SUBMISSION BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE STANDING COMMITTEE ON RESOURCES DEVELOPMENT RE: BILL 146, AN ACT TO PROTECT FARMING AND FOOD PRODUCTION

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Prepared by:

Paul McCulloch
Student-at-Law

Canadian Environmental Law Association
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SUBMISSION BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE STANDING COMMITTEE ON RESOURCES DEVELOPMENT REGARDING BILL 146, AN ACT TO PROTECT FARMING AND FOOD PRODUCTION[1]

The purpose of this submission is to provide the comments of the Canadian Environmental Law Association to the Standing Committee on Resources Development in regard to Bill 146, *An Act to Protect Farming and Food Production.* Bill 146 was introduced by way of first reading on June 26, 1997, and received second reading on December 17, 1997.

PART I - SUMMARY OF GENERAL COMMENTS

i) CELA strongly opposes Bill 146 and recommends that it be withdrawn.

ii) Bill 146 does not address the relevant problem - that the Province has failed to implement proper land use policies that preserve agricultural land. Furthermore, it is inconsistent with the principles of sound planning in providing individual farmers immunity from municipal by-laws which express the desires of a community as a whole. CELA submits that the fair and proper means of protecting farmland is to use a systematic planning and zoning approach.

iii) The expansion of the definition of agricultural operations and the continued reliance upon the definition of normal farm practice as opposed to a definition which incorporates the concept of "reasonableness" will upset the delicate balance between the rights of farmers and the rest of the public and result in inappropriate farming operations being placed beyond the scope of the law.

iv) Bill 146 is being introduced as the nature of farming is shifting towards large-scale corporate operations which have the potential to seriously impact upon neighbouring land users and the environment. At the same time, the government has also drastically cut the public service, compromising its ability to enforce environmental statutes. These changes require greater access to nuisance laws, not even further restricted access as proposed in Bill 146.

v) The only legislative change that is currently required is that the Farm Practices Protection Act should be repealed in its entirety.

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1. By Paul McCulloch, Student-at-Law.

PART II - CELA'S BACKGROUND AND EXPERIENCE

The Canadian Environmental Law Association (CELA) is a public interest group founded in 1970 for the purpose of using and improving laws to protect the environment and conserve natural resources. CELA is also funded as a community legal clinic specializing in environmental law and represents individuals and citizens' groups before trial and appellate courts and administrative tribunals on a wide variety of environmental issues. In addition to litigation, CELA undertakes public education, community organization, and law reform activities.

CELA has a long history of participation in agricultural law reforms. CELA submitted comments to the Standing Committee on Resources Development regarding Bill 83, an Act respecting the Protection of Farm Practices, in December 1988.[2] Our staff have also participated extensively in recent land use planning reform initiatives, including Bill 163, which led to the passing of the *Planning and Municipal Statute Law Amendment Act, 1994* and more recently, Bill 20, which led to the passing of the *Land Use Planning and Protection Act, 1996*. Finally, CELA submitted a brief to the Ministry of Agriculture, Food, and Rural Affairs (OMAFRA) in regard to initial consultations surrounding this current bill last winter.[3]

Furthermore, many of CELA's past and present clients are farmers, and CELA has been extensively involved in the fight to strengthen the protection of agricultural lands and specialty crop lands in Ontario. For example, CELA represented organic farmers who successfully used the common law of nuisance to permanently shut down a nearby landfill site that was adversely impacting their agricultural operations.[4] Currently, CELA is representing farmers whose land is in danger of being contaminated from a nearby illegal tire dump. In another case, CELA is fighting for compensation for a farmer whose land was found to contain hazardous waste from a highway construction project thirty years earlier. Thus, CELA has worked with the farming community and understands their needs.

PART III - GENERAL CRITIQUE OF BILL 146

i) CELA strongly opposes Bill 146 and recommends that it be withdrawn.

CELA did not support the *Farm Practices Protection Act* (FPPA) in 1988 and recommended that it be withdrawn. Our position remains the same today, and thus we oppose any further expansion of the FPPA as proposed under Bill 146. The FPPA has not accomplished its goal, namely the protection of agricultural lands. Bill 146 will be similarly ineffective. The loss of agricultural

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2. Barry Mandelker, *Submission by the Canadian Environmental Law Association to the Standing Committee on Resource Development Regarding Bill 83*, December 6, 1988.

