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UNL's Livestock Environmental Issues Committee
Includes representation from UNL, Nebraska Department of Environmental Quality, Natural Resources Conservation Service, Natural Resources Districts, Center for Rural Affairs, Nebraska Cattlemen, USDA Ag Research Services, and Nebraska Pork Producers Association.

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Nebraska Livestock Nuisance Law

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Until 1976 the Nebraska Supreme Court had ruled that animal feeding operations (AFOs) located in rural areas did not legally constitute a nuisance unless the AFO were improperly operated. However, in 1976 the Nebraska Supreme Court ruled that a rural AFO may constitute a nuisance even if properly operated. This decision made AFO operators liable for the first time in Nebraska if their AFO constituted a nuisance.

In 1977 the Nebraska Unicameral adopted an amendment to the Nebraska Environmental Policy Act defining when AFOs would legally constitute a nuisance. Basically, the statute said that an AFO was not a nuisance (1) if the AFO was there first, (2) if the AFO complied with all state and local regulations, and (3) if best management practices to minimize dust, odors and other nuisance factors were used in the AFO. In 1982 the Unicameral adopted the Nebraska Right to Farm Act, which gave farmers broader protection against nuisance lawsuits.

AFO nuisance cases. Several AFO nuisance cases have been decided by the Nebraska Supreme Court since 1976. In one case the AFO was allowed to continue operation after relocating its lagoons. Two AFOs have paid money damages and are under court order to improve their operations. Two swine operations have been shut down.

$60,000 feedlot damages. In a 1980 Merrick County case the feedlot operator was required to pay $60,000 damages when a commercial cattle feedlot was built across the road from a neighbor's home. This was the first court case where a feedlot had to pay money damages to a neighbor for feedlot nuisance.

Feedlot operation improved. In a 1981 cattle feedlot nuisance case, the feedlot operator was required to either control the nuisance or else discontinue operations. The farm residence predated the feedlot.

In response to the court order (1) the feedlot operator relocated three of the original four feedlot waste lagoons away from plaintiff's rural residence, (2) a portion of feedlot was relocated, and (3) the former lagoons and feedlot area were filled and converted to pasture. The manure was bladed up, combined with dirt, and mounded spring and fall. Many witnesses

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testified that they no longer noticed the feedlot odor from the road.

The trial judge ruled that the nuisance had been stopped. The Nebraska Supreme Court affirmed. The Court stated that the feedlot operators were not required to operate their cattle feedlot with zero flies, odors or dust, but were required to control the nuisance so as to not to interfere with the neighbor's residence.

AFO ordered to close. In a 1985 swine AFO nuisance decision, the swine facility operator was under court order to discontinue the nuisance or discontinue the AFO. The farm residence predated the AFO.

Even though swine facility management improved, the AFO itself was so large and so close to the neighbor farm residence that the AFO still constituted a nuisance, regardless of method of operation. The AFO owner's own expert witnesses conceded that it would be impossible to operate this AFO (800 sows and 6,000-7,000 hogs) without creating an odor problem for residences located within a half mile of the AFO. The plaintiff's home was 1030-1400 feet from defendant's closest holding pond, less than 1/4 mile.

The Nebraska Supreme Court affirmed the order of the trial court closing the AFO. The court noted that due care (i.e. lack of negligence) in operating a business is not in and of itself a defense to nuisance. The defendants had 20 months to control the nuisance and were unable to do so. The court stated "it is inconceivable that so many hogs could be kept in the defendants' facility in such close proximity to the plaintiffs and not be offensive."

AFO closed. In a 1985 Gage county case the a second swine facility was required to shut down. Defendant owned and operated 156 acres of farmland in Gage county since 1961. In 1968 defendant sold plaintiffs 1.67 acres to be used for an acreage. Hogs had been raised on the defendant's farm since 1961, but not from 1968 to 1975. A few hogs were raised beginning in 1975.

In 1981 defendants began construction of a 400 head confined hog facility located 133 feet from plaintiff's house, and 72 feet from the property line. This location was selected because the defendant "wanted to keep as much area as possible to farm and garden." Strong odors were produced by the hog operation, as well as flies and rats.

Plaintiffs were awarded $2000 in damages and the defendants were permanently enjoined from conducting a confined hog operation. The Nebraska Supreme Court affirmed the trial court's decision.

$375,600 AFO damages. National Farms is a large farrow-to-finish operation in Holt County, with 85,000-90,000 hogs under confinement at the time pertinent to the lawsuit. The Kopeckys lived about 2 1/4 mile northwest of National Farms on a small acreage purchased from Mr. Kopecky's parents. Mr. Kopecky worked for National Farms up to the time that the lawsuit was filed. Livestock waste solids were spread on National's cropland adjacent to the hog operation and lagoon liquids were distributed by center pivot irrigation systems.

At the trial the Kopeckys provided considerable evidence that the odors and flies from National Farms were intolerable. The jury awarded $375,600 in damages, apparently on the basis of $500 per day for "bad" days and $100 per day for all other days. The Nebraska Supreme Court affirmed the jury's award of $375,600 in damages against National Farms.

AFO location. AFO operators should take into account the location of neighbor's residences when making a decision to locate an AFO. The operator should also use best available management techniques to

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minimize odors, flies, and other AFO nuisance factors. The same factors should be considered where an existing AFP is significantly expanded.

Iowa right to farm decision. Recently the Iowa Supreme Court ruled that the Iowa right to farm law, which prevented neighbors from suing a farmer for maintaining a nuisance, was unconstitutional. The court ruled that not being able to sue a farmer for nuisance gives the farmer an easement to maintain a nuisance. An easement is a property right that was taken from the neighbor without just compensation, so the right to farm law that prevented the nuisance lawsuit was therefore unconstitutional.

The U.S. Supreme Court in 1999 refused to review the Iowa right to farm decision. Farm and livestock groups wanted the US Supreme Court to overruled the Iowa court decision, but the Supreme Court let the Iowa right to farm decision stand.

If the Nebraska Supreme Court followed the Iowa Supreme Court's approach on the right to farm law, then the Nebraska right to farm law would be unconstitutional as well. There has been no Nebraska ruling to date and none likely for at least 2-3 years. If the Nebraska right to farm law were unconstitutional, then new neighbors could sue farmers for nuisance: livestock odors and flies; nighttime field operations (planting and harvesting); running grain driers at night, etc.

Conclusion. In Nebraska the courts have consistently ruled that a new or expanded AFOS must be located and operated so as to not constitute a nuisance for existing neighbors. This is not changed by either of the Nebraska nuisance statutes. Where the AFO has the earliest occupancy date (i.e. is first in time) it generally will not constitute a nuisance to those who have "come to the nuisance." Where a new AFO is developed, however, or an existing AFO is expanded, the AFO operator faces the likelihood of having to relocate if the new or expanded AFO causes a nuisance to any current neighbors.

In light of this, AFO operators must make locational decisions very carefully: if they disregard the potential nuisance effect of their operation on their neighbors they risk having to discontinue the animal feeding operation. AFO operators ignore this blunt legal fact at their peril.

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