RURAL COMMUNITIES AND CAFOs:
NEW IDEAS FOR RESOLVING CONFLICT

Produced in cooperation with the
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Funded by:
United States Department of Agriculture Sustainable Agriculture Research and Education Professional Development Program, Southern Region
Kerr Center for Sustainable Agriculture

Kerr Center
Poteau, Oklahoma

The Kerr Center for Sustainable Agriculture, Inc., is a nonprofit, 501(c)(3) organization supported by a private endowment, grants, and donations. The Kerr Center strives to find ways of sustaining our world rather than exhausting natural resources that are vital to future generations. The Kerr Center provides leadership, technical assistance, demonstrations, and education for farmers and ranchers seeking ecological and economical methods of producing food and fiber.

The Kerr Center seeks to influence and call to action our acquaintances by both example and education. The Center's Sustainable Rural Development and Public Policy Program was established in 1996. The program assists rural citizens and decision-makers by sharing information about building strong and sustainable communities and the consequences of proposed policies for rural communities and agriculture.

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Published by the Kerr Center for Sustainable Agriculture September 2000 with funding support from the Southern Region SARE Professional Development Program of USDA.

Acknowledgments

Training material doesn't just happen. It is usually a combined effort of many people working toward a common goal of making complex issues more understandable. This manual is no exception. First we are grateful for the generous financial support provided by the Southern Region Sustainable Agriculture Research and Education Professional Development Program of USDA. Without their assistance and flexibility, we could not have completed this project.

There are a number of others who contributed directly and indirectly with their time and insights to make this possible. Senator Paul Muegge and Representative M.C. Liest both were of immense help to us and spent considerable time with us. Also Oklahoma Attorney General Drew Edmondson and his staff were invaluable in this effort.

Special appreciation is extended to Carla Smalts, now deceased, for her efforts with Safe Oklahoma Resource Development and her pioneering environmental work and to her daughter Janell Smalts, an attorney who just joined the Kerr Center to work on the same kind of issues. Also, a note of appreciation is due to Michelle Stephens, Kerr Center Public Policy Director for her advice throughout the project. Special appreciation is extended to Janie Hipp for making the law understandable in this manual. Other Kerr Center staff who assisted with editing, design, and production of this publication are Maura McDermott, Liz Speake, Lena Moore and Carol Vise.

The assistance of the National Center for Agricultural Law in the early stages is appreciated. We are grateful for the contribution of Weldon Shieffer of the Oklahoma Agricultural Mediation Program for his review and comments as well as the staff of the Iowa Mediation program. Others that helped include the Missouri Rural Crisis Center, Teena Gunter of the Oklahoma State Department of Agriculture, and we remain appreciative of the continuing support of our Commissioner of Agriculture, Mr. Dennis Howard.

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Preface

The Kerr Center has a long history of working with rural citizens and farmers on a variety of issues. We have been there for production and marketing advice, and we have been there working for good public policy on behalf of our farmers, ranchers, and rural citizens.

Over the last five years, we have observed a tremendous change in our work and what rural people care about. Aside from the usual weather and price issues that are always before us, our customers are now talking about fairness, equity, mediation, level playing fields, and nuisance issues. This trend of changing concerns has been increasing rapidly as the number of concentrated animal feeding operations has skyrocketed. Farmers and rural citizens are finding that nuisance issues affect community infrastructure and significantly alters their quality of life.

This training manual identifies and explains in layman terms the legal concepts and ramifications of nuisance laws, right-to-farm laws, anti-corporate farming laws, and environmental laws affecting the southern SARE region. The manual addresses these legal issues in the context of community involvement and mediation as solutions, and offers hope beyond just depending on the heavy hand of the law and regulations.

The appendix is complete with training materials made in a PowerPoint program. A copy of the materials are in the appendix and on the enclosed CD for use as a PowerPoint presentation or to make into transparencies or slides. Other materials as related to this general topic are also available through the Kerr Center.

Jim Horne Ph.D.
President, Kerr Center

Foreword

Since the inception of this project, there has been no other industry more plagued by public policy dilemmas than the livestock agriculture industry. Nuisance laws, right-to-farm laws, environmental regulation, and anti-corporate farming laws have been in the spotlight around the country. Many changes in these legal areas have occurred within this project's investigative stage. Much will undoubtedly continue to occur as we proceed upon this most complex of all agriculture policy debates.

What follows is a discussion of the legal principles in these discrete areas, specifically for the states in the southern region of the Sustainable Agriculture Research and Education (SARE) program. Much of the developing national public debate on these issues has centered on just a few states, and the southern region of SARE can claim three of those states as ones which have been leaders in the rapidly changing laws in this area: Oklahoma, North Carolina, and Kentucky.

While undoubtedly the legal frameworks within which the Confined Animal Feeding Operation (CAFO) issue rests, will continue to alter in response to public demands, the needs of rural communities who must co-exist with CAFOs are not being adequately addressed. Should the concerns of rural residents be ignored? Can new social interaction structures be used to empower rural citizens on the CAFO issues? Are there newer and better ways of addressing pollution concerns in addition to the traditional regulatory frameworks?

"Next generation" CAFO policy debates should address the issues of developing a process to reach civilized and sustainable resolution to ongoing CAFO-related problems.

Introduction:
The Effects on Communities of Increased Numbers of CAFOs

Confined animal feeding operations (CAFOs) have been on the rise across the United States for the past several years. The phenomena of vertical integration, consolidation and concentration, and contract farming which began in the 1950s with producers like Tyson Foods, Inc., reached epidemic proportions by the late 1990s. With the increase in vertical integration, consolidation/concentration, and contract farming across all agricultural sectors, the numbers of animals on individual farming sites and the relative size of farming operations have grown. Fewer but larger operations are producing larger and larger quantities of animals for slaughter.

For instance, in the period between 1987 and 1992, the average number of animals per farming operation increased by 56% in cattle; 93% in dairy; 134% in hog; 176% in layer hens; 148% in broilers, and 129% in turkeys. Most of the larger CAFO operations are either building up in or choosing to locate in states that are, relatively speaking, poorly regulated, and in communities with almost no local controls on the operation's ability to operate.

These increases in the number of animals per operation have spawned many impacts in rural areas, not the least of which is the rapid increase in the amount of animal waste present in rural areas. Full grown hogs, for instance, that are grown under confinement conditions produce fifteen pounds of waste per day, about three times the amount a person of equal weight would excrete.[1]

An excellent analysis of the effects on communities of increased CAFOs can be a presentation delivered at the 1999 APA National Planning Conference by James C. Schwab. In his talk entitled "Planning and Zoning for Concentrated Animal Feeding Operations," Mr. Schwab notes:

> The impacts resulting from these operations can largely be placed in three categories: environmental, social, and economic. In the end, like most planning issues, these issues often prove to be intertwined…
>
> First, the environmental issues. Almost invariably, especially with hog farms, the issues revolve around odors and water quality…the odor issue becomes entangled with other issues of local air quality. But by and large, odor control is an issue at least somewhat susceptible to regulation…Because of the expertise needed to regulate impacts on water quality from manure runoff, much of the regulation of CAFOs in this respect has fallen to the U.S. EPA and state environmental agencies…
>
> Suffice it here to say that the impacts are severe enough in many cases to have made planning and zoning believers out of many communities that had previously regarded both with a great deal of suspicion…
>
> And that speaks to the social impacts of these operations. Their arrival has fractured the social network in many small communities where family farms have been for more than a century the bedrock of the local social structure…
>
> Finally, the economic impacts of increased concentration are ones that at least economic development planners should consider long and hard. For one thing, there is the long-term impact of creating, from short-term gain, what may well in some places become rural brownfields due to groundwater and other contamination…Many of these problems can be ameliorated or mitigated to some extent, but not where a community is incapable of effective review and regulation of proposed new operations.

Unfortunately, Mr. Schwab is correct. The environmental, social, and economic impacts of CAFOs are substantial and the rural communities forced to face these issues were, and still are, to a large extent, woefully unprepared to handle them. Not only does rising to meet these challenges and issues take a clear vision and strong hand in planning and zoning – which most rural communities have been

loathe to accept or which are powers most states do not allow localities to exercise – it also takes the capacity and skills of conflict resolution.

In a paper delivered during the *Agricultural Outlook Forum 2000*, on Friday, February 25, 2000 Patricia E. Norris and Sandra S. Batie of Michigan State University noted the following:

> Changes in the animal agriculture industry are characterized by changes in the size of operations, changes in the form of vertical coordination, and shifts in the location and siting of animal agriculture.[2]

The authors imply that whether these changes are causing or being caused by environmental policy changes is not as important as the fact that such changes are "fueling a public demand for policy response."

The authors further note that locational changes – shifts in animal production between regions and clustering of production within a region, such as has occurred in pork with the shift of production out of the Midwest and into the Southeast – have been coupled with demographic changes in the U.S. population. The greater affluence of Americans has, according to the authors, changed expectations concerning environmental issues, and how those environmental issues affect the quality of life.

Historically agricultural landowners enjoyed a wide range of rights with regard to their landownership. These rights were considered inviolate. With the changes in agriculture – location and size – accompanied with demographic changes in U.S. population, have come changes in property rights. The once inviolate rights of agricultural producers are now being questioned by new residents in rural areas and by some long-term citizens of rural areas. One of the most astute observations of the authors is:

> With a history of environmental policies targeting protection of specific media or discharges from particular sources, U.S. policymakers have little experience with a

policy debate that is so broad. There is no single policy issue around which the public has formulated their demands for regulatory attention to animal agriculture and waste management.

The authors note that the following are all contributors to the complexity of the policy issues surrounding the animal waste and agriculture debate:

- Objections to structural change in agriculture from a traditional farming structure to large, consolidated farming structure.

- Objections to size and locational changes.

- Water quality concerns -- nitrogen from a 200 cow dairy is the same as sewage from a community of 5,000 to 10,000 people; phosphorous from a 22,000 bird broiler house matches sewage from a 6,000 population town.

- Odor and related nuisances – less understood, more location specific, and more difficult to measure and monitor.

- Public health concerns – water contamination and odor as threats to public health.

- Property value impacts – declining property values in areas near animal facilities.

In January 1992 Professor Neil Hamilton, in the Introduction to his newest publication, *A Livestock Producer's Legal Guide to: Nuisance, Land Use Control, and Environmental Law*, made the following observation:

> The tension between livestock production in the U.S. and the application of land use controls, environmental regulations, and nuisance law has grown in recent years. While new research developments may someday help reduce environmental concerns, several factors may make the issues even more significant in the near future.

