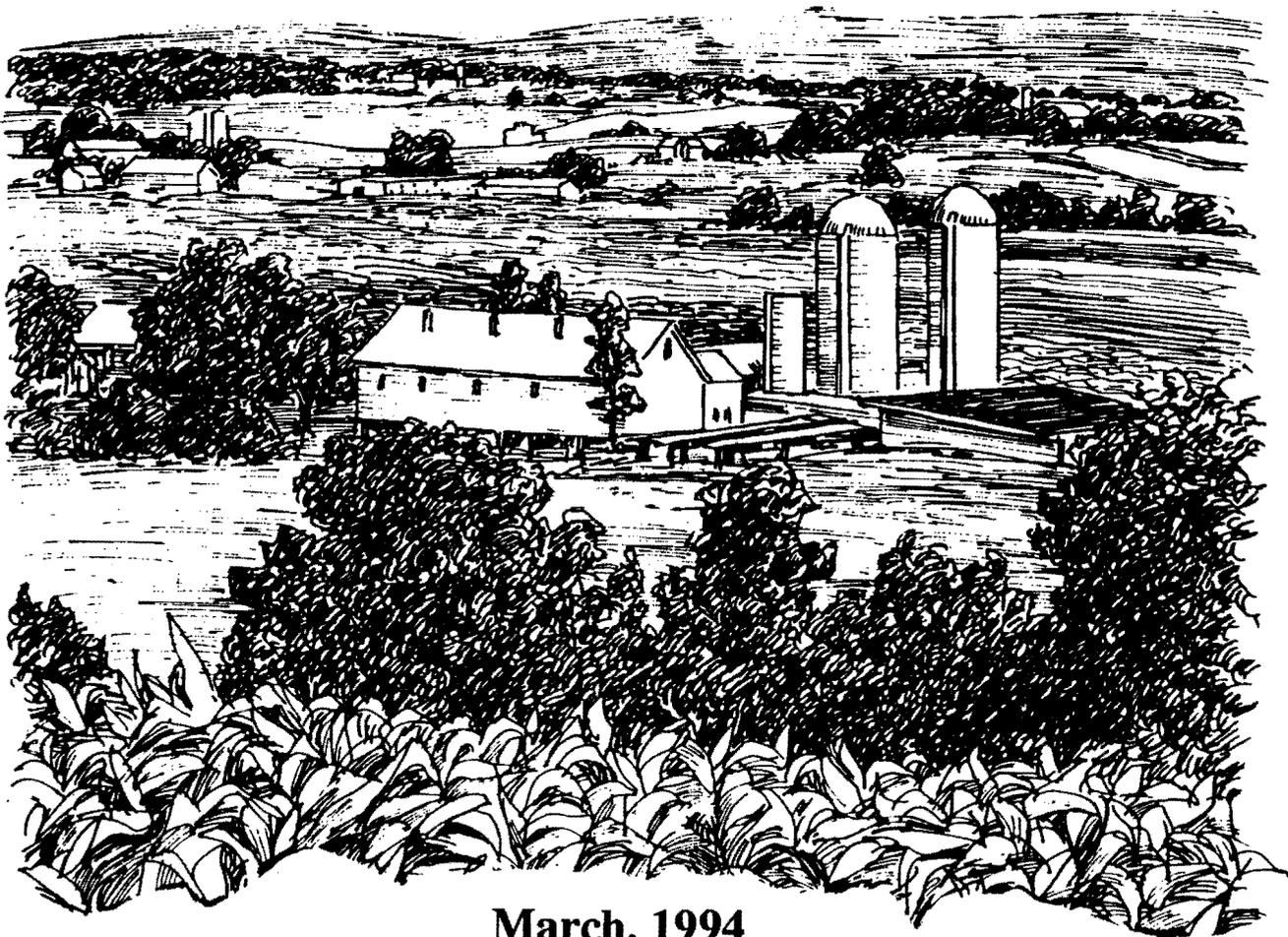


**A FARMER'S HANDBOOK
ON LIVESTOCK REGULATION
IN NEBRASKA**

**By
J. David Aiken
Annette M. Higby
Nancy L. Thompson**



March, 1994

The authors express their gratitude to Nebraska county zoning officials, Nebraska Department of Environmental Quality livestock program administrators, and natural resource district officials who supplied the authors with copies of their regulations and ordinances and who also reviewed the initial draft of this report. This report could not have been prepared without their cooperation. The authors have attempted to incorporate all review comments into the final report. Any remaining errors are the sole responsibility of the authors.

