

# 2002 Traveling Seminar



## Agricultural Law: Update of Animal Feeding Operations Law

10:30-11:15 a.m.

Materials prepared by:

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**1. Senate File 2293 -- Animal Agriculture Compliance Act**

SF 2293 was enacted and signed into law by the Governor on April 29, 2002. SF 2293 amends many existing statutory provisions for the regulation of confinement feeding operations and establishes many new requirements. In addition, the bill moves current statutory provisions for animal feeding operations in Chapter 455B and new statutory provisions in SF 2293 to a new chapter of the Iowa Code, Chapter 456D.

- a. Retroactive applicability. (Sec. 70)
  - i. Subject to the effective dates of individual sections, a proposed operation is not subject to the new construction requirements in the bill if the manure management plan (MMP) for the operation is submitted to DNR after 4/1/02 but before 4/29/02 and the applicant can show evidence of legal commitments to build an operation based on a reliance of the law as it existed on 3/31/02. The evidence of legal commitments must have been submitted to DNR by May 20, 2002. DNR accepted signed construction contracts and production contracts as evidence of legal commitments.
  - ii. Permit applications and MMP's submitted before 4/1/02 are not subject to the bill.
  - iii. CFO's which began construction before 4/29/02 are not subject to the bill if the CFO is not required to have an MMP on file 30 days before beginning construction (CFO's existing on 2/13/02 and which expand after that date).
- b. Animal units. (Sec. 8) The bill converts requirements for separation distances, obtaining a construction permit and other requirements from animal weight capacity to animal units. Animal units are determined by multiplying the number of head of livestock by an equivalency factor. For example, an operation with a capacity of 2,500 head of finishing swine (more than 55 pounds, factor of .4) has an animal unit capacity of 1,000.
  - i. Construction permits/matrix (Sec. 28, 35, 36, 62, 63)(effective April 29, 2002, except the master matrix which becomes effective on March 1, 2003)
  - ii. 1,000 animal units. A construction permit is required for any confinement operation with formed storage (concrete, etc.) and more than 1,000 animal units. (A copy of the construction permit application is available on DNR's website at: <http://www.state.ia.us/epd/wastewtr/feedlot/files/sf2293.pdf>)  
Engineer certified design plans and engineer certification of construction are required only if the site has more than 3,000 animal units (swine finishing sites). All confinement operations, regardless of animal unit capacity, using unformed manure storage (earthen lagoons or basins) are now required to have a DNR construction permit with engineer certified design plans and engineer certification of construction.

iii. Approval of permit application. In addition to meeting all air and water quality requirements in DNR rules (such as separation distances and approval of the manure management plan), each application must receive DNR approval as follows:

- (a) Before 3/1/03 – interim matrix. (Sec. 63) An interim matrix was drafted in the bill. This matrix is used on permit applications approved by DNR after 7/10/02 and until 3/1/03 when the master matrix goes into effect. Counties have 30 days to submit comments on the legal requirements for the application but they cannot participate in the scoring of the interim matrix. DNR has 60 days to approve an application for a construction permit. Each application must meet DNR rule requirements (including the new requirements in the bill for construction standards) and receive a passing score (100 points) on the interim matrix. The interim matrix is available on DNR’s website at:  
<http://www.state.ia.us/epd/wastewtr/feedlot/files/imfinal.pdf>.  
A CFO constructed before 4/1/02 which expands after that date is not required to meet the interim matrix if after the expansion it has a capacity of less than 1,666 animal units (approx. 4,165 head of finishing hogs).
- (b) After 3/1/03-master matrix. (Sec. 35, 36, 62)A master matrix is to include criteria to value environmental and community impacts. The bill sets out the criteria for environmental impacts but not community impacts. The master matrix has been developed by a ten-member committee with two livestock organization representatives. The committee’s recommendations were included by DNR in a notice of intended action presented to the Environmental Protection Commission on September 16, 2002. After public comment and final adoption by EPC, the master matrix will take effect on 3/1/03. Counties will have 30 days to submit comments or an evaluation using the master matrix. Each application must be approved by DNR within 60 days as follows:
  - (1) If the county does not submit a matrix score or if it submits only comments to the DNR, the application must be approved if it meets DNR rule requirements (it is not scored by DNR).
  - (2) If the application passes the county’s scoring and meets DNR rule requirements, DNR must approve the application (it is not scored by DNR).
  - (3) If the application fails the county’s scoring, DNR must independently score the application using the same master matrix. If DNR gives a passing score, DNR must approve the application. If DNR does not give a passing score, DNR must disapprove the application.

