

IN THE MATTER OF THE
FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT,
R.S.B.C. 1996, c. 131
AND
IN THE MATTER OF A COMPLAINT
ARISING FROM THE OPERATION OF A DUCK FARM
LOCATED AT 7455 – 256TH STREET ALDERGROVE, BRITISH COLUMBIA

BETWEEN:

WESTCREEK CITIZENS SOCIETY AND OTHERS

COMPLAINANTS

AND:

VANE INVESTMENTS LTD.,
BERT AND LINDA VANE

RESPONDENTS

AND:

TOWNSHIP OF LANGLEY
BRITISH COLUMBIA AGRICULTURE COUNCIL
POULTRY COMMITTEE

INTERVENORS

DECISION

APPEARANCES BY:

For the Farm Practices Board

Christine J. Elsaesser, Vice Chair
Satwinder Bains, Member
Richard Bullock, Member

For the Complainants

Iris Turaglio, Counsel

For the Respondents

Brian Sims, Counsel
Bert Vane

For the Intervenors

Township of Langley

Brian Taylor, Counsel

British Columbia Agriculture Council

Dick Kleingeltink, Director

Poultry Committee

Ray Nickel, Member

Place of Hearing

Surrey, Langley, and
Abbotsford, British Columbia

Dates of Hearing

November 4, 5, 6, 7, 8, 12 and
December 2, 3, 4, 2002 and
January 22, 2003

INTRODUCTION

1. Under the *Farm Practices Protection (Right to Farm) Act* (the “*Act*”), persons who are aggrieved by any odour, noise, dust, or other disturbance resulting from a farm operation conducted as part of a farm business, may apply to the Farm Practices Board (the “FPB”) for a determination as to whether the disturbance results from a normal farm practice. If, after hearing, the FPB is of the opinion that the odour, noise, dust, or other disturbance results from a normal farm practice, the complaint is dismissed. If the practice is found to not be a normal farm practice, the FPB has authority to order the farmer to cease or modify that practice.
2. This complaint was commenced by the Westcreek Citizens Society and other neighbours.¹ The Westcreek Citizens Society was incorporated on December 27, 2000. Although it claims broader environmental objectives, it appears that the Society’s primary purpose is as a vehicle to organise its members for the purpose of taking legal action against the Vane duck operation located at 7455 – 256th Street, Aldergrove, British Columbia. Initially, many of the same individuals who are Complainants in this proceeding commenced an action in nuisance and sought an injunction restraining that nuisance in the Supreme Court of British Columbia. On June 26, 2001, Mr. Justice Curtis stayed the action until such time as the Plaintiffs exhausted the remedies available under the *Act*.
3. By letter dated September 19, 2001, the Complainants filed a formal complaint with the FPB. The complaint alleged that certain practices of the farm relating to odour, waste treatment, manure removal, shipment of ducks, disruption of watercourses and pollution of local water supply are neither consistent with proper and accepted standards and customs nor with normal farm practice.
4. The Respondents, Vane Investments Ltd. and Bert and Linda Vane, take the position that their duck facility is operated consistent with proper and accepted customs and standards and consistent with normal farm practices of farms in the Agricultural Land Reserve (the “ALR”).
5. After the complaint was filed, an informal settlement process was entered into over a number of months pursuant to s. 4 of the *Act*. This process failed. The Panel was not privy to any part of this process except as consented to by the parties.
6. On July 15, 2002, the British Columbia Agriculture Council (the “Agriculture Council”), the Poultry Committee² and the Township of Langley (the “Township”) were all granted intervenor status. Dick Kleingeltink, a dairy farmer, appeared on behalf of the Agriculture Council and Ray Nickel, a poultry producer, appeared on behalf of the Poultry Committee. Both were supportive of commercial livestock operations in the

¹ According to its Annual Report filed January 19, 2002, there are 28 members in the Westcreek Citizens Society. Other non-Society Complainants also participated in this Complaint for a total of 47 Complainants.

² The Poultry Committee is comprised of four poultry associations (BC Broiler Hatching Egg Producers Association, BC Chicken Growers Association, BC Turkey Association, Fraser Valley Egg Producers Association).

ALR. The Township appeared with counsel and was a full participant in the hearing of the complaint, cross examining witnesses and providing an oral submission at the conclusion of the hearing.

7. In order to ensure that all necessary evidence was before the Panel, the FPB issued summonses requiring the attendance of the following employees of the Ministry of Agriculture, Food and Fisheries (“MAFF”) who had some involvement with the Vane duck farm:
 - a) Stewart Paulson, P. Ag., Food Safety and Quality Specialist – Food Safety and Quality Branch.
 - b) Mark Robbins, P. Ag., Regional Agrologist, Fraser Valley – Central, South Coastal Region.
 - c) Rick Van Kleeck, P. Eng., Waste Management Engineer – Resource Management Branch.
8. In addition, and in response to a request by the Complainants, the FPB issued a summons to Doug Clough, P. Eng., the structural engineer responsible for designing the Vane duck barn.

ISSUES

9. In the pre-hearing conference, the Complainants identified the following issues:
 - (a) Is it consistent with normal farm practices to site an intensive duck farm or similar livestock operation in an area of small acreages and hobby farms?
 - (b) In the alternative, is the duck farm operation inconsistent with normal farm practices because:
 - (i) There is no or insufficient waste management or treatment systems to address waste discharges from the farm and in particular, waste discharges from the farm give rise to unacceptable risks to the local water supply and air quality; and give rise to loss of business and loss of enjoyment of property?
 - (ii) There are inadequate measures to limit noise related to manure removal and the shipment of ducks?
 - (iii) The farm has bulldozed in watercourses resulting in flooding of neighbouring property?
10. The Complainants seek an order that the duck farm cease operations unless and until:
 - a) An appropriate air and waste management system is installed;

- b) Manure removal and duck shipment operations do not occur later than 7:00 p.m.;
- c) Appropriate measures are taken to cease flooding neighbours' property; and
- d) An appropriate waste management system is in place to protect local groundwater sources.

FACTS

11. Mr. Vane purchased his 13.75-acre property on 256th Street in Aldergrove in 1981. Aldergrove is part of the Township, a municipality of approximately 122 square miles. The Township is bordered by the Fraser River to the north, the municipalities of Abbotsford and Surrey on the east and west respectively, and the United States border to the south. Much of the municipality is rural in nature. The Vane duck farm is located within the Westcreek drainage basin. Properties in this area are within the ALR and consist primarily of small acreages and hobby farms. The Township has zoned the properties in this area RU-1, which means that both agricultural and residential uses are permitted. In the immediate vicinity, there are horse stables, commercial nurseries, an ostrich farm and a hay farm. In addition, some property owners keep chickens, steers and sheep.
12. Mr. Vane has resided on his property since 1984 and operates a landscape business. In 1999, he decided to develop a small farming operation. After speaking with Rob Vane, his brother, and Ken Huttema, co-owners of a specialty poultry processing plant, and after visiting Allan Huttema's duck farm, Mr. Vane decided to start a commercial duck operation. In April 1999, Mr. Vane approached Doug Clough of the engineering firm of Omega & Associates Engineering (1978) Ltd. to design a barn. There is disagreement between Mr. Vane and Mr. Clough as to whether Mr. Vane explained that he wanted a duck barn as opposed to a barn for conventional poultry such as chicken or turkey. Consistent with the design of most layer chicken barns, the barn designed by Mr. Clough and built by Mr. Vane was not designed to be watertight. This is an issue here because duck waste has a high water content. If ducks are not raised on dry litter but rather a slatted floor, significant odour issues also arise, as evidenced by the present complaint.
13. The Township approved the barn design and by September 1999, the barn was operational. At a cost of several hundred thousand dollars, Mr. Vane built a three-room facility with mechanical ventilation through twelve chimneys located along the roof of the barn structure. It has a slatted floor and a manure pit to capture duck waste. The barn houses approximately 7500 birds 80% of the time and 10,000 birds about 20% of the time (when incoming and outgoing flocks overlap). The ducks are moved from room to room as they mature. Approximately six and a half weeks after being placed on the farm as ducklings, mature ducks are hauled offsite for processing. Approximately every six months, duck waste is pumped out of the pit, hauled away and spread on fields in the vicinity.
14. Shortly after Mr. Vane commenced his duck operation in September 1999, the Township began receiving complaints about odours emanating from his duck barn. As a result of

these complaints, and unresolved issues relating to air quality and odour, the Township has never issued a final inspection report on the duck barn.

