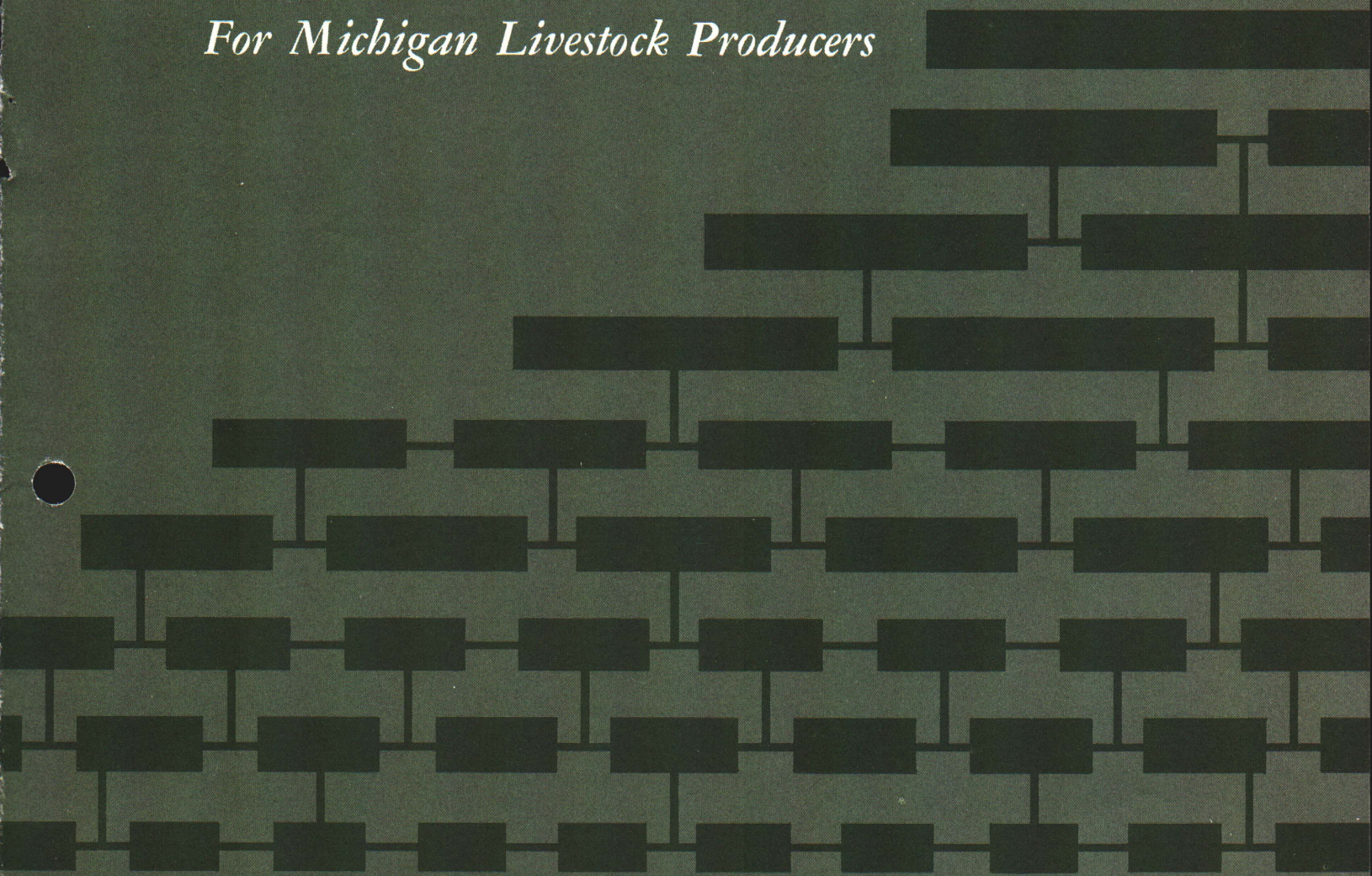


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# Environmental Quality Legal Considerations

*For Michigan Livestock Producers*



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Cooperative Extension Service,  
Michigan State University

**IN COOPERATION WITH:**

Michigan Water Resources Commission  
Air Pollution Control Section, Michigan Department of Public Health  
U.S. Environmental Protection Agency  
U.S. Army Corps of Engineers

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### PREFACE

*This is the second report on environmental quality and animal waste management prepared by the Cooperative Extension Service of Michigan State University. The first report was: "Whose Responsibility? Livestock and Poultry Waste," Farm Science Series, Extension Bulletin E-720, October, 1971.*

