



Environmental Law Update: Livestock and Poultry

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Environmental law affecting agriculture and agribusiness is rapidly changing. The livestock and poultry industries have been noticeably impacted. These changes may affect producers' costs and require substantial modification in practices. This article summarizes selected laws, regulations and court decisions (federal and state) that affect the livestock and poultry industries. While beyond the scope of this article, there has also been significant regulatory activity at the county level, expressed through county ordinances and health department rules.

Federal Regulatory Activities

On March 9, 1999, the U.S. Department of Agriculture (USDA) and the U.S. Environmental Protection Agency (EPA) issued the final Unified National Strategy for Animal Feeding Operations (located on the web at <http://www.epa.gov/owm/finafost.htm#1.0>) after extensive public comment. The final strategy is not a new regulation, but states the current USDA and EPA approach to enforcement of existing regulations. It is an important policy statement that defines the USDA and EPA interpretation of existing laws and regulations and the overall regulatory approach that the livestock industry can anticipate.

The final strategy does not cover livestock grazing on pastures, fields or rangeland. It addresses only those animal or poultry farms where the animals or poultry are concentrated and the feed is brought to the animals or poultry. The purpose of the final strategy is to minimize water pollution

from livestock and poultry farms while promoting the economic vitality of the livestock and poultry industries. The key to achieving this goal is the development of a technically sound, economically feasible, and site-specific Comprehensive Nutrient Management Plan (CNMP) for each livestock or poultry farm. For the majority of livestock and poultry farms, the USDA and EPA envision that development of CNMPs will be voluntary, with farmers encouraged to develop the plans through a combination of education and financial incentives. For large livestock and poultry farms, however, these plans will be a mandatory part of the existing permit process. These federal regulations do not preempt state and local regulations that are more stringent.

The Clean Water Act (CWA) Compliance Audit Program (CAP) for pork producers was established as a result of an agreement between the EPA and the National Pork Producers Council (NPPC). Its purpose is to offer independent, voluntary audits to pork producers to help them comply with the CWA. If violations of the CWA are found as a result of these audits, pork producers have 120 days to report them to EPA and then correct them within a specified time in order to avoid penalties. Note that avoidance of state penalties for violations found as a result of these audits are dependent on provisions of state programs. Many states including North Carolina waive or reduce penalties for prompt self-reporting of most violations. Information on the CAP may be found at <http://es.epa.gov/oeca/ore/porkcap/factsh.html>, or by calling the EPA Region 4 office at (404) 562-9900.

Activity in the General Assembly

North Carolina is among the many states that developed more stringent regulatory programs for livestock and poultry farms. In 1996 the General Assembly addressed livestock farm issues through the passage of Senate Bill (S.B.) 1217. S.B. 1217 amended requirements that restrict where new or expanded swine farms, lagoons, and spray fields can be sited, and rewrote requirements for animal waste management plans for certain livestock and poultry farms. S.B. 1217 also required certification of operators of animal waste management systems on livestock and poultry farms covered by the law. In 1997 the General Assembly passed House Bill (H.B.) 515 which further tightened swine farm-siting requirements. H.B. 515 removed large swine farms from the agricultural exemption to county zoning. All other farms remain exempt from county zoning; however, no farm is exempt from municipal zoning either within corporate limits or within the extraterritorial zoning jurisdiction of municipalities. Importantly, H.B. 515 placed a moratorium on the construction or expansion of most swine farms. There is an exception for farms that use qualifying, innovative technologies. H.B. 515 also mandated a graduated violation point system for swine farms, and required a report on best management practices for controlling odor from livestock and poultry farms.

H.B. 1480 (passed in 1998) extended the moratorium on new swine farm construction or expansion through September 1, 1999. H.B. 1480 modified the definition of innovative technologies under which new or expanded swine farms may be exempt from the moratorium. H.B. 1480 also required that swine farmers register each integrator with whom they have a contract, and that each such integrator be given notice of any farmer violation. The General Assembly has passed no legislation affecting the livestock industry during its current session. However, a bill to extend the animal waste pilot project in Columbus and Jones counties survived the crossover deadline. Although there has been discussion of extending the current moratorium on swine farm construction and expansion, the General Assembly has not done so to date.