The authors also express appreciation to the Center for Rural Affairs and the Nebraska Pork Producers Association, whose financial support made possible the preparation of this Handbook as well as the research upon which the Handbook is based.

As state, county and Nebraska Resource District (NRD) regulations are subject to change, please obtain and review a copy of the relevant state, county and/or NRD regulations before making any decisions regarding feedlot location, operation and/or expansion.

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By
J. David Aiken
Water and Ag Law Specialist
University of Nebraska

Annette M. Higby
Attorney at Law

Nancy L. Thompson
Attorney at Law

For the Nebraska Pork Producers Association
and the Center for Rural Affairs.

March, 1994

INTRODUCTION

This Handbook is intended as a general guide to an increasingly complex legal environment for livestock producers and feeders. It covers state and local regulation of livestock facilities to achieve surface and groundwater protection, rural zoning restrictions on livestock facilities, developments in Nebraska nuisance law and restrictions on corporate feeding under Nebraska's Initiative 300.

The Handbook is intended to educate farmers about their rights and responsibilities under the law. However, for all its complexity, Nebraska's livestock regulation system has left several gaps both in environmental protection and in our understanding of the environmental impacts of an industry of such vital importance to our state's economy. These gaps may lead to an identification of policies that will require further discussion and action.

The Nebraska Department of Environmental Quality (NDEQ), the agency charged with protecting these water resources, is understaffed and underfunded. NDEQ will require increased support to carry out its responsibilities under the Nebraska Environmental Protection Act. The state should also play a role in identifying low cost strategies for producers of all sizes to control manure runoff and to protect the vital resources upon which our economic future depends.

This Handbook is also written for farmers as both producers and as potential neighbors to large scale animal feeding operations. It did not escape our notice that the majority of Nebraska's modern nuisance cases have been brought by farmers. Indeed, most of the complaints about livestock facilities we receive come from farmers themselves and the leading nuisance case in Nebraska was brought by a livestock producer faced with a nearly 4000 head feedlot and four waste lagoons located directly across the road from his home.

A number of community conflicts over large scale confinement feeding facilities have arisen across the state and we expect them to continue whenever and wherever a new facility is proposed. We also expect this Handbook to be used by both proponents and opponents of these new facilities. The public debate over the appropriate level of regulation will continue on the local, state and federal level and this Handbook will hopefully perform a useful role in that debate.

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Chapter 1

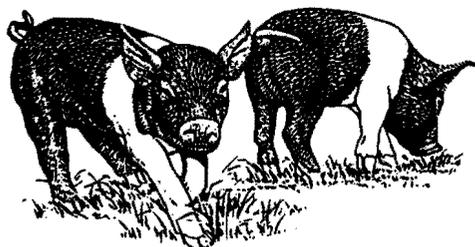
LIVESTOCK AND WATER QUALITY REGULATION

I. INTRODUCTION

Water pollution from livestock waste is governed by a complex set of federal and state regulatory systems. Despite its complexity, this system has left several gaps both in environmental protection and in our understanding of the environmental impacts of an industry of vital importance to our state's economy.