15. The Township of Langley has taken an active role in attempting to resolve the issues between the Complainants and Mr. Vane. The Township organised a stakeholder meeting on April 17, 2000 to hear the neighbours' concerns, identify the potentially affected agencies, share information regarding the duck operation and discuss a process to resolve the immediate and longer term issues. In addition to area residents, Mr. Vane attended the meeting, as did representatives from MAFF, the Agricultural Land Commission, the FPB, the South Fraser Health Region, the Greater Vancouver Regional District ("GVRD") Air Quality Branch and Township staff. MAFF offered to assist Mr. Vane in exploring techniques for minimising odour. It was determined that low cost alternatives would be explored first with one option being ozone air purification technology. The Township felt that a long-term solution would be to enshrine duck farm standards in a farm bylaw.
16. On June 29, 2000, a further stakeholder meeting was held to review the status of the partial ozone tests. At this meeting, it was agreed that the farm would go ahead with a full ozone system.
17. On September 21, 2000, another stakeholder meeting was held. The neighbours felt that air quality remained unacceptable. MAFF staff reported the results of their two-month monitoring program. Of the 31 site visits (conducted during times when the neighbours felt odours were prevalent), 28 visits yielded either no odour or only light detectable odour. The remaining three visits, in the evening and early morning, yielded moderate or strong odour. In the MAFF employees' view, the odours appeared to be of low frequency and low duration. They suggested that the FPB or the GVRD Air Quality Branch determine whether the existing air quality was acceptable. Township staff suggested that a working group (Mr. Vane, a neighbour, and representatives from MAFF and the Township) be established to sort out research options, time estimates and level of commitment of stakeholders and then report back to the whole group.
18. On December 8, 2000, a meeting was held to bring the stakeholder group up to date with the findings of the sub-group. Two draft documents were distributed for discussion. The first set out a recommended process to identify, assess and select an acceptable odour reduction remedy, and the second was a call for proposals from consultants to review duck farm odour reduction methods. As the neighbours required an opportunity to discuss the process, think about potential consultants and gauge the level of support within the neighbourhood, a further meeting was scheduled for mid-January 2001. MAFF suggested that as a demonstration of good faith, the neighbours should make a financial contribution towards the cost of hiring a consultant. The Township suggested that the neighbours should show support for the research perhaps through the signing of a petition.
19. The neighbours chose not to respond to the above proposal. They withdrew from the process. No further meetings were held and in March 2001, the Westcreek Citizens Society and forty individual neighbours commenced a Supreme Court action in nuisance

against Mr. Vane and his duck operation. As mentioned above, Mr. Justice Curtis stayed this action in order to allow the Plaintiffs to pursue their remedies under the *Act*. Their complaint was filed with the FPB in September 2001.

20. As all informal attempts to resolve the complaint were unsuccessful, this matter proceeded to hearing over ten days. The Panel heard from 30 lay witnesses and reviewed 52 affidavits. We also had the benefit of the expert opinions: Mr. Bohdan (Dan) Hrebenyk, climatologist/air quality expert; Dr. Ronald Miner, chemical engineer/animal waste management specialist; Dr. John Paul, specialist in organic waste management; and Mr. Van Kleeck.
21. Since the filing of the complaint, Mr. Vane has continued to work to resolve the odour concerns on his farm. In December 2001, the Agricultural Environment Partnership Initiative approved funding of \$34,000 to investigate three possible odour and dust reduction systems: wetscrubber, bio filter and ozone. Although these systems were successful at achieving some level of odour reduction, implementing them on any more than a trial basis, and over the whole barn, is very costly.

DECISION

The Act

22. The *Act* came into force in 1996. Consequential amendments to the *Municipal Act* (now the *Local Government Act*) require that before a municipality enacts a farm by-law, it must obtain the approval of the Minister responsible for the administration of the *Act* (the Minister of Agriculture, Food and Fisheries). In the case of the Township, although it has been working with MAFF, it has not had much success in having farm by-laws approved. Accordingly, the task of balancing the interests of farmers and their operations with the desires of their neighbours falls to the FPB. The *Act* offers some assistance in determining how these competing interests should be balanced by recognising that “normal farm practices” are protected.
23. Section 1 defines “normal farm practice” as follows:

"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).

24. Section 3 sets out the basis for a complaint to the FPB:

3(1) If a person is aggrieved by any odour, noise, dust or other disturbance resulting from a farm operation conducted as part of a farm business, the person may apply in writing to the board for a determination as to whether the odour, noise, dust or other disturbance results from a normal farm practice.

25. Upon the filing of a complaint, s. 6 provides:

6(1) The panel established to hear an application must hold a hearing and must

- (a) dismiss the complaint if the panel is of the opinion that the odour, noise, dust, or other disturbance results from a normal farm practice, or
- (b) order the farmer to cease the practice that causes the odour, noise, dust, or other disturbance if it is not a normal farm practice, or to modify the practice in the manner set out in the order, to be consistent with normal farm practice.

26. Previous decisions of the FPB are instructive as to the meaning of “normal farm practice” and “proper and accepted customs and standards as established by similar farm businesses under similar circumstances”. In the *Clapham Complaint*, September 22, 1997, a panel of the FPB concluded:

- 26. It is important to emphasize that being aggrieved by “odour, noise, dust or other disturbance” from a farm operation is necessary, but not sufficient, to make a valid complaint under the *Act*. In this case, the evidence given by the Complainants satisfies the Panel that they have been aggrieved by the noise from the propane cannon.
- 27. Having proved that they are aggrieved by cannon noise, the Complainants must provide sufficient evidence in support of their Complaint to allow this Panel to enter into a proper inquiry as to whether the practice complained of is not a “normal farm practice” as defined in Section 1 of the *Act* - i.e., that it was not conducted in a manner consistent with “proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances”.
- 28. The Panel has considered the following points regarding the meaning of the phrase “proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances”. First, where a farmer is found to be carrying on a farm practice that is consistent with proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances, the complaint must be dismissed by this Board despite the subjective impact of the practice on the complainant (Section 6(1)(a)). Whether or not the farmer would also be exempt from a common law nuisance action for that farm practice, or be exempt from the operation of municipal bylaws, would depend on whether the farmer also meets the conditions set out in Section 2(2) of the *Act*. Neither of these latter determinations can be made by this Panel.
- 29. Second, the balance between farmers and their neighbours has been established by the *Act* itself. Where a farmer is carrying out a practice in a manner consistent with proper and accepted customs and standards as established by similar farm businesses under similar circumstances, the complaint must be dismissed.
- 30. Third, this Board must have regard to all the words in the definition of “normal farm practice”, not just the words “proper and accepted”. The Board’s task is not to inquire into whether the farm practice is “proper” in the abstract, but whether it is consistent with proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances.

Therefore, a complainant cannot merely argue that a particular farm practice is not, in his opinion, “proper” because it encroaches on one’s lifestyle or sensibilities. It is implicit in the *Act*, that farmers who are similarly situated will develop customs and standards of practice. These customs and standards help define the term “proper and accepted”.

31. Finally, the *Act* does not ignore the impact of certain farm practices on third parties. The reference to “similar farm businesses under similar circumstances” requires an examination of individual circumstances on a given farm and its vicinity. It does not assume that because a farm practice is conducted in one context, that it will necessarily be “proper and accepted” in all contexts. There may be some circumstances which are so unique – involving serious health and safety concerns on third parties – that it cannot be said that a practice on a particular farm is consistent with normal farm practice.

27. In the *Eason Complaint*, March 10, 2000, the panel concluded:

69. A normal farm practice means a practice conducted in accordance with “proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances”. Applying that test to these facts has been difficult in the sense that these circumstances are quite unique in terms of scale of operation, location of barns and geography. Nevertheless, implicit in the test, as in all good chicken farming, is the existence of practices showing some threshold of consideration for one’s neighbours. In our judgment, it would be unwise to assume that because a farm practice is conducted in some circumstances and on an average scale, it will necessarily be “proper and accepted” where it is conducted in other circumstances and on a much larger scale. Just as similar farm businesses must follow proper and accepted customs for similar businesses under similar circumstances, qualitative differences – as for example, in the scale and siting of an operation – must be taken into account by the FPB in determining whether practices complained of are “proper and accepted”.

