the reserve and thus is property situated on a reserve for the purposes of the *Indian Act* and hence exempt from taxation pursuant to section 81 of the *Income Tax Act* in the case of *Reynold Dickie v. Her Majesty the Queen*, a July 10, 2012 decision of Pizzitelli J.
- Successfully overturned a conviction as "constructor" under the *Yukon Occupational Health and Safety Act* in the case of *Director of Occupational Health and Safety v. Government of Yukon et al.*, 2012 YKSC 47. Veale J. allowed the appeal finding that the Yukon Government was not the constructor on the project.
- Representation before the Supreme Court of BC relating to aboriginal rights and title, judicial reviews and injunction proceedings in the forestry sector and in the Federal Court relating to mining exploration.
- Representation before the BC Environmental Assessment Office relating to a run-of-river project and aboriginal consultation and accommodation
- Representation before the Environmental Appeal Board relating to the failure to consult and accommodate First Nations and on environmental matters in the mining sector.
- Representation before YESAB relating to business operations and aboriginal rights and title in the context of a modern day treaty.
- Representation before the Tax Court of Canada relating to Indian Exempt Status under the *Income Tax Act*.
- Representation before the British Columbia Utilities Commission relating to electricity transmission reinforcement; conducting cross examinations of witness panels and drafting final and reply arguments and experience before with the National Energy Board relating to energy projects.
- Representation before the Alberta Energy & Utilities Board (AEUB) in an oil & gas regulatory pre-hearing and negotiation of a Land-Use Resource and Development Agreement (LRD Agreement) involving multiple parties including landowners, land developers, oil & gas companies, and City of Calgary officials.
- Representation before the Federal Court of Canada relating to First Nations Aboriginal rights issues; experience in First Nations and resource development matters generally.
- Representation before Environmental Assessment Panels.

DIRECTORSHIPS

- Member-at-Large, Canadian Bar Association - Environmental Law Section (BC Branch)
- Co-Chair, Miller Thomson National Environmental Law Group
- Chair, Miller Thomson National Environmental Sustainability Committee

MEMBERSHIPS

- Member, Canadian Bar Association
- Member, Law Society of British Columbia
- Member, Law Society of Alberta
- Member, Environmental Managers Association of British Columbia
- Member, Miller Thomson National CleanTech Committee



John Tidball

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PROFILE

John Tidball is an experienced Environmental Law Specialist, certified by the Law Society of Upper Canada. He has special expertise in matters relating to regulatory compliance and approvals, waste management and contaminated property. He provides environmental law advice and counsel to a wide range of clients in the private and public sectors, where his understanding of government proves invaluable.

He represents clients in their dealings with government regulators, particularly the Ontario Ministry of the Environment, and in proceedings before the Ontario Environmental Review Tribunal (formerly the Environmental Assessment Board and the Environmental Appeal Board) and the Ontario Municipal Board. He is knowledgeable in a number of technical areas, especially in relation to subsurface contamination, air pollution, water pollution and environmental remediation, and is frequently called upon to review consultants' reports. He is recognized as an authority on waste management law and policy.

John also advises buyers, sellers and lenders on the environmental aspects of a wide range of commercial and real estate transactions, particularly in relation to contaminated property.

Prior to entering private practice in 1988, John was legal counsel with the Ontario Ministry of the Environment, where he assisted Ministry staff throughout Ontario on all aspects of environmental regulation.

EDUCATION

- LL.B., Osgoode Hall Law School, York University, 1981
- B.E.S. (Man-Environment Studies), University of Waterloo, 1978

PROFESSIONAL ACHIEVEMENTS

- Leading Practitioners, *Best Lawyers in Canada* (2008, 2013), Environmental Law
- Leading Practitioner, Canadian Legal Lexpert Directory (2010, 2012, 2013) Environmental Law
- Certified Specialist, Environmental Law, The Law Society of Upper Canada

Industry Expertise

CleanTech
Agriculture and Food Production

Key Practice Expertise

Environmental
Regulatory
Administrative Law
Municipal Services

Areas of Focus

Waste Management
Environmental Approvals and Permits
Environmental Assessment
Contaminated Sites
Brownfield Re-development
Government Affairs