The Nebraska Department of Environmental Quality (NDEQ) relies on voluntary compliance with feedlot pollution control requirements, and works closely with livestock industry groups to achieve a high level of voluntary compliance. Yet, many river basins in Nebraska have fecal coliform bacteria readings high enough to preclude swimming or other recreation that involves contact with the water. While many of these bacteria may originate from animal waste, it is unknown whether the source is runoff from confined livestock operations, grazing near waterways, or animals on pasture. It is also not known whether Nebraska's feedlots are a source of nitrate contamination of groundwater in Nebraska. Neither the state nor federal regulatory system provides for monitoring of wells or other activities to determine if this is a danger. NDEQ acknowledges, however, the possibility that construction of additional livestock pollution control structures might be needed and they have determined that in 1990 eight of the fifteen man-induced fish kills in Nebraska streams were a result of livestock waste runoff.(1)

Nebraska's regulatory system has left other information gaps. NDEQ estimates there are 7400 cattle feedlots and 12,500 swine operations in the state, not necessarily exclusive of each other. The 1992 state water quality report notes that NDEQ "is not aware of all new operations in this state since there is no registration requirement for feedlots. The operations we are aware of include those that were inspected at the operator's request, or through a complaint investigation."(2) Yet NDEQ has ample legal authority to require all feedlot operators, existing and new, to notify NDEQ of their existence or intent to develop or expand a feedlot under Nebraska law. NDEQ regulations require all feedlot operators, regardless of their size, to request an inspection to determine whether pollution control structures or permits are necessary - which is essentially the same thing as a registration requirement. This "requirement", however, is rarely enforced.



II. STATE REGULATION OF LIVESTOCK FACILITIES

States are required by the federal Clean Water Act (CWA) to regulate livestock wastes to prevent surface water pollution. The Clean Water Act establishes minimum surface water quality protection standards. If state standards do not meet this minimum, the federal Environmental Protection Agency will step in to administer and enforce them. Nebraska's water quality regulations do not fit the federal regulatory structure in all respects and despite their voluntary nature were approved by the EPA in the early 1970s. Many believe that if Nebraska had to submit its system for federal approval today, it would not pass muster.

A. Legislative Authority

The Nebraska Department of Environmental Quality (NDEQ) administers livestock pollution control requirements under the Nebraska Environmental Protection Act (NEPA)(3) and the federal Clean Water Act. Under NEPA, NDEQ must "develop comprehensive programs for the prevention, control, and abatement of new or existing pollution of the air, waters and land of the state".(4)

In general, NDEQ requires that confined livestock operations meet NDEQ construction and operating requirements, including a minimum 120 days waste storage capacity, plus rainfall. NDEQ staff indicate this may be increased in the future to 180 days storage capacity plus rainfall. Open lot livestock operations must also obtain a National Pollutant Discharge Elimination System (NPDES) permit if feedlot wastes would drain into a stream or other waters of the state.

The current NDEQ feedlot regulatory program does not address the odor aspect of livestock production although state environmental statutes are broad enough to authorize NDEQ to consider odors in feedlot regulations.

The Nebraska Environmental Protection Act establishes specific considerations for livestock waste control regulations. In adopting livestock waste control regulations NDEQ must consider:

- a. the discharge of livestock wastes into the waters of the state or onto land not owned by the livestock operator.
- b. conditions under which permits for such operations may be issued, including design, location and proper management of such facilities.
- c. the protection of ground water from livestock operations, and
- d. the revocation, modification, or suspension of such permits for cause.(5)

B. NDEQ Regulations

NDEQ regulations require all "livestock operators" - regardless of their size - to request an NDEQ inspection. Any operation which feeds or holds livestock in buildings, lots or pens on ground not used for crop production or other vegetation is considered a livestock operation.(6)

Most farmers are probably not aware of this requirement. NDEQ made an effort to inspect all livestock operations in the early 1970s when the state feedlot regulation program began, but now only initiates inspections for new or expanded feedlots. For the most part, NDEQ operates on a complaint basis. If complaints are brought by neighbors or others affected by the operation, NDEQ will take action. By law, NDEQ must seek voluntary compliance prior to taking more formal enforcement action.(7)

If requested, the NDEQ inspection will determine whether a construction permit, an operating permit, or waste control facilities are necessary. Generally, permits and control structures will be required for livestock operations where the uncontrolled runoff of livestock waste(8) threatens "to discharge into waters of the state."(9) "Waters of the state" is defined quite broadly and includes all "streams, lakes, ponds, impounding reservoirs, marshes, wetlands, water-courses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface or underground, natural or artificial, public or private, situated wholly or partly within or bordering upon the State."(10)