*This report was prepared in response to requests for additional information pertaining to environmental quality legal considerations for livestock producers. A special word of appreciation is hereby tendered to the National Pork Producers Council, for granting permission to reproduce various parts of "Legal Guidelines for Pork Producers to Preserve Environmental Quality" in this publication. The following agencies cooperated in preparing this report:*

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**T**he quality of our environment has increasingly become an item of concern to the general public, private citizens, and various state and federal agencies. The possible effects of actions by industry, agriculture, municipalities and consumers are coming under increasing surveillance. Livestock producers are included in this examination of various activities which might possibly affect the quality of the environment, and will receive additional attention in the future.

The legal structure is increasingly being oriented to problems of environmental quality. Private litigation and a variety of public regulations are being used to correct situations which are degrading the quality of our environment. The purpose of this publication is to (1) inform Michigan livestock producers of pertinent public and private regulations pertaining to environmental quality, and (2) point out the implications of these legal restraints to livestock producers.

The abatement and prevention of pollution has become an American social goal, and one that affects each of us. However, pollution abatement is not easy to accomplish, nor without cost. The choice is not one of a completely clean environment versus a highly polluted one. Rather, the problem lies in selecting and maintaining an "acceptably clean" environment. Consequently, society must determine how much it is willing to pay for an acceptably clean environment. Obviously, there are both costs and benefits associated with pollution abatement.

In terms of social benefits, we gain if the quality of our environment is enhanced. However, if we are serious in abating environmental pollution, part of the abatement costs (if not all) must ultimately be transferred to the consumer in the form of higher prices. Thus, the concern of society in arriving at an acceptably clean environment is obvious. Society must balance the social benefits accruing as a result of an improved environment against the costs associated with pollution abatement. Every organization and each individual has the basic responsibility to communicate his ideas to the appropriate public officials for the optimum social solution to our problems.

Since human tolerance levels are involved, which vary significantly, it is obviously difficult to mathematically determine an optimum solution to society's pollution problems. Rather, the process of reaching a "social equilibrium" is a slow one involving the election of public officials and subsequent representative action. Moreover, if an optimum point of social equilibrium is to be attained for a given group — such as livestock producers — it is essential that this group work with those involved in pollution regulation and control.

## PUBLIC CONTROL OF POLLUTION

The basic attitude of many business firms is that any pollution caused by them or their firm is so small that it really does not matter. It is usually less costly for them to pollute than to install expensive pollution abatement equipment. Consequently, they use the environment to freely dispose of their wastes.

Some firms may be large enough to cause a severe environmental problem by themselves. Or, the collective actions of a number of small firms may indeed constitute a severe environmental problem. Thus, the activities of one individual firm or several small firms may potentially affect a very large number of other people or firms.

For this reason, many state and federal agencies have established a variety of regulations to deal with environmental problems. Since individuals and individual firms lack economic incentives in the market place to take appropriate steps to abate environmental pollution, public legislation has become essential.

### Federal Regulation

The Federal Water Quality Act of 1965 (Public Law 89-234) provides that the States may, prior to June 30, 1967 and after public hearing, adopt water quality criteria applicable to interstate waters or portions thereof within the State. If the U.S. Environmental Protection Agency approves of such State criteria, then the criteria will be the water quality standards applicable to such interstate waters. The discharge of matter from any source (including that from improper livestock operations) into such interstate waters, which reduces the quality of such water below the established water quality standards, is subject to prosecution by the Attorney General of the United States. The State of Michigan adopted water quality standards for its interstate waters on June 28, 1967. These water quality Standards were approved by the U.S. government on April 17, 1968, and as such, became enforceable by the federal government as well as the state government.

The U.S. Army Corps of Engineers has jurisdiction over some animal waste pollution problems through its approval or denial of applications for permits to discharge wastes to navigable waters and their tributaries under the Refuse Act of 1899. This application must be approved by both the Michigan Water Resources Commission and the U.S. Environmental Protection Agency.<sup>1</sup> Under the provisions of the Re-

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<sup>1</sup> See: Federal Register, Vol. 36, No. 67, (pp. 6564-6570), April 7, 1971.

fuse Act, operators of confined feeding operations need to apply and obtain a permit if two criteria are met: (1) If the maximum size of their operation at any one time in the preceeding year exceeded 1,000 animal units, and (2) if there was a direct discharge of waste to the receiving waters. Specifically, a statement of the applicability of the Refuse Act Permit Program says that:

*Confined livestock and poultry operations are subject to the permit program if the given feedlot or facility contains 1,000 or more animal units (1,000 beef animals, 700 dairy cows, 290,000 broilers, 180,000 laying hens, 55,000 turkeys, 4,500 hogs for the slaughter market, 35,000 feeder pigs, 12,000 sheep and lambs, or 145,000 ducks) at any time during the calendar year preceding the filing of the application; AND, (1) the livestock or poultry facility utilizes a man-made drainage, flushing or collecting system (waste pits, ditches, detention ponds, lagoons, waste pipes, or the like) from which measurable waterborne wastes are regularly discharged irrespective of rains or melting snow, into a navigable stream or its tributary, or (2) a regularly flowing stream into which wastes are directly placed traverses the feedlot of facility, or (3) there is a frequent overflow from a containment or retention facility.<sup>2</sup>*

Runoff from confined livestock and poultry operations due only to natural causes is not considered a "discharge" at this time, within the meaning of the term as applied to permits required under the Refuse Act of 1899.<sup>3</sup> If an operator has confined livestock operations at different locations or a feedlot which naturally drains in separate directions; and if the drainage, flushing, or collection system for each operating unit is separate and apart, and discharges from a separate and distinct outlet or point, and the waterborne waste from one system does not come together on the property with that from any other of his operating units — the 1,000 animal unit criterion applies to each separate operating unit.

Application forms for a discharge permit are obtainable from the U.S. Army Engineer, Detroit District Office. The application form should be filled out to indicate the details of the confined livestock or poultry operation — size of operation, quantities of feed and water used, waste handling practices, the nature of the waste discharged, and a drawing to identify such things as the location of confined feeding areas, adjacent streams, ditches, ravines, containment ponds, land disposal areas and other appropriate facilities. The application for a discharge

<sup>2</sup> Source: Personal Correspondence, U.S. Environmental Protection Agency, Chicago Office, November, 1971.

<sup>3</sup> Ibid.

permit is evaluated and a determination made on the applicability of the permit program to the operation. The Water Resources Commission must provide in a certification or other written communication a statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards. This must be done prior to issuance of the permit by the Corps of Engineers. The Environmental Protection Agency, in turn, will not approve a permit application unless there is assurance that (1) applicable State water quality standards have been correctly applied, (2) the industry's affluent is given at least secondary treatment or its equivalent where the standard requires this, and (3) there is strict adherence to the Environmental Protection Agency's policy that high quality waters do not suffer degradation.

### State Regulation

In Michigan, pollution control is vested in the Water Resources Commission and the Air Pollution Control Commission. To date, no regulations have been developed by these Commissions relating specifically to livestock farms. Both Commissions have dealt with environmental problems accruing from animal operations on an individual farm basis. A somewhat unique piece of legislation to Michigan is the Environmental Protection Act. These are each discussed separately.

#### WATER RESOURCES COMMISSION

The Water Resources Commission is responsible for establishing water quality standards for the various waters of the state in relation to current or future public use as it shall deem necessary (Act 245, Public Acts of 1929, as amended). State waters include both underground and surface waters. The Commission has the authority to make regulations and orders restricting the polluting content of any waste material or polluting substance discharged or sought to be discharged into any state waters. It has the authority to take all appropriate steps to prevent any pollution it feels is unreasonable and against public interest in view of the existing conditions of any state waters. The Commission, or any duly appointed agent, has the right to enter at all reasonable times, in or upon, any private or public property for the purpose of inspecting and investigating conditions relating to the pollution of any waters. Any person requiring a new or substantial increase over the present use now made of the waters of the state for sewage or waste disposal is required to file a written statement with the Commission detailing: (1) the nature of the enter-

prise contemplated; (2) the amount of water required; (3) source; (4) the proposed point of discharge of the wastes into state waters; (5) the estimated amount discharged, and (6) a fair statement setting forth the expected or known characteristics of the waste.

The Director of the Michigan Department of Agriculture is a member of the Water Resources Commission.

#### AIR POLLUTION CONTROL COMMISSION

The Michigan Air Pollution Control Commission is responsible for establishing rules and regulations for controlling or prohibiting air pollution, and controlling and abating air pollution in accordance with any rule or regulation which it may promulgate under existing legislation (Act 348, Public Acts of 1965, as amended). The Commission has the right to *enter and inspect any property at reasonable times or places pursuant to reasonable notice* for the purpose of investigating either an actual or suspected source of air pollution or ascertaining compliance or noncompliance with any rule or regulation. This Commission also has other powers such as to receive and initiate complaints of air pollution in alleged violation of any rule or regulation which may be promulgated under the Air Pollution Act. The Director of the Michigan Department of Agriculture is also a member of the Air Pollution Control Commission.