Year of Call

Nunavut Bar, 2003
Ontario Bar, 1983

REPRESENTATIVE WORK

- Counsel to Ontario Power Generation for the Joint Review Panel proceeding on the Darlington New Nuclear Project
- Counsel to a major automotive company on an application brought by a neighbour for leave to appeal the issuance of a certificate of approval for air emissions
- Counsel to several Ontario municipalities with respect to the acquisition of landfill contaminant attenuation lands
- Counsel to a major Canadian corporation with respect to the remediation and long-term management of a legacy contaminated industrial site in Toronto
- Counsel to a major environmental remediation contractor
- Counsel to several Ontario municipalities with respect to contaminated sites and brownfields funding

PUBLICATIONS & PRESENTATIONS

- Legislative Initiatives to Modernize the Environmental Approvals Process”, in Key Developments in Environmental Law 2009-10, Canada Law Book
- “Environmental Law”, in Business Laws of Canada, West (a Thomson Reuters business), (2010)
- “Current Government Regulations Impacting EFW Projects”, Canadian Institute Waste-Based Energy Conference (November 2009)
- “Energy and Waste in Ontario: The Current Regulatory Climate”, Insight Conference (2008)
- “Legal Liability Update”, Strategy Institute Conference on The Future of Urban Waterfronts (2008)
- “Recent Developments in Environmental Assessment Waste Management”, Insight Conference (2005)
- The Key to Environmental Compliance: How to Avoid Environmental Liability, Exercise Due Diligence and Keep Out of Jail (Toronto: Emond Montgomery, 1993) (with J.B. McMeekin and M.C. O’Donohue)

COMMUNITY INVOLVEMENT

- Member, Markham Theatre Advisory Board

MEMBERSHIPS

- Member, Canadian Bar Association
- Member, Ontario Waste Management Association
- Member, Canadian Nuclear Law Organization
- Member, International Nuclear Law Association



ENVIRONMENTAL ISSUES IN AGRICULTURE

March 14, 2014
Langley BC

Added experience. Added clarity. Added value.



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AGENDA

1. Right to Farm Legislation
2. Regulating GHG Emissions in B.C.
3. Agricultural Operations: How could the *Fisheries Act* possibly apply to my operation?
The New Regime
4. Manure Law: Nutrient Management Regulation
in Canada

Right to Farm Legislation

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2

History of Right to Farm Legislation

- Found across Canada and US
- Most provinces enacted legislation by late 1980s

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Legislation across Canada

- *Farm Practices Protection (Right to Farm) Act*, RSBC 1996 c. 131
- *Agricultural Operation Practices Act*, RSA 2000, c. A-7
- *The Agricultural Operations Act*, SS 1995, c. A-12.1, amended SS 2013, c.27
- *Farming and Food Production Protection Act*, 1998, S.O. 1998, c.1, amended 2006, c. 35

Purpose of Right to Farm Legislation

- Urban encroachment on agricultural land
- Nuisance complaints
 - Odour
 - Flies
 - Dust
 - Noise
 - Chemical spraying



Nuisance Complaints

- Traditional legal model assesses nuisance from the point of view of the complainant
- Unreasonable interference with an owner's use of his or her land
- Complainants can be awarded damages or obtain an injunction to stop the nuisance

Overview of Right to Farm Legislation

- Protects normal farm practices, which are defined:
 - A "normal farm practice" means a practice that is conducted by a farm business in a manner consistent with
 - (a) proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances, and
 - (b) any standards prescribed by the Lieutenant Governor in Council,
 - and includes a practice that makes use of innovative technology in a manner consistent with proper advanced farm management practices and with any standards prescribed under paragraph (b).
- [*Farm Practices Protection (Right to Farm) Act*, RSBC 1996, c.131]

Overview of Right to Farm Legislation con't

- “Farm operation” is typically defined in the legislation
- In the BC Act, “farm operation” includes:
 - Growing, producing and raising animals or plants
 - Clearing, draining, irrigating or cultivating land
 - Any agricultural activity over agricultural land
 - Plantations for specialty wood crops
 - Turf production
 - Aquaculture
 - Raising or keeping game
 - Processing or direct marketing by a farmer of own products

Overview of Right to Farm Legislation con't

- Where a farm operation conforms to the requirements set out in the *Act*, a farmer will not be found liable in nuisance for odour, noise, dust or other disturbance resulting from the farm operation, and cannot be enjoined from these activities
- An activity which is not a normal farm practice will not be protected

