

Dragun Corporation and BW Law Group White Paper

**Using Improved Environmental Communications
As a Risk Management Tool to Avoid Costly Litigation
Involving Concentrated Animal Feeding Operations**

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Introduction

With the use of Concentrated Animal Feeding Operations (CAFOs), livestock agriculture has changed dramatically. There have been quantifiable gains in productivity allowing fewer farms to meet the demands of a growing population while reducing their environmental footprint. There has also been increased conflict and communication barriers between CAFO owner/operators and local stakeholders, as well as those concerned that CAFOs may negatively impact the environment. For CAFO owner/operators, this conflict has resulted in litigation, costly settlements, and increased environmental controls. One way that may help reduce the conflict and resultant litigation is to establish an environmental management system. The authors of this paper look at the gains in livestock

agriculture, case studies of litigation, and the potential of more effective environmental communication programs to reduce conflicts and litigation. The authors of this paper address certain environmental and legal issues associated with CAFOs but do not address animal rights issues.

Finally, the authors do not suggest there is a simple solution to the problem of real or perceived environmental issues involving CAFOs or the conflicts that may arise from these environmental issues. We merely hope to present suggestions, based on our experience with these matters, which may help livestock owners and operators avoid costly litigation. We do recognize, however, that certain groups are specifically targeting CAFOs with the sole objective of shutting them down. We acknowledge that, with regard to such

groups, no amount of communications may be effective in resolving disputes and litigation may be the only alternative.

More Production with Better Efficiencies

There are few, if any, industries that operate the way they did in the past. Manufacturing operations are far more efficient and productive than they were just a generation ago. Transportation, communication, and technology have all changed in a very dramatic way. According to the Council for Economic Education, (in the United States), real output has increased 15-fold since 1900, while population has only tripled (Council for Economic Education, n.d.).

Agriculture too has changed rather dramatically since the early 1900's. The changes in agriculture have been positive from the standpoint of productivity.

According to the American Farm Bureau,

one farmer in 1940 fed approximately 19 people. Today one farmer feeds 155 people (American Farm Bureau, n.d.). Additionally, according to Center for Strategic and International Studies, "Since 1960, the world's population has more than doubled, from 3.1 billion to 6.7 billion, and real per capita income has nearly tripled. Over the same period, total production of cereals grew faster than population, from 877 million metric tons in 1961 to more than 2,351 million metric tons in 2007..." (Center for Strategic and International Studies, 2010).

Livestock farms have also realized significant increases in productivity. Key and McBride (2008) state that "Although the number of farms with hogs dropped over 70 percent from more than 240,000 in 1992 to 70,000 in 2004, the US hog inventory remained stable at about 60 million head" (Key and McBride, 2008).

The dairy industry has realized tremendous gains as well, “Modern dairy practices require considerably fewer resources than dairying in 1944 with 21% of the animals, 23% of feedstuffs, 35% of the water and only 10% of the land required to produce the same 1 billion kg of milk” (Capper et. al, 2009). Capper et. al (2009) also state, “It is also clear that the environmental impact of the modern US dairy production system is considerably less than that of the historical systems with substantial reductions in resource use (feedstuffs, crop land, energy and water) waste output ...and GHG emissions.”

Divergent Viewpoints

However, this increased productivity in agriculture has not come without change and controversy. Looking at the fundamental issue as it relates to livestock agriculture, increased inputs has lead to

increased output; for livestock the *waste* output comes in the form of manure.

The handling of the output, or manure, is the crux of the environmental debate at CAFOs. Farmers have one view of how the manure should be managed and regulated (traditional methods); environmental activists have another view (more “regulated”). Communication between the two groups on how best to address this issue has been strained.

In addressing this strained communication issue between environmental groups and farmers, Zinn and Copeland (1998) said, “Agriculture and environmental groups can have trouble communicating with each other because of differing perceptions about what the problems are and how best to view them, differing concepts on environmental quality and responsibilities to maintain that quality, as well as differing institutional

perspectives.” The communication gap between environmental groups, local community activists, and other stakeholders and livestock agriculture has only become more profound since the Zinn and Copeland report.

The environmentalists are focused on what they believe to be the “solutions” to the environmental issues; farmers on the other hand are concerned about how these “solutions” may impact their business.