3. Donna Bigelow, *Submissions by the Canadian Environmental Law Association to the Ministry of Agriculture, Food and Rural Affairs on the Draft Discussion Paper on the Farm Practices Protection Act*, February, 1997.

4. *Nippa* v. *C.H. Lewis (Lucan) Limited* (1991), 7 C.E.L.R. (N.S.) 149 (Ont. Ct. Gen. Div.).

land to industrial, commercial and residential development occurs due to a loss of ownership rights and changes in land use designations, not due to pressures exerted by neighbouring land owners. Thus, CELA opposes Bill 146 and recommends that it be withdrawn. CELA's main concerns are summarized below.

ii) Bill 146 does not address the relevant problem - that the Province has failed to implement proper land use policies that preserve agricultural land. Furthermore, it is inconsistent with the principles of sound planning in providing individual farmers immunity from municipal by-laws which express the desires of a community as a whole. CELA submits that the fair and proper means of protecting farmland is to use a systematic planning and zoning approach.

The real crisis facing Ontario's agricultural community is the failure of the Province to implement stringent land use laws, guidelines and policies that preserve agricultural land. Thus, it is truly ironic that this government is proposing a bill that purports to protect agricultural land after passing Bill 20 in 1996 which removed the protection provided by the Provincial Policy Statements under the *Planning Act*. Bill 20 also purported to place greater decision making power in local hands, yet Bill 146 proposes to take that power away by prohibiting municipalities from enacting by-laws which regulate farming activities. These inconsistencies demonstrate that neither Bill 20 nor 146 have been well thought out. CELA submits that the proper means of protecting farmland is to use a systematic planning and zoning approach. Municipal by-laws are an integral part of this system and no one should be given an individual immunity from this public process. Therefore, CELA opposes the proposed amendments that provide immunity to farmers from municipal by-laws.

iii) The expansion of the definition of agricultural operations and the continued reliance upon the definition of normal farm practice as opposed to a definition which incorporates the concept of "reasonableness" will upset the delicate balance between the rights of farmers and the rest of the public and result in inappropriate farming operations being placed beyond the scope of the law.

The proposed amendments contained in Bill 146 address problems that currently do not exist. There has not been a sudden and drastic increase in nuisance suits against farmers and OMAFRA has failed to demonstrate the need for the proposed changes. The fear of nuisance actions against farmers is just that, a fear; there is little evidence that such actions are common in Ontario. This position is further supported by the fact that the Farm Practices Protection Board heard only 12 cases between 1988 and 1997, an average of only 1 or 2 cases per year.

Similarly, there is no evidence that the courts have been handling nuisance claims against farmers in an inappropriate manner. A nuisance complaint which involves the loss of enjoyment of property requires the court to take into account the character of the area in determining whether to grant a remedy. Residents who come to an area where farming is prevalent would therefore have little likelihood of success unless the farming practice was negligent. The cost of using the civil courts is also a strong deterrent to litigation and would act as a bar to individuals bringing

frivolous or unsubstantiated claims. Thus, there is no reason to take the important area of nuisance law out of the supervision of the courts.

Yet, Bill 146 proposes to remove nuisance actions from the courts and place it under the supervision of a partisan administrative tribunal which will upset the delicate balance between the rights of farmers and those of the public. The expansion of the list of activities which are immune from nuisance actions and the continued reliance upon the term "normal farm practices" as opposed to those which are "reasonable" and "necessary" will result in a wide range of farm practices being given undo protection, beyond that which most people would consider appropriate. Good farming practices are not in any danger of incurring liability from nuisance suits, and they never were. One can thus only conclude that this bill is being introduced to insulate those who carry out poor farming practices, ones which are unduly injurious to neighbours and potentially environmentally damaging, from being held accountable for their actions. Therefore, CELA also remains opposed to the expansion of the definition of farming practices and providing immunity from nuisance actions to a greater range of activities.

iv) Bill 146 is being introduced as the nature of farming is shifting towards large-scale corporate operations which have the potential to seriously impact upon neighbouring land users and the environment. At the same time, the government has also drastically cut the public service, compromising its ability to enforce environmental statutes. These changes require greater access to nuisance laws, not even further restricted access as proposed in Bill 146.

