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Legal Guidelines for Swine Waste Management

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Current legal guidelines for swine waste management are the result of a balancing process in which society sought an "acceptably clean" environment. Any society must balance the benefits and costs of polluting activities. Neither a heavily polluted nor a clean and unspoiled environment is the "optimum" result. Where there is pollution, producers are imposing costs on others by making them live amid air, water, solid waste and noise pollution. In a pollution-controlled environment, producers' costs of pollution abatement are eventually transferred to consumers in the form of higher prices.

All citizens and groups have the basic responsibility to communicate their ideas on pollution problems to the legislatures, courts, and executive agencies. Pork producers are no exception.

Some producers take the attitude that pollution caused by them or their firm is so small it really does not matter. Most of the time it is less costly for them to pollute than to install pollution control facilities. Consequently, they pollute.

Clearly, the pollution of one producer may adversely affect many. In particular, those downstream or downwind usually suffer the consequences. Given that the pollution of one producer may potentially affect many others, a situation may exist where the social costs of pollution exceed the private benefits gained from the polluting activity.

In recognition of this fact, state and federal agencies have been established to regulate pollution. But this public regulation is also accompanied by private regulation of pollution. Private pollution regulation occurs when one individual sues another individual on the theory that the second individual's use of his property is a nuisance.

Public Regulation of Pollution

Public pollution regulation exists at both state and federal levels. At the federal level the major enforcement responsibility lies in the Environmental Protection Agency (EPA). EPA is a good example of "new federalism." Under this concept, EPA sets minimal pollution tolerance levels which the states must enforce; otherwise, the federal government will regulate pollution for the states. Of course, individual states may develop more stringent regulations than the federal minimums.

Each state has developed its own framework for policing and abating pollution. Most have created two separate agencies, one responsible for air and the other for water pollution. Each agency establishes minimal tolerance levels for specific pollutants. Producers exceeding these tolerance levels are guilty of polluting.

These state agencies generally have at least two different remedies to assist them in policing pollution. They may seek an injunction against the polluter. Some also have the authority to clean up the pollution and then charge the cleanup costs to the polluter via a special tax bill, although the injunction is the legal remedy most often sought. In addition, fines of \$100 or more per day also may be imposed if pollution continues after agency notification to cease.

Complying with EPA Regulations

The Federal Water Pollution Control Act, as amended by Public Law 92-500, enacted October 1972, prohibits any discharge of pollutants into a waterway from a *point source* unless authorized by a permit from the appropriate regulatory agency. Confined livestock feeding is defined as a point source in this federal law. Thus, EPA was faced

with establishing regulations that would move toward eliminating water pollution resulting from confined feeding operations.

EPA proposed regulations setting down limits on animal concentrations in confined operations above which a permit would be required. These regulations were challenged in the Federal District Court for the District of Columbia, resulting in a 1975 court order requiring substantial changes in the EPA regulations.

On March 18, 1976, EPA issued final regulations establishing conditions under which animal feeding operations are subject to permit requirements. The big change from earlier regulations is that animal feeding operations that do not discharge pollutants into the nation's waters are not required to apply automatically for a permit. This is regardless of size and is a significant change by EPA in their approach to regulating animal feeding operations. Merely having fewer than 1,000 animal units (equal to 2,500 swine weighing over 55 lb.) will no longer exempt you from a possible permit requirement. If a hog operation discharges a pollutant into the nation's waters, the hog operation manager should check with EPA and state pollution agencies to comply with all applicable regulations. Terms such as "nation's waters" or "state's waters" are defined in the statutes creating the various regulatory agencies. Generally the waters regulated include rivers, streams, lakes, and other bodies of surface and sub-surface water not entirely confined upon lands owned or leased by an individual or group.

For public pollution regulation, pork producers are given a concise definition of pollution (parts per million per each pollutant). However, the definition of pollution is less concise for private regulation. A brief and useful definition of water pollution is the depositing or causing anything to be deposited in the water that unreasonably interferes with its use by others.

Private Regulation

Private regulation of air and water pollution occurs indirectly through the nuisance law. Nuisance law is of common-law origin and is similar in all states. It is based on the right held by all landowners to be free from unreasonable interference with the enjoyment of their property. An unreasonable interference with such enjoyment is called a "nuisance." Consequently, a nuisance might involve foul smells, dust, flies, rodents, banging hog feeder lids, squealing pigs, water contamination, dead animal carcasses, and manure spillover. The rules governing conduct in this area are identical regardless of the type of pollution involved. To the extent these rules restrain one's conduct, they constitute private regulation of pollution.

Nuisance law primarily involves civil lawsuits between two or more private citizens or businesses. They often are initiated by nearby residents seeking an injunction or reimbursement for damages allegedly suffered because of the manner in which a business conducts its production and/or waste disposal operations.

The Legal Procedure in a Nutshell

In nuisance cases the complaining party may seek (1) an injunction, (2) damages (either actual or punitive), or (3) both an injunction and damages. The facts of each case determine the type of remedy sought as well as the outcome of any such suit.