Farm Practices Protection (Right to Farm) Act, RSBC 1996 c. 131

- Designates the provincial board under the *Natural Products Marketing (BC) Act* as the board to hear complaints under the Act
- BC Farm Industry Review Board (FIRB)

BC Farm Industry Review Board con't

- Has dual responsibilities:
 - Supervisory board over all marketing boards in the province
 - Hearing body to assess complaints under the Right to Farm Act
- Is a specialized tribunal in the agricultural sector

BC Farm Industry Review Board con't

- Person aggrieved by a disturbance can apply in writing to the Board for determination as to whether the disturbance arises from a normal farm practice
- Person must have a personal interest in the subject matter
- Multi-party complaints will not be accepted:
 - *Miller v. Panoramic Farms*, BC FIRB, January 8, 2009
- Person must be able to show that he has suffered a grievance, or that he will inevitably suffer a grievance:
 - *RJ Farms & Grain Transport Ltd. v Walker et al.*, 2011 SKQB 185 at para.

BC Farm Industry Review Board con't

- Complaint is made to BC FIRB
- In some provinces complainants are required to notify the farmer. In BC, FIRB will notify the farm operator/owner
- Before constituting a hearing panel, FIRB has the power to consult with the farmer/operator, and obtain the advice of knowledgeable persons with a view to resolving the dispute

BC Farm Industry Review Board con't

- If FIRB is satisfied that the complainant has complied with the statutory requirements for filing a complaint, and attempts to resolve the matter informally have been unsuccessful, FIRB will constitute a hearing panel of 3 members
- Hearings are public, and all decisions are posted on website

BC Farm Industry Review Board con't

- At the conclusion of the hearing, FIRB will
 - dismiss the complaint if the activity is found to be a normal farm practice, or
 - order the farmer to cease or modify the practice if the board is of the opinion that the disturbance results from an activity which is not a normal farm practice
- Chair of panel can also dismiss a complaint if subject matter is trivial, application is frivolous or vexatious, or complainant has insufficient personal interest in subject matter of the application
 - *Ofiesh, Elving and Knapp v. Beckwith Farms*, BC FIRB, September 2, 2011

Impact on Other Legal Proceedings

- In some provinces, the legislation specifies whether a complainant can bring an action in nuisance relating to a farm practice
- BC does not expressly address whether an action can be brought
- BC Act specifies restrictions on what orders a court can make in relation to farm practices

Impact on Other Legal Proceedings con't

- Orders of FIRB can be filed in BC Supreme Court, and such orders will have the same force and effect as if they were judgments of that court
- Appeals of FIRB decisions may be taken to BC Supreme Court within 60 days of notification of the decision
- Appeals are limited to questions of law and jurisdiction

Impact on Other Legal Proceedings con't

- The Board is a specialized tribunal and within its specialized expertise, its decisions will be granted deference
- An appeal from an order of the BC Supreme Court to the Court of Appeal may only be taken with leave of the court

Impact on Other Legal Proceedings con't

- In BC, since 1997 there have been 70 decisions under the legislation
- In 2013, complaints decided by BC FIRB include:
 - Noise arising from the use of propane cannons to deter birds from crops
 - Barking dogs, noisy pheasants
 - Odours from relocated cattle exercise yard
 - Odours, noise, flies, bright lights arising from equestrian centre
 - Odours from poultry operation
 - Noise from composting operation

Lessons from across Canada

- Saskatchewan has had Right to Farm legislation for many years, but it is not well known or well used.
- In Saskatchewan, the process is private. No decisions are made available beyond the parties to the dispute.
- In Alberta, the administrative tribunal established under the legislation is virtually dormant.
- Ontario has a very robust complaints processes.
- Applications in Ontario are made to the Ontario Normal Farm Practices Protection Board.

Lessons from across Canada con't

- In Ontario, between 2010 and 2011, over 150 complaints were received.
- Complaints in 2010-2011 were received as follows:
 - Odour (30.7%)
 - Noise (46.7%)
 - Dust (7.3%)
 - Flies (8%)
 - Light (2%)
 - Vibration (1%)
 - By-law violation (4.7%)

Lessons from across Canada con't

- In Ontario, Ministry staff (engineers and environmental specialists) were able to resolve the vast majority of complaints.
- Only three complaints were finally decided by the Board. The remainder were resolved through settlement discussions prior to the decisions being rendered.
- Since 2011, no decisions have been rendered by the Board – all complaints have been resolved through agreement.

Thanks to Angela Riano, articled student.