It must also be noted that these amendments are coming at a time when two important changes are occurring in society. First, it appears that the nature of farming is moving away from the family owned and operated farm to large-scale corporate operations. Ontario is just now seeing its first giant hog farms which have the potential to cause enormous nuisance disturbances and significant environmental damage. The experience with these types of operations in other jurisdictions, such as North Carolina and Quebec, has not been particularly positive.[5] Furthermore, in the past, most nuisance disputes have been resolved through Ministry of Agriculture or Environment officials.[6] The fact that these disputes involved neighbours who are part of the same community would have been an essential element in aiding this cause. Corporate farms involving absentee owners are not governed by the same forces. Thus, there is a need to make access to nuisance actions more accessible, not less, in the future.

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5. For a discussion of the situation in North Carolina, see Pat Stith and Joby Warrick, "Boss Hog: North Carolina's Pork Revolution", *The Amicus Journal*, Vol. 18, No. 1, pp. 36-40; In Quebec, the Centre Quebecois du droit de l'environment has initiated a complaint to the Commission on Environmental Cooperation over the Provinces failure to enforce pollution regulations against agricultural operations, particularly massive hog operations. See Commission on Environmental Cooperation, *Secretariat Bulletin*, Fall 1997, p. 11.

6. Michael Toombs, "Odour, Noise and Dust Complaints and the Farm Practices Protection Act", OMAFRA, December 1993.

Second, the changes proposed in Bill 146 coincide with the drastic cuts this government has made to the public service. There is an assumption underlying the proposed changes that environmentally damaging farm practices will be caught under the *Environmental Protection Act*, thus removing the need for private citizens to protect their own property and preserve the environment through nuisance actions. Yet, the Ministry of the Environment's budget has been cut 43% since 1995, resulting in staff reductions from 2430 to 1550. The fact is that the Ministry does not have the staff or resources necessary to thoroughly enforce the Act, leaving citizens to act on their own and the environment's behalf. Bill 146 places significant obstacles in front of anyone who wishes to pursue this path.

v) The only legislative change that is currently required is that the Farm Practices Protection Act should be repealed in its entirety.

Therefore, in CELA's view, the only change that should be made is that the FPPA should be repealed in its entirety. Bill 146 only serves to further a trend which has been proven ineffective in achieving its goal, namely the preservation of agricultural land. The proper course of action, if the government is truly committed to preserving agricultural land, is to reinstate strict provincial land use planning policies and guidelines, coupled with proper environmental monitoring and enforcement. Bill 146, like its predecessor, the FPPA, fails miserably in this regard.

PART IV - DETAILED CRITIQUE OF BILL 146

In addition to the general concerns outlined above, CELA has numerous objections to specific sections and wordings of the bill itself. Some of these comments follow from our general criticisms. Others raise separate issues which have not yet been raised. However, before proceeding further, it must be stressed that in making these comments, CELA is by no means implying that it accepts Bill 146. We stand by our position that Bill 146 and the FPPA should be repealed in their entirety, and proper land use policies be implemented immediately.

Preamble:

The first paragraph of the preamble is misleading. As outlined above, this Bill will not "conserve, protect and encourage the development and improvement of agricultural land". Rather, it protects agricultural **practices**, whether they are sound or not.

In regard to the third paragraph, we would ask that OMAFRA and other agricultural organizations be required to demonstrate that, in fact, it is "increasingly difficult for agricultural operators to effectively produce food, fibre and other agricultural and horticultural products". CELA remains unconvinced that this is in fact true.

S.1 - Definitions:

(1).

Normal Farm Practice - The definition of "normal farm practice" should be changed to provide for the consideration of whether a practice is "reasonable" and "necessary", instead of whether the practice is "normal". As well, the definition should require that a normal farm practice be environmentally sound. As the definition stands now, an unreasonable, unnecessary and environmentally irresponsible farm practice may be found to be "normal" if other farmers also use the same procedure, leaving a complainant with no recourse to the law.

Disturbance - The definition of disturbance should not be expanded to include flies, smoke and vibration. These are only a nuisance when a farm practice is poorly managed.

(2).

Agricultural Operation - As stated above, the expanded definition of agricultural operation will result in numerous activities being included which are not appropriately classified as rural farming activities. Bill 146 should be aimed at addressing annoyances rather than activities that may be harmful to people's health and damaging to the environment. CELA remains adamantly opposed to this expanded definition, especially the inclusion of actions such as the application of pesticides (f), ground and aerial spraying (g), and the storage and handling of wastes (h).