Generally, the legal issues in cases alleging air, water, solid waste, and/or noise pollution to be "nuisances" are quite similar. First, the plaintiff (party initiating the lawsuit) typically complains of foul odors, loud and recurring noises, contaminated water, and physical conditions which amount to a health hazard for his family. On the other hand, the defendant usually says: "This is my livelihood, and I stand to lose thousands of dollars invested in buildings and equipment which cannot be readily converted to another agricultural use."

In an injunctive action the guiding principles are "fairness and good conscience." This is the goal the court seeks to achieve—fairness to both parties. In reality, the court is weighing the interests of the respective parties. The party considered to have the greater interest will win the lawsuit.

Mandatory injunctions are seldom issued by courts. Rather, courts usually issue performance standards which must be met if the pork producer is to continue his operation. The economic feasibility of meeting these pollution levels then determines whether he will be able to continue production.

Injunctions Against Polluters

All pork producers want to avoid being held liable for both actual and punitive damages. Likewise, they do not want to see their buildings and equipment stand idle because they have been closed by an injunction. With respect to an injunction, the court simply weighs the interest of the respective parties. There is no one thing producers can do in order to *completely* insulate themselves from the possibility of an injunction being granted.

In determining whether an injunction will be granted, it is important to notice whether the nuisance is classified as public or private in nature. If classified public, it is more likely an injunction will be granted simply because the interests of the public are being weighed against the interests of a private producer. However, the producer also may have the public interest weighed to some extent on his side where he provides jobs for a number of people in a community. An action for an injunction will take into account all relevant circumstances.

What the Courts Have Said

Before looking at the considerations in lawsuits where damages are sought, we will first review some recent cases. In case A, a cattle feeder contracted to feed 7,500 head of cattle for a major packer. Soon after the feedlot began operating, a heavy three-day rain "flushed out" the feedlot into a nearby creek.

The water from the creek (containing nitrates and other impurities) evidently seeped into the well of a dairy farmer located downstream. After drinking from the well, his cattle became ill and several died. He had substantial veterinary expenses, was forced to haul water from other sources and eventually had to go out of the dairy business. At trial, the jury decided this was a "nuisance," and the dairy farmer was reimbursed for his "actual" damages. No "punitive" (exemplary) damages were granted.

Case B involved a turkey processing plant. Two lagoons were used to handle the waste from the plant, and they were located within 300-500 ft. of plaintiff's residence. The design capacity of the lagoon was such as to handle the waste products from 11,000 birds per day using 55 gal. of water per bird. However, the plant was operating at a capacity of 20,000 birds per day, using 70 gal. of water per bird. As a result, the lagoons overflowed onto the plaintiff's property.

In this case the plaintiff complained that odors, flies, insects, waste water, and filth all came onto his land, and that this constituted a nuisance. The jury returned a verdict against the processing plant for \$25,000 actual and \$15,000 punitive damages.

Actual and Punitive Damages Distinguished

Many lawsuits against pork producers request both actual and punitive damages. The term "actual damages" means just what it implies. A plaintiff wants to be reimbursed for his out-of-pocket expenses, property losses, and lost profits, as illustrated by case A. He also wants to be paid for any decrease in property values, as existed in case B.

Assuming that a nuisance is present, the plaintiff would be entitled to compensation for actual damages such as loss of property value or profits if he could prove the existence of those damages and that the defendant's actions proximately caused the actual damages.

The term "punitive (exemplary) damages" refers to damages granted because of the defendant's conduct. They may be granted if you "intentionally" or "maliciously" injure another person. To this extent, punitive damages are similar to a heavy criminal fine levied in lieu of imprisonment. However, punitive damages are paid to the plaintiff rather than to the court and constitute a windfall gain to him.

In this respect, it is important to note that punitive damages were granted in case B while they were not awarded in case A. The different outcomes can be explained by factual differences in the cases.

In case B, legal malice was proved. It is defined as "the doing of a wrongful act intentionally without just cause or excuse." The management was knowingly operating "without just cause or excuse" at a level which was approximately twice that which the lagoons were designed to handle. This type of conduct was not involved in case A.

Temporary vs Permanent Nuisances

The court may classify a nuisance as either temporary or permanent. If classified permanent, both past and future damages are determined. However, since a temporary nuisance may be abated, the plaintiff is only awarded damages suffered in the past. If the nuisance continues, this same plaintiff can sue again and collect damages suffered since the last lawsuit. In this way classification as permanent or temporary may affect a pork producer's future attempt to abate pollution because of the possibility of being sued again.

How Can Nuisance Lawsuits Be Avoided?

It is difficult for producers to achieve *absolute* protection against lawsuits brought for damages or injunctions. However, there are several possibilities for improving their position in defending against nuisance lawsuits.

Zoning

Zoning has been suggested by some as being helpful. If an area in which a feeding operation is located is zoned for agricultural use, this is at least evidence that the use of the land is not classified unreasonable automatically. However, probably the greatest effect of zoning is not to grant absolute protection but rather simply to decrease the possibility of a lawsuit arising by keeping at a minimum the number of people living nearby. This occurs simply because a majority of non-farm citizens will now live in areas zoned for "residential use" rather than next to a pork production facility in an area zoned for agriculture.

