

**IOWA LIVESTOCK  
ENVIRONMENTAL  
REGULATIONS & NUISANCE  
CASE UPDATE**

**IOWA PORK PRODUCERS  
ASSOCIATION  
January 28, 2009  
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# Iowa Ag Nuisance Lawsuits-2008

- *Wood v. Schott, Cedar County*
  - 100 cow dry-lot cow calf operation – March to May
  - Not a nuisance
  - \$30,000 to Schott for “limitation or loss to their cattle business” due to the Woods’ “use of the legal process for an improper purpose (abuse of process)”

# Iowa Ag Nuisance Lawsuits-2008

- *Tetzlaff v. Camp and Pangborn, Polk County*
  - 300 head hog operation in Madison county
  - Surface spread hog manure not a nuisance
  - Tetzlaffs bought 10 acres directly across the road from Camp's farmstead and built a new home
  - Jury rejected Tetzlaffs' claims that Camp's manure spreading caused permanent brain injury to their daughter

# Iowa Ag Nuisance Lawsuits-2008

- *Hommes v. Rock River Feedyards* - Lyon County
  - Rock River - 6,500 head cattle feedlot
  - Hommes lives less than 1,000 feet from 6 acre feedlot effluent runoff control basin and center pivot irrigation system – also has a 500 head swine nursery and 1,000 head swine finisher
  - Jury found runoff control basin and center pivot were not a nuisance
  - Jury did award \$40,000 to Hommes for manure and snow melt runoff from large 2007 snowstorm when Rock River scraped and land applied snow and manure from the feed bunk areas - a rapid snow melt occurred and a snow drift diverted the runoff onto the Hommes property and into the basement

# NUISANCE Anticipatory nuisance

- Nuisance suit filed before or during construction alleging that a nuisance “will necessarily result” and that an injunction should be granted prohibiting construction and/or operation
- In *Simpson v. Kollasch, Kossuth Co.*, Iowa Supreme Court denied request for injunction on anticipated nuisance because there was no evidence that a nuisance would “clearly and necessarily result” from the operation as proposed

# NUISANCE

## Protection for producer

- Insurance
  - Standard farm liability policies normally don't cover – but producer should always check with the insurance company and/or an attorney
  - Environmental policies available
    - Coverage for claims and costs of defense

# NUISANCE

## Steps to help to avoid lawsuit

- Location
  - Separation distance
  - Prevailing winds
- Tree buffers
  - Existing trees
  - Fast growing trees planted with slower growing species
- Biofilters
- Clean pigs and buildings
- Manure treatments and additives
- Timing of manure agitation and application

# EPA FINAL CAFO RULE

- CAFO – 2,500 head of swine over 55 lbs, 10,000 swine less than 55
- CAFO must obtain a federal discharge permit (NPDES) if the CAFO discharges or proposes to discharge
- CAFO discharges or proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur
- Iowa confinement operations cannot discharge by law
- Without an NPDES permit, can be no discharge – with an NPDES permit, can discharge from greater than 25-year, 24 hour storm event



# EPA FINAL CAFO RULE

- A discharge also includes discharges from land application
- However, ag stormwater discharges do not require an NPDES permit
- An ag stormwater discharge – CAFO must apply manure in compliance with a site specific nutrient management plan
- This plan is not required to be submitted to EPA or DNR, but must be kept with records on site or “at a nearby office”

# EPA FINAL CAFO RULE

- Is NPDES permit needed for an “accidental discharge”?
  - If the cause of an accidental discharge that has occurred in the past has been changed or corrected, the CAFO would not be considered to discharge or propose to discharge and an NPDES permit would not be required due to the accidental discharge

# EPA FINAL CAFO RULE

- No Discharge Certification Option
  - Voluntary
  - For CAFOs that do not discharge or propose to discharge
  - Why do it?
    - If discharge occurs, penalties for discharge but not for failure to have an NPDES permit
    - If discharge occurs without NPDES permit or voluntary certification option, CAFO has burden to prove it did not discharge or propose to discharge

# EPA FINAL CAFO RULE

- No Discharge Certification Option
  - EPA and DNR do not review the certification
  - Requirements for certification are:
    - Technical evaluation
    - Signed certification statement
    - Statement submitted to DNR

# EPA AIR EMISSIONS REPORTING

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) & Emergency Planning and Community Right-to-Know Act (EPCRA) air release reporting requirements:
  - Qualifying Releases must be reported: more than 100 pounds of H<sub>2</sub>S or NH<sub>3</sub> per 24 hour period
  - Not required at this time if farm was signed up under EPA Air Compliance Consent Agreement – reporting may be required for these farms once the monitoring study is completed
  - Exemptions