28. In the *Wright Complaint*, August 12, 2002, the panel stated as follows:

45. In considering the interference, the Panel has considered the type of interference, the severity, the duration, the character of the neighbourhood and the nature of the Complainant’s use of his land. With respect to the character of the neighbourhood, we have considered the zoning, whether the Respondent’s conduct changed the character of the neighbourhood and the reactions of other residents in the neighbourhood.
46. The timing of the transformation of the subject property from an orchard to a vineyard is a relevant consideration.... An assertion was made by one of the witnesses for the Respondents that the farm was “here first”. For the Complainant it was asserted that the residents were “here first” in relation to the vineyard.
47. The impact of timing has been considered by other Farm Practice tribunals and the courts in Canada where it has been described as “first in time, first in right”. An automatic “first in time, first in right” approach would not be warranted. That would be too restrictive an interpretation of the *Act* and would unduly limit the establishment of new farming operations. The relative timing of the establishment of the vineyard and the occupancy of those who complain of the noise is part of the site-specific circumstances to be considered.
48. ...[T]he same practice may qualify as a normal farm practice in one situation but not in another where the circumstances are different.

29. The statements in the *Clapham*, *Eason* and *Wright* complaints are consistent with those made in the judgment of the Ontario Court of Appeal in *Pyke v. TRI GRO Enterprises*

Ltd. (2001), 204 D.L.R. (4th) 400 (Ont. C.A.) [leave to appeal to S.C.C. dismissed]. The issue before the Court in that case was the correct interpretation of “normal farm practice” in Ontario’s farm practices protection legislation. The Court examined both the original (1988) Ontario definition – which for present purposes is identical to the present British Columbia definition – and the amended (1998) Ontario definition, which changed the word “accepted” to “acceptable”. The majority and the dissent disagreed on the question whether “first in time” should be a relevant factor in defining normal farm practice, with the majority determining that it was (paras. 85-86). As this factor does not alter our decision in this case, we need not dwell on it further. What is important from *Pyke* is the fact that the justices were unanimous that the change of language from “accepted” to “acceptable” did not alter the fact that a farm practices board must closely examine and weigh industry practice, but in light of words like “proper” and “circumstances”, it must also necessarily exercise an “evaluative” function. As stated by the majority, “[a]s I read both the 1988 and the 1998 Acts, farming operations do not automatically gain statutory protection by showing that they follow some abstract definition of industry standards” (para. 78). The dissenting judge took the same view: “I agree, and the parties do not dispute, that the determination of what constitutes a ‘normal farm practice’ must be made in a proper context, and that, depending on the practice under review, the context may be broad indeed, involving the consideration of many relevant factors including the proximity of neighbours and the use they make of their lands. However, it is my view that this approach applies under either statute. Hence, nothing turns on the 1998 amendment to the definition of ‘normal farm practice’ in this case and the differences between the two statutes are not ‘material’ in any real sense” (para. 42).

The Submissions of Intervenors

30. In coming to our decision on this complaint, we have had the benefit of the submissions of the three intervenors. Their submissions are briefly summarised below.

a) Township of Langley

31. The Township did not intervene in support of either the Complainants or the Respondents. Rather, the Township’s role in this proceeding was to ensure that the appropriate evidence was before this Panel to allow it to make a reasoned decision with respect to the complaint. It is the Township’s position that this Panel must take a broad view of what constitutes a normal farm practice and consider the relevant contextual, site-specific circumstances before it.³ Factors to consider include the location of the operation, the surrounding geographical features, the proximity of neighbours and their use of their lands, the zoning of the farm land and the neighbouring lands, the timing of the introduction of the duck farm operation to the area, weather features of the area and

³ In support of this proposition, the Township relies on *Pyke v. TRI GRO Enterprises Ltd.*, *supra*, a decision relating to a complaint made against a mushroom composting operation. While not binding on this Panel, it offers assistance in how to assess “normal farm practice” and “proper and acceptable customs and standards”. Although our *Act* uses the phrase “proper and accepted customs and standards” (as did the predecessor to the Ontario Act), the Court of Appeal held, and we agree, that nothing turns on this changed wording.

any other factors which may bear on the potential effect, if any, of the duck farm on others.

b) British Columbia Agriculture Council

32. The Agriculture Council is a general farm organisation representing over 12,000 BC producers. It chose to intervene in this complaint due to its concerns about the potential implications of this decision on agriculture producers generally, and poultry and livestock operations specifically. In its view:

A decision that this operation does not constitute normal farm practice will have a significant impact on producer's (sic) attitudes and support for land reserve legislation, which will be detrimental to stated provincial objectives by increasing pressure for exclusion and development of agricultural land.

33. The Agriculture Council argues that as the Vane duck operation meets all zoning and setback requirements, it is a legitimate operation within the ALR. In its view, the operation employs practices consistent with the definition of "normal farm practice" under the *Act* and as such, this complaint should be dismissed. The Agriculture Council also argues that the Mr. Vane's ongoing efforts to address odour and dust emission issues should be supported and encouraged. For its part, the Agriculture Council has provided funding to support research to investigate systems to remove dust and odour from duck confinement buildings. It maintains that "resolution of rural urban conflicts through ongoing mitigation efforts is greatly preferable to costly and ongoing legal challenges, which appear designed to force legitimate agriculture activity out of business".

c) Poultry Committee

34. The Poultry Committee represents the four major poultry sectors in BC: broilers, layers (table eggs), broiler breeders and turkeys. There are other smaller sectors including layer breeders, turkey breeders, silkie chickens, ducks, geese, ostrich, emus and others. The four major sectors include 539 licensed farms in British Columbia, collectively generating \$575.6 million in farmgate sales annually and making the poultry sector one of the most important agricultural commodities to the provincial economy. While the poultry industry has been quite successful, it is vulnerable due to BC's relatively higher costs – taxation, land, feed and labour. Further, most of the poultry sector is located in close proximity to its primary market – the Lower Mainland. As a result, the poultry industry feels significant pressure from the expansion of the non-farming community into agricultural areas. The Poultry Committee suggests that it was for this precise reason that the provincial government created the ALR in the 1970s. Given that less than 5% of our land base is suitable for agriculture, if other industries and urban development are allowed to encroach on agricultural land, BC will become increasingly vulnerable in terms of food self-sufficiency.
35. The Poultry Committee maintains that commercial poultry operations are characterised by confined housing operations, similar to the Vane duck farm. Manure is a valuable by-product from all poultry operations and virtually all manure storage generates some

odour whether it is in liquid or solid form. It is not unusual for poultry operations to be situated on small acreages with manure being trucked off site.

36. Members of the Poultry Committee visited the Vane operation. As a result of their visits, they make the following observations:
1. In order for the poultry sector to remain viable in BC, all levels of government and the Farm Practices Board must continue to encourage agricultural production, and specifically poultry production, within the Land Reserve.
 2. The Farm Practices Protection Act is important legislation for the poultry sector because it is intended specifically to encourage growth and development of the agricultural sector by giving farmers protection for the inevitable odours, noise, dust and other disturbances that will arise from normal farming practices.
 3. The farm practices employed by the Vane duck farm appear to be entirely consistent with the normal farming practices commonly associated with poultry production in British Columbia.

Are the Complainants Aggrieved by a Farm Practice?

37. A complaint under the *Act* involves a two-step analysis. First, a panel must be satisfied that the Complainants are aggrieved by odour, dust, noise or some other disturbance emanating from the farm. If the Complainants cannot establish that they are aggrieved, the complaint must be dismissed without need to consider whether the alleged source of the grievance results from a normal farm practice. On this initial threshold question, this Panel is satisfied that the Complainants are aggrieved by the odour emanating from the Vane duck farm and to a very small degree, by flooding. As very little was heard in evidence relating to noise concerns surrounding manure removal and the shipment of ducks, the Panel is not satisfied that the Complainants are aggrieved by noise from the Vane duck farm. In addition, the Complainants have not satisfied this Panel that they are aggrieved by a threat of contamination of groundwater. More will be said on these issues later.
38. The Panel heard extensive evidence from the Complainants regarding the pristine nature of the Westcreek area. It was designated as “Environmentally Sensitive Area 1” by the Township of Langley in a 1992 study as there are natural forests and salmon-bearing creeks within its boundaries. They argue that the Vane duck farm has completely changed the character of the community and unlike many cases the FPB sees, this is not a case where the community came to the farm; the farm came to the community. Many of the Complainants resided in the area 20 years or more before the development of the duck farm.
39. The Complainants do not see themselves as “complainers” and certainly the Panel does not have this impression of the neighbours who gave evidence before us. Quite the contrary. Their backgrounds are varied. They include farmers, agrologists, gardeners, people who grew up on farms and who have been around agriculture most of their lives.
40. They are not naïve about farm smells but in their collective opinion, the odour coming from the Vane duck operation is not a “normal” farm smell. They describe the odour in various ways, “like sewage”, “putrid”, “pungent and nauseating”, “unbelievable”. The

odour is periodic and unpredictable. It wafts in and out of their homes and properties. Children have been teased at school because the odour sticks to clothing.