Logically, zoning law and nuisance law are simply separate concepts. Zoning does not, for example, make air pollution smell better. Thus, once a lawsuit is filed under the nuisance law, the existence of zoning will not affect its outcome.

However, if a pork producer's use of his land is prohibited by zoning ordinances, such use will be declared a public nuisance. In most cases, injunctions are proper against prohibited uses.

In some instances, the adoption of zoning ordinances may make current pork producing operations illegal because they are a nonconforming use. Whether or not such prior nonconforming uses may be continued or expanded depends on the zoning law of each state.

Site Selection

Locating a swine operation some distance from the homes of others may be the most important thing one can do to avoid nuisance lawsuits. Prevailing winds must be taken into account when deciding where to locate a hog facility. Location is also a key to avoiding stream pollution. In selecting a site, remember that a lawsuit for an injunction is brought in a court of "good conscience." "Do unto others as you would have them do unto you" is a good rule to follow.

While new or expanding swine operations have the option of selecting their site, some may find it to be economically unrealistic to move to another location. They must be particularly aware of good management techniques to avoid harming their neighbors.

Prior Operation of the Feedlot

A pork producer is less likely to be held liable for damages if he initiated his operation before the complaining neighbor moved in. But being there first does not grant absolute protection in most states. Before "prior operation" will help to relieve one of liability, it must be shown the new resident "assumed the risk" of living amid the alleged nuisance-causing operation. If the swine operation has been expanded to a substantially larger size, or if the new neighbor simply did not realize how bad conditions were, the neighbor logically may not have assumed the risk of living so near to a polluting activity. This is because he must "appreciate" how bad conditions will be before he legally "assumes the risk."

Most courts do not give the feedlot operator automatic protection just because he was there first but do allow the jury to take this into consideration in arriving at their verdict. It is unlikely a jury would be sympathetic toward a nearby neighbor who moved in one month and sued the pork producer the next. Your attorney can tell you how much protection, if any, prior operation gives in your state.

Who Caused the Problem?

In one case, a developer bought land near a feedlot which was less expensive than land lying in other directions from a municipality. He then built and sold retirement homes to people from all over the country (in some instances, sight unseen). While the new residents were successful in getting the feedlot closed down, the developer was required to pay the cost of moving the producer to another location. Therefore, there now is at least some judicial indication that individuals responsible for moving near a livestock confinement operation may be forced to pay the cost of moving the feedlot to a new location.

Licensing Laws

Several states now have licensing or permit laws which regulate livestock operations to varying degrees. In some cases, compliance with them will be regarded as good evidence that the feeding operation is not a nuisance. In essence, this shifts the "burden of proof" (burden of going forward with the evidence) onto the plaintiff to prove a nuisance exists. As a practical matter, if the issue of whether a given operation constitutes a nuisance is a very close one, this burden of proof may be an important determinant in the outcome of the lawsuit.

An important aspect of most licensing laws is that they may help to do away with punitive damages. If a pork producer complies with all pollution control regulations, it is relatively more difficult for the jury to conclude that the pork producer "intentionally did a wrongful act without just cause or excuse." Thus, compliance with licensing requirements may make it less likely that punitive damages will be assessed. It may be the only type of "insurance" pork producers can obtain against nuisance lawsuits for their livestock operations, because many farm insurance policies only cover damages granted for negligence and not for nuisance. Read your insurance policies carefully to determine the limits of coverage.

Do's and Don't's for Pork Producers

- **Do** become familiar with your state pollution control agency and its regulations. Compliance with state pollution laws is supportive of your side should a nuisance lawsuit arise.
- **Don't** get lax on management practices such as timely manure disposal and proper animal carcass handling. Once your operation meets pollution agency standards, maintain that compliance.
- **Do** maintain a "good neighbor" policy. Keep confinement buildings located at the maximal distance from neighbors' houses. No one, not even farm people, likes to live too near a manure lagoon or banging hog feeders.
- **Don't** ignore early warnings of a nuisance lawsuit. If a neighbor's complaints cannot be remedied satisfactorily, consult promptly with an attorney. Select an attorney who is familiar with pork production and pollution standards.
- **Do** keep up-to-date on confinement and manure handling technology. Pork producers who continually strive to minimize odors, insects, noise, and other annoyances are substantially reducing the likelihood of public or private regulatory intervention.

Concluding Comments

Pork producers are subject to pollution control from both the public and private sectors. Most public regulations are applied via tolerance levels by state air and water pollution enforcement agencies. Private pollution regulation, on the other hand, comes about through civil lawsuits based upon nuisance law.

Since civil lawsuits based on the nuisance law usually involve a jury decision on whether an activity unreasonably interferes with the neighbor's enjoyment of his property, the outcome of lawsuits will vary with the jury and case circumstances. Some juries might find "interference with enjoyment" even though an operation is meeting all state and federal air and water pollution tolerance standards. Consequently, it is possible for a pork producer to be sued in a civil action even though he conforms with all state regulatory standards. For this reason, the previously suggested "good neighbor" policy may be of special importance in many cases.

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