> Changes underway in the structure of the livestock industry increase the potential for conflicts between agriculture and non-farm land uses…[3]

Professor Hamilton recognized many of the factors which would increase pressures on livestock agriculture:

- concentration of animals into larger production units
- confinement of waste with its accompanying odor
- changes in the size and technology of livestock production
- environmental concerns over water quality
- local concern for environmental protection
- increased movement of non-farmers into rural areas
- increased public awareness and attention to environmental concerns
- social fears over the effect of large livestock operations
- increased pressures on local governments to control location of livestock operations.

Professor Hamilton was prophetic in considering the impact on social, legal and environmental frameworks that the rise of CAFOs would have. The increase in large operations coincided with and led to an increase in numbers of producers whose entire agricultural livelihood was intertwined with contractual obligations to large corporate agricultural operations.

The ways in which animal agriculture has developed over the past decade have resulted in an incredible amount of tension: tension between farmers and non-farmers, tension between government regulators and the agriculture industry, tension between environmentalists and farmers, and tension between industrial agricultural operations and rural citizens. It has seemed at times that conflict and ever-complicating issues were at every turn.

What began as concerns over odor, water pollution, and location of operations have turned into private property rights debates, increased regulation of farmers and farming practices, and the creation of community organizations designed to

fight industrial agriculture. What has been lost in many communities is trust, civility towards neighbors, and community cohesion.

Central to these problems has been a handful of laws – some new, some old – that continue to change as the dialogue increases in intensity. We all tend to think that the best way to solve our problems is through more and better legislation. That may not pose the best solution to these incredibly complex problems. What must come first, however, in any discussion of these problems is a proper foundation in the rudiments of the legal issues around which the public debate hovers. These are: nuisance, right-to-farm, anti-corporate farming, and environmental laws. This discussion will focus on developments in these areas within the southern region SARE states, but will not ignore developments that are of major significance in other states or at the national level.

Nuisance Laws

What is a "nuisance"? A nuisance is a centuries old legal concept that the law will not tolerate an unreasonable and substantial interference with another's quiet use and enjoyment of his or her property. The concept of nuisance is grounded in the idea (recognized as a legal right) that the owner of land has the right to use and enjoy his or her property free from unreasonable interference by others and that landowners must likewise use their property so as not to cause injury to adjacent owners. The nuisance concept can also be thought of as a variation of the ageless maxim: "Do unto others as you would have them do unto you."

Nuisance law has generally developed over the centuries within the common law (judicial interpretations), and many states have adopted statutes specifically identifying certain types of activities or situations as nuisances. Examples are: distilled spirits, houses of ill repute, dangerous plants or pests, and the like. The practice of agriculture through the years has netted many judicial interpretations of nuisance. Courts, when hearing agricultural cases in which nuisances are alleged, interpret whether the activity in question constitutes an interference with another

person's property rights, whether the interference was unreasonable, whether injury has occurred, and the extent of the landowner's rights to his property.

If neighboring landowners bring a suit against an agricultural operation and the operation is found to be a nuisance, courts can order the operation closed, alter how it does its business, or assess penalties to compensate for the nuisance. Loss of farmland might occur on the part of the offending farming operation, or the farming operation could be closed altogether. Even if a lawsuit fails, the cost of defending against these suits is in many circumstances very high.

All Southern Region SARE states have nuisance principles codified within their statutory laws and have decades-old judicial interpretations of nuisance principles scattered throughout their case law. A typical nuisance statute is Oklahoma's, which defines nuisance as "unlawfully doing an act, or omitting to perform a duty, which act or omission either: First. Annoys, injures or endangers the comfort, repose, health or safety of others; or Second. Offends decency; or Third. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river,…or Fourth. In any way renders other persons insecure in life, or in the use of property…[4]

Right-to-Farm Laws

Right-to-farm laws were originally designed to protect existing agricultural operations by giving farmers who meet the legal requirements of the law a defense against nuisance suits. Right-to-farm laws first made their appearance in state statutes in the 1970s. State lawmakers created the right-to-farm concept and embodied it as a part of state law in response to their fears of the loss of agricultural land due to the movement of residential developments into historical farming areas.

This increasing "urbanization" of rural areas (which continues today) was creating more and more conflict between agricultural landowners who had sometimes farmed in a particular area for generations and new residents in rural areas from urban or non-farming backgrounds. Many of the traditional side effects

of a farming operation-- dust, flies, odor, noise from field work, spraying of farm chemicals, slow-moving farm machinery and the like-- were unfamiliar to those moving into traditional rural, farming areas in the 1970s.

Some of these new neighbors to agricultural operations utilized their access to the courts in order to challenge what others felt to be the traditional side effects of an agricultural-based lifestyle or business enterprises.

By the 1990s, every state had passed right-to-farm legislation and some local and city governments had also enacted such laws. While every state has a variation of right-to-farm statutes, not all state statutes are identical. There are several basic forms of right-to-farm laws:

- the traditional right-to-farm laws
- laws requiring the use of generally accepted agricultural management practices
- laws listing specifically protected activities
- laws protecting animal feedlots in particular
- laws requiring that protected enterprises be within specially created agricultural districts
- local right-to-farm ordinances which tend to mirror the larger state statutes.

The General Purpose of Right-to-Farm Laws

North Carolina's right-to-farm law is indicative of the statutory purposes set out in many states' right-to-farm statutes:

> It is the declared policy of the State to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. When nonagricultural land uses extend into agricultural areas, agricultural operations often become subject to nuisance suits. As a result, agricultural operations are sometimes forced to cease operations. Many others are discouraged from making investments in farm improvements. It is the purpose of this

Article to reduce the loss to the State of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed a nuisance.

North Carolina Right-to-Farm Law
1979

The Traditional Right-to-Farm

Traditional right-to-farm laws require that the agricultural operation which seeks protection have been in existence for at least one year (or longer, as determined by the statute) prior to any change in the surrounding area which led to the filing of the nuisance claim. In order for the agricultural operation to be protected by a right-to-farm statute, the operation itself must have already been in the area and been in operation for a specified period of time. Normally the operation cannot have been a nuisance at the time it was begun, it cannot be operated improperly or negligently at the time the lawsuit against it was filed, and if it has all necessary permits from state or local authorities in place, it will be protected. These types of qualifications are generally all contained within what are thought of as traditional right-to-farm statutory schemes.

Conduct According to Generally Accepted Agricultural Management Practices

Some right-to-farm statutes require that in order to achieve protection behind the right-to-farm shield, the agricultural operation must be in compliance with "generally accepted agricultural management practices." In some states, generally accepted agricultural management practices are those that are in conformity with federal, state, and local laws and regulations, do not affect public health and safety, and may also be those that are specifically identified by bodies such as departments or commissions of agriculture as being indicative of generally accepted agricultural practices. If the farmer follows generally accepted agricultural management practices, the law creates a presumption of reasonableness on the part of the operation.

A major question facing right-to-farm laws in those states utilizing the "generally accepted" approach is who or what entity establishes practices as "generally accepted." Some laws require the department of agriculture to do so, other laws are silent, leaving it to the farmer to prove to the court what a standard or acceptable practice is.

Other lingering questions with this type of right-to-farm include: what procedure is used to establish "generally accepted practices," do agricultural groups have input in establishing standards, what other groups have input in establishing standards, how is compliance with the standards determined, and by whom.

Protection of Specific Agricultural Practices

In some cases, only specifically identified practices are given right-to-farm protection. Usually right-to-farm statutes will give broad sweeping protection to "agricultural activities" and "agricultural operations." However, some states have specifically indicated the types of activities conducted by agricultural operation that are intended for protection. Presumably any activity falling outside those that are specifically enumerated would fail to obtain right-to-farm protection.

Examples of the types of activities (some perhaps objectionable) for which some statutes grant protection are:

- odor from livestock manure, fertilizer or feed
- noise from livestock or farm equipment
- dust created during plowing or cultivation operations
- use of chemicals if the use is in accordance with regulations
- water pollution from agricultural activities so long as those activities are in accordance with accepted management practices for water protection.

Protections for Livestock Feedlots

Some right-to-farm laws operate specifically to protect livestock feedlots from nuisance suits concerning odors or the handling of animal waste at those feedlots. States which have had this type of protection incorporated into state statute include Oklahoma, Wyoming, Tennessee, and Kansas.

Agricultural District Requirement

Other right-to-farm laws require that, in order to obtain nuisance protection, the operation must be included within a properly formed and properly recognized agricultural district. Very few states have this requirement. Agricultural districts are usually formed, within those states that have this type of entity, by application to a county official for the creation of such a district. All agricultural operations seeking admission to the agricultural district must agree to conduct their agricultural operations in conformance with specified uses. Once the district is properly formed, the right-to-farm defense is available to the operation within the district. Iowa, Delaware, Illinois, Maryland, Minnesota, Ohio, Oregon, Virginia, and Wisconsin have agricultural district laws.

Local Ordinances Providing a Right-to-Farm

Some local governments have adopted right-to-farm protections similar to the provisions contained in the larger state version. Counties in Pennsylvania, Maryland, Iowa, and California have passed local ordinances creating a right-to-farm. Some states authorize these types of enactments at the local level, but many other states do not give local governments the power to regulate agriculture.

At one point in the mid-1990s, 29 counties and several cities in California had local right-to-farm ordinances. The ordinances generally followed a California Farm Bureau model establishing a local grievance procedure to resolve disputes before the disputes became lawsuits. Disputes were submitted to three-member local committees who investigated, met with the parties, and issued advisory decisions concerning the dispute. In addition, all prospective purchasers of land were required to be notified of the existence of the right-to-farm law.

Application of the Right-to-Farm Protection

When nuisance lawsuits are filed against agricultural operations and the right-to-farm defense is invoked, there are a number of general questions facing the courts and the parties in these disputes:

1. Are the operations “farming operations” according to the definition of such term under state law?
2. What is “farming” or an “agricultural activity” under the state law?
3. Was the farm a nuisance when it began?
4. Has the operation been conducted “reasonably”?
   The question may become what is “reasonable” to the farmer and what is “reasonable” to the neighbor, and which position will prevail.
5. Has there been a change in the farming operation? If so, when did the change occur?

Most laws require that the activities of the operation be unchanged in order to remain protected by the right-to-farm defense. If the operation expands or uses a changed technology on the farm, the question then becomes whether a change in the operation has occurred such that the farming operation will lose the right-to-farm protection. In recent years, many states have passed laws addressing this issue, requiring a new time period to run after each expansion or providing that the operation may use the original “establishment date” only if reasonable expansions or changes to the operation have occurred.

