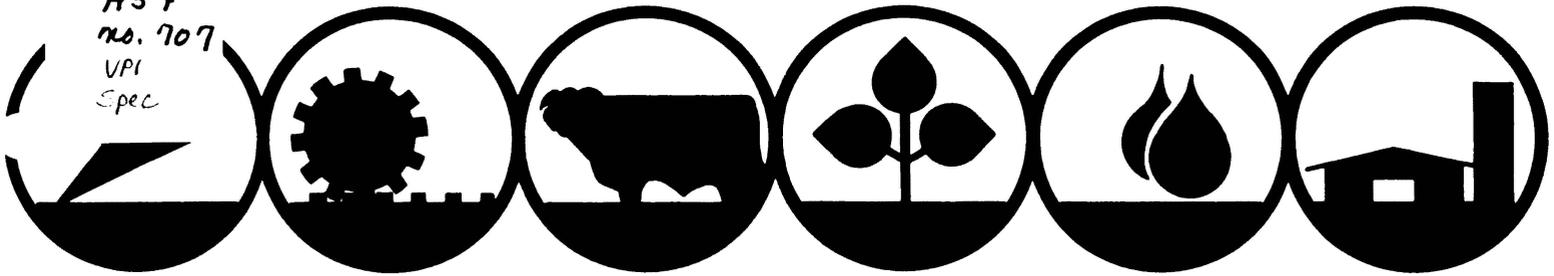


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AGRICULTURAL ENGINEERING

ENVIRONMENTAL QUALITY LEGAL GUIDELINES FOR VIRGINIA LIVESTOCK PRODUCERS

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Many State and Federal agencies have been established, or expanded, in recent years to regulate pollution from livestock farms and other industries. Accompanying this public regulation has been an increase in what amounts to private regulation of pollution. In reality, private pollution regulation occurs when one party sues another on the premise that the second party's use of his property is legally a nuisance.

The following discussion should increase the awareness of Virginia livestock producers of the conditions which may lead to involvement in a nuisance lawsuit, and how liability in such cases may be reduced. Discussion of State and Federal regulation of livestock wastes is provided in another publication.

Nuisance Law and Private Regulation

The nuisance lawsuit is, in effect, private regulation of environmental pollution. Standards for this type of regulation are the subjective human tolerance levels for water and air pollution.

The concept of nuisance has not always been a part of American common law. Years ago, the landowner was supreme, and his rights were almost boundless. Consequently, the landowner could do whatever he desired with his land. Passage of time, however, brought the realization that every landowner could not, in reality be supreme. It became clear that adjacent landowners might use their property in ways that were incompatible with each other. The two basic legal principles—that one may use his land exactly as he wishes, but may not interfere with others' rights to enjoy their property—came squarely into

conflict. Nuisance law has evolved to temper such conflicts with "reasonableness". The existence of a "nuisance" is based on the premise that all persons have the basic right not to be interfered with in the reasonable use and enjoyment of their property. Any unreasonable interference with such use or enjoyment is legally a "nuisance".

Because of the common law origin of nuisance actions, the rules governing conduct in this area apply to all types of pollution. Although what constitutes a "nuisance" may vary somewhat from state to state, each case must stand largely on its own facts and circumstances, with some reliance on prior court decisions (rather than legal statutes). Nuisance actions may result from a wide range of situations including air, water, solid waste, and noise pollution. This publication, however, is only concerned with cases involving the commercial production of livestock.

An actual nuisance lawsuit, in most situations, is simply a civil lawsuit between two or more individuals or businesses. Suits usually involve neighbors who are requesting the court to award them monetary damages as compensation for damages allegedly resulting from livestock production or waste management operations of the defendant, or injunctive relief to force the defendant to cease his objectionable activity. To the extent that injunctive relief or monetary damages are granted, the defendant is subjected to private regulation of his business. A more subtle and less formal regulation results if a producer takes precautions to avoid any anticipated litigation.

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Outline of Legal Procedure

Plaintiffs may seek several courses of action when an agricultural operation is considered to be a nuisance. The complaining party (parties) may ask for (1) an injunction, (2) damages (actual and/or punitive), or (3) both an injunction and damages. The facts of each case determine what type of legal action a plaintiff brings as well as the result that is reached. Generally, nuisance suits involving livestock farms tend to be similar. The plaintiff (complaining party) typically complains about the odor, noise, contamination of soil or water, or other unpleasant physical conditions.

The livestock producer, as a defendant, attempts to show that the conditions are not as bad as they are alleged to be by the plaintiff. In addition the defendant will testify that his livelihood depends on his being able to continue his operation. He will indicate how much he has invested and the economic waste that will result if he is not allowed to continue.