41. The neighbours testified as to the many ways they have modified their behaviour to minimise the impact of the odour on their lives:
 - curtailing at-home social functions and entertaining guests;
 - restricting outdoor activities, including working in their yards and gardening;
 - keeping windows and doors closed;
 - installing air conditioning to compensate for having to shut windows; and
 - sleeping in the basement away from the odour.

42. The neighbours also report that the odour has interfered with home-based businesses such as tree farms and nurseries. Customers and employees complain about the odour. As the odour has interfered with some of the Complainants plans to develop or sell property, they believe that the odour has negatively impacted property values.

43. The Complainants reported health concerns that they attribute to the odour⁴:
 - Annabel Dean, horse breeder, trainer and riding instructor, reports that when the odour is bad she is unable to work her horses, her eyes water, her nose streams and she coughs. She has stopped riding her horses altogether because she believes the odour has affected her lungs.
 - Ms. Dean also reports that she has developed a skin condition since the farm began operating. She has been on tetracycline for the past three years. Her doctor has diagnosed rosacea, contact dermatitis, chronic rhinitis and inflamed mucus membranes but cannot attribute a cause.
 - Ms. Dean reports that one of her mares developed something like a “smoker’s cough” and swollen glands. The vet believed it was an allergic reaction but could not say to what. Another horse developed a swollen face and had to be removed from the property.
 - Ms. Dean’s son has developed asthma since the duck farm began operating, but no medical opinion links his asthma to the duck farm.
 - Esther Reed reports headaches if she does outside chores while the odour is present.
 - Nadine Mayer reports having nosebleeds and headaches since the farm began operating. Her mother developed a runny nose, watery eyes and congestion during her three-month visit.
 - Courtenay McDonald reports having a persistent cold since the duck farm began operating. He has yet to see a specialist.
 - Claire Lament has observed a worsening of her asthma symptoms since the duck farm began operating.
 - Sian Krannitz, nursery operator, who lives more than a mile away from the duck farm, describes herself as a childhood asthmatic. She has only suffered a handful

⁴ It should be noted that there was no evidence from any medical practitioner confirming that the odour or dust from the duck farm was the cause of any medical conditions.

of asthmatic attacks as an adult. After a visit with Ms. Dean, she walked through a “waft” of odour while going to her car, which triggered her most severe (level of) asthma attack. She required ventolin and breathing exercises to restore normal breathing.

- Many other Complainants reported similar systems of increased coughing, eye, nose throat irritation and some instances of nausea when exposed to the odour.

44. The Complainants described the proximity of their residences to the duck farm and the frequency of the odour as follows⁵:

- Ms. Dean’s house is about 190 meters west of the Vane duck barn; the properties are adjoining. Her barn is about 100 meters from the duck barn. In the summer, odour is much worse in the evening, in the winter odour is worse during the day. She describes some degree of odour every day, wafting in and out of her property.
- Ms. Reed is south of Ms. Dean but adjacent to the Vane property; according to her affidavit, her house is about 150 meters west of the barn. She smells the duck farm every single evening into the early morning in the summer (when she is at home). In the fall and winter, the odour is less predictable; it is more dependent on the weather.
- Daryl Zazulak lives approximately 1800 feet from the Vane barn. He describes smelling the odour at least four days a week, usually in the morning and late evenings; he does not notice significant differences summer to winter.
- Ms. Mayer lives across the street from the Vane duck farm. Her residence is about 100 meters northeast of the duck barn. Ms. Mayer describes a very bad odour present 20 to 25 days a month usually in the evenings.
- Mr. McDonald, who lives just east of Ms. Mayer, reports odour two to five times a week, primarily in the summer and fall.
- Kenneth McGougan lives to the south of the Vane duck farm with one property in between. He is approximately 1500 to 2000 feet from the farm. He describes smelling a pungent, nauseating stench from the duck farm approximately 24 times a month, lingering from a few minutes to three or four hours.
- Ross Bock lives west of the duck farm beyond the Reed and Dean properties. Despite the presence of a stand of mature trees between his property and the Vane duck farm, in the months between May and September he reports that very, very strong odour affects his residence in the evening on nearly a daily basis.
- Trevor Badminton and his wife, nursery operators, who reside approximately 500 meters due west of the duck barn, kept a diary of the duck odour between April and October 2002. Significant odours were observed on three days in April, four days in May, thirteen days in June, eleven days in July, seventeen days in August, six days in September and one day in October.
- Russ Bruce, nursery operator, lives approximately half a mile to the southwest of the Vane duck farm. He describes an unbearable smell, similar to a mushroom composting facility, experienced from time to time. The smell is more prevalent at night and in the winter. In the winter there may be five times a month the odour is bad as compared to a bit less in the summer. Odour can be experienced

⁵ The lists in paras. 43 and 44 are not intended to be exhaustive.

for six days in a row then not again for a month. The odour can be particularly intense and long-lasting when the manure is being spread.

45. The Complainants' expert witness Dr. Ronald Miner is a chemical engineer/animal waste management specialist who visited the farm on two separate occasions, February 6, 2001 and October 11, 2002. In his February 23, 2001 report, Dr. Miner concluded that the manure handling system of the Vane duck barn was similar to a conventional septic tank. He stated:

Septic tanks are widely used for the treatment of household sewage in rural areas. The important factor is that they always have solid covers and are buried a minimum of 45 cm beneath the ground to prevent the escape of odors. Septic tank contents are highly odorous and for most people highly offensive. This is not an appropriate method of handling duck wastes and is particularly inappropriate in proximity to neighboring residences such as exist in this location.

Anaerobic decomposition is that which occurs in the absence of dissolved oxygen and results in the production of reduced gases typified by hydrogen sulfide, ammonia, amines, mercaptans and other gases known for their highly offensive odorous character. The design of a duck barn with this type of manure handling system is inappropriate and will require extensive modification if it is to no longer be a nuisance and interfere with the rights of neighboring property owners to enjoy their homes.

Installation of a simple air scrubber is unlikely to resolve the issue. Although I have not examined the detailed design of the barn, I would anticipate that a satisfactory solution will include the addition of an exterior manure holding or treatment system and the installation of a flushing system within the building to remove fresh droppings several times daily. An air scrubber may also be necessary depending upon the effectiveness of the manure flushing system to keep the building free of decomposing duck droppings. Any flushing within the building should be done with fresh water or with water treated to the point of being odor-free and aerobic (contain free dissolved oxygen).

The addition of odor control devices to this building such as an ozone generator is not likely to be successful because of the massive odor source existing in the current manure storage. Air scrubbers are unlikely to be effective due to the large volume of air that must be handled and the high concentration of odorous gases that would be expected from a building of this type.

It would be my considered judgment that the current site is inappropriate for the raising of 10,000 ducks. A more remote site would have made waste handling and odor control much more feasible. I suggest the owner either consider relocating the barn to a more appropriate site, identifying an alternate use for the barn, or engage a consultant in the design of an alternate waste handling system that will both preserve the health of the ducks and eliminate the discharge of odorous air into the surrounding neighborhood.
[emphasis added]

46. Dr. Miner inspected the Vane duck barn on October 11, 2002. In his October 16, 2002 supplementary report, he observed:

Duck droppings are stored in a liquid form in pits beneath the entire building. Mr. Vane reported that droppings are hauled from the pits twice a year by an outside contractor and spread on agricultural land. This long-term, anaerobic storage of duck droppings in a liquid system is similar to having a very large uncovered septic tank beneath the building. This is the most odorous alternative mode of duck manure storage. By taking exhaust air from immediately over the stored liquid, this material is what is transported to neighbouring residences...[emphasis added]

47. Dr. Miner concluded that the “Vane Duck Barn is a source of continuous odor of high intensity. The odor is of a sufficiently high intensity to adversely impact residents living within five km of the site. The intensity will be greatest at those residences closest to the barn”.
48. The Complainants also rely on the October 4, 2002 report of climatologist, Dan Hrebenyk. Mr. Hrebenyk conducted ambient odour intensity sampling of the Westcreek neighbourhood on August 12, 16 and September 22, 2002. He concludes:

Based on the three site visits that were made to the community in the vicinity of the duck barn on 256th Street in Aldergrove, *it is my professional opinion that the odour impacts from this operation are of sufficient intensity to be considered a source of nuisance odours on neighbouring properties along 254th Street and 76th Avenue.* The odour impacts observed are higher than considered to be acceptable in jurisdictions such as Ontario and Australia which regulate odours from agricultural activity. This conclusion is based on the following considerations:

1. Odours were detected on each of the three visits to the area, and odour intensities of 3 on the n-butanol reference scale were observed at times during all three sampling periods. A level 3 on the scale is sufficient to cause annoyance and complaints from some individuals, especially in a sensitized population such as exists in this community.
2. During one of the site visits, odours up to a level 6 on the n-butanol scale were observed. This level is sufficiently high to be considered universally objectionable.
3. These odour intensities are equivalent to odour concentrations of 6-25 D/T, and this level of odour impact exceeds the numerical limits for acceptable odour impacts as defined in Ontario for odour sources in general, and in Western Australia for odour impacts from poultry operations.
4. Eye irritation was noted by this investigator on one occasion and throat irritation was noted on two occasions during the sampling program. This type of irritation is consistent with exposure to elevated levels of ammonia, a compound known to be emitted from animal manure.
5. The measured odour intensities and the intermittent nature of the odours detected is entirely consistent with this investigator’s experience with other sources of odour that result in large numbers of odour complaints from exposed communities.