As part of the general rules of the Air Pollution Control Commission, a person planning to construct, install, reconstruct or alter any process or control equipment which may be a source of air pollution must submit plans and specifications to the Commission for approval *prior* to the initiation of any construction, installation, or alteration. The plans and specifications should include such information as the expected composition of the air stream, expected physical characteristics of particulates, type of air cleaning device (if any), other information necessary to appraise the possible effects of the affluent, and any other pertinent information that may be required by the Commission. A permit to install is granted when the Commission believes that the plans and specifications are in accordance with the rules and regulations pertaining to air pollution control. After completion of any construction for which an application, plans and specifications were approved, the Commission shall issue a permit to operate the facility, provided its actual operation does comply with air pollution control rules and regulations. If an application is denied, the applicant shall be notified in writing of the reasons therefore. The Air Pollution Control Commission has required permits for some livestock operations.

#### ENVIRONMENTAL PROTECTION ACT OF 1970

A unique piece of legislation in Michigan is the Environmental Protection Act of 1970 (Act 127, Public Acts of 1970). This particular legislation may be used by both public agencies and individuals in seeking corrections to environmental problems. This bill provides that ". . . the Attorney General, any citizen, corporation, organization, governmental unit, or other legal entity may bring an action in the circuit courts of the state against any other citizen . . . entity for declaratory and equitable relief for the purpose of protecting the air, water, and other natural resources of the state from pollution, impairment, or destruction."

Before this bill was enacted, an individual had to demonstrate some personal injury or damage before bringing suit. This is no longer required. It is also significant that, under this act, the individual can bring his action directly against governmental units and agencies as well as against private concerns or nongovernment entities. This is true even though the polluter may have complied with the previously discussed requirements of either the Air Commission or the Water Commission, or both.

The first court case relating to a livestock farm under the Environmental Protection Act came to trial in October, 1971 (Clinton County Circuit Court File No. 844). This particular case deals with a swine farm. The plaintiffs requested a complete injunction against the defendants under the Environmental Protection Act and also requested a total of \$230,000 damages under the common law theory of nuisance. The outcome of this particular case has not been decided, but will undoubtedly serve as some precedent for future court cases dealing with livestock operations.

#### PRIVATE REGULATION<sup>4</sup>

Private regulation of pollution may occur in Michigan through either the previously discussed Environmental Protection Act or the judicially-created doctrine of "nuisance".<sup>5</sup> What constitutes a "nuisance" varies substantially from state to state. Each case must stand largely on its own facts and circumstances, although there is some reliance on prior case decisions (rather than statutes). The existence of a "nuisance" is based on the premise that all persons

<sup>4</sup> The following sections are largely based on: Legal Guidelines for Pork Producers to Preserve Environmental Quality, National Pork Producers Council.

<sup>5</sup> "Public" regulation of pollution may also occur through nuisance litigation when an individual situation is deemed a "public nuisance."

have the basic right that they are not to be interfered with in the reasonable enjoyment of their property. Any unreasonable interference with such enjoyment is legally a "nuisance". A nuisance may consequently involve air, water, and/or noise pollution. The rules which govern conduct in this area are somewhat identical, regardless of the type of pollution involved. However, "nuisances" *vis a vis* water pollution are tied to the nature of one's riparian rights. Thus, they serve as a restraining force on one's conduct, and constitute a form of "private regulation" of pollution.

Plaintiffs may seek several courses of action when an agricultural operation is deemed to be a nuisance. The complaining party may ask for (1) an injunction, (2) damages (actual and/or punitive), or (3) both an injunction and damages. The specifics of each case determine what type of legal action a plaintiff brings, as well as the outcome of any such suit. Nuisance suits dealing with livestock farms tend to be quite similar. The plaintiff may typically complain of foul odors, loud and recurring noises, contaminated water, or physical conditions which amount to a health hazard. The livestock producer, as a defendant, usually responds by saying that the livestock farm is his livelihood. If he is closed down, he stands to lose thousands of dollars invested in buildings and equipment which cannot be readily converted to other agricultural uses. If the suit is for an injunction, the guiding principle is generally called a "balancing of the equities". Under this doctrine (assuming an injunction is sought), the court is actually weighing the interests of the respective parties. The party considered to have the greater interest will win the lawsuit. If the peace and comfort of the plaintiff is viewed as superior, the livestock producer will be closed down or ordered to modify his operation.