A farm by nature has a lot of manure, feed, and animals that generate odors and create a working environment that is not familiar to a majority of the public. This was not true a generation or two ago when we were by-in-large an agrarian society. Now, less than 1% of the population claim farming as an occupation (EPA, n.d.). Two changing dynamics, fewer people exposed to farming life and farming

practices changing dramatically, underscore the communication gap.

Who is right and what has changed the perception of farmers from idyllic Americans to “corporate polluters” (to use a pejorative term) is a very complex question. Certainly, part of the answer lies in the realm of environmental communication and Environmental Management Systems (EMSs). Further, environmental communication may play a critical role in reducing the number of lawsuits against CAFO owner/operators.

Environmental Communication

The reality is, there is a lot of negative press from those who oppose CAFOs and livestock agriculture in general, and much of their communication is sensationalized. While CAFO owners/operators cannot control the communications of other organizations,

they can provide more effective communication to convey their message of environmental stewardship as a way to offset the sensationalism.

Looking at models for environmental communication, Lundgren and McMakin (2004) propose that risk communication includes three areas:

- Care Communication (safe use procedures)
- Consensus Communication (impact assessments)
- Crisis Communication (responding to accidents)

Consensus communication is critical in locating a new facility that has the potential to emit pollutants of any kind. Owners of CAFOs considering locating in a community should understand the local stakeholder's view of the CAFO "industry." Communication issues are not negated by zoning laws or right-to-farm ordinances.

Environmental communication may be able to help bridge the gap between

issues relating to right-to-farm, zoning, and provide for a more amicable relationship between farmers and stakeholders.

CAFO Environmental Litigation

CAFOs have come under increasing federal, state and local scrutiny. Abdalla and Lawton (2006) point out, "[t]he expansion of livestock and poultry production, particularly larger confined animal operations, is increasingly leading to private disputes and public issues concerning agricultural production and the environment."

Current and past litigation in opposition to CAFOs seek not only monetary damages, but also seek permanent injunctions to put an end to their operations. This section of the article will discuss the legal claims asserted in these lawsuits, the damages available under these theories of recovery, and more

fully describe, by way of an example of a case arising in Missouri, the typical background facts associated with disputes between CAFOs and local stakeholders.

For many years, nuisance, as a means of legal recovery, was largely theoretical. However, nuisance law has reached new prominence, particularly with respect to environmental disputes, including environmental disputes related to siting or operation of CAFOs. In fact, private nuisance claims are the primary means of legal recovery pursued by those stakeholders challenging CAFOs. Specifically, such stakeholders claim that CAFOs cause certain adverse effects, such as offensive odors or the presence of flies, which results in either a temporary or permanent loss of use or enjoyment of their property. Such stakeholders generally seek, through these private nuisance lawsuits, either compensatory or injunctive relief. The

compensatory awards under these private nuisance claims are quite substantial. Some of these lawsuits have resulted in multi-million dollar verdicts against CAFOs.

For instance, in *John Owens v. Contigroup Cos. and Premium Standard Farms*, WD 72560 (Mo. App. W.D. 2011), a jury awarded more than \$11 million to fifteen (15) rural Missouri plaintiffs seeking damages from odors emanating from a hog farm in Gentry County, Missouri. The jury awarded \$825,000 to each of thirteen (13) plaintiffs, with lesser awards to the other plaintiffs. This jury award was ultimately upheld on appeal to the Missouri Court of Appeals for the Western District. This is only one example of many cases resulting in large jury verdicts for plaintiffs suing CAFOs. See also *M. Adwell v. Contigroup Companies, Inc.*, WD72560, (MO. App. W.D. 2011)

(jury awarded each plaintiff \$750,000 for a total award of \$4.5 million; see also *Hanes et al. v. Continental Grain, Inc., et al.*, 58 S.W. 3d 1 (Mo. Ct. App. 2001) (over fifty (50) plaintiffs received a jury award of \$100,000 each for a total award of \$5.2 million. This award was upheld on appeal).