A suit which asks for an injunction will be decided under the guiding principle generally called a "balancing of the equities". The judge must decide whether the defendant's use of his property is unreasonably interfering with the use or enjoyment of the plaintiff's property. In practice, the court is actually weighing the interests of the plaintiff's position against the defendant's operation. The main factors examined concerning the plaintiff are: (1) the extent of harm he suffers, (2) the character of harm he suffers, (3) the social value of the plaintiff's own activity, (4) the suitability of the plaintiff's activity to the area, and (5) the plaintiff's ability to avoid the harm. These factors are balanced against the following factors relating to the defendant: (1) the social value of his activity, (2) the suitability of his activity to the area, (3) the impracticability of preventing the harm. Although these may not be the only factors examined, they are the most common considerations in nuisance lawsuits.

Many petitions for injunctive relief are accompanied by a separate "count" requesting "actual" and perhaps even "punitive" damages. The term "actual damages" means just that—the plaintiff desires reimbursement for expense and property losses, including expenditures to prevent his property from being harmed, as a result of the actions of the defendant. Such losses may result from actual losses of livestock, or reduction in real estate value. The primary legal issue in actual damages is whether the polluter *caused* the damages allegedly suffered by the plaintiff. To

recover actual damages the plaintiff must prove two things: (1) that a nuisance exists, and (2) that the nuisance actually caused the damage. Punitive damages may also be requested because of the defendant's negligence. They are not intended to repay the plaintiff for any loss he may have suffered, but rather to punish the defendant. To recover punitive damages, the plaintiff must prove that the defendant intentionally or maliciously injured him. The terms "intentionally and maliciously" are used in a legal sense to characterize a situation where the defendant is "doing a wrongful act intentionally or without just cause or excuse". For example, if a defendant is aware that his disposal facility does not have the capacity to handle the waste that he is producing, yet he continues to overload it causing harm, his conduct could easily be categorized as "doing a wrongful act without just cause or excuse".

Types of Nuisances

There are two general types of nuisances—public and private. When property is used in such a manner as to interfere with the rights of a substantial number of people, this may be characterized as a "public nuisance". If only the rights of a few are involved, this will probably constitute a "private nuisance".

This distinction may be critical in a lawsuit for an injunction. It may be easier for the plaintiff to win a suit for an injunction where a public nuisance is involved because the interests of the public may be substantially greater than the interests of a private individual. Thus, since the court is merely "balancing the equities" of the parties, the scales are more likely to tip in favor of the plaintiff if the rights of the public are being affected. Frequently, in cases of alleged public nuisances, suit will be brought by a public agency or official acting in the public interest, rather than by a private individual.

Livestock producers who are considering the modification or construction of new production facilities should critically examine the projected growth and development patterns adjacent to the site of their proposed facility. A site which is likely to be adjacent to a heavy concentration of neighbors within a few years might be a poor risk. It could become an alleged "public nuisance."

Illustrative Cases

The following actual cases illustrate the ideas discussed previously.

Case A

A feeder had contracted to feed 7,500 head of cattle for a major packer. Soon after operation began, a heavy, 3-day rain "flushed out" the feedlot into a nearby creek. The water from the creek, contaminated with nitrate and other impurities, evidently seeped into the well of a dairy farmer located downstream. After drinking 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 than to go out of the dairy business. At trial, the jury decided the action of the cattle feeder was legally a nuisance and the dairy farmer was reimbursed for his actual damages.

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, it is probable that the conduct was neither malicious nor intentional.

Case B

The plaintiff in this case had purchased his farm in 1950 and raised a few cattle. At that time, the air was clean and the stream passing through the farm was pure. In 1965 the defendants, a corporation, began a swine breeding and feeding operation on an adjoining farm located on a hillside above the plaintiff's farm. The defendants first constructed a few hog houses in 1965 but made no provisions for waste disposal, so as a result, the effluent from these houses flowed onto the plaintiff's farm. When the defendants constructed additional hog houses, they built a cesspool. However, the cesspool overflowed and ran into a stream whereupon the plaintiff contacted the State Health Department and conferred with the manager of the defendant's operation. The defendants then built four more 30- by 130-foot hog houses, continued to fill the first cesspool, and in addition, constructed a new lagoon. The lagoon however also filled to overflowing. To remedy this, the embankments were built higher, increasing the capacity. In 1967, effluent flowed over the top of the lagoon

embankment and ran across the plaintiff's farm. In 1968, a plug ruptured in the lagoon drain pipe and flooded the plaintiff's pond. Shortly thereafter the defendants built a new lagoon which by the end of the year was seeping and overflowing. Early in 1969, the defendants built an additional lagoon.