Legislation adopted in 1993 requires NDEQ to establish financial responsibility requirements for entities required to have NDEQ permits. NRS §81-1505(21). NDEQ has proposed new requirements that livestock operators be required to post a bond or otherwise provide responsibility to clean up the livestock facilities if the facilities are abandoned. The proposed financial responsibility requirements would apply to livestock facilities with capacities of 1000 animal unit capacities or greater (1,000 steers or 2,500 feeder pigs minimum). NDEQ has a task force that includes livestock industry representatives and others to develop the final livestock facility financial responsibility regulations. Preliminary indications suggest that the amount of money that would need to be posted may be approximately the cost of the facility's lagoon.

C. Construction Permits

If livestock waste control facilities are needed, the state regulations require that a construction permit be obtained, but NDEQ generally only requires permits for "housed livestock operations". The construction permit will impose certain requirements with respect to design, storage capacity, manure disposal, and location of the facility. It will also require that the facility be designed by the U.S. Soil Conservation Service or by a registered professional engineer, according to NDEQ specifications.(11)

The NDEQ livestock waste control facility design criteria differentiate between "open lots"(12) and "semi- or totally housed livestock operations."(13) Livestock wastes from an open lot may be controlled through a single retention structure, such as an impoundment or an embankment to collect and store all runoff for subsequent removal.(14) Runoff may also be controlled through a combination of debris basins(15) and holding ponds,(16) or any other waste control system approved by NDEQ.(17)

Additional waste control measures for open lots, including some low cost options, are identified in the NDEQ "Guidelines for Livestock Waste Management in Nebraska" (1977). They include: single retention structures, diversions, grassed waterways and buffer strips, field sinks, serpentine waterways, and oxidation ditches.(18) The Guidelines are a very useful reference, and were prepared in cooperation with the UNL Department of Agricultural Engineering (now the Department of Biological Systems Engineering), the USDA Agricultural Research Service, the Soil Conservation Service, and the Nebraska Livestock Feeders Association (now the Nebraska Cattlemen Association).

The design criteria for housed livestock operations are somewhat different. Livestock wastes from a housed operation must be controlled by one or more of the following: (a) a liquid manure storage pit(19) or tank, holding pond or a combination thereof to retain all livestock waste for at least 120 days(20), (b) a lagoon(21) for anaerobic, aerobic or biological waste treatment, or (c) other waste control systems approved by NDEQ.(22)

Both the open lot and housed livestock control structures must have sufficient storage capacity to contain all livestock wastes from the open lot or housed operation.(23) The structures must also have sufficient capacity to contain all rainfall runoff which can be expected from a 25 year, 24 hour rainfall event. A 25 year, 24 hour rain is the largest amount of rain which could be expected to fall during any 24 hour period within a 25 year time span. It varies considerably throughout the state ranging from 3.4 inches in the Panhandle to 5.85 inches in the southeast corner of the state.(24) In addition, with respect to open lots, surface drainage must be diverted around the livestock operation and the livestock waste control structures to the "maximum extent possible."(25)

In determining the storage volume necessary for the housed operation, the owner or operator must also consider manure disposal practices. Adequate storage must be provided to allow disposal at times compatible with crop management and available disposal equipment.(26)

For both open lots and housed operations the amount of land used for manure application and disposal must be based on the nutrient value of the livestock wastes and the soil and site characteristics of the disposal area.(27) The regulations do not require manure testing for nutrient content, and do not specify particular management practices for manure application.(28) However, the regulations at least imply that manure application should not exceed crop needs, taking soil

conditions into account.(29) The regulations also cover manure application through irrigation systems, primarily to prevent back-siphoning down the well and contamination of groundwater.(30)

Livestock waste control facilities may not be located: (a) within 100 feet of a domestic well, (b) within 1000 feet of a public water supply well (unless the applicant can show NDEQ that no pollution will result), (c) where the waste control facility will violate surface water quality standards;(31) or (d) where NDEQ determines that ground water may be contaminated.(32) The regulations do not establish a method for determining whether the waste control facility might pollute ground water except through NDEQ site inspection, if the operator requests the inspection.