Many cases dealing with requests for injunctive relief may be accompanied by separate counts requesting "actual" and perhaps even "punitive" damages. The term "actual damages" means just that—the plaintiff desires to be reimbursed for his expense and property losses incurred as a result of the actions of the defendant. This includes health problems and discomforts personal to the plaintiff. The primary legal issue in actual damages is whether the polluter caused the damages allegedly suffered by the plaintiff. It is not necessary to determine whether negligence was involved in order to establish liability. Rather, proof of causation is sufficient.

Punitive damages may also be requested under nuisance suits by the plaintiff because of the defendant's conduct. They may be granted if there was malicious intent related to the conduct which injured another person or his property. In this context, puni-

tive damages might be compared to a heavy criminal fine levied in lieu of imprisonment. The following actual cases illustrate the differences between actual and punitive damages.

#### CASE A

In this actual case, a cattle feeder had contracted to feed 7,500 head of cattle for a major packer. Soon after the feedlot began operating, a heavy rain "flushed out" the feedlot into a nearby creek. The water from the creek (containing nitrate and other impurities) evidently seeped into the well of a dairy farmer located downstream. After drinking from the well water, his cattle became ill and several died. He had substantial veterinary expenses, was forced to haul water from other sources, and eventually had no other choice but to go out of the dairy business. At trial, the jury decided this was legally a nuisance and the dairy farmer was reimbursed for his actual damages. No punitive damages were granted.

No punitive damages were granted in this case because the defendant, when he learned that his feedlot was polluting the dairy farmer's well, immediately took steps to remedy this situation. Given the difficulty of foreseeing that waste products from the feedlot might first wash into the creek, then seep into the soil and the dairy farmer's well water, it is quite probable that the conduct was neither malicious nor intentional.

#### CASE B

This actual case involved a turkey processing plant. Three lagoons were used to handle the waste from the plant, and were located within 300 to 500 feet of the plaintiff's residence. The lagoons were designed to handle 11,000 birds per day using 55 gallons of water per bird. However, the plant was operating at a capacity of 20,000 birds per day, using 70 gallons of water per bird. The plaintiff complained that odors, flies and insects, waste water and filth all came onto his land. The jury returned the verdict against the processing plant for \$25,000 actual and \$15,000 punitive damages.

Laymen might seriously contend that the turkey processor in this case did not intentionally or maliciously interfere with the plaintiff's rights. However, the legal definition of malicious conduct often differs from the layman's interpretation. Legal malice has been defined by the courts as "a doing of a wrongful act intentionally without just cause or excuse". Also, a "reasonable man" is imputed with the knowledge of the probable consequences of his conduct. Thus, there was some evidence on which the jury should pay punitive damages. The turkey processor

was knowingly operating at approximately twice the level for which the lagoons were designed, "without just cause or excuse".

## IMPLICATIONS FOR LIVESTOCK FARMERS

The preceding legal restraints provide a means for preserving the quality of the environment. Livestock producers may preserve the quality of the environment *and* avoid legal action by carefully considering these regulations. Following are some of the more important legal considerations which livestock producers and their advisors might consider.

### SITE SELECTION

Ideally, the most important single thing which could be done to prevent legal suits would be locating a livestock farm some distance from water, farm and nonfarm residences and major roads. An appropriate site minimizes such problems as water, noise or odor pollution. An inappropriate site may result in legal action being instituted by either private parties or public agencies.

Many livestock farms are, however, already situated close to non-farm neighbors, farm neighbors, major roads, or various streams or watercourses. Farms with these locational problems need to be carefully analyzed for potential problems, and how these problems can be corrected through modification of the manner in which they collect, process, store and dispose of animal wastes.

### PRIOR OPERATION

Individual livestock producers should not rely on the assumption that they are less likely to be held liable for damages to nearby neighbors or rural residents if their operation was initiated before such neighbors moved into the nearby locations. "Being there first" does not necessarily grant any protection. Before "prior operation" even becomes a factor for consideration, it must be shown that nearby residents assumed the risk of living amid an alleged nuisance-causing operation. It should be pointed out that if a livestock producer then expanded the size of his operation (above normal year to year variation) after nearby residents moved into the area, he may have little legal ground (prior operation) to stand upon.