S.2 - When Farmer Not Liable

Subsection (3). - There has been a slight rewording of this section which is completely unacceptable to CELA. Under the FPPA, a farmer could be held liable for any disturbance which was in violation of certain environmental statutes. Bill 146 proposes to change this section such that a farmer will only be held liable if there is a "charge pending related to that nuisance". This is a very serious change. It means that a complainant may only bring a nuisance action if there has been a charge laid against the offender. Given the drastic cuts to the Ministry of the Environment, it is a very difficult and lengthy process to have the Ministry investigate and charge an offender. Under the old Act, at least complainants could demonstrate on their own accord that an offender was in violation of one of the environmental statutes. Now, even this avenue has been eliminated, making it nearly impossible for an individual to protect their own property interests and preserve environmental quality in the face of improper farming practices.

S. 3,4, and 5 - Normal Farm Practices Protection Board

CELA does not have any specific objections to the procedural aspects of the Board, other than to suggest that, in making procedural rules of conduct, the Board should consider the experiences of the Environmental Appeal Board and the former Environmental Assessment Board and the guidelines that these Boards have issued over time. CELA believes them to be excellent examples of procedurally fair rules.

S. 6 & 7 - Immunity from By-laws

Again, CELA adamantly opposes these amendments which potentially provide immunity to agricultural operations from municipal by-laws. The development of a municipal plan or zoning by-law is the outcome of a public process and represents the interest of the community as a whole. It is unacceptable that one individual or family should be able to usurp this process. If the province is truly committed to preserving agricultural lands, then it should exercise its own powers under the *Planning Act* and issue a comprehensive policy statement in that regard. Of course, this government has already acted in precisely the opposite fashion, redrafting the provincial policy statements to weaken the protection provided to agricultural lands, and changing section 3(5) of the *Planning Act* such that local councils must only "have regard" to provincial policy statements as opposed to "be consistent" with them.

It would thus appear that the true intent of Bill 146 is to rectify the faulty amendments made to the *Planning Act* in 1996. Bill 146 is now needed to address the conflict that will undoubtedly occur as a result of the changes to the *Planning Act* which encourage poor land use planning and incompatible uses being implemented side by side. Unfortunately, this bill only treats a symptom of the illness created by the changes to the *Planning Act*. Furthermore, it comes with its own side effects, that being that inappropriate farm practices which are unduly injurious to neighbouring properties and potentially environmentally damaging are provided an immunity from common law nuisance actions.

Two wrongs do not make a right. Bill 146 and the FPPA should be repealed and proper land use planning policy and guidelines put back in place. Municipal by-laws are an integral part of this system and no one should be given an individual immunity from this public process.

Section 6(17) - Retroactivity

This section is particularly unfair. It enables farmers to challenge by-laws which were passed before even the idea of Bill 146 was even publically disseminated. In the meantime, many people may have made planning decisions based on by-laws which they did not know might be challenged by neighbouring farmers. This section should only apply to by-laws passed after Bill 146 has been passed and been proclaimed.

Section 9 - Guidelines

It would be helpful if the government would have made available draft guidelines to accompany this bill in order to appreciate the type of policies we might expect. It is impossible to comment on this section otherwise.

Other Specific Comments

i) Ministerial Power

Bill 146 proposes to invest numerous powers within the Minister and cabinet, continuing the trend which began with the Omnibus Bill (Bill 26) in January 1996. For example, the bill proposes to grant the Minister power to add to definitions (s. 2(b)vi, 2(k), and 10(a)). This begs the question as to why are any of the definitions included in the statute, whereas others may be prescribed by regulation? This treatment is inconsistent. Statutory definitions are a preferred means of law making and consistent with the principles of the rule of law.

ii) Relationship of Bill 146 to the *Environmental Bill of Rights, 1993*

The *Environmental Bill of Rights, 1993* (EBR) provides for public input into decision making which may impact upon the natural environment. Currently, the FPPA is not subject to the public participation rights of the EBR. As Bill 146 will result in even a more broad range of activities being granted immunity from nuisance actions, it should be a prescribed act under the EBR regulations. This would mean that any policies and regulations to be passed under the new Act would be required to be posted on the Environmental Registry and the public would be given 30 days to comment on them. It would also mean that the public could request a review of these policies upon presenting evidence justifying the need for the review.