For example, Missouri law at one time did not allow a “significant difference” in environmental pressures on neighbors when an operation expands or changes. A livestock operation must ensure that waste-handling capabilities do not exceed minimum recommendations of the Extension Service in order to retain right-to-farm protection. In addition, the operation may not have been completely relocated.

Other states have allowed expansions of operations but have given each expansion a separate “established date” (Hawaii); provide no protection for expanded operations (Colorado); or provide no change in the established date, even if there were expansions or adoptions of new technology (Georgia).

With the continued pressure concerning CAFO operations, the courts may begin to take different positions on what a "substantial or significant change in the operation" might be. Legislatures may also attempt to carefully define, by statute, the parameters of change or expansion.

6. Has the operation complied with "generally accepted agricultural management practices" (should this be a requirement under the particular state law)?
7. Has there been negligent or improper operation of the farm?
8. Has the farm caused pollution, and if so, where and when?
9. Does the farm have all necessary permits from federal, state, or local authorities in place?

Interpretations of the Right-to-Farm by the Courts

As of the early 1990s, as few as two dozen cases had been reported nationwide involving right-to-farm laws. Due to the meteoric rise in large CAFO operations, these numbers are increasing. While it cannot be clearly reported as such, the protections offered operations under the right-to-farm laws seem to have been somewhat of a deterrent against substantiated or unsubstantiated claims being brought against operations. The level of proof required to overcome the defense and the risk of high costs in fees, particularly in those states in which fee-shifting to the unsuccessful litigant occurs, can be high hurdles in the contemplation period before lawsuits are filed.

Historically, courts have not allowed right-to-farm protection if:

- the activity in question was not covered under the law
- the neighbors were present before the agricultural activity began
- the activity in question was not agricultural in nature
- the dispute involved off-farm impacts not covered by the law, or
- the operation was being conducted in an improper manner.

Most recently, however, the Iowa Supreme Court took right-to-farm laws to a place most agricultural associations did not want them to go.

Iowa's Latest Interpretation of Right-to-Farm

In Bormann v. Board of Supervisors of Kossuth County, the Iowa Supreme Court was confronted with a direct challenge to the constitutionality of one of Iowa's right-to-farm provisions.[5] The case, decided in 1998, was originally brought after the Kossuth County Board of Supervisors failed to establish an "agricultural area" upon proper application. Two months after denial of the application for creation of an agricultural district, another attempt was made to create a district, with the board this time approving the agricultural area designation by a "flip of a nickel." Several neighbors of the new agricultural area filed an action in court challenging the board's creation of the agricultural area.

The challenge directly confronted the issue of constitutionality of one of Iowa's right-to-farm provisions; i.e., right-to-farm protections afforded those operations within designated agricultural areas. The neighbors to the agricultural area argued that the creation of the area, with its accompanying nuisance protections, in effect resulted in a taking of their private property without payment of just compensation, a violation of federal and state constitutional provisions.

The Iowa Supreme Court ruled that the provisions of Iowa's agricultural area statutes that gave operations within the areas immunity from nuisance suits (right-to-farm protection) were unconstitutional. In reaching that conclusion, the court stated:

> When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few. In short, it appropriates valuable private property interests and awards them to strangers…

> We recognize that political and economic fallout from our holding will be substantial. But we are convinced our responsibility is clear because the challenged scheme is plainly – we think flagrantly – unconstitutional.

In 1999, the United States Supreme Court let the Iowa Supreme Court ruling stand by refusing to review the decision. The long- and short-term effect of this decision remains to be seen with regard to the continued viability of right-to-farm statutes. Since the decision was reached, no other cases have been finally resolved using the analysis of the Iowa court as guidance – this could happen in the future, however, throwing right-to-farm protections in other jurisdictions in question.

Right-to-Farm in the Southern Region SARE States

Alabama[6]

Prior to enactment of the right-to-farm law, Alabama courts heard and decided several agricultural nuisance issues. In Baldwin v. McClendon[7], a hog confinement operator was required to pay damages to a neighboring farmer for a nuisance claim. In Gregath v. Bates[8], the Alabama Court of Appeals affirmed an injunction against a hog confinement operation determining that odors from the operation were a "continuing and repeated nuisance" which had to be stopped.

Alabama enacted its right-to-farm law in 1979. Under the law, agricultural, manufacturing and industrial plants, and farming operations were not to be defined as nuisances simply because of any changes in the locality around the operations. In order to obtain protection, the operation must have been in existence and operation for one year prior to the changed activity in the area, and must not have been a nuisance when the operation began. If the operation, through negligence or improper care, became a nuisance, the operation would lose its protection. Local regulations that might conflict with right-to-farm protection were not allowed, and

the right-to- farm protection was not given to an operation that was causing water pollution or overflow onto another's land by its activities.

While there have only been a few cases interpreting the 1979 statute, the most interesting to the CAFO issue is Christiansen v. Hall[9], in which the Alabama Supreme Court held that odors coming from poultry houses did not constitute a nuisance.

Arkansas[10]

Ozark Poultry Products Inc. v. Garman[11], was a case decided prior to enactment of Arkansas' right-to-farm law in which rendering plant odors were bad enough to interfere with the plaintiffs' enjoyment of their homes. The company argued that the plaintiffs suffered no greater than the public in general and that therefore the action should have been brought as a public nuisance and not a private nuisance. The Supreme Court ruled that the problem was a public nuisance and that an action for private nuisance could also have been brought under Arkansas law. Prior Arkansas case law had determined that injunctions were an appropriate remedy against offending rendering plants.

In 1981, Arkansas enacted a right-to-farm law that gave public and private nuisance protection to operations if the operation had been in existence for more than one year and was not a nuisance when it began. Under Arkansas law, an agricultural facility "includes but is not limited to any plant, facility, structure, or establishment used for the feeding, growing, production, holding, processing, storage or distribution for commercial purposes of crops, livestock, poultry swine, or fish, or products derived from any of them." In order to retain protection, the operation cannot have changed the character of its operation or have materially increased its size. As in many state right-to-farm statutes, suits for water pollution or overflow onto another's lands are not covered by right-to-farm protections. Also, Arkansas counties and municipalities are not allowed to pass ordinances that might make an agricultural facility a nuisance.

Higbee v. Starr[12], was decided after enactment of the Arkansas right- to-farm statute. The case involved the Low Gap Hog farm that was alleged to be a nuisance and operating in violation of the Clean Water Act. The court ruled the pollution was caused by unsanitary practices of the defendant and her family who allowed animals on site to roam freely, drink, swim, bathe in, and foul all water resources on the farm. Right-to-farm protection was not afforded the defendant.

In a later case, McRae v. Bishop[13], a scentometer was used to measure odors at the site. Although the right-to-farm law was not discussed in the decision, it is interesting to note that the farm had materially changed in operation due to contracting with Tyson Foods to raise hogs, materially increasing the size of the operation by constructing four hog houses with a capacity for 2,500 hogs.

Florida[14]

Several cases were decided in Florida prior to the enactment of the right-to-farm law. In Bunyak v. Clyde J. Yancey & Sons Dairy, Inc.[15], the court found a dairy farm to be a nuisance due to overflow of liquid manure onto an adjacent cattle farm. In Buchanan v. Golden Hills Turf and Country Club Inc.[16], the court found a cattle feedlot was a nuisance due to odors but held that an injunction against the feedlot operation was too broad. In Mercer v. Brown[17], the court found a hog farm that was feeding garbage was a nuisance, limited the number of hogs on the farm to 1,000, and restricted the time and method of storing food at the facility.

In 1979 Florida passed its right-to-farm statute, amending it in 1982 and in 1987. The statute protects farms that have been in operation for one year or more and that were not nuisances when established. The farm operation must conform to generally accepted agricultural and management practices. Some activities, such as storing untreated offal, are not protected by the statute. The farm operation will not become a nuisance as a result of changes in conditions in and around the locality of the farm. For those farming operations which were adjacent to an established homestead or business as of March 15, 1982, the operations are restricted from changing to more excessive farm operations with regard to noise, odor, dust or

fumes. In 1987 the statute was amended to include aquaculture in the definition of a farm.

One case in Florida that specifically discussed expansions or changes in operations was Pasco County v. Tampa Farm Service, Inc.[18] Tampa Farm Service had operated egg and poultry production facilities in Hillsborough County since 1977, raising 1.5 to 2 million chickens. The company owned 849 acres of agricultural land at three sites in Pasco County. These spots were used for spreading chicken manure. Along the way the company changed its methods of manure handling from one that was relatively odor free to one that resulted in frequent collection of wet manure, thus resulting in a substantial increase in odors.

The court addressed "changing technologies" in its opinion. In the opinion, the court discussed the purpose of the right-to-farm:

> The goals and purposes of such statutes are meritorious. The legislature certainly has valid reasons to protect established farmers from the expense and harassment of lawsuits aimed at declaring this vital industry to be a nuisance. We do not interpret the Florida Right-to-Farm Act as an unfettered license for farmers to alter the environment of their locale merely because the practices which they used in 1982 were acceptable at that time.

Georgia[19]

Georgia enacted a right-to-farm statute in 1980. The statute indicates that agriculture operations may not become public or private nuisances as a result of changed conditions in or around the operation if the operation has been in existence for one year or more.

The Georgia statute was among the first to be considered by a court in a nuisance dispute. In Herrin v. Opatut[20], the Court held that a large poultry operation was not protected under the right-to-farm due to changes in the farming operations.

In 1989 the law was amended to add very specific definitions of agricultural facility and agriculture operation, the new amendments protecting expansions of the farm or changes in the use of technology at the operation.

Kentucky[21]

In Hall v. Budde[22], the Kentucky Supreme Court held a hog farm was a legitimate business and odors and noise from the farm were not a nuisance. In the Hall case, the plaintiffs moved into the neighborhood many years before, and had knowledge of the operation before the lawsuit was filed. In Curry v. Farmers Livestock Market, the court held that a livestock barn and market were not a nuisance. In Valley Poultry Farms Inc. v. Preece[23], odors, noise, and insects from a neighbor's chicken house were found to be a nuisance even though the operation was conducted with due care.

In 1980, Kentucky passed a right-to-farm statute providing that an agricultural operation which had been in operation for more than one year does not become a public or private nuisance due to any changed conditions in the area. The operation must have not been a nuisance when it began, must not be operated in a negligent manner, and must have been operated unchanged for more than one year.