Photo Image courtesy of Dan at FreeDigitalPhotos.net

Environmental Issues in Agriculture: Regulating GHG Emissions in B.C.

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AGENDA

1. Metro Vancouver Air Quality Management Bylaw
2. Permits and Approval Process
3. Proposed new Air Quality Management Bylaw
4. Do's and Don'ts for Air Quality Permits and Applications
5. *West Coast Reduction Case*

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Metro Vancouver (formerly, the Greater Vancouver Regional District)

Metro Vancouver is authorized to “**prohibit, regulate and otherwise control the discharge of air contaminants**”.

The B.C. *Environmental Management Act* authorizes Metro Vancouver to establish prohibitions, regulations, rates or levels of fees, conditions, requirements and exemptions for different persons, operations, activities, industries, trades, businesses, air contaminants or works, and for different classes of persons, operations, activities, industries, trades, businesses, air contaminants or works

...

Applicable Bylaws

- Air Quality Management Bylaw No. 1082
- Air Quality Management Fees Regulation Bylaw No. 1083

Table 1 – Air Contaminant Emission Fees for Authorized Discharges

Column 1 (A) Air Contaminant	Column 2 (B) Emission fee per tonne of air contaminant
Particulate Matter (filterable and condensable from solely combustion sources)	\$300
Particulate Matter (filterable and condensable from solely non-combustion sources)	\$30
Fine Particulate Matter (filterable and condensable from combined combustion and non-combustion sources, not fuelled solely by natural gas and/or propane)	\$300
Particulate Matter (all other filterable from combined combustion and non-combustion sources, not fuelled solely by natural gas and/or propane)	\$30
Nitrogen Oxides (NOx)	\$50
Photoreactive volatile organic compounds (photoreactive VOC)	\$60 (for the 2011 calendar year) \$100 (beginning in 2012)
Non-photoreactive volatile organic compounds (non-photoreactive VOC)	\$30
Sulphur Oxides (SOx)	\$100
Total Reduced Sulphur (TRS)	\$150
Hazardous Air Pollutants	\$1,000
Other (not otherwise specified)	\$30
Odour (fee per billion odour units)	\$50

Air Contaminants and Odour

- “**Air Contaminant**” means any substance that is emitted into the air that
 - (a) injures or is capable of injuring the health and safety of a person;
 - (b) injures or is capable of injuring property or any life form;
 - (c) interferes or is capable of interfering with visibility;
 - (d) interferes or is capable of interfering with the normal conduct of business;
 - (e) causes or is capable of causing material physical discomfort to a person; or
 - (f) damages or is capable of damaging the environment; ...
- “**Pollution**” means the presence in the environment of substances or contaminants that substantially alter or impair the usefulness of the environment; ...

Permits and Approvals

Permits

11 The district director may issue a permit to allow the discharge of an air contaminant subject to requirements for the protection of the environment that the district director considers advisable and without limiting the generality of the foregoing the district director **may do one or more of the following in the permit:**

- (1) **place limits and restrictions on the quantity, frequency and nature of an air contaminant permitted to be discharged and the term for which such discharge may occur;**
- (2) require the holder of a permit to repair, alter, remove, improve or add to works or to construct new works and to submit plans and specifications for works specified in the permit;
- (3) require the holder of a permit to give security in the amount and form and subject to conditions the district director specifies;
- (4) require the holder of a permit to monitor, in the manner specified by the district director, an air contaminant, the method of discharging the air contaminant and the places and things that the district director considers will be affected by the discharge of the air contaminant;
- (5) require the holder of a permit to conduct studies, keep records and to report information specified by the district director in the manner specified by the district director;
- (6) specify procedures for sampling, monitoring and analyses, and procedures or requirements respecting the discharge of an air contaminant that the holder of a permit must fulfill.

The proposed New Bylaw will apply to:

- Facilities that process organic materials including farms and farm processes, facilities that compost organic waste, rendering plants, animal feed plants, mushroom media composting facilities, intensive agricultural feedlot activities, and anaerobic digesters processing non-agricultural waste.



Classification System



- Facilities will be classified into low risk sources, medium risk sources, and high risk sources based on the amount of odour released into the community, the sensitivity of the receptors, and the offensiveness of the odours.
- This classification will determine the action the facility will be required to take, as well as the fees the facility will be required to pay.