# EPA AIR EMISSIONS REPORTING

- EPA Rule – issued 12/18/08, effective 1/20/09: New exemption to CERCLA & EPCRA air release notification requirements:
  - CERCLA – Any release of a hazardous substance from animal waste from farms.
  - EPCRA - Any release of a hazardous substance from animal waste from farms that have fewer than the number of animals in any of the following categories:
    - 700 mature dairy cows
    - 1,000 veal calves
    - 1,000 cattle (other than above)
    - 2,500 swine – 55 pounds or more
    - 10,000 swine – less than 55 pounds
    - Also includes horses, sheep, turkeys, chickens, and ducks

# EPA AIR EMISSIONS REPORTING

- Who is potentially liable under EPCRA reporting requirements?
  - The legal standard is “owner or operator” of a facility that has had a qualifying release of a regulated pollutant must immediately submit notice
  - 2003 Kentucky federal court decision: An “operator” is a person who manages, directs, or conducts operations specifically related to pollution

# EPA AIR EMISSIONS REPORTING

- Contract Feeding: Who is potentially liable under EPCRA reporting requirements?
  - Contract grower is an owner or operator
  - Contractor: Under the 2003 Kentucky federal court decision, a contractor in a poultry feeding contract was liable as an “operator” because the contractor in that case managed and/or directed many of the operations related to the venting of ammonia



# EPA AIR EMISSIONS REPORTING

- Leased facilities (landlord/tenant): Who is potentially liable under EPCRA reporting requirements?
  - Tenant is potentially liable as an “owner or operator”
  - Landlord: 2003 Kentucky federal court decision: Landlord who has no control over the operations of a facility or knowledge of a reportable release is not subject to EPCRA reporting requirements as an owner or operator

# EPA AIR EMISSIONS REPORTING

- Call “State Emergency Response Committee” (DNR at 515-281-8694)
- Call “Local Emergency Response Committee” See EPA website for contact number:  
<http://yosemite.epa.gov/oswer/lepddb.nsf/SearchForm?OpenForm>
- Written report within 30 days (EPA to issue guidance)
- Followup written status report in one year
- More information:  
<http://www.iowapork.org/Newsroom/NewsForProducers/CERCLAEPCRA/tabid/1290/Default.aspx>

# MANURE MANAGEMENT PLANS

## Phosphorus index

- Phased in based on date of original MMP
  - Before 4/1/02 – P Index required with first annual update MMP on or after 8/25/08
  - On or after 4/1/02 & before 10/25/04 – P Index required with first annual update MMP on or after 8/25/06
  - On or after 10/25/04 – must comply with P Index

# MANURE APPLICATION

## Rule - restrictions on manure on soybeans

- EPC rule effective May 14, 2008:
  - 100# N/acre limit on land in an MMP to be planted to soybeans
  - 100# N/acre limit “does not apply on or after June 1 of each year” – regular limit of 3.8# N/bu of soybean yield applies
  - Complete ban on May 14, 2013 if EPC reviews available scientific information and publishes notice that a complete ban will be put in place

# STOCKPILING MANURE

## Open feedlot operations – 2006 Iowa legislation

- Stockpile - store solids outside of a feedlot or structure or area that drains to a feedlot or structure
- Cannot stockpile:
  - Within 400 feet of a designated area or 800 feet of a high-quality water resource
  - Within 200 feet of a surface tile inlet unless steps taken to ensure runoff will not reach the tile inlet
  - In a grass waterway or where water pools
  - On more than 3% slopes unless measures to contain runoff are implemented
- Must remove and land apply solids within 6 months.
- Federal EPA & DNR rules: CAFO's cannot discharge manure from production areas unless the discharge is pursuant to an NPDES permit. Definition of production area includes stockpiles

# CONFINEMENT - STOCKPILING DNR POLICY

- Does not apply to CFO's constructed before 1/1/06 unless there are "performance" issues
- Applies to all CFO's regardless of size
- Does not apply to manure sold under Chapter 200A if the manure is moved from the site of the CFO and under the control of the 200A distributor

# CONFINEMENT - STOCKPILING DNR POLICY

- Permanent/Long term stockpile: in place more than 6 months out of a 2 year period
- Short term stockpile: in place more than 15 days but less than 6 mos. out of 2 yr. period
- Temporary stockpile: in place no more than 15 days
- 1250 ft. radius to determine stockpile location

# CONFINEMENT - STOCKPILING DNR POLICY

- 400 ft. from a Designated Area
- 1250 ft. from a residence
- 800 ft. from a high quality water resource
- 200 ft. from a surface tile intake
- Short & long term piles cannot be in 100 yr. floodplain of major watersource
- Not on land with more than 3% slope unless have containment methods, structures or practices
- On soils classified as acceptable in top 5 ft. under DNR rule 567- ch. 121, p. 3