D. Operating Permits

A livestock operator must obtain an operating permit prior to using the waste control structure.(33) An operating permit will be issued after it is shown that the livestock waste control structure has been completed according to NDEQ specifications.(34)

Operating permit conditions include following the management practices specified by NDEQ, known as "best management practices" or BMP's. The operator must also give NDEQ the right to enter the facilities for inspection and to notify NDEQ regarding any planned expansion of the livestock operation.(35)

The best management practices (BMPs) specified by NDEQ include a number of measures to prevent water pollution at or near the site and in the process of disposing of manure. Generally, they require operation and maintenance in a manner that prevents water pollution and they

require disposal under suitable weather and soil conditions to prevent a discharge of pollution into waters of the state.(36)

The operating permit will also require operators of housed facilities to maintain sufficient storage capacity for at least 120 days storage during the winter months. Operators of open feedlots must maintain sufficient storage capacity during winter months to accommodate snow melt and early spring rains. Operators must also insure that adequate equipment is available to empty and clean livestock waste control facilities and that an adequate disposal area is available when disposal is necessary. Livestock waste must be disposed of or stockpiled to prevent water pollution, with excess wastes removed periodically or mounded.(37)

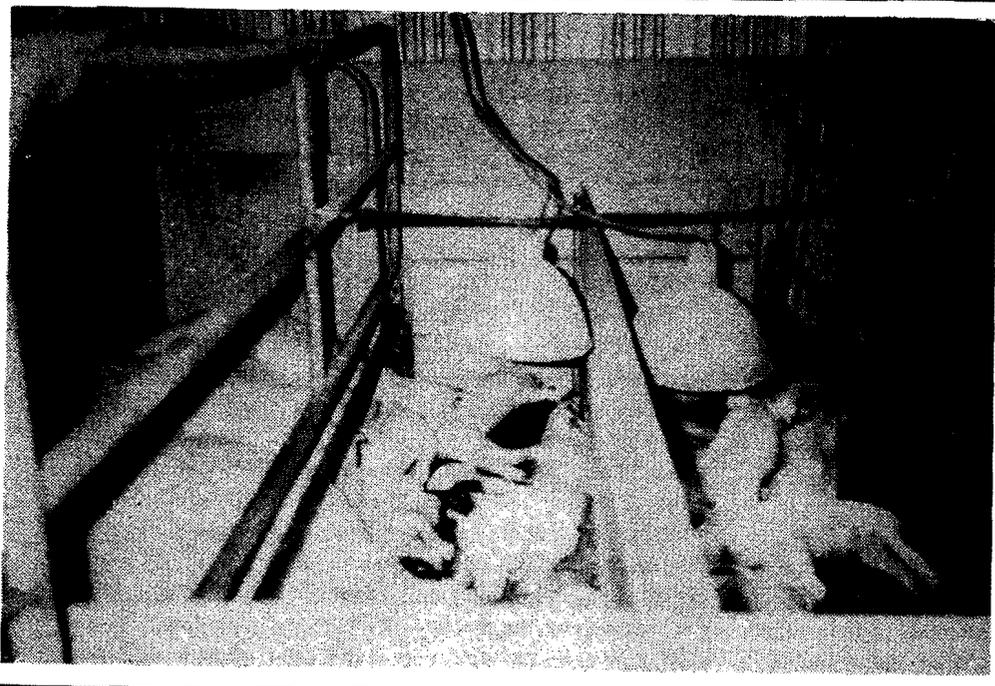
The regulations on management practices also require the livestock operator to use disposal areas under proper conservation treatment to prevent runoff; to apply wastes at proper nutrient loading and application rates, using suitable disposal methods and equipment; and to monitor irrigation equipment to ensure proper operation. Repairs on facilities and equipment must be to original design condition.(38)

E. Permit revocation, modification, suspension

Construction or operating permits may be revoked, modified or suspended if the operator allows a discharge of livestock wastes into waters of the state; violates the surface or ground water quality standards; engages in misrepresentation or nondisclosure in dealing with NDEQ; refuses to allow NDEQ personnel to enter the premises or to sample waste sources or surface or groundwater; fails to operate

and maintain the livestock waste control facility as specified on the approved facility plans and specifications and NDEQ best management practices; fails to maintain irrigation distribution equipment; or otherwise violates the livestock waste control rules or permit conditions.(39)

Continuing to operate the facility while not in compliance could subject the operator to civil enforcement proceedings (see Enforcement Section), although NDEQ must seek voluntary compliance prior to initiating more formal enforcement proceedings.