Anecdotal information provided by residents suggests that the odour impact area is much larger than was observed in the three site visits, but this information could not be corroborated.
[emphasis added]

49. For their part, the Respondents do not deny that the duck farm produces odour. However, they emphasise that the real question for this Panel to determine is the reasonableness of the odour produced considering its frequency, intensity, duration and offensiveness.
50. The Respondents point to the Complainants own expert, Mr. Hrebenyk, whose data confirmed that the odours do not occur frequently. Fifty percent of the time, on the dates, times and locations that data was collected, no odour was detected. This result is consistent with the observations of MAFF employees who attended at the site 31 times and rarely observed odour. With respect to intensity, Mr. Hrebenyk’s evidence was that many of his observed odours were at the low end of the scale, below the level where one would expect complaints. Mr. Hrebenyk did observe one “spike” or odour event that was significant, but a one time event should not, according to Mr. Van Kleeck, lead to the conclusion that an odour is of unacceptable intensity. With respect to duration, the

evidence of the Complainants and their witnesses was that the odour was transient in nature, wafting in and out. As for offensiveness, according to Ontario standards, of 34 livestock types listed, only horses, milk cows and broiler chickens were considered lower in terms of odour potential. The Respondents submit that after considering the frequency, intensity, duration and offensiveness of the odour, its impact is reasonable and the Complainants are not “aggrieved”.

51. The cumulative effect of the testimony of the Complainants satisfies us that offensive odour occurs at a sufficient frequency, intensity, and duration throughout the year so as to satisfy the threshold question that they are aggrieved by the odours emanating from the Vane duck farm. The fundamental issue for this Panel is whether these odours result from a “normal farm practice”. This issue will be dealt with later.
52. The second main ground of this complaint is that the Complainants are aggrieved by the threat of groundwater contamination due to storage of liquid duck manure in a tank not specifically designed for that purpose. As the residents of Westcreek rely on wells for their water supply, they are concerned (a concern validated by the structural engineer) that the manure storage tank could leak. It was not designed for long-term storage of liquid manure and it was not designed to be watertight. If the tank leaks, there is a very real risk that groundwater will be contaminated. On at least one occasion, a well in the neighbourhood has failed a water test but the source of contamination was not determined.
53. In response, the Respondents argue that it is not clear that seepage of manure into groundwater falls within the definition of “other disturbance” under s. 6 of the *Act*. However, assuming that it does, the Respondents submit that the Complainants have failed to demonstrate that groundwater in the Westcreek area has been contaminated or that the source of any contamination is the Vane duck farm. To be aggrieved, the Complainants must show that “some other disturbance” (in this case contamination), resulting from the farm operation, *has* injured or wrongly or adversely affected their rights or interests. The Respondents argue that neighbours cannot be aggrieved by what they speculate may or may not occur.
54. The only evidence the Panel heard relating to water contamination relates to the contamination of a stream flowing through the Vane property. As a result of a complaint, the then Ministry of Environment (now the Ministry of Water, Land and Air Protection – “WLAP”) investigated the Vane operation and identified free-range birds as the source of contamination. Mr. Vane resolved these issues to the satisfaction of WLAP and no further source of contamination has been identified.
55. The Panel agrees that the Complainants have not demonstrated that they *are* aggrieved by the threat of contamination of groundwater. The evidence falls short of proving that the Vane barn does leak or that any resulting leakage has contaminated the groundwater. Although there has been one instance where a neighbouring well failed a water test, nothing attributes this failure to the Vane duck operation. There are many potential sources for well contamination including livestock such as sheep, horses or cattle as well as the Complainants’ own septic tanks. This aspect of the complaint must therefore be

dismissed without consideration of whether the storage of liquid manure in a concrete tank not designed for that purpose is a normal farm practice. Similarly, the issue of whether Mr. Vane has complied with building codes and other requirements is left to the regulatory bodies responsible for such determinations.

56. Finally, the Complainants submit that they are aggrieved by flooding. The construction of the duck barn did result in minor flooding to the property of Ms. Reed and Ms. Dean. A neighbour (Mr. Zazulak), experienced in construction and in the de-watering of roads, foundations and building sites, has viewed the properties and concluded that the construction of the duck barn altered natural drainage. He is of the view that if the Vane property is re-contoured, the flooding problem could be rectified. The Respondents do not dispute that flooding has occurred.
57. The Panel recognises that this is a minor concern. If the Complainants were not pursuing the larger odour complaint, it is doubtful that this issue would be before the FPB. However, minor or not, the Panel is satisfied that a small portion of the properties of at least two Complainants is now wetter than it was before construction. Accordingly, Ms. Reed and Ms. Dean have demonstrated that they are aggrieved by flooding.

Do the Disturbances Result From Normal Farm Practices?

58. The Complainants submit that the odour (and to a minor degree, the flooding) do not result from “normal farm practices” and as such, the Vane duck farm should be directed to cease or modify the practices which cause these disturbances. In support of this position, they rely on the expert opinion of Dr. Miner that the extreme odours emanating from the Vane duck operation do not result from “normal farm practices”. In his supplemental report of October 16, 2002, he states:

Among the issues raised by this facility is whether the housing of the ducks and the associated waste handling practices qualify as “normal farm practices” as defined in the British Columbia Farm Practices Protection Act of 1996. In my opinion, there are a variety of factors which cause this facility to fail the first criteria, “conducted in a manner consistent with proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances”. The practices of the Vane Duck Farm fall outside the definition of a “normal farm practice” in any jurisdiction with which I am familiar in North America. Among those practices are the following:

- a. The Vane Duck Barn is a “concentrated duck raising facility” Such facilities are inappropriate in the immediate proximity of pre-existing residences. In my opinion, those jurisdictions which set separation distances would insist that this facility be at least 500m from the property boundary.
- b. *The liquid manure handling system adopted for this barn is known to be the most odorous of the various options available* and is therefore used by only 1% of the confinement poultry operations on a limited land area.
- c. The odor from this operation is adversely impacting property owners up to 5 km from the site. This is inappropriate for protection.
- d. The University of British Columbia has measured the exhaust air odor intensity as being between 16,000 and 22,000 dilutions to threshold. This is a very intense odor. Exhausting air of

this quality is certain to interfere with the adjacent property owners and is likely to result in public health issues.
[emphasis added]

59. The Complainants also submit that the Vane duck farm does not follow the same or similar practices of other duck farms in BC, Canada, North America and Europe. Of the four commercial duck farms in the Fraser Valley, Fraser Valley Duck and Goose Ltd. (“FVDG”) is the largest with three sites, producing two-thirds of the ducks in BC. All three sites are considerably larger than 13.75 acres. In the past, it too used a wet manure system. However, in response to complaints, FVDG now uses dry litter in all but one of its barns.⁶ The one barn using a wet manure system is located near its processing plant and is flushed daily with waste water from the plant.
60. The three other operations belong to Allan Huttema, Frank Pauls and Mr. Vane. The Allan Huttema operation is situated in a rural neighbourhood which includes dairy and hog farms. Mr. Huttema too has had on-going odour complaints from a neighbour resulting in an FPB complaint. As a result of the complaint, that operation agreed to improve its manure management practices by moving from a wet system to a dry litter system. When the operation changed to a dry system, odours were greatly reduced. The third producer, Mr. Pauls, has two sites, an older site managed on a wet system and a newer site managed on a dry system.
61. Elsewhere in Canada, the Complainants point to Brome Lake, a well-established duck operation in Quebec. This large operation is situated on 350 acres, and raises ducks on both wet and dry litter systems. However, only a very small proportion of the manure output is liquid. It is pumped out every three days and stored in a long-term storage tank. In the USA and Europe, the Complainants submit that while ducks may initially be raised on wire mesh, after three or four days they are moved to a dry litter system. Many operations have complex systems for managing manure, separating liquids from solids and aerating waste.
62. The Complainants also submit that the Vane duck operation does not meet normal farm practices for other forms of contained livestock. It is not standard for poultry operations to use liquid manure systems. Nor is it standard for hog operations, which do rely on liquid systems, to be situated on a small acreage. They argue that Mr. Vane’s use of a liquid manure management system is out-dated and not the norm for the duck industry. Further, when one looks at where the Vane property is situated, it is not “proper and accepted” to site a duck farm relying on a liquid manure management system in close proximity to neighbours and in “an environmentally sensitive area”. The Complainants point to the setback requirements in Ontario as a measure of what should have been done in this case.⁷

⁶ According to Ms. Reed who spoke with an employee of FVDG, clean saw dust is added daily to barns and once a week, the barns are cleaned out and the litter is changed. This of course differs from Mr. Vane’s system, in which the basement of the barn is filled with manure, the odour from which is released out the barn’s chimneys.