In 1991 Kentucky passed a statute that provided that among the facts to be considered in determining the existence of a private nuisance are: the lawful nature of the defendant's use of the property, the manner in which the defendant has used the property, the importance of the defendant's use of the property to the community, the influence of the defendant's use to the growth and prosperity of the community, the kind, volume, and duration of the annoyance or interference with the use and enjoyment of the plaintiff's property caused by the defendant's use of property, the respective situations of the parties, and the character of the area in which the defendant's property is located, including but not limited to all applicable statutes, laws or regulations.[24]

In 1997, the Kentucky Attorney General made headlines when he issued an opinion finding that industrial agricultural operations were in fact just that, industrial sites as opposed to agricultural sites, were not reasonable, prudent, and accepted farming operations, and as such were not subject to protection under the state's right-to-farm law.[25]

Louisiana[26]

Early nuisance law in Louisiana resulted in court interpretations such as that found in Bankston v. Farmers Cooperative Gin[27]. There, the court held a cotton gin was no longer a nuisance due to modifications, but that the gin had previously caused $400 damages to a neighbor's home.

In 1983, Louisiana adopted a right-to-farm law that gives nuisance protection to agricultural production activities and agricultural facilities that provide marketing, processing, or agricultural support services (cotton ginning, fertilizer and chemical application). If those engaged in such operations conduct the operations in accordance with generally accepted agricultural practices, they would be protected from nuisance actions brought by those subsequently moving into the vicinity. The law created a presumption that anyone engaged in agricultural production was following generally accepted agricultural practices.

The Louisiana nuisance protection did not apply in actions based on negligence, intentional injury, or violations of state or federal law or regulations. The law restricted the ability of local governing authorities to adopt ordinances that would declare an agricultural operation a nuisance or any zoning ordinance that would force the closure of agricultural operations.

Mississippi[28]

Mississippi's right-to-farm statute provides that agricultural operations, including facilities for the production and processing of livestock, farm-raised fish and fish products, livestock products, and poultry or poultry products for commercial or industrial purposes, are provided protection from nuisance lawsuits. The law requires that operations must have existed for one year or more, and if so, the

operation will have an absolute defense to a nuisance lawsuit if the conditions purportedly causing the nuisance have existed substantially unchanged since the established date of operation.

Expansion of the operation is also protected but each expansion will be given a separate established date of operation. The law does not affect any provision of the Mississippi Air and Water Pollution Control Law, therefore, an operation might be able to obtain the use of the right-to-farm defense but not escape prosecution for pollution violations.

North Carolina[29]

In 1979, North Carolina passed a right-to-farm law protecting agricultural operations from nuisance suits due to changes in the locality if an operation had existed for at least one year and was not a nuisance when it began. The law did not protect operations that were run in a negligent or improper manner and did not affect the right to recover damages due to changes in conditions to streams or damages caused by overflow of lands.

Local ordinances seeking control over agricultural operations were rendered void but those operations located within the corporate limits of a city on the date of enactment of the law (March 26, 1979) were subject to local ordinances.

North Carolina's right-to-farm law was one of the first right-to-farm laws enacted and has served as a model for other right-to-farm laws. Cases decided after enactment of the right-to-farm law reflect the courts' changing interpretations. In Baucom's Nursery v. Mecklenburg County[30], the court was confronted with whether the operation was a "farm" under the statute. The court held in favor of a nursery using a 19.6 acre tract zoned for residential use which sought to claim coverage under the right-to-farm act.

In Mayes v. Tabor[31] the same court ruled a hog farm adjacent to a band campground was a nuisance. There, the band campground had been in existence for 60 years when it sued a neighboring hog farmer who had been in existence for less

than 15 years. The owners of the band camp argued that the stench from the almost 500 hogs confined in sheds within 10 feet of their property line was a nuisance and prevailed.

In 1995 the North Carolina law was amended to include limitations on siting requirements for swine houses and lagoons, provision for enforcement of siting requirements by civil action, and requiring written notification of swine facilities to neighboring landowners.[32]

Oklahoma[33]

Oklahoma's right-to-farm law was also one of the earliest enacted. In 1969 Oklahoma passed a bill which provided that if licensed feedlots complied with the regulations concerning them made by the Oklahoma Department of Agriculture, then this constituted prima facie (on its face) evidence a nuisance did not exist so long as the feedlot was not in violation of zoning regulations.

In 1980, Oklahoma again took up the issue of right-to-farm and passed a similar provision granting even wider coverage to other types of agricultural operations. If agricultural activities were consistent with good agricultural practices they were presumed to be reasonable and to not constitute a nuisance if they were conducted on farm or ranch land and were established before the non-agricultural activities nearby. If agricultural activities were conducted in conformity with federal, state, and local laws and regulations they were presumed to be good agricultural practices and to not adversely affect the public health and safety. However, activities with a substantial adverse effect on public health and safety were not granted the presumption. The Oklahoma laws were amended in 2000 to include forestry among the protected activities.

South Carolina[34]

The South Carolina right-to-farm law was passed in 1980 and generally protects agricultural operations from nuisance suits. It is of the traditional right-to-farm statutory "one-year" format. The protection given agricultural operations in South Carolina will not apply if the operation is conducted improperly or

negligently. An operator may still be liable for damages caused by the pollution from an operation. Local ordinances making agricultural operations a nuisance are void unless the farm is located within the cities' corporate limits.

In 1990 South Carolina amended the law to add several definitions, including a lengthy explanation of the type of agricultural production activities that would bring an operation under protection by the statute.

Tennessee[35]

Tennessee passed a right-to-farm law in 1979 giving feedlots, dairy farms, and egg production houses protection from nuisance suits if they complied with applicable rules of the department of health and environment. In order to claim protection, the operation must also comply with all applicable zoning regulations.

In 1982 Tennessee again passed a right-to-farm law applying to a broader range of operations. This later law created a rebuttable presumption that the operation was not a public or private nuisance if the operation was conducted in conformance with Tennessee Department of Agriculture regulations. If the operation came under the law, all types of activities conducted on the property were protected, including: activities causing dust, odors, fumes and noise, operation of irrigations pumps, ground and aerial seeding and spraying, the application of fertilizers, conditioners, insecticides, herbicides, and pesticides and the employment and use of labor.

Texas[36]

Prior to enactment of its right-to-farm law, Texas courts ruled in Lacy Feed Co. v. Parrish[37] that a turkey farm was causing a nuisance when odors, feathers, and manure from the turkey farm washed onto adjoining property.

Texas enacted a right-to-farm law providing that if the farm has lawfully existed for one year prior to the suit and has not been substantially expanded or altered during that time, it would not be held a nuisance. The Texas law includes a fee shifting provision if the operation comes under protection of the right-to-farm

statute. If, however, the operation violates any federal, state, or local statute or is a threat to the public health, safety, or welfare, right-to-farm protection will not apply. The fee shifting provisions do not apply to actions brought by the Department of Health or a local prosecuting attorney[38].

Virginia[39]

Virginia adopted a traditional "one year" right-to-farm law in 1981. The agricultural operation does not become a nuisance due to changed conditions in the locality if it has existed for at least one year. If negligent or improper methods are followed, or if the farming operation has changed significantly, the protection will not be given. Local ordinances making an agricultural operation a nuisance were rendered void. If the farming operation causes pollution or a change of condition to another's streams or land, the operation may still be liable for damages caused.

Later changes to the Virginia law required that the protected farm utilize best management practices in order to gain right-to-farm protection. Also contained in the 1995 revisions were provisions giving counties the ability to adopt setback requirements and minimum area requirements for operations within agricultural districts. While the local government cannot unreasonably regulate practices, it may do so if its regulations bear a relationship to public health and safety.

Improving Right-to-Farm Laws

The continuing evolution of conflicts concerning livestock operations will undoubtedly lead either to an erosion of the right-to-farm protections or to an improvement in the parameters for obtaining the right-to-farm defense in a nuisance action. Several of the observations or criticisms of right-to-farm laws are:

1. They should/can be more clearly written, easier to understand and apply, and should contain more precise definitions.
2. The laws are being used by large CAFO operations of a size that were never the intended users of the laws.

3. Farmers and lawyers should be more familiar with how right-to-farm law works.
4. The laws should be combined with efforts to preserve farmland.
5. There should be a notification for those who buy in an area, such as existed in the California model.
6. The laws should include local grievance procedures to resolve disputes, such as exist in the California model.
7. Establishment of "acceptable agricultural practices" standards should be more inclusive of all sectors of the agricultural and rural community.
8. Only certain sizes of operations should be able to gain protection from nuisance suits.
9. Industrial-sized operations should not be considered agricultural operations.

Anti-Corporate Farming Laws in Southern Region SARE States

Oklahoma is the only state within the Southern SARE Region that is an anti-corporate farming state. Nationwide, there were only nine states which ever enacted an anti-corporate farming law. The other states with anti-corporate farming measures are: Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, and Wisconsin.

Oklahoma adopted, in the 1970s, a provision that sought to protect family farming and restrict the expansion of corporate farming enterprises. Over the years the exceptions created by legislative enactment to the original anti-corporate farming bill have created a law swallowed by its own exceptions. The bottom line for determining the effectiveness of any law is to determine whether it actually prevented that which it set out to prevent. In this case, the answer would have to be a resounding "NO!" Not surprisingly the situation is similar in most of the nine states that have anti-corporate farming laws in place.

Oklahoma's anti-corporate farming provisions are found in the constitution and in the statutes. Oklahoma's constitutional provisions provides:

> No corporation shall be created or licensed in this State for the purpose of buying, acquiring, trading, or dealing in real estate other than real estate located in incorporated cities and towns and as additions thereto; nor shall any corporation doing business in this state buy, acquire, trade or deal in real estate for any purpose except such as may be located in towns and cities and as additions to such towns and cities, and further except such as shall be necessary and proper for carrying on the business for which it was chartered or licensed…[40]

Oklahoma's statutory anti-corporate farming provision provides:

> It is hereby declared to be the public policy of this state…that…no foreign corporation shall be formed or licensed under the Oklahoma General Corporation Act…for the purpose of owning or leasing any interest in land to be used in the business of farming or ranching. A domestic corporation may, however, be formed under the Oklahoma General Corporation Act to engage in such activity if the following requirements are met…[41]

The Oklahoma law then goes on to outline certain exceptions. Trustees, certain partnerships, and limited partnerships are exempted from the prohibitions.. Oklahoma law also exempts family farm corporations. Other corporations specifically exempted by statute from the anti-corporate farming ban include: corporations involved in livestock and poultry for production and sale, or use as breeding or feeding stock; corporations involved in research and/or feeding of livestock or poultry, but only to the extent of such research and/or feeding arrangements; corporations involved in forestry; fluid milk processing operations; and charitable or eleemosynary corporations.