F. NPDES Permits

The NDEQ also issues NPDES permits under the federal Clean Water Act. NPDES stands for the National Pollutant Discharge Elimination System. The Clean Water Act requires an NPDES permit for any activity which may result in a direct discharge of pollutants into the waters of the United States.(40) Concentrated animal feeding operations (also called CAFOs) get special mention under the Clean Water Act regulations. Under federal rules, CAFOs are operations that have a certain number of animals (e.g. 300 slaughter cattle, 200 dairy cattle, 750 swine, 3000 sheep or lambs, 9000 laying hens or broilers) confined in one area for 45 days or more out of a 12 month period. The area cannot sustain crops, vegetation, forage growth, or post-harvest residues. Animals on pasture lands are not regulated.

Under Nebraska's rules, if the operation might directly or indirectly discharge livestock waste into waters of the United States, other than in the event of a 25 year, 24 hour rainfall, the operator must obtain an NPDES permit from NDEQ.(41) Nebraska has no size requirements for the operation. The permit will prohibit any discharge except in the event of extraordinary rainfall.(42) NDEQ generally requires NPDES permits for open lot livestock operations where wastes might drain into a stream. However, the agency also recommends NPDES permits for housed operations with NDEQ construction and operation permits so that if facility waste holding capacity is exceeded during an extraordinary rainfall period, the discharge will be allowed.

In Nebraska, virtually the same standards are used to determine whether an NPDES permit and an NDEQ construction and operating permit will be required, although there are some significant and curious differences. First, totally housed confinement units are typically not required to obtain an NPDES permit. And second, the NPDES permit program provides very limited authority to address groundwater contamination. Still, these differences don't appear to justify the possible necessity of obtaining three different permits. Some argue that the system should be overhauled to integrate state and federal requirements under a one permit system.

The determination of whether an NPDES permit is needed is made when the livestock operator requests an NDEQ inspection of the facilities.(43) There are 205 livestock operations that require NPDES permits in Nebraska.(44)

G. Enforcement.

NDEQ relies on voluntary compliance by operators. NDEQ, however, is authorized to inspect livestock waste control structures(45) and failure to comply with the NDEQ regulations could be grounds for civil enforcement penalties, including fines and injunctive relief (i.e. a court order to stop operating the waste control facility). Court actions would be

filed by the county attorney or the Attorney General.(46)

If livestock wastes do reach a stream and result in fish kill, the livestock owner will likely be required to pay a penalty (unless the operator has an NPDES permit) plus fish restocking fees. Violation of livestock waste control facility construction or operating permit requirements is a misdemeanor (up to 60 days imprisonment, \$100-\$500 penalty per day of violation, or both upon conviction). NRS §81-1508(a). Violation of NPDES permit requirements is also a misdemeanor but has stiffer penalties (up to six months imprisonment, up to \$5,000 fine per day of violation [depending upon the size of the operation and the extent of pollution], or both upon conviction). NRS §81-1508

During 1990-91, the majority of violations were corrected through voluntary compliance. Three administrative orders were issued by NDEQ for livestock operations. Four cases were referred to the Attorney General for litigation. Three of those cases, which involved waste discharges in violation of the federal NPDES permit requirements, were settled with civil penalties. One case involving a livestock facility discharge with no NPDES permit (and which would not have been authorized even with an NPDES permit) is still pending.(47)

NDEQ believes the vast majority of permitted livestock operations are in compliance with the permit conditions, although facility inspections revealed that maintenance upkeep was required at some operations. Not all facilities are inspected annually. Some major facilities are inspected biannually and others every two to four years. The size of the operation and the potential for discharge into waters of the state are considered when determining the frequency of inspections.(48)

III. FEDERAL REGULATION OF LIVESTOCK FACILITIES

Since the federal Clean Water Act establishes the minimum water quality protection standards by which states must abide, any changes in the federal NPDES permit requirements bear watching. If those standards become more stringent, Nebraska might be required to follow suit and revise its current system for regulating pollution from livestock waste.