- (4) Either the county or the producer may appeal DNR's decision to the EPC within 14 days and EPC has 35 days to make a decision. A producer may use the lengthier appeal process through an administrative law judge.
- A CFO constructed before 4/1/02 which expands after 3/1/03 is not required to meet the master matrix if after expansion it has a capacity of less than 1,666 animal units (approx. 4,165 head of finishing hogs).
- c. Construction design statements. (Sec. 33) (effective March 1, 2003)
- Before construction can begin, a construction design statement from a contractor is required for CFO's with more than 500 animal units and less than 1,000 animal units. Construction design statements are also required with permit applications for CFO's with more than 1,000 a.u.'s and less than 3,000 a.u.'s (swine finishing sites)(the limit for swine farrow to wean sites is 1,250 a.u.'s). The statement must include a summary of the structures to be built and certification by the contractor that construction standards will be met.
- d. Construction design standards. (Sec. 50, 60)(effective April 29, 2002)
- Current concrete design standards are applied to construction of all new formed structures (except CFO's with less than 500 animal units) until March 1, 2003 when new standards are to be adopted by DNR rules.
- e. Manure management plans (Sec. 38, 39, 40)
- i. Annual filing with DNR and county. (effective March 1, 2003)
- An updated plan must be filed with DNR and the county each year and must be approved by the DNR before manure can be applied.
- ii. Phosphorus index - phased in. (Sec. 39) All MMP's - for both new and existing CFO's - must be based on a phosphorus index. DNR must develop a state nutrient management strategy, but may develop the P index before development of the nutrient management strategy. DNR rules on the P index will become effective no earlier than 7/1/03.
- (a) For an original MMP submitted before 4/1/02, the P index is first required 4 years after DNR rules on the P index are effective.
- (b) For an original MMP submitted after 4/1/02 but before DNR rules on the P index are adopted, the P index is first required 2 years after the rules are effective.
- (c) An original MMP submitted after DNR rules on the P index are adopted must meet the P index.
- f. Manure Application Separation Distances (Sec. 46)(effective March 1, 2003)
- i. Manure spread within 200 feet of a creek, etc. Manure application (from any livestock - confinement or open feedlot, and any size of operation) is prohibited within 200 feet of a creek, river, lake, designated wetland, drinking water well, cistern, ag drainage well unless the manure is injected

- or incorporated on the same date it is applied or if there is a 50 feet buffer (buffer exception does not apply to ag drainage wells).
- ii. DNR may increase distance – high quality waters. DNR has discretion to increase this distance up to 800 feet for a “high quality water resource”, a list of creeks, rivers, and lakes as designated by DNR rules.

g. Separation Distances for Construction of Confinement Operations ( new distances effective March 1, 2003).

- i. Air quality (Sec.14) (residences, public use areas etc.)
  - (a) Current Separation Distances in effect until March 1, 2003  
From residences, businesses, churches, or schools

<625,000	>625,000 & <1.25M	>1.25 M	Animal weight capacity (pounds)
1250	1875	2500	anaerobic lagoons and uncovered earthen basins
1250	1500	2000	uncovered formed manure storage structures
1000	1250	1875	covered earthen basins, covered formed structures, and confinement buildings
750	1000	1500	Egg washwater storage structure

From public use areas (including cemeteries (other than cemeteries where there have been 6 or fewer burials within the last 50 years)) or from residences, businesses, churches, or schools which are located within a city limits

1250	1875	2500	all structures in above table
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From road right of way: 100 ft.

New Separation Distances in Effect After March 1, 2003  
From residences, businesses, churches, or schools

Less than 1,000	1,000 to 3,000	More than 3,000	Animal capacity – animal units
1875	2500	3000	anaerobic lagoons and uncovered earthen basins
1500	2000	2500	uncovered formed manure storage structures
1250	1875	2375	covered earthen basins, covered formed structures, and confinement buildings
1000	1500	2000	Egg washwater storage structures

From public use areas (including cemeteries (other than cemeteries where there have been 6 or fewer burials within the last 50 years)) or from residences, businesses, churches, or schools which are located within a city limits

1875	2500	3000	all structures in above table
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From road right of way: 100 ft.