Criticisms of proposed New Bylaw

- Fees imposed will be determined by the use of odour units, the same method of monitoring and testing which the Board in *West Coast Reduction* found to be too imprecise to be used for compliance purposes.
- Fees lessen the financial resources available to be utilized to develop odour reducing solutions within the facilities at issue.
- The complaints system is unreliable.
- The new Bylaw undermines the public interest in sustainable management of organic wastes, as articulated by Metro Vancouver itself in a series of recent formal policy pronouncements, specifically: the Integrated Solid Waste and Resource Management; the Zero Waste Challenge: Goals, Strategies and Actions Zero Waste Challenge; and the Regional Organics Strategy Regional Organics Strategy.

Indirect Tax?

- Those facilities classified as high risk will face charges of **\$5 per year for each person exposed to a specified level of odour.**
- The new policy will shift the cost of odour enforcement onto high-risk odour-generating facilities at \$5 per person per year for those that are impacted (as determined by Metro Vancouver).
- The level of odour will be determined by odour units, to be measured by an odour panel who will assess the odour in accordance with internationally accepted methodologies.



West Coast Reduction Case

- 2010 decision out of the British Columbia Environmental Appeal Board, *West Coast Reduction Ltd. v. British Columbia (Ministry of Environment)*.
- West Coast sought to set aside the decision of the Air Quality District Director to amend their existing air permit to add various requirements, conditions, criteria, standards, guidelines and objectives all relating to the eventual reduction in the amount of odour emitted from their rendering plant.
- “battle of the experts”



Environmental Appeals Board

Key Points from the West Coast Reduction Case

- The Board found that the amendments were wrongfully imposed by the Director, as he did not have the authority or jurisdiction to impose the requirements at issue.
- The Board found that the complaints process utilized by the GVRD provides significant room for error, and did not provide sufficient information to determine whether or not the amendments were necessary for the protection of the environment.
- It was found to be more likely that the amendments were an attempt to placate the public rather than to provide a real solution to the odour issue. As a result, the Board found that the Director's amendment of the permit was an improper exercise of discretion.



West Coast Reduction Case

- In relation to the use of odour units, the Board found that the Director does have authority to introduce a new unit of measurement into a permit amendment in certain situations.
- “The notion that odour units can be used as an indicator of an environmental “smell” is simply too flawed to be used as a method of determining compliance, and is therefore not suitable for determining whether the environment is adequately protected.”
- “Given that there are many steps in the process of attempting to calculate odour units which are problematic, and which contain so many points of bias and subjectivity, the Panel finds that the ultimate number or value coming out of an odour unit measurement cannot be relied upon as meaningful, particularly for the purposes of evaluating compliance with a mandatory term of a permit.”



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Integrated Solid Waste and Resource Management Plan

- The overriding principle of the Integrated Solid Waste and Resource Management Plan is the avoidance of waste through an aggressive waste reduction campaign and through the recovery of materials and energy from the waste that remains. In line with this principle, the Integrated Solid Waste and Resource Management Plan (ISWRMP) has four goals:
 - Goal 1: Minimize waste generation
 - Goal 2: Maximize reuse, recycling and material recovery
 - Goal 3: Recover energy from the waste stream after material recycling
 - Goal 4: Dispose of all remaining waste in landfill, after material recycling and energy recovery

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Negotiating Air Quality Permits

- Do your homework and review like permits for like facilities
- If you are capping emissions, make sure you will be able to comply those caps
- Consider your source input for emissions calculations
- Limit reporting obligations and testing requirements
- Build in flexibility for improving your operations or minor changes to works and procedures
- Develop a good relationship with the regulator
- Find a good consultant with expertise for testing and monitoring

Negotiating Air Quality Permits con't

- Don't forget to calculate your fee
- Don't set emissions caps you can't meet
- Don't accept "no odours"
- Don't assume that the source of complaints is your facility



Agricultural Operations: How could the *Fisheries Act* possibly apply to my operation? The New Regime

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Some Cases That May Interest You...

