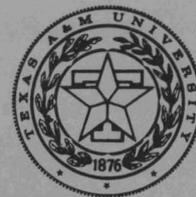


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Legal Aspects of Odor and Dust from Feedlots

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Because of the current emphasis on environmental quality, all businesses, including feedlots, will become more subject to pollution regulation. A feedlot is subject to both public and private regulation of the environment. Public regulation is shown by more enforcement for prevention of substances in our air supply. On the other hand, *human tolerance* levels serve as the basis for private regulation of the environment. The impact of public and private regulatory schemes on feedlots will be reviewed.

Public Regulation

Almost all states now have or are considering an agency to abate, prevent, and police air pollution. These "clean air commissions" have made their initial efforts in our major cities. Most air agencies are of more recent origin than the water agencies.

Methods to measure air pollutants will become more reliable. A few states have established regulations based on the measurement of the volume of odor free air required to dilute odorous air below the detection level. Injunctions or daily fines may be imposed on those feedlots who continue to pollute.

Present Private Considerations

Private influence on air pollution occurs through the so called "nuisance" laws. All persons have the *basic right* to enjoy their property. Any unreasonable interference with such enjoyment is legally a nuisance. A nuisance may involve air pollution. The rules governing conduct in this area are basically the same in all states because of the common law origin of

nuisance actions.

Nuisance lawsuits involve two or more people or businesses. They often involve nearby neighbors asking for alleged damages claimed because of the conduct of the business. The threat of a lawsuit or an actual lawsuit based on the nuisance law may affect the feedlot conduct. This changed conduct is caused by the "private regulation" of pollution.

The Legal Procedure

In past nuisance cases, the complaining party has asked for:

1. An injunction
2. Damages (either actual or punitive)
3. Both an injunction and damages

The facts of each case decide what type of legal action is brought. The facts may also decide the outcome of any such suit. *Rules of law* in this area may be insignificant.

The issues of cases alleging air pollution to be "nuisances" are quite similar. The plaintiff complains of foul odors and physical conditions which amount to a health hazard.

The defendant says, "Look, this is my livelihood. If you close me down, I stand to lose the money invested in buildings and equipment. It is not fair for you to shut down my business."

If the suit is for an injunction, the guiding basis is "fairness and good conscience". The court seeks to achieve fairness to both parties. The court weighs the interest of both parties. The party thought to have the greater interest will win the lawsuit.

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Types of Nuisances

There are two types of nuisances; public and private. When a feedlot is run in such a manner as to disturb the rights of a large number of people, this is said to be a "public nuisance". If the rights of only a few are disturbed, this will make a "private nuisance".

This difference may be critical in an injunctive action. Public interests are greater than the interests of a private person. Because the court decides the interest of the parties, the plaintiff will have a better chance for an injunction if the rights of the public are being disturbed.

The current trend in court decisions is to ask the owner to change the method of operation if possible. This will relieve the plaintiff while letting the defendant continue operation.

Actual and Punitive Damages

Many suits for injunctive relief also have another "count" for actual and perhaps punitive damage. The "actual damages" phrase means that the plaintiff wants to recover his expenses and property losses. The primary legal issue is "Did the polluter *cause* the damages suffered by the plaintiff?" The fact that a feedlot may have been free of negligence is not considered for liability purposes.

"Punitive damages" are granted because of the defendant's conduct. They may be granted if you "intentionally" injure another person. Thus, punitive damages are like a heavy criminal fine.

However, the legal definition of intentional conduct differs from the layman's concept. Legal malice has been defined by the courts as "the doing of a wrongful act intentionally without cause or excuse."

Permanent Versus Temporary Nuisances

Another very important factor is whether a feedlot is called a temporary or a permanent nuisance. This determination is made by the court. The decision may influence the feedlot's future course of action. A *temporary nuisance* is one which can be corrected. The feedlot could make certain basic changes in management which would result in it being less objectionable to the neighbors.

A feedlot, sued for a temporary nuisance, is liable only for damages suffered in the past. However, if the feedlot does not take steps to abate the nuisance, it can be sued again. The plaintiff may collect damages suffered since the previous lawsuit. Thus, if the feedlot nuisance is not corrected, the feedlot may be periodically subject to a lawsuit.

A *permanent nuisance* is one which is not correctable. Since nothing can be done to relieve the suffering, all damages due to the plaintiff, both *past* and *future*, can be determined by the jury in one lawsuit.