State Regulatory and Executive Actions

The Environmental Management Commission adopted temporary *Odor Rules for Animal Operations* on February 11, 1999, with an effective date of March 1 (see <http://daq.state.nc.us/Rules/Adopted/>). The permanent draft rule is available for review at <http://daq.state.nc.us/Rules/Draft/>. Under the temporary rule, the Department of Environment and Natural Resources, Division of Air Quality is empowered to respond to complaints about odor from animal and poultry farms and to require best management practices to reduce objectionable odors. Under the permanent draft rules, if adopted, all livestock and poultry farms covered under the rules would be required to submit an odor management plan to the Division of Air Quality. The Division of Air Quality has indicated flexibility in enforcing the temporary *Odor Rules* where producers can document that particular requirements are problematic for their situations. Interested persons should contact the Division of Air Quality for details.

Governor Hunt has proposed conversion of anaerobic swine waste lagoons and spray fields to new technologies. This proposal can be found at <http://www.state.nc.us/EHNR/files/hogs/hogplan.htm>. While some of its elements may be implemented administratively, most of the proposal will require action by the General Assembly.

Court Decisions Affecting Permitting

The courts have been busy too. The distinction between a point source of surface water pollution and a nonpoint source has been a source of conflict for several years. Point sources are easily identified (concentrated sources of water pollution) while nonpoint sources are more difficult to identify (diffuse sources of water pollution). Although the distinction is arbitrary, the consequences are enormous. Livestock farms that are nonpoint sources of water pollution are regulated through North Carolina's nondischarge permitting program. These farms may be required to develop an animal waste management plan described above. Livestock farms that are point sources of water pollution must apply to the N.C. Department of Environment and Natural Resources (DENR) for a National Pollutant Discharge Elimination System (NPDES) permit.

Compared to the nondischarge permitting process, the NPDES permitting process is lengthy and expensive. Before DENR can issue an NPDES permit, it must invite comments on the terms of the proposed permit. EPA regulations under the Clean Water Act define certain large livestock and poultry farms as concentrated animal feeding operations (CAFOs). A livestock farm labeled a CAFO is presumed, without proof of any discharge of pollution to surface waters, to be a point source of water pollution and must obtain a NPDES permit. Historically, most livestock and poultry farmers assumed, at worst, they were nonpoint sources of water pollution. This assumption was challenged in a 1994 decision of the U.S. Court of Appeals for the Second Circuit. In that decision, *Concerned Area Residents for the Environment v. Southview Farm (Southview)*, the Second Circuit held that Southview Farm, a large, upstate New York dairy, was a CAFO for which a NPDES permit was required. As that case was only applicable to the Second Circuit, North Carolina livestock and poultry farms were not directly affected. However, in December 1998, the U.S. District Court for the Eastern District of North Carolina applied *Southview* at the preliminary injunction stage in a case brought against a North Carolina hog farm. In *American Canoe Association, Inc. v. Murphy Farms, Inc.*, the Eastern District found that the hog farm subject of the lawsuit was a CAFO and required the defendants in the case to apply to DENR for a NPDES permit. One issue raised by the defendants was DENR's policy against issuing NPDES permits to livestock and poultry farms; however, the court noted in a footnote to its decision that DENR has agreed with EPA to issue NPDES permits to livestock and poultry farms.