On the other hand, it is unlikely that a court would be very sympathetic toward a rural resident who moved in one month and sued a nearby dairy producer the next month. Finally, prior operation pertains mainly to nuisance suits, and has little applicability to air or water quality problems which may be dealt with by various public agencies.

## ZONING

Zoning has frequently been mentioned as a panacea for all environmental problems. It is not. Zoning is too late for some areas where livestock farms are already interspersed with rural residences, or are situated close to nearby streams or watersheds. Since no comprehensive regional or state zoning provisions have been established, zoning is often subject to local political pressures. Moreover, a livestock operation can still be declared a "nuisance" through private litigation even when the area is zoned exclusively for agriculture.

The single greatest effect of zoning is not absolute protection, but rather decreasing the possibility of lawsuits, by keeping the number of conflicting uses of land and water resources at a minimum. Thus, an appropriate zoning plan for a particular area might benefit producers from additional urban encroachment, but will do little to solve problems already present with existing animal operations.

### LICENSING AND REGISTRATION

Kansas, Nebraska, and several other states have licensing or registration laws which regulate livestock operations in varying degrees. Michigan does not presently have such laws. These laws typically require animal operations of a certain size to register or to secure an annual license from an appropriate state agency. Depending upon the specific regulations tied to the licensing and registration system, varying adjustments may be needed by individual livestock producers. For example, the issuance of a license *might* be dependent upon whether a livestock farm meets regulations pertaining to locational features and waste disposal practices. Compliance with such regulations could require varying expenditures by livestock producers.

Probably the most important aspect of these laws is that it may help to do away with some punitive damages which might be incurred by livestock producers. That is, if individual livestock producers comply with licensing and registration requirements, it is somewhat difficult to conclude that they have intentionally done any wrongful act without just cause or excuse. However, actual damages may still be awarded in some cases.

### COMPLIANCE WITH REGULATIONS

Livestock farms must comply with zoning regulations and all other applicable water pollution, air pollution, and other environmental regulations. It is, therefore, highly essential that producers be aware of various laws and ordinances which would apply to

their individual operations, as well as know whom to contact about specific problems. For example, a producer planning to enlarge the size of his livestock operation, or one planning to develop a new livestock operation, is required by law to check with the Water Resources and Air Control Commissions if water or air resources would have substantial demands placed upon them. Also, representatives from the Water Resources or Air Control Commission may enter upon any private property at any reasonable time to investigate an existing or potential problem which might affect water or air resources.

#### HOUSEKEEPING

Proper "housekeeping" practices may greatly minimize potential environmental problems associated with livestock farms. Waste management methods which minimize the release of offensive odors should be utilized, particularly if an adequate buffer zone is not available for natural odor dissipation. Particular attention needs to be given to the timing and site where animal wastes are disposed. Waste management practices which control the release of potential pollutants into surface and underground waters should also be utilized. A good neighbor policy of "do unto others as you would have them do unto you" is a good rule to follow in animal waste management.

Farmers with questions or specific problems relating to the design, layout, or modification of their present facilities may obtain assistance from a variety of agencies. The Cooperative Extension Service at Michigan State University, the Soil Conservation Service, Agricultural Stabilization and Conservation Service, Michigan Department of Agriculture, Water Resources Commission, and Air Pollution Control Commission can supply various forms of assistance.

#### SUMMARY

Livestock producers are increasingly coming under public and private surveillance relative to how they manage their animal waste problems. The legal situation is subject to change over time, and varying legal constraints may be forthcoming.

There are both private and social costs and benefits associated with pollution abatement, such as might originate from animal wastes. If a socially acceptable solution to pollution problems originating from livestock farms is to be attained, livestock producers should cooperate with administrative agencies responsible for abating and preventing pollution.

There are several important reasons why livestock producers should work with administrative agencies. The foremost, of course, is simply to prevent and abate pollution. A second reason is that many suits may be avoided which seriously endanger a farm business. Finally, legislation may be avoided which would place one region at a competitive disadvantage with other regions.

Lawsuits based on nuisance law ultimately involve court decisions. Since each decision may be limited in application to the peculiar facts before the court concerning when one interferes with his neighbor's enjoyment of his property, the determinations of such interference may vary greatly. A livestock farmer may be found guilty even though he is meeting all public air and water pollution regulations and standards. Consequently, it is conceivable that a livestock producer may be sued in a civil action even though he works closely with a state regulatory agency. Thus, a careful consideration of some of the previously mentioned implications of private and public regulations may be significant to some producers.