The plaintiff testified that he saw the defendants' employees pumping waste out of the first lagoon into the natural watercourse that flowed onto his property. He presented pictures of fish kills resulting from the pollution of his pond. Evidence was introduced to show that the defendants had constructed a diversion terrace to prevent their wastes from going into their own water supply, but had taken no measures to prevent them from running onto the plaintiff's property. The plaintiff further testified that his daughter's high school social life was upset by the odor, and that his friends greeted him when they drove down the road by holding their noses. He indicated that there was a difference in his drinking water, and that rats and flies had overrun his property. He introduced pictures of a decomposing hog on the defendant's property right across the plaintiff's property line. The evidence showed that immediately prior to the trial, vegetation was killed by overflowing lagoon effluent and that the three- or four-foot deep road ditch running in front of both defendants' and plaintiff's properties was level full of lagoon effluent. Testimonies from the plaintiff and many other neighbors stated that the odor was the most sickening, rotten, nauseating odor that they had ever smelled. The plaintiff asked for an injunction to stop the operation and for actual and punitive damages.

In this case the trial judge dismissed the request for an injunction and submitted the case to a jury to determine whether a nuisance existed and what, if any, damages should be awarded. Some laymen might seriously contend that the defendant in this case did not intentionally or maliciously interfere with the plaintiff's rights. However, as noted above, 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 accredited with knowledge of the probable consequences of his conduct. Thus, there was some evidence on which the jury could award punitive damages; the hog producer was blatantly allowing pollutants from his operation to be discharged into a natural watercourse and onto his neighbor's property. In addition, he had taken measures to protect his

own property from effects of the pollutants but had taken no measures to prevent pollutants from running onto the plaintiff's property. The jury returned a verdict against the defendant, awarding \$46,200 actual damages and \$90,000 punitive damages. This verdict was upheld on appeal.

It should be pointed out that, in a case such as this, if the defendant does not take steps to abate the nuisance, he could be sued again by the same complaining party for future damages suffered if additional, unanticipated, and uncompensated damages occur. In addition, other complaining parties may bring suit against the defendant for alleged damages incurred before abatement of the nuisance.

Case C

This case involved a confinement swine operation. The plaintiffs, all neighbors and some of whom were related, complained that a swine finishing barn constructed by the defendants in 1965 resulted in noxious odors and toxic gases being carried to their property by prevailing winds. The plaintiffs complained that they experienced nausea, loss of appetite, and enjoyment of their property, as well as the depreciation in the value of their property as a result of the odors from the defendant's swine barn. An injunction was sought to order the defendants to rebuild their operation at some other location on their property so that the plaintiffs would not be subjected to the offensive odors.

Evidence was introduced in court to indicate that the defendants' operation was well-managed, and they were not negligent in their maintenance or waste disposal practices. Expert witnesses testified that there was no fully effective means of controlling odors, and handling and disposing of livestock wastes. The location involved was agriculturally zoned and was traditionally a farming area. The plaintiffs failed to prove any substantial drop in their property value, or any other monetary damages, nor did they prove any health hazard from the odor they experienced from time to time. The court recognized that on fairly frequent occasions, when the wind was coming from the direction of the defendants' barn, they experienced an odor which they considered to be unpleasant. The defendant's witnesses tended to prove that the plaintiffs were overstating the problem, and that they did not experience the odors with any high degree of frequency. An important factor was the fact that the defendants attempted to control odors with an odor control chemical when they learned that such a product was available. Such evidence, along with

testimony that the defendants conducted a good commercial swine operation with no pollution of adjacent land or water, persuaded the court that injuries suffered by plaintiffs were not substantial enough to warrant an injunction. The court ruled that as long as the defendants continued their operation in a careful and efficient manner, and used such odor control products and devices as became available and were **economically feasible**, they would not be required to relocate their barn and could continue operation of their swine business.

Avoiding Nuisance Law Suits

Recognizing that a suit for an **injunction** is an equitable action, the court will weigh the interests of both parties and attempt to reach the fairest possible result. Since this "weighing of interests" is always involved, it becomes apparent that there is nothing a farmer can do to be certain that he is safe from nuisance actions. However, there are some things which can be done to improve his position, especially where the lawsuit involves a request for damages.

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 non-farm 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 waterways. Farms with these locational problems need to be analyzed carefully for potential problems, and how these problems can be averted through modification of the collection, processing, storage, and disposal of animal wastes. This is especially important when upgrading or expanding at an old site; sometimes it may be wise to abandon an old site and to invest expansion or remodeling money in new facilities at a better location.