Punishment for violation of the anti-corporate farming provisions is weak: $500 fines and misdemeanor actions. Corporations found in violation can be subject

to divestiture actions. Corporations are not required to file special reports with governmental agencies under this law.

LeForce v. Bullard[42] was an early case decided under the anti-corporate farming statute. The court found that formation of a farming corporation with power to own and hold real estate necessary for carrying on the business of farming was not forbidden by the constitution; the court finding that the intent of the provisions was to prevent land companies from buying rural land, not to prevent private corporations from owning land.

Oklahoma Land and Cattle Co v. Mattingly[43] followed the LeForce ruling. Barton v. Baptist General Convention found that the constitutional provision does not prohibit acquisition by a religious corporation of land outside the incorporated city limits for farming purposes.

Oklahoma's anti-corporate farming statutes underwent their most recent changes in the early 1990s in order to accommodate the influx of corporate agricultural enterprises into the state. These efforts were a part of broader economic development efforts by state and local officials. Amendments to the anti-corporate farming provision during this critical period of the early 1990s resulted in throwing open the state to the rapid influx of several large corporate farming enterprises, particularly in the western part of the state. Arguably, the only efforts within Oklahoma which could be interpreted as operating as a curb to factory farming are provisions contained in subsequent bills requiring stronger environmental controls on CAFOs.

The nine other states with anti-corporate farming measures have likewise seen efforts in the 1990s to encourage rural economic and agricultural development through broadening the exceptions to anti-corporate farming, only to then see a swift effort to curtail corporate agricultural growth within their states through tightening of the anti-corporate farming and environmental provisions. The overall effect of these provisions has been that while there may be some effect on growth of particular corporate agricultural operations within a state, none of the states within

which these laws may be found has been entirely successful in curbing this type of growth through anti-corporate farming provisions.

What has been seemingly most effective in recent years in addressing corporate agricultural growth has been a shift toward tightening the restrictions on large CAFOs through various measures such as environmental regulations, zoning efforts, and odor regulations.

Public Enemy No. 1: Odor

Odor is the nuisance issue that seems to cause the most difficulty between agricultural operations and their neighbors. Flies, noise, dust are problematic – but nothing else seems to rise to the level of odor. Among all the issues facing agriculture in the past decade, the issues surrounding the substantial increase in odor following the move toward larger and larger CAFOs has clearly been the most contentious. Tempers have flared and dialogue has become the most heated around odors associated with hogs, with poultry odors coming in a close second in most areas.

The problems associated with these seemingly subjective issues – odor, sensitivity to odor, and how to measure both – were illustrated in many states in scrambles to identify odor-measurement and enforcement issues in the late 1990s.

An early study done by the Nuisance Odor Task Force of the Texas Air Control Board (1993) revealed that only three of the 200+ governmental entities (state, county, and regional agencies) surveyed around the country used the number of complaints as the sole method of determining whether a nuisance odor existed. Fourteen agencies that responded used a scentometer to determine whether a nuisance odor existed. Historically, both federal and state laws failed to include agricultural odors as issues to be regulated under applicable air pollution laws. But, odor lies at the heart of most agricultural nuisance claims.

Yale Clinic Odor Study

Probably the most definitive study of CAFOs and odor conducted in the South during the 1990s was published in spring 1998 by the Yale University Environmental Protection Clinic in coordination with the Kerr Center for Sustainable Agriculture.

The Yale Clinic report, *Controlling Odor and Gaseous Emission Problems from Industrial Swine Facilities: A Handbook for all Interested Parties* is an overview of odors and gases, sources of such problems within agricultural operations, public health issues related to odors and gases, and the effects of odors on local economies, property values, and community dynamics. Methods of controlling and of measuring odors were discussed as were the then-existing laws and regulations addressing odor issues.

The Yale Clinic Odor Study explained in detail the emissions from swine CAFO facilities: odors, gases, manure wastes and carcasses. Odor is the complex mixture of gases, vapors, bioaerosols and dust resulting from anaerobic decomposition of swine manure. Odors are most commonly characterized by the smell of ammonia and the "rotten egg" odor of hydrogen sulfide.

Most swine odors come from land application of manure and the swine buildings. Measuring these odors can prove difficult, as the best method is the human nose, a fairly subjective instrument. Minimal data is available concerning the impact of swine odor on human health although several studies have shown substantial ill effects to swine workers.

The four major swine gases which cause problems are: hydrogen sulfide, ammonia, carbon dioxide and methane. All can and do cause public health effects. Finally, the environmental effects associated with swine waste lagoons and improper carcass disposal can be substantial. These latter problems have proven easier for regulators to grasp in the struggle to control CAFOs.

Summarizing the "lay of the land" in swine odor at that time, the Yale study incorporated a number of recommendations in its executive summary:

1. Federal regulation was needed to curb the "race toward the bottom" among states lowering their odor standards in order to lure new agricultural industry.
2. State and local controls were needed to tailor odor regulations to the needs of local areas.
3. Incorporation of existing odor-abatement technology in the pork production process was necessary.
4. Incorporation of the costs of environmental protection into the costs of food production and food consumption was necessary.
5. Economic incentives and labeling should be used in order to give the public a voice in production issues.
6. Empowerment of community members in the decision-making process relative to large scale facilities was necessary.

The study offered suggested methods of controlling odors from swine facilities: improved cleanliness, improved ventilation, use of biofilters and air scrubbers, dust control mechanisms, and alteration of waste handling and storage systems. Changes in the technology of land application of waste as well as proper carcass disposal were also cited as necessary changes in order to address odor concerns. Finally site selection and design was not to be overlooked as means for addressing future odor concerns.

While odor may be at the heart of many of the problems encompassing CAFOs, the regulatory community's first response has been to regulate these entities based on potential for water pollution activity. And in response to the overwhelming anger and frustration of many local community residents, several local governmental entities (cities, municipalities, counties) have attempted to exercise local control over CAFO activities.

Environmental Regulation of CAFOs

While the scientific/research community has been scrambling to address odor and pollution issues resulting from increased CAFO operations, the regulatory community has also been busy addressing CAFO issues. The Yale study correctly noted that odor and air quality issues have taken a back seat to water pollution issues in the enhanced federal and state regulation of CAFO operations.

Regulations concerning manure handling and storage, land application and setback distances for CAFO operations have undergone substantial change in many states over the past several years. While these regulations may have some effect on odor and air issues, most do not address the odor and air problems head-on. Regulatory frameworks continue to define the field by focusing on water pollution issues instead of the accompanying odor and air quality issues.

Federal regulatory structures have been the last to address the needs of communities in regulation of the ever-increasing numbers and size of CAFOs. State and local authorities have been first in defining acceptable limits to this phenomenon. Among the state-level leaders in determining acceptable limits for CAFOS have been a few southern states: North Carolina, Kentucky, and Oklahoma. They join a handful of progressive states that seek the means to define their state's agricultural landscape while addressing the needs of their citizens in a comprehensive and fair manner. Much yet remains to be done, but the following offers a brief description of the activities which have been occurring at the national and state levels.

Federal Clean Water Act

The federal government through the Environmental Protection Agency (EPA) regulates the activities of large-scale animal feeding facilities as "point sources" of water pollution. The Clean Water Act defines AFOs as point sources of pollution in some circumstances and requires those affected operations to carry a National Pollutant Discharge Elimination System (NPDES) permit. If livestock facilities

meet minimum size requirements of the federal law, usually 1,000 animal units, and they were not built to discharge, the facilities have not been required to obtain a discharge permit from the EPA. Recently, however, regulatory interpretation of the NPDES requirements are that size determinants alone should dictate whether a permit is required, not the discharge history of the facility.

Total Maximum Daily Load (TMDL)

The Clean Water Act requires that a "total maximum daily load" be established for each listed water (waters within each state that do not meet state water quality standards). Over 20,000 water bodies have been identified as not meeting water quality standards.

In August, 1999 EPA proposed TMDL regulations which would address the Clean Water Act requirements. On March 30, 2000, a federal court in San Francisco upheld the EPA's longstanding interpretation and practice that EPA and the states have the authority to identify waters impaired by nonpoint sources of pollution and to develop TMDLs for such waters under the Clean Water Act.

EPA is under court order in eighteen states to establish TMDLs if the states do not establish the TMDLs; there are another eight states in which actions have been filed seeking to compel EPA to establish TMDLs; and yet another three states in which notices of intent to sue have been filed on these issues. These numbers will change as the courts hear the issues. Among the most contentious of new regulations that affect CAFOs are the new TMDL regulations.

Effluent Limitation Guidelines

EPA has also begun evaluating guidelines it first issued in 1974 that established CAFO effluent limitations. EPA is in the process of rewriting these guidelines and changes may be anticipated as early as the year 2002.

State Water Quality Protection

States establish their own laws to implement federal water quality protection requirements. In some instances, these state laws have exceeded the federal requirements, as the federal requirements are considered a minimum level of regulation. The laws establish minimum standards for the handling and disposal of animal wastes in order to prevent water pollution. Most operations do not have to obtain a construction permit for a new facility, although many states have recently heightened their levels of scrutiny for new facilities. Operating permits for certain sized facilities are usually required. Most state laws also establish guidelines, some in the form of stringent requirements, for the land disposal of animal waste.

State water quality laws have been the source of many of the changes facing livestock operations in the past several years. EPA, or states with delegated Clean Water Act authority, issue NPDES permits for CAFOs in accordance with applicable guidelines.

State and Federal Air Quality Laws

Most states and the federal regulatory schemes have not been well-organized in addressing air quality problems surrounding agricultural operations. The community outrage over agricultural odors, particularly surrounding large hog operations, has prompted a reexamination of state and federal air quality requirements. Early attempts to regulate livestock operations through air or odor regulations proved too difficult to implement. The newest regulatory structures place restrictions on where new operations can be located and establish guidelines for odor reduction in animal waste disposal.

USDA/EPA Strategy for Animal Feeding Operations

In late 1998, as a part of the Clinton Administration's Clean Water Action Plan, the USDA and the EPA announced a draft plan to "improve America's water quality and reduce public health risks associated with animal feeding operations." The strategy established a national expectation that all animal feeding operations would develop and implement comprehensive nutrient management plans (CNMPs)

by the year 2008. The plans would address manure handling and storage, application of manure to the land, record keeping, feed management, integration with other conservation measures, and manure utilization options.

With all its complexity, the strategy merely "encouraged" 95% of the existing 450,000 animal feeding operations to implement voluntary CNMPs. Only the largest of the large 5% would be required to have plans in place. With the adoption of the strategy, USDA and EPA also indicated their intentions to increase enforcement with regard to NPDES permit violations.