- (b) Grandfather provision. The law now provides that any expansion of a confinement operation qualifies for the separation distances in effect at the time the operation was constructed instead of the distances in effect when the expansion occurs.
- (c) Road right of way – exemption for planting trees deleted. The current exemption to the 100 feet setback from a road right of way for planting trees between the building and the road is deleted effective April 29, 2002. After that date, the only exemption for new or expanding confinement operations will be to obtain a waiver from the governmental body which built or maintains the road.
- (d) Dry manure included. Dry manure operations (poultry, swine hoop buildings and dry bedded cattle confinement buildings) constructed after April 29, 2002 are required to meet air quality separation distances. Other exemptions in current law remain.
- ii. Water quality (Sec. 45)(rivers, lakes, creeks, drainage ditches, designated wetlands, ag drainage wells, etc.)
  - (a) Rivers. Distance from navigable waters increased from 500 feet to 1,000 feet
  - (b) Creeks. Distance from creeks, drainage ditches, etc. increased from 200 feet to 500 feet
  - (c) Ag Drainage wells. Distance from ag drainage well surface inlet slays at 500 feet. Distances from ADW wellheads and cisterns are increased from 500 feet to 1,000 feet. However, DNR may increase these distances up to 2,000 feet.
  - (d) Designated wetlands. Creates separation distance of 2,500 feet from designated wetlands. A designated wetland is a wetland owned and managed by the federal government or the DNR and designated as a protected wetland.
  - (e) Secondary containment. Only exemption from these distances is for a secondary containment barrier as provided under current DNR rules. There is no exemption for small animal feeding operations.
  - (f) Floodplains. Construction is prohibited in a 100 year floodplain (will be defined by DNR rules). Before 3/1/03, a producer must petition DNR for approval to build in a floodplain.

- h. Air Quality Monitoring and Standards (Sec. 23)
  - i. Standards established. Hydrogen sulfide, ammonia, and odor from animal feeding operations (open feedlots and confinements) will be monitored by DNR by conducting field studies. DNR may develop comprehensive plans and programs and establish air quality standards.
  - ii. Standards at residence, public use area, etc. Any air quality standard established and enforced must be based on distances from a confinement feeding operation structure to a "separated location" -- a residence, business, church, school or public use area (including cemetery) where a separation distance applies. All initial DNR measurements must be taken at a "separated location." If there is a violation of the standard at the separated location, DNR may trace the pollutant to its source.
  - iii. DNR rules. DNR plans and programs for air quality standards cannot be enforced before 12/1/04. However, DNR has proceeded with rulemaking to establish standards for hydrogen sulfide (.015 ppm) and ammonia (.15 ppm). See Notice of Intended Action, Ia. Admin. Bulletin 8/21/02, ARC 1876B, p. 260.
- i. Monitoring wells. (Sec. 37) DNR has the authority to require the installation and operation of a "water pollution monitoring system" if the confinement feeding operation uses earthen manure storage.
- j. Fees for DNR regulation and enforcement. (Sec. 43) Permit fee of up to \$250, fee for first manure management plan of up to \$250, and an annual compliance fee of \$.15 per animal unit (\$240 for a 4,000 head capacity hog operation) sent to DNR with annual updated manure management plan. If the person filing the manure management plan is a contract producer, the owner of the livestock is required to pay the annual compliance fee. DNR may transfer money from the Manure Storage Indemnity Fund to the Compliance Fund and repay the money from fees collected.
- k. Wildlife Injury. (Sec. 58) (Effective April 29, 2002) In addition to potential civil and criminal exposure for pollution of waters of the a responsible party (any person not just an operator of an animal feeding operation) is also liable for restitution for wildlife damage and for the DNR's administrative costs of investigating the pollution event. The DNR is to adopt rules to implement the restitution provisions, but may assess liquidated damages of up to \$15 for each game fish and \$1,000 for each fish on the endangered or threatened species list. The DNR can also estimate losses of any species of wildlife that are not practical to count.
- l. Civil penalties. Iowa Code section 455B.110(3) is repealed. This section provided that no civil penalty of more than \$3,000 could be imposed against an animal feeding operation unless the Environmental Protection Commission approved the penalty.