Furthermore, these lawsuits are not isolated to large CAFOs. *McEowen v. North View Swine, 05CD-CV00016 & 08CD-CV00076*, is an example of a small “family” farm that was sued. Although the case settled in 2009, the costs to defend this lawsuit, up to the point of settlement, were in excess of \$200,000.

An important issue in these cases is the characterization of the nuisance. Namely, do the CAFOs constitute a *temporary* or *permanent* nuisance? Generally, plaintiffs in these cases argue for temporary nuisance so they can recover for loss of use and enjoyment of property in an

unlimited amount. If the CAFOs are classified as permanent nuisances, the only damages available to the plaintiffs for property damage are the diminished fair market values of property. However, in a permanent nuisance lawsuit, plaintiffs also sometimes seek injunctive relief aimed at shutting down CAFOs.

Another aspect of private, temporary nuisance claims is potential for recovery of punitive damages. Plaintiffs typically seek punitive damages based on the violation of state law or county ordinances. Generally, state environmental regulations are used as the applicable standard of care. Plaintiffs in these lawsuits attempt to demonstrate that the CAFO has violated some state or local environmental regulation, and thus have, with flagrant disregard, failed to exercise the requisite standard of care justifying an award of punitive damages.

Lawsuits against CAFOs are also used as drivers for compelled implementation of more sophisticated technological controls aimed at minimizing the actual or perceived adverse environmental impacts from CAFOs. For instance, in *Clean v. Premium Standard Farms*, 19 S.W.3d 160 (Mo. App. W.D. 2000), the parties agreed to entry of a consent decree designed to advance the development of “Next Generation Technologies” for the reduction of odor, to improve waste handling and dispersion practices, and to develop technology to reduce the acreage of land needed to spread waste.

One case, which exemplifies the extent to which aggrieved stakeholders will go in opposing CAFOs, is the case of *State ex rel. Missouri Parks Association, Village of Arrow Rock and Friends of Arrow Rock v. MDNR, et al., Missouri Farm Bureau*, 316

S.W.3d (Mo. App. W.D. 2010). On August 31, 2007, the State of Missouri, through the Missouri Department of Natural Resources (MDNR), issued Dennis Gessling (Gessling) a one-year construction permit that authorized construction of a 4,800 hog CAFO in Saline County, Missouri, near the Village of Arrow Rock. The Village of Arrow Rock is identified as a distinctive destination by the National Trust for Historic Preservation and is home to numerous historic buildings. Additionally, the Sappington Cemetery State Historic Site and two other landmarks listed on the National Register of Historic Places are in or near the Village of Arrow Rock. MDNR issued the construction permit pursuant to its authority under the Missouri Clean Water Law and the Missouri “Hog Bill.” The permit automatically expired on August 30, 2008. While the permit was

active, a petition was filed with the Administrative Hearing Commission (“AHC”) to initiate an appeal to the Missouri Clean Water Commission. While this was pending, the Missouri Parks Association filed suit seeking declaratory relief. Despite the fact that the proposed CAFO had complied with MDNR’s regulations regarding buffer distances, the trial court ruled against MDNR and declared that MDNR should not have issued the construction permit because: (1) it had a constitutional duty to protect state parks and historic sites, and (2) a CAFO should not be permitted within fifteen (15) miles of those sites. The trial court ruled that MDNR must revoke the permit because the potential odor and pollutants that could emanate from the Gessling CAFO could threaten these sites.

Ironically, the original permit holder, Gessling, was not named as a defendant in the suit and did not actually end up

constructing the CAFO. Further, Gessling’s permit would have expired on its own five (5) days after the trial court entered its ruling. Despite the fact that the matter was, for all practical purposes, resolved, various state agencies, historic preservationists, and producer associations pursued the dispute to advance or defend their own broad positions with respect to CAFOs. These “interested parties” included opposing state agencies, the Village of Arrow Rock, Friends of Arrow Rock, Respondents, the Missouri Farm Bureau, the Missouri Cattlemen's Association, the Missouri Dairy Association, the Missouri Pork Association, and the Missouri Egg Council.