⁷ Ontario uses a tool to determine Minimum Distance Separation (MDS I & II). The MDS I standard is used to determine the minimum distance separation of new development from existing livestock facilities. The MDS II is

63. The Respondents submit that any odour emanating from its farm results from “normal farm practices” and as such should be protected by the *Act*. Prior to building the barn, Mr. Vane visited other livestock operations. At that time, Allan Huttema had ducks on a slatted floor over a liquid manure pit. Similar techniques were also used at two hog operations he visited. Research on the internet and in books as well as discussions with Ken Huttema confirmed this as an accepted method of duck husbandry. As for the siting of the barn, Mr. Vane meets all applicable legal setback requirements for his barn. According to MAFF employee, Mark Robbins, Mr. Vane also meets the more rigorous setback requirements in Ontario. Further, the siting of the barn does not indicate a lack of concern for neighbours; the barn is not pressed up against the property line where its impact would likely be greater.
64. Mr. Vane has opted for some “different” perhaps innovative practices. He vents his barn through 12 rooftop chimneys. While this is unusual for poultry, according to MAFF employee, Mr. Van Kleeck, this is standard for hogs. It is a European design allowing for better mixing of odours. MAFF accepts rooftop chimneys as a proper and accepted method for ventilating a barn. As for the manure management system, Dr. Paul, Ken Huttema, and the three MAFF employees all testified that it is a proper and accepted practice to store manure in liquid form below a slatted floor. The Respondents concede that it is difficult to compare Mr. Vane’s farm to similar farms under similar circumstances, as the duck industry is so small. However, if one compares Mr. Vane’s operation to swine and dairy operations using a liquid manure system, his practices are proper and accepted. In looking at the Huttema and Pauls operations, both have used slat floors with under-slat storage of manure at one time or another.
65. In the event that the Panel determines that the odour coming from the Vane operation is not reasonable, the Respondents argue that the Panel must consider in the words of the *Eason Complaint*, the “threshold of consideration for one’s neighbours”. Paragraph 69 of the decision in that Complaint states:

69. A normal farm practice means a practice conducted in accordance with “proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances”. Applying that test to these facts has been difficult in the sense that these circumstances are quite unique in terms of scale of operation, location of barns and geography. *Nevertheless, implicit in the test, as in all good chicken farming, is the existence of practices showing some threshold of consideration for one’s neighbours.* In our judgment, it would be unwise to assume that because a farm practice is conducted in some circumstances and on an average scale, it will necessarily be “proper and accepted” where it is conducted in other circumstances and on a much larger scale. Just as similar farm businesses must follow proper and accepted customs for similar businesses under similar circumstances, qualitative differences – as for example, in the scale and siting of an operation – must be taken into account by the FPB in determining whether practices complained of are “proper and accepted”. [emphasis added]

used to determine the minimum distance separation for new or expanding livestock facilities from existing or approved developments. According to MAFF employee Mark Robbins, applying the MDS II model to the Vane duck farm yields a set back distance of 156 meters and the Vane barn is 175 meters from the nearest dwelling. According to Ms. Reed’s affidavit her, back door is 150 meters from the barn. The Panel also notes that according to her affidavit Ms. Mayer’s residence is about 100 meters northeast of the barn.

66. In the Respondents' submission, Mr. Vane has far exceeded what is required of a farmer. He has attended numerous formal and informal meetings with his neighbours, the Township, and other local and provincial government agencies. He has agreed to work with MAFF and the University of British Columbia on odour reducing experiments including the use of ozone and a bio-filter. Despite the neighbours' abandonment of informal processes set up to resolve these issues in favour of litigation in the Supreme Court, Mr. Vane continues his unwavering commitment to find an effective and economically viable method to reduce farm odours from his operation.
67. As to the remedies sought by the Complainants, the Respondents submit that as the odours from the Vane duck farm result from "normal farm practices", no order modifying the operation should be made. As for the pit leakage complaint, no grievance has been demonstrated and as such, that is the end of the matter and that aspect of the complaint should be dismissed.
68. To deal with the easier matters first, the Panel is of the view that the Complainants have made a valid complaint with respect to flooding. The Respondents do not deny that the construction of the duck barn may have altered drainage to some minor degree causing flooding of a small portion of the Dean and Reed property. This flooding is not the result of normal farm practices. With respect to the complaint relating to groundwater contamination, as the Complainants have failed to satisfy the Panel that they are aggrieved by a practice of the Vane duck farm, it is unnecessary for the Panel to consider whether the threat of groundwater contamination results from normal farm practices.
69. That leaves the more complicated issue – do the odours, which are the source of this grievance, result from a normal farm practice? After much thought and deliberation, it is the Panel's opinion that they do not.
70. The Panel had the opportunity to make a site visit to the Vane duck farm as well as the surrounding neighbourhood. The Panel did not observe anything in the character of the neighbourhood which would preclude the operation of a properly managed containment livestock operation. The fact that many of the other neighbours have chosen to use ALR land for homes and hobby farms does not prevent others from using the land for commercial agricultural purposes other than horse or tree farms, nurseries, and gardens. MAFF employee Mr. Van Kleeck prepared a report confirming that there are containment livestock operations in the Fraser Valley on plots of land smaller than the 13.75 acres owned by Mr. Vane.⁸ Thus, the Panel concludes that it is proper and accepted practice for commercial livestock operations to exist on small acreages within the Fraser Valley.
71. However, our analysis must go further and take into account the nature of the actual operation. In this case, Mr. Vane operates a duck farm of up to 10,000 ducks on his 13.75 acres. A consideration of "proper and accepted customs and standards as established by similar farm businesses under similar circumstances" involves the following:

⁸ In the hog, dairy and poultry sectors, 16%, 2% and 63% of producers operate on properties less than 13.75 acres.

- a) what are proper and accepted customs and standards for other duck farms in the Fraser Valley and beyond, in terms of siting of operation?
 - b) what are proper and accepted customs and standards for other duck farms in the Fraser Valley and beyond, in terms of manure management?
72. As earlier observed, the duck industry in British Columbia is very small. There are four main operations, FVDG, Allan Huttema, Mr. Pauls and Mr. Vane. There are also two minor producers, Ken Huttema and Rob Vane. According to MAFF employee, Mr. Van Kleeck, FVDG produces 2/3 of BC's ducks on three sites. The Allan Huttema operation and Mr. Pauls each produce approximately 13% while Bert Vane produces about half that (6%).
73. Looking at the FVDG operation, it has one site on Huntington Road and another on Bradner Road in Abbotsford; a third site along with the processing plant is located in Yarrow. It is a larger operation but all three sites are considerably larger than 13.75 acres. At the Yarrow site, only one barn out of six is operated on a wet system. That barn is used for young ducks and is flushed daily with waste water from the processing facility and then the liquid is stored in a large tank until it can be spread on agricultural land. The rest of FVDG's barns are operated on a dry litter system.
74. Mr. Pauls has a layer and broiler operation in addition to his duck farm located on four or five different parcels of land on the Sumas Prairie. His meat duck operation is twice the size of Mr. Vane's operation but is located on approximately 25 acres, in an area where commercial livestock operations, including dairy and poultry, are present. Mr. Pauls raises layer and meat ducks. His layers are raised using a dry litter system; his meat ducks are raised in a similar fashion to that employed by Mr. Vane.
75. The Allan Huttema operation is approximately the same size as Mr. Pauls' operation and located on 65 acres. Although originally Allan Huttema raised meat ducks on wire mesh, in response to complaints by a neighbour, the operation has since been converted to a dry litter system. It should be noted that Mr. Huttema has since sold his duck operation.
76. Ken Huttema gave evidence that both he and his partner Rob Vane occasionally produce a small number of ducks for their processing operation (approximately 1500-2000 birds at a time). They raise their ducks in chicken barns using a dry litter system. Mr. Huttema's property is 12 acres; the size of Mr. Vane's property is unknown.
77. The following conclusions can be drawn. Of the limited number of duck operations in the Fraser Valley, Mr. Vane's is one of the smallest. Only Ken Huttema and Rob Vane produce fewer ducks (albeit on a part time basis). Compared to the other duck operations, Mr. Vane's operation is sited on a small acreage in a neighbourhood comprised of other small acreages. Unlike the areas surrounding the operations of FVDG, Allan Huttema and Mr. Pauls – which have commercial dairy, poultry and/or hog operations nearby – the area surrounding Mr. Vane is largely residential albeit on ALR land. As for manure management, the majority of the other duck operations use a dry litter system (FVDG, Allan Huttema, Ken Huttema, Rob Vane). Mr. Pauls and Mr. Vane both use a wet litter system for meat ducks. Based on the evidence of various experts, a