2. **Senate File 503.** Provides that design standards for “settled open feedlot effluent basins” (basins used to store manure, precipitation induced run-off, and other run-off from an open feedlot after settleable solids have been removed) established by DNR rules shall account for the special design characteristics of open feedlots, including but not limited to the dilute composition of settled open feedlot effluent.

3. **Nuisance Law Update.**

- a. Statutory Nuisance Defenses - Right-to-Farm Laws.
  - i. Constitutionality of Ag Area Law.  
*Bornmann v. Board of Supervisors of Kosuth County*, 584 N.W.2d 309 (Iowa 1998). The Iowa Supreme Court ruled that Iowa’s Agricultural Area Law nuisance defense (Iowa Code §352.11(1)(a)) was a taking of neighbors’ private property.
  - ii. Iowa Code Section 657.11. Animal Feeding Operations Nuisance Defense. Iowa’s third right-to-farm law was enacted on May 31, 1995 and amended effective May 21, 1998. The stated purpose of this section is to protect agricultural producers who manage their operations in compliance with state and federal requirements from the costs of defending nuisance suits. Iowa Code §657.11 (1999). This section provides a defense to suits alleging interference with another person’s comfortable use and enjoyment of life or property if the interference: (1) does not arise out of a failure to comply with federal or state law or (2) (a) is not unreasonable and for substantial periods of time, and (b) is not a result of the failure of the operator to use prudent generally accepted management practices reasonable for the operation. Iowa Code §657.11(2) (2001).

This nuisance defense applies regardless of the established date or expansion of the operation. Activities involved with livestock production qualify for the defense, including the treatment, disposal, transportation, and application of manure.

A person bringing a losing cause of action against a livestock operation found to be entitled to the nuisance defense must pay all costs and expenses of the defense if the claim is determined to be frivolous. The nuisance defense does not apply to injury or damage caused before the effective date of the Act and is not available to producers who are classified as chronic violators under section 657.11(4).

- iii. Six Iowa district courts have followed the analysis of *Bornmann* and found Iowa Code section 657.11 unconstitutional: (1) *Ehmen v. Hillstrand*, Greene County No. EQCV019070, (March 15, 1999); (2) *Gacke v. Pork Xtra, LLC*, Sioux County No. LACV019489, (July 31, 2001), (3) *Sierra*

*Club, et al. v. Murphy of Iowa, Inc., Wayne Weber, and Stoecker Farms, Inc.*, Allamakee County No. LACV023308; (4) *Kleemeier, et al. v. Beazly Group, Inc., and Pork Innovation, Inc.*, Calhoun County No. LA CV500316.; (5) *McCulley v. Fremont Farms*, Poweshiek County No. LALA001085; and (6) *Blass, et al. v. Iowa Select Farms, Inc., et al.*, Sac County No. LACV018147.

The district court's ruling in *Gacke v. Pork Xtra, LLC*, is currently on appeal to the Iowa Supreme Court, No. 02-0417.

- b. Recently decided Iowa District Court Nuisance Cases. (See attached chart).
- c. Pending Iowa District Court Nuisance Cases.
  - i. *Blass, et al. v. Iowa Select Farms, Inc., et al.*, Sac County No. LACV018147. Jury trial scheduled for September 30, 2002.
  - ii. *McCulley v. Fremont Farms*, Poweshiek County No. LALA001085.

#### 4. **County Regulation Under Home Rule Authority.**

- a. In general, under home rule power a local government can exercise powers unless that power is prohibited by the state or that power is inconsistent with state law. In Iowa, counties have the following home rule power under the Iowa Constitution:

Counties home rule. SEC. 39A. Counties . . . are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly. . . . Iowa Constitution, Article III, Section 39A.

- b. *Goodell v. Humboldt County*, 575 N.W.2d 486 (Iowa 1998). The Iowa Supreme Court ruled that ordinances adopted by Humboldt County were not valid under Iowa county home rule authority. The court invalidated the ordinances based on implied preemption -- inconsistency with state law. The court ruled that each of the four ordinances were inconsistent with state law because each directly conflicted with various state environmental laws regulating confinement livestock production.