- Prince Albert, SK area cattle rancher fined for failing to obey inspector's direction to stop manure going into a stream and not finding alternative water for his cattle
- Two mushroom growing companies in Abbotsford, BC fined \$90,000 for harming fish habitat
- Composting operation fined for discharging material to water and harming fish habitat
- Town of Ponoka, AB convicted of discharging wastewater that killed fish (2011)
- Hatchet Lake Denesuline First Nation (La Ronge, SK) fined for diesel spill into a river

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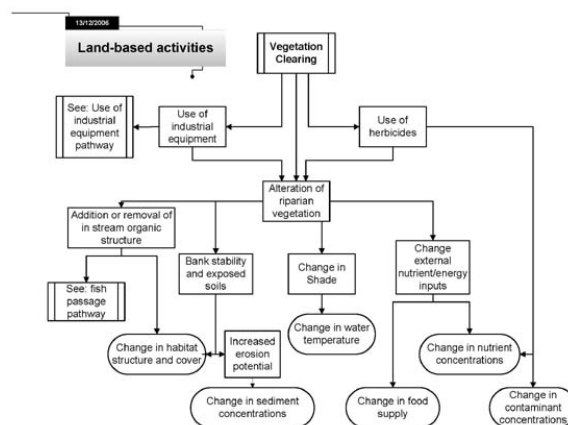
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Some Possible Scenarios

- Bridges – installation, maintenance
- Grazing of livestock near water
- Clearing of vegetation near water
- Spills into water or near water
- Drainage, flood control, water management
- Waste water management
- Manure management/ Composting
- Vehicles near water or crossing streams



An Example: Vegetation Clearing



Recent Changes to the *Fisheries Act* What do I need to know...

- Significant increase in penalties
- New duties to report
- Additional powers to enforcement officers
- New offence – failing to comply with Authorization condition
- Opportunity to amend/ cancel Authorizations



Photo courtesy of Fisheries and Oceans Canada

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What Fish Are Now Protected New Serious Harm Regime

35. No person shall carry out any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery

Ability to exempt fisheries



Photo courtesy of Fisheries and Oceans Canada

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What Actions Are Covered?

Focus on “serious harm”

35: “No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery”

“Serious harm” means:

“...serious harm to fish is the death of fish or any permanent alteration to, or destruction of, fish habitat”



Photo courtesy of Fisheries and Oceans Canada

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The New “Serious Harm” Regime

“...serious harm to fish is the death of fish or any permanent alteration to, or destruction of, fish habitat”



Photos courtesy of Fisheries and Oceans Canada

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Administrative Guidelines



- Fisheries Protection Policy Statement
- Fisheries Protection Program Operational Approach
- Guidance for the Application of the Transitional Provisions for Ministerial Authorizations
- Applicant's Guide to Submitting an Application for Authorization under Paragraph 35(2)(b) of the *Fisheries Act*

<http://www.dfo-mpo.gc.ca/habitat/changes-changements/index-eng.htm>

Subsection 36(3): Deposit of Deleterious Substances

- General prohibition unchanged – protection not limited to CRA fisheries



Reporting

- New reporting obligation: duty to report occurrence that results in serious harm to fish (ss.38(1) – (10))



(This is in addition to the existing duty to report a deposit of deleterious substances.)

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Inspector's Directions

- Increased power to issue directions
- Previously inspectors had power to issue directions to take correcting measures
- Amendments provide:
 - That both inspectors and fisheries officers have the power to issue directions
 - Situations where directions may be issued are expanded to include where a HADD has occurred or where there is serious danger of an occurrence



Photo courtesy of Fisheries and Oceans Canada

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Enforcement / Penalties

- Fines for sections 35 and 36(3) related offences are increased for consistency with fines under the *Environmental Enforcement Act*
- Minimum and maximum penalties now
- Penalties increased
- Penalties vary depending on the accused:
 - Individuals
 - Small revenue corporations
 - Other corporations
 - 1st offence (indictment): \$500k (min) - \$6m (max)
 - 2nd offence: \$1m (min) - \$12m (max)
- New offence for failing to comply with s35(2) condition – in force



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Transitional Provisions: Review of Existing Authorizations

- Existing Authorizations are deemed to be an authorization under the new regime
- Review of existing Authorizations available until Feb 24, 2014
- Amend your Authorization now?