wet manure management system produces more odours than a properly managed dry litter system. Manure in a wet state is anaerobic and results in the production of many volatile compounds.

78. Although Mr. Vane’s operation is relatively small, it is located on a small site, in close proximity to many residential neighbours and employs a more odorous manure management system. The combination of these latter three factors leads the Panel to conclude that the Vane operation falls outside the proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances. To fall within the parameters of “similar farms in similar circumstances”, the Vane farm would need to alter one of the three factors listed above. If the operation was located on a larger site, if it was farther away from neighbours or if it used a dry litter system, it would likely fall within “similar farms in similar circumstances”. However, the Panel finds that it is not proper and accepted practice in BC for a duck operation to be sited on a small acreage, in close proximity to many residential neighbours, if that operation uses a wet system. Mr. Pauls’ operation is not similar; it is located on a larger property and in an area where other commercial livestock operations are found. The Allan Huttema, Ken Huttema, Rob Vane and FVDG operations use a dry manure system and operate on larger properties. While they may have some neighbours in close proximity to their operations, it is not to the same degree as observed at the Vane duck farm.
79. Although it is less of a concern in this instance, size of operation is relevant to any contextual analysis determining normal farm practice. Mr. Vane had a plan to expand his operation once he resolved the issues with odour. Clearly any expansion of an operation on a small acreage must be looked at very closely to see if that expansion can occur and still maintain normal farm practices. In other jurisdictions, such as Alberta and Ontario, a formula is used to determine a farm operation’s potential impact on the surrounding area given the planned number of livestock units, the type of livestock, the distance between the barns and the nearest dwelling and the type of manure storage planned. Although BC does not have such a system, performing such a calculation prior to building or expanding a farm operation is a good predictor of potential farm practices concerns. Certainly these types of concerns are easier to address at the planning stage rather than after the fact.
80. The Panel appreciates that there is a continuum of acceptable practices and it is very difficult to draw a clear line as to what is acceptable and what is not, especially in a small industry. However, of the operations that do exist in BC and based on the evidence that a properly managed dry system is less odorous than a properly managed wet system, the interaction of the three factors, size of property, proximity of neighbours and manure management leads us to the conclusion that Mr. Vane does not follow normal farm practices. As such the Panel is satisfied that the Vane operation falls outside the protections of the *Act*. Having come to this conclusion, not much can be gained by reviewing the evidence of duck operations in other jurisdictions other than to observe that similar manure management technologies are used world-wide and similar issues arise.

81. Further, the magnitude of this complaint separates it from other complaints against duck farms. While some of the other duck farms have been subject to complaints, these complaints have tended to be isolated, made by one neighbour involving a particular incident. An investigation is done and a resolution is identified. In the case of Mr. Vane, the situation is very different. With the exception of a few people, an entire neighbourhood supports this complaint. While it may be that the force behind the complaint is Ms. Dean and Ms. Reed (two neighbours whose property adjoin the Vane farm), nonetheless the rest of the neighbours have sworn affidavits and attended this hearing to make their concerns known. All gave similar evidence of the negative impact this operation has had on their lives, homes and businesses. While Mr. Vane has continued to work hard and try new techniques, the odour problems have not changed much since 1999. The neighbours are obviously frustrated and their complaints cannot be dismissed as overly sensitive or naïve. Typical of the attitudes of the neighbours is the following comment of Ross Bruce, a nursery operator:

...I am not here to criticise. I am just here to say... everything can work and duck farming can work. How it can work and how it will not work I don't know. I am not a duck farmer. But I mean all farming does work. You know, I mean you see feed lots. I mean just because a person farms doesn't mean that everything you do is wrong or everything you do is right. I have relatives that farm 4,000 acres of grain in the prairies and they are concerned about big huge feed lots that are around them and polluting all their water. This is a person that's a third generation farmer and it doesn't come easy for them to go up against another farmer and complain and when basically there is too many animals in one area and it's not drained properly, it's not managed properly. I don't think any farmer wants to complain about anybody else as a farmer and *sometimes there is just things that aren't working and they have to be fixed*...I have lived in the area for almost...twenty-four, twenty-five years. I know most of my neighbours. They have had lots of reason to complain about little things...we have big sawdust trucks coming in all the time...When plants are hauled out occasionally pots ... fall off, we have to go along and clean them up. They have had lots of reason to complain about me and they haven't. Bert, these people wouldn't do this lightly. They just wouldn't. You know it's not a – it's not a neighbourhood made up of city slickers per se. If it was, I would not participate. I wouldn't be part of this. [emphasis added]

82. While MAFF employees gave evidence that odours were not particularly bad when they attended at the neighbourhood, they do not live next to the farm 24 hours a day, 7 days a week. Their evidence does not contradict the neighbours who concede that the odour is not always present, varying depending on time of day, time of year and the particular weather. The Panel accepts that for those who live near the Vane duck farm day in and day out, the odours produced by that farm are extreme and unacceptable.

83. Mr. Vane, the Poultry Committee and the Agriculture Council emphasized the fact that the Vane duck farm is located in the ALR. The fact that land is in the ALR is a circumstance relevant to defining normal farm practice, but it is not conclusive. The fact that a property is located within the ALR does not give a farmer the absolute right to carry out whatever agricultural practice he wants on his property. The *Act* does not exempt farms in the ALR from its application. Farmers within the ALR like those situated elsewhere are subject to the same test: are their “practices consistent with proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances”?

84. The Respondents raised two arguments that deserve further comment. The first relates to the Township's submission, noted above, that to determine what is a normal farm practice, the Panel must look at the relevant contextual, site-specific circumstances. In making this submission, the Township relied on the Ontario Court of Appeal decision in *Pyke v. TRI GRO*, also discussed above, which considered Ontario's farm practices protection legislation. According to *Pyke*, factors to consider include the location of the operation, the surrounding geographical features, the proximity of neighbours and their use of lands, zoning, when the farm was introduced to the area, weather features and any other relevant factors. The Respondents argue that *Pyke* is of limited assistance to the Panel. Ontario does not have an ALR and as such the broad approach used under the Ontario legislation must be narrowed to fit within BC's regime which recognises farming as the primary use for ALR land.
85. While the *Pyke* case is not binding on the Panel, it is instructive, as it is the first Court of Appeal decision in Canada issued with respect to farm practices legislation. Its reasoning is compelling, and as noted in the decision itself, its interpretation of "normal farm practice" does not depend on the 1998 amendment changing the word "accepted" to "acceptable". Finally, as noted above, *Pyke* is very much in line with the FPB's approach to understanding "normal farm practice", as set out in *Clapham, Eason and Wright*. As noted above, the fact that some of BC's agricultural land is contained within the ALR is important, but it is just one factor to take into account when looking at the context out of which a complaint arises.
86. The Respondents also argued that even if the impact of the odour is unreasonable, Mr. Vane has met the "threshold of consideration" for his neighbours, and as such deserves protection from the *Act*. In the Panel's view, the Respondents are misreading the *Eason Complaint* wherein the following comment is made "[n]evertheless, implicit in the test, as in all good chicken farming, is the existence of practices showing some threshold of consideration for one's neighbours". Having found that the impact of the odour from the Vane duck farm does not fall within normal farm practices as it is not consistent with proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances, no amount of consideration for ones' neighbours after the fact can save what amounts to a farm practice that is not "normal".
87. The submissions of both the Poultry Committee and the Agriculture Council expressed concerns about the potential implications of this decision on agriculture producers generally and poultry and livestock operations specifically. A couple of observations should be made. First of all, duck farming is a small niche industry. While aspects of duck farming are similar to other poultry, hog and dairy operations, it is a distinct industry producing a distinct product. Second, a practice may qualify as a normal farm practice in one situation but not in another where the circumstances differ. Third, nothing in this decision should be construed as saying that a properly managed containment livestock operation is not possible on the Vane property. Approximately 63% of all broiler operations in the Fraser Valley are located on properties of similar or smaller sizes. As long as the operation is of an appropriate size and properly managed, it would be afforded the protections of the *Act*. Given the Panel's observations of Mr. Vane

as a farmer, had this complaint arisen out of Mr. Vane's operation of a broiler operation, in all likelihood the complaint would have been dismissed.