- c. Iowa Code Section 331.304A. Following the *Goodell* decision, Iowa Code Section 331.304A was adopted effective on May 26, 1998. This statute expressly preempts county home rule authority to regulate conditions or activities occurring on land used for the production, care, feeding, or housing of livestock unless the regulation is expressly authorized by state law.

- d. Local Health Ordinances Under Iowa Code Chapter 137.

- i. County, city, or district boards of health have authority under section 137.6(2) to “make and enforce such reasonable rules and regulations not inconsistent with law or with rules of the state board as may be necessary for the protection and improvement of the public health.”
- ii. Rules of a county board of health become effective upon approval by the board of supervisors and publication in a general circulation newspaper. Section 137.6(2)(a).
- iii. On July 9, 2001, the Worth County Board of Supervisors adopted an ordinance regulating confinement livestock operations in three aspects: (1) toxic air emissions; (2) worker safety regarding air quality; and (3) water quality.
- iv. *Worth County Friends of Agriculture, et.al. v. Worth County*, Worth County District Court No. EQCV011065. The Plaintiffs, a group of Worth County farmers and the Worth County Farm Bureau, challenge the ordinance as being invalid under Iowa Code section 331.304A (state pre-emption) and *Goodell v. Humboldt County*.
- v. Several counties (e.g., Cerro Gordo, Adair, Taylor, and Madison) have recently adopted moratoriums prohibiting construction of livestock operations unless a variance is granted by the county. Franklin county adopted a moratorium but rescinded it after a suit was filed challenging the ordinance’s validity under Iowa Code 331.304A and *Goodell v. Humboldt County*. *LJDD Enterprises, L.L.C. v. Franklin County*, Franklin County District Court No. CVCV003391.

Adair County’s moratorium is being challenged in the case of *Natural Pork Production II, LLP v. Adair County*, Adair County District Court No. EQCV004515.

IOWA SWINE NUISANCE CASES - 1990-2002

Case	No. of Head/Type of Operation	No. of Plaintiffs	No. of Residences	Jury Trial?	Injunction Granted?	Nuisance as to Residents —Damages for Personal Discomfort, Physical and Mental Pain and Suffering	Nuisance as to Owners —Damages for Reduction in Residence Value
Sayre v. ISU, Boone Co., 12/28/90	200 sows, 650 pigs, 1150 finishing - slurry tank	4	2  Sayer .2 mi n.east Gauger .4 mi n.east	Non- jury	<u>Yes:</u> cover on slurry tank, manure injected	<u>Yes:</u> \$20,000 - past damages 1. James Sayre \$5,000 Phyllis Sayre \$5,000 2. Don Gauger \$5,000 C. Cleavinger \$5,000	<u>Not applicable:</u> Court ruled nuisance was temporary vs. permanent
Weinhold v. Wolff, Buena Vista Co., 8/30/94	800 - finishing - earthen basin	2	1  ½ mi north	Non- jury	No	<u>Yes:</u> Past and future damages 1. Dennis & Ruth Weinhold: \$45,000	<u>Yes:</u> Reduced property value based on testimony of Plaintiff: 1. Dennis & Ruth Weinhold \$11,500
Gacke v. Pork Xtra, Sioux Co., 1/8/02 (on appeal)	4,000 - finishing - pit under slat	2	1  1/4 mi south	Non- jury	No	<u>Yes:</u> Past damages, no future damages 1. Joseph & Linda Gacke: \$45,600	<u>Yes:</u> Reduced property value based on testimony of Plaintiff: 1. Joseph & Linda Gacke: \$50,000
Kleemeiers, Carvers, Dischlers, Carver, Carver, Dischlers, & Carver Trusts v. Pork Innovation & Beazly Group, Calhoun Co., 1/24/02	4,170 - finishing - pit under slat	12	4  Kleemeier ½ mi west  Dischler ½ mi north  J. Carver ½ mi east  B. Carver 1 mi south	Jury	No	<u>No:</u> No past or future damages  1. Jim & Barb Kleemeier \$0  2. Randy & Michelle Dischler \$0  3. Jason Carver \$0  4. Brian Carver \$0	<u>Yes:</u> 15% reduction to each of 4 property owners based on appraisal: 1. Jim & Barb Kleemeier \$15,529 2. Gene & Ruth Dischler \$22,058 3. Carver Trusts \$16,764 4. Jim & Judie Carver <u>\$22,058</u> \$76,409