The final regulations concerning the USDA/EPA Unified National Strategy for Animal Feeding Operations were released on March 9, 1999. Accompanying the plan, EPA released an *EPA Draft Guidance Manual and Example NPDES Permit for Concentrated Animal Feeding Operations* and the USDA released the *Draft Comprehensive Nutrient Management Plan (CNMP).* The CNMP document will be the structure around which regulatory and voluntary programs for controlling waste at animal feeding operations will be structured. Among the actions that are contained in the Unified Strategy, Draft Guidance and Effluent Limitation Guidelines are:

1. All AFOs must establish CNMPs.
2. Changes in the definition of a CAFO to provide more consistency nationwide.
3 Elimination of the 24-hour, 25-year storm event exemption from requirements for obtaining an NPDES permit.
4. Establishment of a plan for regular inspection of CAFOs.
5. Establishment of manure land application regulations.
6. Requirement of individual permits for large, new and expanding CAFOs.
7. Analysis of the current management practices for storage and handling of manure.

State Activities Challenging CAFO Growth

This document could not possibly contain a full reporting of the activities among the various states over the past decade in attempting to control or curtail CAFO growth. What follows is a briefing of some states' activities:

In the South:

North Carolina

- 1997. The North Carolina state legislature adopted a bill that included a two-year moratorium on construction of operations of more than 200 swine. Counties were given the authority to zone and regulate hog facilities of certain sizes and setback distances between homes, property lines and operations were established. The bill also specifically dictated the requirements for development of measures to address odor control within the state.
- 1999. Hurricane Floyd spurred a 2 million gallon hog waste spill when a lagoon ruptured, causing waste to flow into a tributary of the Northeast Cape Fear River; huge hog waste spills had come previously in the state, spurring the late-1997 legislative activity.
- 2000. A study finding that industrial hog farms affect the health and quality of life of people living near them.
- Environmental Management Commission taking first steps in 2000 to phase out hog lagoons in North Carolina by beginning rule-making process that would require farmers to switch to other waste disposal methods.
- July 2000. An agreement between Attorney General and Smithfield Foods, Inc. which would set the stage for phasing out open-air hog lagoons and sprayfields in North Carolina.

Alabama

- Thirty demonstrators march on the office of the Alabama Department of Environment Management in August 2000 to urge stronger regulations against animal operations

Kentucky

- In February 2000, the Kentucky Natural Resources and Environmental Protection Agency, Division of Water, issued emergency regulations concerning CAFOs. These were issued in response to a finding that a state of emergency exists. They instruct the Natural Resources and Environmental Protection cabinet to promulgate administrative regulations to issue, continue in effect, remove, modify, suspend or deny permits for water discharges. A public health emergency was found to exist due to changes in the pork poultry, beef, and dairy industries. The new regulations require that all persons who own or operate a CAFO must sign an application for and obtain a KPDES permit, including anyone who owns the animals; directs the manner in which the animals will be housed or fed; or controls the inputs or other material aspects of the operation. All owners and operators are jointly and severally liable for compliance under a KPADES permit. This development is called joint or co-permitting, a development for which U.S. EPA has indicated support. Kentucky is the first state to take steps to enforce joint liability.

Mississippi

- 2000. Mississippi environmentalists and farmers pushing $75 million lawsuit against hog producers for allegedly releasing pollutants making 160 families living near hog farms, processing plants, and meat packers sick .
- 1999. Senate Bill created two-year moratorium on hog operation permits and established local control for hog operation siting.

Oklahoma

- 1998. moratorium on hog permits.
- 1998. Hog bill signed increasing setbacks, requiring odor abatement plans, increasing fines for violations and fees for regulation, requiring training and certification on waste management and odor, and delineating that impacts to property values constitute grounds to object to permits.

- 1998. Oklahoma poultry bill required environmental training, waste management plans, registration of all operations, and training money from integrators.
- 2000. Oklahoma contract grower bill would "level the playing field" between small agricultural producers and huge corporate farming giants, but the bill did not pass out of committee.

South Carolina

- 1996. South Carolina adopted new laws regarding confined swine feeding operations; some specifically address the issues of undesirable levels of odor emitted from such operations. Setback distances were established and land application restrictions adopted.

Outside the South:

Missouri

- Twenty Premium Standard Farm (PSF) lagoon spills in 1998 alone; by Spring 2000, the EPA had taken action to join a lawsuit filed in 1997 by PSF neighbors over repeated violations of the Clean Water and Clean Air Acts.
- The St. Joseph City Council formally advised Seaboard Farms, Inc. in 2000 that its business is not welcome in the municipality or within a 100-mile radius of the city.
- Missouri townships passed health-related zoning ordinances in attempts to control CAFO growth in the state.

Maryland

- Maryland regulators took steps in August 2000 to force large poultry companies to take responsibility for the chicken manure their animals produce, shifting the burden away from small contract growers.

Iowa

- 450,000 gallons of slurry escaped from an earthen basin at a 3200 head northern Iowa hog facility in 1998.

- Iowa Attorney General Miller filed suit to block Smithfield Foods, Inc., from acquiring Murphy Farms, Inc., alleged the acquisition would violate Iowa's anti-corporate farming statute.

Colorado

- Two referendums on livestock waste in 1998. The two initiatives were placed on the ballot by two different petition drives.

Utah

- Illnesses within communities in close proximity to large hog operations were seven times higher than the state average (2000).

Illinois

- Reduction in property taxes for surrounding neighbors acknowledging loss in property value.

Nationwide Studies

The National Policy Education Committee, supported by the Farm Foundation, several state Extension offices and the USDA-CSREES, undertook a survey in order to fully and exhaustively compile data concerning animal confinement policies in the states. Briefly, results of the survey first reported in summer 1999 indicated:

- 38 states reported CAFOs as controversial; 39 states indicated increased incidences of conflict and media attention surrounding CAFOs; 22 states reported increases in proposed legislation concerning CAFOs; 19 indicated court actions were pending over CAFO issues; and 16 indicated new local ordinances had been passed concerning CAFOs.
- In 36 states, state-level agencies must approve CAFO sites; 22 require local agency approval.
    - 29 states have separation/set-back requirements.

- 36 states require manure management plans, but only 16 states impose odor standards.
- 9 states prohibit corporations from farmland ownership or ownership of animals in confinement; 3 states impose packer ownership restriction; 2 states require packers to public report contract livestock prices; and 10 states have restrictions on business arrangements for CAFOs.
- 50 states have nuisance suit protection for some or all CAFOs; 10 states have enacted state or local moratoria against CAFOs; 10 states have authorized local option referendums or have preemptions on local regulatory authority of CAFOs; and 14 states provide or require mediation processes in conflicts between CAFOs and others.

These examples are indicative of the growing activities within many states to curb, halt, or control the development of rural areas into CAFO factories. Within the Southern Region SARE states, the most sustained activity to control growth and properly analyze the effects of CAFOs has been in Oklahoma, North Carolina, and Kentucky.

An Example of What Can Happen:
The Oklahoma Regulatory Thicket

In 1991 and again in 1993 Oklahoma's anti-corporate farming laws and right-to-farm statutes were altered, setting the stage for a huge influx of corporate hog operations. These changes allowed certain types of previously prohibited activities and gave absolute nuisance protection to certain activities. The number of hogs in Oklahoma then grew within a few years from 200,000 head to 1.6 million with another 1.6 million in applications pending.

Oklahoma had and still has a voluntary permit process. The EPA was relatively inactive in the state even though there was a NPDES General Permit in place for Oklahoma and 3 other states in region 6. Oklahoma had relatively few siting requirements and no requirements for monitoring wells.

In 1996 new regulations were adopted but applications for permits kept coming. In 1997, new regulations were adopted by the Oklahoma Department of Agriculture and the Oklahoma governor seated a task force that later issued strong recommendations concerning the growth of CAFOs and the state's responsibilities.

By 1998 Oklahoma had a new hog law and a new poultry law. Interestingly, Oklahoma politics during that period reflected a Democrat-controlled House of Representatives and Senate, but a Republican governor. The governor was from Tulsa, whose water supply was threatened by the highly-polluted Lake Eucha – pollution having been caused by the ever-growing number of CAFOs.

Lake Eucha was at the center of much of the controversy in Oklahoma which led to hog and poultry regulation. Lake Eucha's watershed is approximately 230,000 acres – 60% in Delaware County in northeast Oklahoma and 40% in Benton County, Arkansas, where 67% of the poultry houses in the area are located. Eucha provides 50% of the drinking water for Tulsa – a city of 500,000.

The lake has high phosphorous and nitrogen levels. Within the watershed can be found 714 chicken houses, 57 hog houses, 5 turkey houses and numerous cattle operations. Approximately 825,000 lbs of nitrogen and 2,585,000 lbs. of phosphorous were produced by confined animals in the watershed in 1996. Thirteen million chickens per year are raised in the Eucha watershed equaling the waste output of 1.3 million humans in nitrogen and 3.8 million humans in phosphorous, for a total of the equivalent of 150,000 total tons of human waste per year.

Active community organizations helped set the agenda for increased regulatory requirements on CAFOs. The City of Tulsa became and remains very active in the situation, as is the community group SORD (Safe Oklahoma Resource Development) from the western part of the state.

Local Control of CAFOs

While many local communities have been actively seeking means to control the growth of CAFOs in their areas, the statutory deck has been stacked against them. Most states have laws in place, some very dated, that restrict the ability of local governments to regulate agriculture.

In 1946 Iowa passed such a law, preventing counties from zoning land or buildings used for agriculture. When recently asked to reexamine this law, the Iowa Supreme Court in Kuehl v. Cass County,[44] held that all agriculture is exempt from county zoning and that areas of swine production, regardless of size or the absence of crops on site, is primarily an agricultural function and cannot be zoned by county governments.

Prior to the decision in the Kuehl case, Humboldt County, Iowa, had adopted four ordinances governing large livestock confinement feeding facilities. The ordinances covered permits for the operation, financial assurance that the operation would leave a clean site should it close operation, groundwater protection, and toxic air emissions. All ordinances were upheld on review by the courts except the one regarding air pollution. On appeal, the state supreme court struck down all the ordinances and held that counties cannot regulate in this area, ruling that the state legislature had preempted the county's authority to enact these ordinances.