Prior Operation

Individual livestock producers should not rely on the assumption that they are less likely to be held liable for damages to neighbors or rural residents if their operation was initiated before their neighbors moved into the area. Being there

first, or "prior operation," does not necessarily protect the producer. Before "prior operation" becomes a factor for consideration it must be shown that residents, on moving into the area, "assumed the risk" of living near the alleged nuisance-causing operation. That is, it must be shown that the complaining party could have appreciated how bad conditions would be prior to moving in before they legally "assume the risk". If, however, a livestock producer 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 on. 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.

Prior operation pertains mainly to nuisance suits. It has minimal application to air or water quality problems which may be dealt with by various public agencies enforcing pollution regulations.

Zoning

Zoning has frequently been mentioned as a panacea for all environmental problems, but, it is not. Zoning is impractical for some areas where livestock farms are already interspersed with rural residences, or are situated close to 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 to protect, but rather to decrease the possibility of lawsuits by keeping the number of conflicting uses of land and water resources, and the number of nearby residents, at a minimum. In case of a lawsuit, it may also be helpful if a feeding operation is located in an agriculturally zoned area so that use of property for livestock feeding is not unreasonable per se (see Case C). Generally though, an appropriate zoning plan for a particular area might protect producers from additional urban encroachment, but will do little to solve problems with existing animal operations.

Licensing and Registration

A number of states have licensing or registration laws which regulate, in varying degrees, livestock

operations. Except for permits required by the State Water Control Board for waste storage facilities, Virginia does not presently have such laws. The U.S. Environmental Protection Agency also has a permit system, but permits under this system normally do not affect typical Virginia livestock farms.

Typically, licensing and registration laws require animal operations of a certain size to register or to secure an annual license from an appropriate state agency. Depending on the specific regulations tied to the licensing and registration system, varying adjustments in management and facilities may be needed by individual livestock producers. For example, issuance of a license may depend on whether a livestock farm meets standards 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 they may prevent some punitive damages which might be incurred by livestock producers. That is, if individual livestock producers comply with licensing and registration requirements, it will be difficult to conclude they have intentionally done any wrongful act without just cause or excuse. However, actual damages may still be awarded to plaintiffs in some cases.

Compliance with Regulations

Livestock farms must comply with zoning regulations and all other applicable environmental regulations that do exist in Virginia. It is, therefore, essential that producers be aware of various laws and ordinances which would apply to their individual operations, and 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 Virginia State Water Control Board and Virginia State Air Pollution Control Board if water or air resources would have substantial demands placed on them. Representatives from the Virginia State Water Control Board and Virginia State Air Pollution Control Board may investigate any private property at a reasonable time to inquire into an existing or potential problem which might affect water or air resources.

Information about requirements of State and Federal Agencies are discussed in another publication available from your Extension Agent.

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 used, particularly if an adequate buffer zone for natural odor dissipation is not available. Particular attention needs to be given to the timing and site of animal waste disposal to prevent annoyance of neighbors. 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 an excellent rule to follow in animal waste management.

Summary

Livestock farmers may expect increasing public and private scrutiny of their livestock waste

management. A layman's understanding of nuisance lawsuits can be helpful in planning and managing livestock operations to avoid potential liability.

Since lawsuits based on the nuisance law necessarily involve a human decision as to when one interferes with his neighbor's use or enjoyment of his property, the outcome may vary from case to case. Some courts may find "interference with enjoyment" even though the defendant is meeting all public regulations for water and air pollution abatement. So, it is possible for a producer to be sued even though he works closely with appropriate state regulatory agencies. The likelihood, though, of being involved in a nuisance suit may be reduced greatly by following the suggestions discussed in a previous section of this publication. The best protection, however, may well be a "good neighbor" policy.

Selected Glossary

Action—a legal proceeding by which one seeks to have a wrong put right; a lawsuit.

Bring action—to start a lawsuit.

Common law—the law of a country or state based on custom, usage, and the decisions and opinions of law courts.

Count—any of the charges in an indictment, each of which gives a reason and is sufficient for prosecution.

Damages—money claimed by, or ordered paid by a court to a party (parties) to compensate for injury, loss, etc., caused by the wrong of the opposite party (parties).

Defendant—the defending party, or person sued or accused in a lawsuit.

Equitable action—a lawsuit resolved by general principles of fairness and justice whenever existing law is inadequate.

Injunctive relief—the assistance sought by a complaining party (parties) in a court to prohibit a person, or persons from carrying out a given activity.

Liability—state of being legally bound or obligated to make good any loss or damages adjudged by a court.

Litigation—the act or process of carrying on a lawsuit; a lawsuit.

Malice—evil intent; state of mind shown by intention to do, or intentional doing of, something unlawful.

Petition—a written request or plea in which specific court action is asked.

Plaintiff—a person who brings a suit into a court of law,; the complaining party.