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Manure Law: Nutrient Management Regulation in Canada

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Regulatory Objectives

- Supply nutrients to soil at appropriate rates, timing and methods
- Minimize the risk of pollution through loss of nutrients through runoff into surface water, leaching into groundwater and emissions into the air
- Balancing these two objectives can prove challenging

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The Federal Role

- Only really applicable federal legislation is the Fisheries Act, in particular the section 36 prohibition against the deposit of a deleterious substance into waters frequented by fish
- Otherwise, the federal role is primarily advisory and supportive to the regulatory initiatives of the provinces – support for development of Environmental Farm Plans

Provincial Regulation

- Approaches vary widely across Canada, but all try to balance the competing regulatory objectives
- Some provinces regulate nutrient management entirely through the ministry with responsibility for agriculture (e.g. Saskatchewan, Alberta)
- Others also regulate through the ministry responsible for environmental protection (e.g. Ontario, Quebec, British Columbia)

Prairie Provinces

- Manitoba
 - regulates on the basis of water quality management zones – nitrogen and phosphorus restricted by zone
 - nutrient management plan (NMP) required for storage facilities on environmentally sensitive lands, golf courses or where regulated nitrogen/phosphorus limits cannot be met
 - additional requirements under *The Environment Act* may apply to a livestock operation >300 Animal Units

Prairie Provinces con't

- Saskatchewan
 - applies only to intensive livestock operations (ILOs)
 - regulated by Ministry of Agriculture
 - prescribed ILOs required to store waste in accordance with an approved **waste storage plan** and to manage waste in accordance with an approved **waste management plan**

Prairie Provinces con't

- Alberta
 - AOPA and 3 Regulations establish province-wide permitting requirements and standards for all operations that handle manure – authorization required for manure collection and storage
 - NMP only mandatory if operator exceeds prescribed limits for soil nitrogen or salinity
 - standards prescribed for storage facilities

Quebec

- Regulates under the *Environmental Quality Act*
- Standards prescribed for storage, spreading and treatment of “livestock waste”
- Annual Agro-environmental Fertilization Plan (or NMP), signed by an agrologist, is required for any spreading
- Project notice required for new storage facility
- Authorization Certificate required for large project

Ontario

- *Nutrient Management Act, 2002*
 - One of Ontario's responses to the Walkerton tragedy
 - enforced by the Ministry of the Environment
 - requires both NMP and nutrient management strategy
 - significant focus on non-agricultural source material (NASM) such as biosolids
 - regulates the management of all materials that are applied to land by the agricultural industry, municipalities and other generators of materials containing nutrients

Ontario con't

- Nutrient Management Strategy (NMS)
 - deals with generation and storage of nutrients
 - required on a phased-in basis for all farms
 - approval required for new projects, operation within 100 m of municipal well and farms receiving off-farm material for anaerobic digester
- Nutrient Management Plan (NMP)
 - deals with the application of nutrients
 - Required if livestock numbers > 300 nutrient units (NU) or farm is within 100 m of municipal well

Ontario con't

- NASM Plan
 - deals with on-farm storage and application of NASM
 - need to meet beneficial use criteria
 - requires approval for specified activities
- Regulation prescribes a range of standards
 - land application (e.g. no application <150 m from top of bank, minimum depth to groundwater, rates)
 - outdoor confinement areas
 - siting, construction and storage
 - vegetated filter strips

Atlantic Canada

- New Brunswick
 - manure NMP only required for new operations
 - may be additional environmental requirements in specified watersheds and wellhead protected areas
- Nova Scotia
 - no specific regulatory regime – focus on EFPs
- PEI / Newfoundland & Labrador
 - emphasis on voluntary adoption of NMP

British Columbia

- Regulated under the 2002 *Agricultural Waste Control Regulation* (under the *Environmental Management Act*)
- Regulation adopts the Code of Agricultural Practice for Waste Management (2002)
 - prescribes minimal requirements for storage facilities
 - sufficient capacity
 - setbacks - 15 m from watercourse and 30 m from domestic water supply
 - Prescribes unfavourable conditions for application

British Columbia con't

- Comprehensive regulatory reform proposal released in a Policy Intentions Paper in January 2012
- Consultation period ended May 31, 2012
 - 119 responses received
- Ministry of Environment currently working with the BC Agriculture Council on further consultations with the agriculture industry - no fixed timeline - regulatory changes not anticipated before spring 2014

British Columbia con't

- Proposal is to shift to regulating discharges from agricultural operations by a new code of practice
 - new prescriptive storage requirements with phase-in for existing storage facilities
 - new requirements for composting and curing of agricultural wastes
 - operations land applying agricultural wastes, by-products or other nutrient sources may be required to prepare an NMP –risk-based screening approach proposed

British Columbia con't

- New Regulation to be supported by guidelines and BMPs
- Canada-BC Environmental Farm Program also continues to encourage preparation of NMPs

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