# CONFINEMENT STOCKPILING DNR POLICY

- Designated areas are:
  - Lake, river, reservoir, creek, stream, ditch, or other body of water or channel having definite banks & a bed with water flow
  - designated wetlands, known sinkhole
  - Cistern, drinking water well, abandoned well
  - Ag drainage well or ag drainage well surface inlet
  - Excluded:
    - Terrace tile inlet or surface tile inlet
    - Lakes or ponds with no outlet and which are entirely on one landowner's land

# CONFINEMENT - STOCKPILING DNR POLICY

- Away from areas of concentrated runoff and ponding (waterways)
- In Karst terrain, need 5 feet vertical separation distance between bottom of pile and limestone, etc. Long term piles must be on reinforced concrete at least 5" thick

# CONFINEMENT - STOCKPILING DNR POLICY

- Covers & pads:
  - Short term stockpile:
    - cover impermeable to precipitation
  - Long term stockpile:
    - cover impermeable to precipitation & on all-weather surface of compacted earth, granular agg., asphalt, or concrete; OR
    - Building or other roofed structure of wood, steel, etc. and with walls, etc. to prevent surface runoff into the pile

# MANURE APPLICATION

Proposed rule – frozen or snow covered ground

- Proposed DNR rule:
  - Would be effective Oct. 1, 2009
  - Would apply to confinement and open feedlot operations with a manure management plan, nutrient management plan, or a DNR “enforcement action for a water quality violation caused by runoff from manure or effluent application” (effective 1 year after enforcement action initiated)

# MANURE APPLICATION

Proposed rule – frozen or snow covered ground

- No surface application (not injected or incorporated within 24 hours)
- on frozen (impenetrable due to frozen soil moisture – except if only frozen in top 2 inches or less) or
- snow covered (1 inch or more of snow or any area of continuous ice coverage)

as follows:

# MANURE APPLICATION

## Proposed rule – frozen or snow covered ground

- Within 200 ft. of and draining to a terrace or surface tile inlet unless the inlet is plugged
- During an active snow melt (snow or ice is actively melting and water is flowing from the field)
- One or more inches of snow cover and maximum temperatures exceed 40F or are predicted by NWS to exceed 40F within 48 hours
- The probability of .25 inches or more of rain is more than 50% by NWS within 48 hours after the end of the application period
- Between Feb. 15 and April 15

# MANURE APPLICATION

## Proposed rule – frozen or snow covered ground

- If liquid manure, not on:
  - Snow covered ground
  - Frozen ground with 2% or greater slope unless soil conservation practices are in place & P Index is less than 2
  - Frozen ground with slope of 5% or more
- If solid manure, not on:
  - Snow covered ground with 5% or more slope
  - Frozen ground with 9% or greater slopes unless soil conservation practices are in place & P Index is less than 2
  - Frozen ground with 14% or greater slope

# MANURE APPLICATION

## Proposed rule – frozen or snow covered ground

- Person applying manure on frozen or snow covered ground must be provided a map showing designated areas, terrace or surface tile inlets, and slopes where manure cannot be applied
- No exceptions for emergencies such as prolonged bad weather or broken water lines



# MANURE APPLICATION

## Proposed rule – frozen or snow covered ground

- Liquid manure:
  - Can be pumped through conventional liquid manure equipment
  - In any other situation, less than 20% solids
- Solid manure:
  - Cannot be pumped through conventional liquid manure equipment
  - In any other situation, 20% solids or more
- Existing DNR rules:
  - Injection: application of manure with equipment that discharges it beneath the soil surface
  - Incorporation: soil tillage following surface application which mixes manure into the upper 4 inches or more of soil

# MANURE APPLICATOR CERTIF.

- Commercial manure service: in the business of transporting, handling, storing, or applying manure for a fee
- DNR interpretation: If a producer applies the producer's manure (from a site that requires applicator certification) to someone else's land and receives money (for either the manure or the application), then the producer must be certified as a commercial applicator instead of as a confinement site manure applicator

# OPEN BURNING

- DNR rules prohibit open burning of combustible materials unless:
  - DNR grants a variance
  - Exemptions include:
    - Trees and tree trimmings & landscape waste
    - Recreational fires
    - Residential waste
    - Paper or plastic pesticide containers and seed corn bags. Must be ¼ mile from someone else's building, livestock area, wildlife area or water source. Cannot exceed one day's accumulation or 50 pounds. If causes a nuisance, DNR may order relocation of burning.
- Effect of rule: Burn barrels at livestock buildings are prohibited.