88. Finally, nothing in this decision should be read as a negative comment against Mr. Vane. Throughout the complaint process, Mr. Vane has been a gentleman. He has been sensitive to his neighbours' concerns and worked with due diligence to find a solution. He has sought and followed the advice of experts. However, his neighbours have not been unreasonable in their concerns either, and unfortunately, a readily available, affordable solution has yet to be found. Ozone has not proven to be the fix. It is unreasonable to ask the neighbours to continue to wait to see if ozone will work, when it is Dr. Miner's opinion that it will not. A biofilter is costly and not a viable solution.
89. This whole situation is unfortunate. Mr. Vane wanted to use his agricultural land for an agricultural purpose, a laudable goal. He investigated his options. Conventional poultry production was too expensive, requiring the purchase of quota. With the encouragement of Ken Huttema and Rob Vane, Mr. Vane embarked on his duck business. While Ken Huttema was aware of complaints against his own brother's operation, his encouragement to Mr. Vane was likely fuelled by his needs as a processor for more product to service his markets. As this was a part-time venture, Mr. Vane opted for a manure management system which was less labour intensive and less costly, a wet system. This system involved the use of a slatted floor over a cement storage tank with manure being emptied every six months. Twelve chimneys were installed to ventilate the manure tank and the barn. Unfortunately, according to Dr. Miner, he could not imagine a better barn design for producing odours.
90. The following passage from the *Eason Complaint* is equally applicable here (para 73):
- The Panel is very much aware that odour is not measurable in the same fashion as disturbances such as noise (decibels) and dust (volume of particulate). Great care must therefore be taken to ensure that FPB decisions on such questions are not idiosyncratic. However, the legislation specifically creates the board to which it has assigned the task of considering practices that, amongst others, cause odour. Acknowledging that great care must be taken in exercising these judgments, the Panel in this case, unanimously without hesitation, concludes that the odour from the Outlander operation has too great an impact on the Easons to be allowed without the installation of reasonable mitigation measures aimed at reducing the disturbance. As we will note below, significant odour may still remain after mitigation measures have been installed. However, proper and accepted practices require no more or less in a case like this than the taking of reasonable steps to attempt to ameliorate this impact.
91. Accordingly, the Panel finds that the practice of the Respondents that causes the odour is not a normal farm practice. Going back then to consider the Complainants' issues, as to the first issue, it is consistent with normal farm practices to site a duck farm or a similar livestock operation on a small acreage. However, that duck farm or livestock operation must be of an appropriate size and must employ proper manure management practices. Where, as here, the duck farm or livestock operation is located on a small acreage, with neighbours in close proximity, practices producing intense odours which are proper and accepted on a larger acreage located in an area where other livestock operations are present are not appropriate or reasonable. In fact the combination of a small site and

close neighbours leads to the conclusion that manure management practices should meet if not exceed the practises seen on larger operations sited on larger properties.

92. FVDG, representing two-thirds of the BC duck industry, can be viewed as an example of a good industry standard. It too has had complaints with respect to odour in the past. However, it now operates a vigilantly managed dry manure system in all but one barn. The one remaining barn managed on a wet system is used for growing young ducks and is flushed daily with waste water from the processing plant. The resulting liquid is stored in an enclosed tank and periodically spread on agricultural land.⁹
93. To answer the second issue, the Panel finds that it is inconsistent with normal farm practices for the Vane duck farm to rely on a wet manure management system when that system creates unacceptable and extreme levels of odours for the surrounding neighbours. The Panel has seen no evidence to establish that the wet manure management system is contaminating the local water supply. This is an issue for public health officials or WLAP, who have the statutory tools to investigate these sorts of issues.
94. To answer the third issue, the Panel does not find any evidence to support the Complainants allegation of inadequate measures to limit noise related to manure removal and the shipment of ducks. The shipment of live animals is a necessary part of livestock production. In the case of poultry, birds are often shipped at night when birds are calmer. As for noise generated by manure removal, a certain amount of noise is to be anticipated when manure removal occurs. There was no evidence led to suggest that these aspects of the Vane operation were anything other than proper and accepted practices as used by similar farms under similar circumstances.
95. Finally, as indicated above, the Panel is satisfied that to a very minor degree, Ms. Reed and Ms. Dean have experienced minor flooding to a small portion of their respective properties which adjoin the Vane farm and such flooding does not result from normal farm practices.

ORDER

96. Given that we have found a breach of *Act* insofar as the practices complained of result in odour and flooding, s. 6(1)(b) of the *Act* confers upon the Panel the jurisdiction to order the farm to modify the practice in the manner set out in the order, to be consistent with normal farm practice. Normal farm practice with respect to the odour disturbance requires the implementation of reasonable measures to attempt to mitigate those odours.
97. Accordingly, and pursuant to s. 6(1)(b) of the *Act*, the Panel orders the Respondents to cease operating their duck farm until they modify their manure management practices to reduce odour, as follows:

1. Cease using a liquid manure management system.

⁹ This manure management system is consistent with Dr. Miner's description of a method for dealing with liquid manure that may be appropriate in certain circumstances.

2. Modify the barn to employ a dry manure management system, under and implemented in accordance with a litter management plan recommended by a qualified technical professional, which plan shall address the following elements at a minimum:
 - vigilant litter management practices to reduce the amount of anaerobic activity in the litter, including but not limited to regular additions of litter and reducing water spillage;
 - litter removal from barn on a regular basis; and
 - litter from barn stored in a covered location.

98. The Panel's modification order in the previous paragraph will take effect on November 1, 2003, which period of time is designed to give the Respondents a fair opportunity to grow out their flocks. If, within 10 days after this Order is issued, the Respondents provide the Panel with a compelling reason why their flocks cannot be shipped within this period, the Panel will entertain a submission for an extension of time before the modification order takes effect.

99. The modification order we have made will obviously not be applicable if the Respondents decide not to continue to operate their duck farm. Furthermore, it will not be applicable if the Respondents choose to produce some other containment livestock. In that event, of course, the Respondents would be wise to have regard to the factors discussed in this decision so as to ensure that any new farm business complies with normal farm practice.

100. The next issue concerns the appropriate remedy for the flooding problem. The evidence was that the barn's construction altered the drainage in a manner that caused minor flooding. The Panel gave some consideration as to whether we have the jurisdiction to order modification even if Mr. Vane chooses to stop farming. It is our opinion that we do not. The Panel therefore orders that, if the Respondents continue their farm operation in the period that our modification Order takes effect, any future farming must fix the drainage problem within six months of farming operations commencing. In addressing this issue, Mr. Vane is encouraged to retain a technical advisor, and to discuss potential remedies with his neighbours, Ms. Dean and Ms. Reed. The Panel observes that Mr. Zazulak has viewed the situation and may be an appropriate person to consult to rectify the flooding issue.

101. The complaints with respect to the threat of contamination of groundwater and noise relating to duck and manure shipments are dismissed.

102. Finally, it should be noted that the Complainants may or may not be satisfied with the Vane duck farm's impacts even after it implements the practices contemplated by this modification Order. However, as was stated in the Eason Complaint normal farm practices in this case require nothing more or less than the farm taking reasonable steps aimed at ameliorating the odour problem. If the farm does that, our view is that the farm will be compliant with the *Act*. If the Complainants find that those works do not address

their concerns, it is open to them to pursue any remedy they may have with another agency.

Dated at Victoria, British Columbia, this 25th day of August, 2003.

FARM PRACTICES BOARD

Per

(Original signed by):

Christine J. Elsaesser, Vice Chair

(Original signed by):

Satwinder Bains, Member

(Original signed by):

Richard Bullock, Member