Kansas had on the books for many years an anti-corporate farming law. In the mid-1990s, the Kansas legislature gave county citizens the right to determine their own fate with regard to the influx of corporate farming enterprises. Counties could, by vote of the people, determine whether the state ban on corporate farming could be lifted for their particular county. At one point in the mid-1990s, approximately two dozen Kansas counties had lifted the ban by local vote on corporate farming enterprises. Some counties had, however, changed their minds and were headed back toward corporate farming restrictions.

There is a virtual patchwork quilt of positions in the various states on the ability of local governments to regulate agricultural operations. Virginia gives broad discretion to counties, allowing them to write their own swine regulations. Colorado counties have been imposing their own regulations with regard to large operations, while county citizens in Indiana also have authority to zone agriculture. Minnesota counties have agricultural zoning authority, and some townships have exercised that control. At the same time, many more counties lack any meaningful ability to regulate agricultural operations locally.

Rural Conflict Over CAFOs

Perhaps the most difficult phenomenon that has accompanied the rise of CAFOs in rural areas is the increased conflict within rural communities. There are many parties involved. On the one hand are economic developers who have been fighting an uphill battle for many years to stimulate growth in rural areas. On the other hand are long-time rural residents who are not enthralled with the health, environmental, social, and economic impacts CAFOs bring to the community. At ground zero in the conflict are the closest neighbors to such facilities who must live with the day-to-day problems associated with proximity to large and ever-growing units of animal production.

Each of these interest groups bring important arguments to the table. Not all will win in the traditional win-lose scenario of litigation and politics.

Resolving Disputes Outside Litigation

Alternative Dispute Resolution (ADR) is a means by which conflicts between individuals or groups of individuals are resolved outside litigation. Conflict has been defined as:

> A battle, contest of opposing forces, discord, antagonism existing between primitive desires and instincts and moral, religious, or ethical ideals.

Conflict, according to the USDA, occurs when "…two or more people oppose one another because their needs, wants, goals or, values are different. Conflict is almost always accompanied by feelings of anger, frustration, hurt, anxiety, or fear." The USDA also takes the view that "…While the definition of conflict and our feelings about conflict tend to be negative, conflict itself does not need to be negative! Our ability to manage conflict can influence the outcome of a conflict, how we feel about the way the conflict was handled, and how we feel about the people who were involved in the conflict."

ADR techniques are a part of a larger arena of conflict management – resolution of conflict in a sensible, fair, and efficient manner. The cornerstones of conflict management and alternative dispute resolution are communication, problem solving, and negotiation.

ADR usually involves a neutral third party whose role is to facilitate discussion, check the merits or values of the parties' claims, move the parties in creative ways toward resolving the problems that exist between them, and commit those outcomes to agreements which can be adopted and hopefully implemented by the parties.

Interests vs. Positions

One of the most important principles of alternative dispute resolution is the idea that parties who come together to air and hopefully, resolve, disputes should approach the experience with a focus on their interests as opposed to their position. When coming from interests, the participants can focus on the outcome they anticipate or contemplate from the conflict. In contrast, when coming from a position, participants focus on who was to blame, who was at fault, and who has liability for what happened in the past and then it follows, who will win in the conflict. Interest-based negotiation is the idea of working with rather than against one another in resolving issues and discussing problems.

Types of ADR Processes

Mediation and arbitration are the most familiar ADR processes, dating back to the early 1900s in usage. Both involve negotiating – a process by which two or more individuals discuss an issue, including differences over an issue, and attempt to reach a resolution.

Arbitration involves a third-party decision maker, selected by the parties, who conducts an abbreviated process of information exchange, presides over a mini-hearing and renders a decision which may be binding or non-binding.

Mediation is interest-based ADR in which a third party neutral (mediator) meets with two or more parties who have a conflict, facilitates discussions, and assists the parties in reaching a mutual resolution of their differences. No decision-making authority rests in the mediator; resolution of the problems rest with the parties.

Neutral Evaluation involves a neutral fact finder who considers the relative merits of the parties' cases. Parties generally provide the highlights of their respective positions in an informal presentation to the neutral, with the neutral submitting a nonbonding objective evaluation of the case to the parties.

Ombudsmen are highly-placed individuals in an organization who provide confidential and informal assistance to employees and others in resolving work-related conflicts and concerns. This individual is not part of line management, but is independent, highly regarded, and trusted within the organization.

Peer Review is an ADR process in which, for example, a workplace dispute is presented to a panel of employees for a binding or non-binding decision. Panel members are skilled in handling sensitive issues.

ADR methods are used as an alternative to litigation for a variety of reasons. With ADR, resolution of problems can be more timely, more efficient and most cost effective. ADR tends to mend and improve relationships while litigation focuses on

positions. Generally, the parties are more committed to good outcomes and the parties don't forfeit their legal rights to file a formal complaint or grievance.

ADR is appropriate under a number of circumstances: when the parties' relationship must continue; where there are communication difficulties; when a third party neutral might change the dynamics (powers) of the parties; if one or both parties are willing to resolve differences; if confidentiality is important; if the parties want to retain control over the outcome; and if time – use and efficiency – is important.

Use of ADR methods occur within a variety of contexts both in the state and federal as well as international court system and in:

-Health care determinations
-Family court matters (divorce, child custody)
-Most civil matters (not criminal cases)
-Business disputes
-Military cases
-Commercial disputes relating to federal contracts
-Adverse determinations in the workplace.

ADR within USDA

While the principles of alternative dispute resolution have been gaining more widespread acceptance and usage throughout the U.S., the use of dispute resolution methods has had a parallel acceptance within the agricultural community since the mid-1980s. The Agricultural Credit Act of 1987 first embodied the concept that dispute resolution, particularly in the arena of financial disputes, could be critical to the survival of farmers struggling to make ends meet. The first agricultural credit mediation program to be accredited or certified by the USDA was in a Southern Region SARE state, Oklahoma.

Section 502 of the Agricultural Credit Act of 1987[45] authorized the USDA to help states develop certified state agricultural mediation programs. The USDA

agencies were required under that act to participate in those programs should the farmer/debtor request mediation.

Under the Act, the Farm Service Agency (FSA) is given the authority to administer state mediation programs. The goal of state agriculture mediation programs is to assist farmers, their creditors, and any others affected by the actions of the USDA, to resolve disputes. The goal is ultimately to reduce the numbers of farmers who are required to go through costly administrative appeals on financial issues or litigation of contentious matters that could likewise be costly and lengthy, and ultimately to avoid bankruptcy or the financial failure of those farmers. Funding for agricultural mediation programs in the states began with the Agricultural Credit Act of 1987 and has been extended continually through FY 2000.

In 1994, Section 282 of the 1994 USDA Reorganization Act expanded the agricultural mediation program to include authority to resolve disputes regarding wetland determinations, conservation compliance, agricultural credit, rural water loan programs, grazing on national forest system lands, pesticides, and other issues the Secretary of Agriculture deems appropriate. The act further required that administrative appeals participants be offered mediation as an alternative. Agriculture mediation states may now hear FSA credit issues, commercial bank and finance company issues, forest service issues, rural housing issues, environmental and water issues, EEO issues and other issues.

FSA has the authority to certify a state's agricultural mediation program and to provide matching funds for up to 70% of the operating and administrative costs of the program. Matching funds usually come from state legislature appropriations. In all, the use of agriculture mediation is approved in 25 states and over 3000 cases per year are mediated. States participating in the FY 2000 agricultural mediation funding program were: Alabama, Arizona, Arkansas, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming.

Interestingly, only 4 of the 13 southern SARE states participate in the agricultural mediation program: Alabama, Arkansas, Florida, and Oklahoma. (For addresses of these states' mediation programs see p. 55)

Mediation of Agricultural Disputes

In 1990, Iowa became the first state to require mediation to resolve disputes involving agriculture. The Iowa law requires a party to obtain a mediation release before initiating a nuisance claim against an entity that is covered by the statutes. Other states have been slow to follow Iowa's lead, even though the federal statutory authority has existed since 1994 to warrant expansion of agricultural mediation programs into other rural disputes.

Among the southern states utilizing mediation for agricultural-related disputes, Oklahoma became the first state in 2000 to broaden its existing mediation program into a wider range of agricultural and rural-related disputes, paving the way for community mediation programs to expand in the state[46].

Community Mediation

While the use of ADR methods has been in existence in a variety of contexts for almost a century, the next generation for ADR has come in the form of community mediation programs. The types of cases processed by community mediation programs includes:

-School-based dispute resolution
-Intergroup (gang) dispute resolution
-Public policy disputes
-Victim/offender mediation efforts.

Community mediation of public policy disputes is used in order to facilitate resolution of problems among diverse organizations interested in the same issues, such as governmental agencies, community organizations, advocacy groups,

business groups, school boards, governmental commissions and others. Conflicts between governmental officials, homebuilders, landowners, development organizations, and environmental groups, for example, have been resolved using community mediation.

The National Association for Community Mediation has as its focus to address the needs of community mediation centers, their staff and volunteer mediators, and as well as individuals and organizations that may be interested in community mediation. According to NAFCM, the basic thrust of any community mediation effort in the area of public policy is:

> -Reconciliation with one another in order to create a future that is more equitable and just for the community.
> -Resolution of conflicts so that justice is served and differences between the participants are honored.
> -Development of leadership among diverse groups within the community and development of future peacemakers in the community.

There are already a number of community mediation programs throughout the nation, and a notable number have arisen in the Southern Region SARE states. There are community mediation programs in Alabama (3), Arkansas (1), Florida (5), North Carolina (22), Georgia (2), Kentucky (3), Louisiana (3), Oklahoma (3), South Carolina (3), Tennessee (6), Texas (10), and Virginia (11).

An example of effective use of community mediation principles are the efforts of those in Catron County, New Mexico, where ranchers, environmentalists, the timber industry, and the forest services were at odds over how to manage forest land. The efforts of community participants and talented community facilitators in discussion of the public policy/environmental issues facing the community of Catron County over use of forest lands, led to many breakthroughs within the community: a diffusion of tension, resolution of problems, and overcoming the difficult task of getting people to communicate with one another in order to resolve their community problems. The problems facing Catron County involved complex legal, economic,

societal, and environmental issues – much like the issues facing rural communities in the CAFO debates.

Use of ADR and community mediation should be explored as a means of resolving community disputes over the CAFOs they find in their midst. As an additional means of addressing community conflict over CAFOs, the community must begin taking steps to ensure that neighborliness is foremost in the minds of CAFO company officials.

Can We Create Good Neighbors?