Thus, if a feedlot has been termed a permanent nuisance already, there may be less incentive to alter the operation to decrease pollution.

How to Avoid Lawsuits

Because a suit for an *injunction* is an equitable action, the court will weigh the interest of each party. The court will attempt to reach the fairest possible results. This "weighing of interest" is always involved. Thus, there is no one thing which a feedlot can do to be completely safe from nuisance action. There are some things the feedlot can do to improve its position if the lawsuit involves damages.

Zoning

Feedlot operation in an area zoned for agriculture does not give absolute protection against nuisance lawsuits. A feedlot's "unreasonable interference" with enjoyment is not affected by zoning. The odor is just as intense with zoning as without.

However, if the feedlot is located in a zone for agricultural use, this is at least evidence that the use of land is not unreasonable. Also, agricultural zoning keeps the number of people living nearby at a minimum. This factor is the greatest benefit from zoning where nuisance lawsuits are concerned.

Site Selection

Selection of a remote site may be the most important thing a feedlot can do to avoid nuisance lawsuits. Remember that an action for an injunction is tried in a court of "good conscience". The "do unto others as you would have them do unto you" rule is a good one to follow.

Priority of Use

"Who was there first" may also be important in some lawsuits. Legally, a feedlot is not protected because it was there first.

The courts have said it is unfair to give the feedlot absolute protection for two reasons. The feedlot may have significantly increased in size after the plaintiff moved in. This size increase may have created the "nuisance". Also the plaintiff simply may not have realized how bad the conditions were when he purchased his property.

Either case can be used to show that the plaintiff did not "assume the risk" of living next to the present nuisance. Proof of assumption of the total risk is needed for absolute protection. The law can not grant absolute protection. However, the jury may take into account the fact that the feedlot was there first. The jury is not likely to award a plaintiff who has just recently moved into the area.

Example: Benefits of Laws

One Kansas law requires all animal feeding operations having 1,000 head or more livestock on hand at any one time to secure an annual *license* from the Livestock Sanitary Commissioner. Their law specifically states that compliance with this requirement is *prima facie* evidence that the feeding operation is not a nuisance. In essence, this shifts the "burden of proof" on this issue to the plaintiff. 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 a lawsuit.

A second Kansas law requires certain livestock operations to have their water pollution control facilities *approved* by the State Department of Health before they can operate. The fact that this "*approval jurisdiction*" is located in the Department of Health may have a practical effect on some juries and thereby make it less likely that they will conclude a health hazard to exist.

Licensing Laws

A few states have licensing laws which provide varying degrees of regulation for feedlot operators. (Most of these licensing laws involve only water pollution.) The law may state that compliance with regulations is *prima facie* evidence that the feedlot is not a nuisance. This shifts the "burden of proof" to the plaintiff. This "burden of proof" may be very important in the outcome of the lawsuit. If neither party can produce evidence for a clear decision of a nuisance, the party having the "burden of proof" loses the lawsuit. Thus, a feedlot complying with the licensing laws may improve the chances of winning the lawsuit.

Agency Jurisdiction

The agency that enforces the licensing of the law may be important to the outcome of a lawsuit. If the licensing law is enforced by a health or environmental agency, the feedlot may have a better defense. The feedlot attorney might argue, "There is no health hazard here. Otherwise the health authorities would not have permitted this operation to continue." This argument may not be deciding but it could sway some juries.

An even more important factor is an agency with power to impose design criteria. This design criteria

may eliminate the element of punitive damages. If the feedlot manager does everything required by the agency, a jury would not likely conclude he has done "a wrongful act intentionally without cause or excuse". The jury would think that he has done what the "experts" believe necessary to avoid creating a nuisance. Thus, the added protection from punitive damages may be worth the extra red tape for feedlot compliance with an agency.

Waste Management Facilities

Waste management facilities must be large enough to handle the load. If adequate facilities could reduce the nuisance level, their installation may be more economical than damages imposed by a lawsuit.

Contractual Rights and Duties

The terms of a growing or feeding contract can determine which parties are liable for nuisance caused damages. The feedlot manager should carefully read all contracts involving major changes of feedlot operation.