Nuisance and Right-to-Farm Court Decisions

When one landowner unreasonably interferes with the right of a neighboring landowner to use and enjoy his or her land, that neighbor may bring a private nuisance lawsuit to force the first landowner to stop the objectionable practice (injunctive relief), pay damages, or both. Since some normal farming practices make noise, create odor, or affect water quality or quantity, farmers are sometimes

defendants in lawsuits based upon nuisance. In a July 1998 opinion, *Parker v. Barefoot*, the North Carolina Court of Appeals was asked to decide whether the plaintiffs were entitled to a jury instruction that the defendant hog farmers' use of the best technology available to control odor is not a defense in a nuisance suit. The Court of Appeals concluded that the use of *state-of-the-art* technology could not be considered when deciding whether a nuisance exists but may be considered in deciding the magnitude of the nuisance. The plaintiffs requested damages (money) and injunctive relief (which would mean either closing the hog farm or eliminating the odor that created the nuisance). The Court of Appeals explained that if the jury found that a nuisance existed then the plaintiffs would be entitled to damages, but that the finding of a nuisance would not automatically entitle the plaintiffs to injunctive relief. Whether the trial court could grant injunctive relief would depend upon the magnitude of the nuisance. The Court of Appeals ordered a new trial based upon its decision. An appeal of the decision is currently before the N.C. Supreme Court.

At common law a plaintiff could bring a nuisance lawsuit although the defendant's land use preexisted the plaintiff's use. For example, a homeowner who built a home next to a hog farm that was not a nuisance before the home was built could successfully bring a nuisance lawsuit against the hog farm. In recognition of the importance of agriculture to North Carolina and the investment required, the General Assembly long ago modified this rule. The current rule, N.C.G.S. §§106-700-701, (often called the right-to-farm law) states that no farm that has existed for more than one year, that was not a nuisance when started, and that is neither negligently nor improperly operated may become a nuisance because the use of neighboring land has changed. In 1994 the Court of Appeals in *Durham v. Britt* decided that a farm that substantially changes its operations (from turkeys to hogs) will be treated as a new farm. The most recent case with implications for right-to-farm laws is a highly publicized 1998 decision of the Iowa Supreme Court, *Bormann v. Board of Supervisors in & for Kossuth County, Iowa (Bormann)*.

Although *Bormann* is not law in North Carolina, it has implications for North Carolina because the Iowa right-to-farm law, found to violate the Fifth Amendment to the U.S. Constitution, is similar to North Carolina's right-to-farm law. Moreover, the Iowa Supreme Court cited a North Carolina Supreme Court decision in

support of its decision. Also, if the reasoning of the Iowa decision is adopted widely, it would have profound implications for many environmental laws. The Iowa Supreme Court found that the right-to-farm law had the effect of creating an easement permitting farmers, thus protected, to create nuisances without compensating their neighbors. In the view of the Iowa Supreme Court this is tantamount to the government physically taking the property, a *per se* taking. Governments must always provide compensation for *per se* takings; failure to do so violates the takings clause of the Fifth Amendment of the Constitution. There is a second type of taking called a regulatory taking. This type of taking occurs where there is no physical invasion of the landowner's property, but the regulation so restricts the use of the property that courts treat the property as if taken and require compensation. It is extremely difficult for landowners to win regulatory takings cases because courts balance the public interest protected by the regulation against the loss of value to the property owner. If other courts apply the analysis in *Bormann*, a variety of other environmental and other regulations might be classified as *per se* takings, which would make it easier for landowners to recover their losses.

This publication is designed to acquaint you with certain legal issues and concerns. It is not designed as a substitute for legal advice, nor does it tell you everything that you need to know about the subject. If you have specific questions about this topic, you are encouraged to contact your County Extension office, the regulatory agency responsible for your particular concern, an attorney, or other professional advisor. If you need an attorney, you may call the North Carolina Lawyer Referral Service, a non-profit public service project of the North Carolina Bar Association, toll-free: 1-800-662-7660 (Wake County residents call 677-8574).

Swine Farm Zoning Resource Notebook to be published

The Department of Agricultural and Resource Economics is preparing a collection of resource materials on swine farm zoning (as authorized by H.B. 515) to help extension agents, pork producers and others with the various issues involved. The notebook is currently at the final editing stage and will be published later this summer. Each County Extension office will be provided with a copy; copies will be available to the general public for a fee to recover costs of reproduction. More information on the notebook can be obtained by contacting the author at ted_feitshans@ncsu.edu or (919) 515-5195.

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