The Good Neighbor Project (GNP) is an interesting option for analysis and application to the CAFO issue. Proposed and encouraged by Sanford Lewis, Esq., the GNP works toward establishment of Good Neighbor Agreements between local communities and the corporations that reside within those communities. The agreements provide a pro-active or preventive framework for addressing local environmental and economic concerns. In working through and establishing a Good Neighbor Agreement, the parties become involved in interest clarification, technical education, and cooperative collaboration. Several industries and communities are beginning to utilize Good Neighbor Agreements; most agreements at this time are being forged with refineries and mills.

According to Lewis:

> Because there is little real corporate accountability for decisions that affect local communities, citizens groups throughout the U.S. have organized to combat some of the detrimental effects of exploitative industrial practices. The demands of these groups vary from place to place; in some instances, the emphasis is on environmental concerns, while in others it is on jobs and economy related concerns. In a few communities, both types of concerns have emerged, in tandem.

Lewis' opinion is that traditional regulatory responses to pollution and hazardous waste are generally inefficient, in some cases, do not even address the

environmental and health hazards facing the communities in which the corporations exist. Lewis suggests that many communities have stopped relying on top-down government control to address their concerns and needs, and are learning how to address the issues facing their communities themselves. While recognizing the importance of "legal" approaches to community empowerment (zoning, nuisance suits, citizen enforcement of environmental laws through citizen suits), Lewis also recognizes the importance of "nonlegal" approaches; i.e., information dissemination and boycotts.

Good Neighbor Agreements - contractual relationships between communities and corporations - may do more to foster sustainable development than any governmental efforts to do so. Incorporated into a Good Neighbor Agreement may be stakeholder audits whereby neighbors and workers engage in direct, on-site evaluation of local facilities. Outcomes of the audits can include recommendations for changes that may be needed at the facility to ensure local sustainability. Also incorporated in some Good Neighbor Agreements are:

- public disclosure of company documents, including those relating to hazard assessment and risk analysis, accidents, and waste minimization and reduction plans
- rights to inspect facilities
- commitments to local hiring
- commitments to local economic needs
- regular review mechanisms
- safety training and accident prevention requirements
- emergency response methods
- monitoring programs
- waste minimization plans.

The visibility and access incorporated into stakeholder audits can counteract the trend in many states (fifteen at this point) to enact laws encouraging and allowing corporations who undertake environmental audits to keep the outcomes of

those audits secret from the public. As many as 22 states now have audit privilege and immunity laws in place.

EPA has recently stepped into the community agreement arena, having established a program of regulatory flexibility similar to the Good Neighbor Project known as Project XL and Project XLC (for communities). These programs engage local stakeholders in actions leading to a project agreement that may waive some environmental regulations with EPA in exchange for broad-based stakeholder involvement and hopefully a cleaner overall outcome. Some argue, however, that the EPA process may be more lengthy and ultimately less fruitful than citizen-led GNP projects.

Many might be skeptical whether large corporations would become involved in good neighbor agreements except as a public relations ploy. It should be noted that among the corporations that have good neighbor agreements in place are General Chemical, Unocal, Rhone-Poulenc, Intel and Alcoa Aluminum. Regardless of motive, good neighbor agreements can be powerful tools for communities in ensuring the neighborliness of the CAFOs within their community.

Rural Communities:
The Next Battleground or Leadership Proving Ground

John Ikerd, retired agricultural economist at the University of Missouri, Columbia, in his piece entitled: *Large-Scale, Corporate Hog Operations: Why Rural Communities are Concerned and What They Should Do,* cited some of the many reasons why rural communities tolerate the influx and growth of CAFOs within their realm: job creation, increasing the tax base, improvement to the local economy, competition among other desperate rural communities for scare economic opportunities, the inappropriate assumption that the larger facilities will utilize the most modern of pollution prevention programs, and the general feeling that they can't stand in the way of progress or that opposing the operations will align them

with those who are either environmental extremists or don't care about the issues, but don't want the operations in their own backyards.

According to Ikerd, sustainability decisions – i.e., land use decisions – will continue to be made within the context of the economic picture – both by the economics of the marketplace in general and the economics of the highest and best use of the land specifically. Ikerd contends that the three cornerstones of sustainability: ecological soundness, economic viability, and social justice must *all* be met with regard to our future land use decisions in order to truly achieve progress. He states:

> Rural America may well be the place where America makes a historic stand for sustainability – just as the cities of the South gave birth to the Civil Rights movement. The first rural community to declare and defend the fundamental moral and ethical right of its people to determine how land is used may be remembered much as Rosa Parks is remembered for refusing to move to the back of the bus in Montgomery.
>
> The most significant long-run social, economic, and cultural impacts of CAFOs on rural communities could well be the beginning of a new revolution – a revolution that ultimately will discard the outdated paradigm of short-run, self-interest economics for a new paradigm of sustainable economic, ecological, and social development.

In a study commissioned by the Wallace Institute for Sustainable Agriculture, entitled *Agricultural Industrialization in the American Countryside* (released 1998), the author, Professor Emery Castle of Oregon State University, urged rural communities to adopt a "monitor, manage, and modify where necessary" approach to new agricultural enterprises. He urged rural communities to conserve their total rural capital (comprised of manmade, natural, human, and social capital) in order to achieve economic, environmental, and social vibrancy in the future. He argues that rural communities should pull away from "extreme" positions – such as accepting industrialization without modification or the other extreme of banning all forms of industrialization – when dealing with the agricultural changes in rural areas, and move toward a logical, thoughtful, and realistic analysis of the needs of

the community, the strengths of the community, balanced against the real and perceived effects of industrialized farms.

Conclusion:
A New Paradigm

Is the continuing spiral of regulation the only way to control CAFO growth? Are litigation and regulation the only effective means to curb polluting activities? Will there be anything left of rural communities by the time regulatory agencies stop the polluting tendencies of the CAFO industry? Will the regulatory structure actually ever stop the pollution?

The agricultural and rural professional – county Extension personnel, agricultural banking officials, farmers and ranchers, as well as rural citizens – must be able to fully understand the complexity of issues (legal, social, and economic) which are part and parcel of the transforming CAFO industry and the regulatory environment within which it lives. Having said that, are there alternative means of addressing the community problems associate with CAFO growth?

Is the path toward dependence on the CAFO structure the sustainable one? Most would say no – that the growth of larger and larger CAFO enterprises at the expense of rural communities and smaller farming enterprises – is not sustainable for either the farming community or the rural community. Nevertheless, it seems to be the path we are on for the time being and it seems to be a path controlled by archaic and centuries-old legal principles (nuisance law), complex and bulky regulatory structures (federal/state pollution control agencies), with ineffective means for community voices to be heard.

Perhaps the cornerstone of the new paradigm of which Ikerd and others speak – sustainable solutions - is the implementation of a comprehensive alternative dispute resolution program within rural communities accompanied by implementation of a mechanism which will facilitate the creation and maintenance

of something like good neighbor agreements. Clearly, continuing to rely on bulky and slow, top-down regulatory structures to control an ever-expanding and creative CAFO industry may ultimately prove two things: one, that this form of control, which is separate and distant from the community itself, will ultimately not protect the community; and two, that the best interests of rural communities fighting to maintain their quality of life are served in a rebirth of their own power to control their destinies. While mediation and good neighbor agreements are not the only answers, they may be better answers than making legal experts out of everyone left in rural communities.

SOUTHERN REGION SARE STATES WITH AGRICULTURAL MEDIATION PROGRAMS INCLUDE:

Alabama: **Alabama Department of Agriculture & Industries**
P.O. Box 3336
Montgomery, AL 36109-0336
334-240-7245/334-240-7270
http://agri-ind.state.al.us/mediation.htm

Arkansas: **Farm/Creditor Mediation Program**
Arkansas Development Finance Authority
P.O. Box 8023
Little Rock, AR 72203
501-582-5895/501-682-5893

Florida: **Florida Agricultural Mediation Service**
University of Florida College of Law
P.O. Box 117620
Gainesville, FL 32611-7620
http://grove.ufl.edu/~mediate/

Oklahoma: **Oklahoma Agriculture Mediation Program**
Oklahoma State University, Wellness Center
2302 West 7th St.
Stillwater, OK 74074
800-248-5465/405-377-0033/405-377-1048
http://www.oamp.net

ENDNOTES

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[7] 288 So.2d 761 (Ala. 1974).
[8] 359 So.2d 404 (Ala. 1978).
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[12] 598 F. Supp. 323 (E.D. Ark. 1984).
[13] No. CA 90-515, 1991 Ark. App. Lexis 1 (Ark. Ct. App. 1991).
[14] Fla. Stat. Ann. Section 823.14 (West 1991).
[15] 438 So.2d 891 (Fla. D. Ct. App. 1983).
[16] 257 So. 2d 54 (Fla. D. Ct. App. 1972).
[17] 190 So. 2d 610 (Fla. D. Ct. App. 1966).
[18] 573 So. 2d 909 (Fla. App. 1990).
[19] Ga. Code Ann. Section 41-1-7-G.
[20] 281 S.E.2d 575 (Ga. 1981).
[21] Ky. Rev. Stat. Ann. Section 413.072 (Baldwin 1990).
[22] 169 S.W.2d 33 (Ky. 1943).
[23] 406 S.W.2d 413 (Ky. Ct. App. 1966).
[24] Ky. Rev. Stat. Ann. Section 411.500-570.
[25] KY OAG 97-31 (Aug. 21, 1997).
[26] La. Rev. Stat. Ann. Secs. 3601-3607 (West 1987).
[27] 116 So. 2d 91 (La. Ct. App. 1959).
[28] Miss. Code Ann. Section 95-3-29 (1990).
[29] N.C. Gen. Stat. Secs. 106-700 to 701 (1990).
[30] 303 S.E.2d 236 (N.C.Ct. App. 1983).
[31] 334 S.E.2d 489 (N.C.Ct. App. 1985).
[32] N.C.Gen. Stat. Secs. 106-800 – 805.
[33] Okla. Stat. Ann. Tit. 2, Sec. 9-110 and Okla. Stat. Ann. Tit. 50 Sec. 1.1 (2000).
[34] S.C. Code Ann. Secs. 46-45-10, -50 (Law Coop 1990).
[35] Tenn. Code Ann. Secs. 44-18-101 to 104 (1987); Tenn. Code Ann. Secs 43-26-101 to 104 (1990).
[36] Tex. Agric. Code Secs. 251.001-005 (Vernon 1982).
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[40] Okla. Const. XXII, Sec. 2.
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[42] 454 P. 2d 297 (Okl. 1969).
[43] 456 P. 2d 544 (Okl. 1969).
[44] 555 N.W. 2d 686 (Iowa 1996).
[45] P.L. 100-233.
[46] S.B. 1078.