Maintenance

Next to site selection, maintenance is the most important factor to prevent or reduce lawsuit damages. Good visual appearance may reduce possible lawsuit chances. Consistent clean up efforts may convince a jury that there was no intentional, wrongful or unreasonable operation.

Existing and Proposed Legislation

There are three areas of pollution law affecting agriculture which may change in the future. These are:

1. A "balancing of interest" test used to determine the outcome of an injunctive action.
2. Expanding the concept of legal "standing" so that private citizens may, in the public interest, initiate actions against "polluters".
3. A "model act" to regulate animal feeding operations.

Balance of Interest Test

The typical nuisance case involves both an injunction and damages. The usual outcome is that damages are granted. The injunction is denied. This outcome gives some protection to existing feedlots, because it amounts to giving the feedlot the right of eminent domain.

With the emphasis on preserving environmental quality, urban areas may not continue to give existing feedlots the major decision making power for site location. The balance of interest test may be abandoned in favor of a method to preserve urban environ-

mental quality. The recent court settlement of the Spur Feedlot lawsuit in Arizona may be part of this trend. The feedlot was moved for the rights and interests of the public, but the urban developer was ordered to pay the costs of the move.

Expanded Concept of Standing

Since 1970, five states have expanded the concept of standing to permit anyone to initiate an action to abate or prevent present or prospective pollution. In the past, a plaintiff had to be able to show that he had some financial interest in the outcome or controversy. These recent statutes take a significant step. These laws make every citizen an "attorney general" because anyone can start a lawsuit *in the public interest*. Other state legislatures are considering similar laws. Where these laws are enacted, greater incentive will exist to abate pollution.

Model Act for Feedlots

As a result of the National Symposium on Animal Wastes, 1971, the Council of State Governments is developing a model act for feedlots. This law is not intended for the purpose of preventing water, air and solid waste pollution. Existing state regulatory agencies are generally equipped to control these problems. There are other reasons for developing such a model state act. These include:

1. The problems of animal agriculture are unique. Existing regulatory agencies may not be able to permit economical solutions for agriculture.
2. If the states do not enact legislation to control agricultural pollution, the federal government will.
3. Agriculture can help draft legislation. This increases the possibility that pollution regulations will be economically realistic. Also, the unique problems of agriculture will be recognized by those responsible for enforcement.
4. The legislation can provide protection by specifying that compliance shall be *prima facie* evidence that an operation is not a nuisance.
5. Compliance with the requirements of such legislation will help to eliminate punitive damages.

Feedlots should investigate whether these potential benefits outweigh the cost and red tape of compliance before deciding whether to back or propose model legislation.

Summary

There are both social costs and social benefits associated with pollution control. Likewise there are also private costs and private benefits. If we are to approach the optimum solution to our pollution problems, it is essential that cattle feeders and administrative agencies, charged with the responsibility

Maintenance Prevents Nuisance Judgement

In Michigan, this February, a county circuit court judge declined to issue an injunction against a swine operation as long as the unit is run in a husband-like manner and odor control products or devices that are economically feasible are used. Claimed damages were also dismissed. The judge indicated that the key factor for the favorable decision was that the swine unit was using good husbandry and housekeeping practices.

The judge's opinion further noted that the swine operation used commercial production methods followed by most farmers, that these production methods are not completely odorless, and that the operation was in a zoned agricultural area. These factors, combined with good maintenance practices, made it difficult for the plaintiffs to establish that the defendants were using their property in a wrongful or unreasonable manner. Also, in this case, the plaintiffs were unable to prove significant injury to the enjoyment of their own property.

for abating pollution, work together at all times.

Cattle feeders have a big stake in working with administrative agencies for three reasons. The foremost, of course, is simply to prevent and abate pollution. A second is that it will help maintain a good image for the cattle feeding business. The third, and by no means the least, is that it may also help to eliminate the possibility of punitive damages. All three of these factors are of critical importance to the cattle feeder.

Since a civil lawsuit, based on the nuisance law, necessarily involves a jury decision, the determination of "interference with enjoyment" may vary. Some individuals might find "interference with enjoyment" even though an operation is meeting all public air and water pollution regulations and standards. Consequently, it is possible for a cattle feeder to be sued in a civil action even though he works closely with his state regulatory agency. For this reason alone a "good neighbor" policy may be important under most circumstances.

Prepared by the Odor and Dust Subcommittee, Feedlot Waste Management from information by Donald R. Levi, University of Missouri.