Ultimately, the Missouri Court of Appeals for the Western District vacated the trial court’s summary judgment against MDNR on the grounds that the matter was

moot at the time of entry of the amended judgment. The Court of Appeals ordered the lawsuit dismissed. The Court of Appeals found that the trial court's judgment was advisory, as it adjudicated future permits for which no one had applied. The Court of Appeals held that the trial court usurped state statutes that specifically regulate CAFOs and that the plaintiffs had failed to exhaust their administrative remedies. Application for transfer of the case to the Missouri Supreme Court was denied.

This case is an unfortunate example of the intensity of the disputes between owners or potential owners of CAFOs and those challenging CAFOs. Likewise, it is a sad, and extremely expensive, example of the lawsuits that producers, state permitting agencies, impacted neighbors, and coalition groups increasingly appear to be using to advance and defend their own positions.

Environmental Management on Farms

The previous examples of litigation demonstrate the need for CAFO owner/operators to take proactive steps to avoid litigation. One of the solutions to help mitigate the conflict is better communication through Environmental Management Systems (EMS). Taking a page from other industries, there are excellent models of EMSs. One of the most recognizable is the American Chemistry Council and Responsible Care. Programs such as Responsible Care are designed not just to be more environmentally responsible, but to communicate these efforts to the stakeholders. For the chemical industry, it took the unfortunate Bhopal, India incident to bring to light the need for this type of program. For others, it has been stakeholder pressure for change and transparency.

Each EMS-type program is built on some of the basics of risk communication, including the fact that the organization communicating must be credible and trustworthy and that the audience must be allowed to participate in the risk management decision (Lundgren and McMackin, 2004).

The farming community has recently responded to the growing concerns by developing proactive programs that are very much in line with the EMS. The National Pork Producers Council and the National Pork Board have developed the “We Care” program that includes six ethical standards; Food Safety, Animal Well-Being, Environment, Public Health, Employee Care, and a commitment to the communities in which they operate. As it relates to the environment, the ethical standard for We Care states, “We affirm our obligation to safeguard natural resources in all of our

practices.” They also state that Pork

Producers will:

- Manage manure as a valuable resource and use in a manner that safeguards air and water quality.
- Manage air quality from production facilities to minimize the impact on neighbors and the community.
- Manage our operations to protect the quality of natural resources (Ethical Principles for US Pork Producers, 2008).

Another program, Farmers

Assuring Responsible Management

(FARM) was launched recently by the

National Milk Producers Federation

(NMPF). This program, according to

NMPF, “is a nation-wide, verifiable

program that addresses animal well-being.

Its mission is to demonstrate and verify

that U.S. milk producers are committed to

providing the highest standards of animal

care and quality assurance.” Future

elements of the program will include

environmental management. In 2002,

NMPF also developed the “Dairy Environmental Handbook, Best Management Practices for Dairy Producers” (National Milk Producers Federation).

While these types of proactive programs similar to an EMS may not negate the eventuality of more traditional environmental regulations at CAFOs, they will perhaps begin to pave the way for better communications between CAFO owners and various stakeholders, and thereby reduce friction and litigation.

A recent book underscores the challenges for agriculture. “Toward Sustainable Agricultural Systems in the 21st Century” (National Academies Press, 2010), acknowledges the accomplishments in agricultural productivity and recognizes the challenges facing agriculture from an environmental management standpoint. They state in part, “To help achieve a sustainable agriculture system that looks

beyond the end goal of providing more goods, the committee identified four goals that should be considered simultaneously:

- satisfy human food, fiber, and feed requirements, and contribute to biofuels needs
- enhance environmental quality and the resource base
- maintain the economic viability of agriculture
- improve the quality of life for farmers, farm workers, and society as a whole” (News from the National Academies, 2010).

Agriculture will continue to be challenged to meet the needs of a growing population and to do so in a manner that is perceived to be environmentally sustainable that meets the satisfaction of various stakeholders. This is a paradigm shift that will take time, but is likely inevitable.

Conclusion

Agriculture has made tremendous gains in productivity. These gains allow farmers to feed a growing population. However, the concentration of livestock agriculture has brought increased conflicts and litigation between CAFO owner/operators, local stakeholders, and those concerned that CAFOs may negatively impact the environment. Some of the recent changes in livestock agriculture, including the We Care program and FARM program, may provide proactive steps and better communication between CAFO owner/operators and stakeholders to reduce the friction and the resultant litigation.

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