On February 8, 1993, the Environmental Protection Agency (EPA) adopted new regulations governing concentrated animal feeding operations (CAFOs) and NPDES permits that are stricter than the current regulations. These new regulations are only effective in EPA Region 6 (Louisiana, Texas, Oklahoma and New Mexico)(49) where authority for the NPDES permit program had not been assumed by the states. But they are significant to all states since they may signal EPA's intent to make the federal NPDES requirements for livestock feeding operations more stringent. EPA has prepared an internal report regarding problems with the current NPDES program with respect to livestock, and has

established a working group to revise its national standards.(50)

The Region 6 regulations use a general permit approach, which means all CAFOs have a blanket permit as long as they follow certain "best management practices." So long as the general permit requirements have been met, a concentrated livestock feeding operation need not obtain an individual NPDES permit. The general permit requirements are complex and only the highlights are presented here to give Nebraska feeders a glimpse of possible regulation to come.

In Region 6, new CAFOs of 1000 or more head of feeder cattle or their equivalent(51) must submit a mini-environmental impact statement for EPA approval prior to construction.(52) Existing operations that expand to this size must meet a similar requirement(53) and all livestock operations, regardless of their size, are encouraged to comply.(54) Compliance with these general permit requirements will exempt the operator from the individual NPDES permit application requirement.(55)

The mini-impact statement must include a plan for pollution prevention and waste management and must describe the operation's potential pollution sources, its waste management controls, and plans for preventative maintenance. The CAFO must have waste holding capacity for all wastewater plus the 25 year, 24 hour storm event.(56) There can be no release of pollutants from the CAFO, other than during precipitation exceeding a 25 year, 24 hour storm event.(57) How the CAFO will be managed to meet these requirements must be included in the CAFO's pollution prevention plan. The plan must also include best management practices for manure disposal (BMPs).(58)

The Region 6 regulations also require the CAFO's waste retention facilities either to have a liner meeting EPA specifications or professional documentation that the facility will not leak. A liner is not required if the CAFO operator can demonstrate that wastes migrating from the structure to groundwater would not ultimately reach a stream. Manure land application, if used, must be documented. Manure application timing and rates must be in response to crop needs. Manure storage or surface disposal is prohibited within the 100 year floodplain.(59)

When the general permit requirements are not met, are violated, or when special environmental circumstances are present, operators are required to apply for an individual NPDES permit or stop operating. An NPDES permit may subject the operator to more frequent inspections.

Besides the changes made in Region 6 enforcing the Clean Water Act, EPA has also begun implementing new requirements of the Coastal Zone Management Act in states along a coast, including those bordering the Great Lakes. By July 1995 coastal states are to have programs requiring confined animal facilities to use the "best available technology" for reducing pollution from livestock waste. EPA has developed "management measures" for livestock facilities that specify how waste is to be controlled. The measures are different depending on the size of the operation and include

the type of structures needed, vegetative practices, disposal methods, and nutrient management. Very small operations (under 50 head beef, 20 dairy cows, and 100 swine) and operations that already have an NPDES permit are exempt from the management measures. Many experts believe these Coastal Zone Act measures are a precursor of things to come for all states.(60)

IV. LIVESTOCK REGULATION IN OTHER STATES

The livestock facility regulations for the states bordering Nebraska - Iowa, Missouri, Kansas, Colorado and South Dakota, as well as Illinois, Minnesota, Texas and Wisconsin might serve as examples for improved livestock regulation in Nebraska. Several states have more specific livestock operation waste management regulations or guidelines than the Nebraska Department of Environmental Quality regulations. Several states have or are developing spacing requirements and ground water protection requirements for livestock operations. Some of the more progressive regulatory approaches are described below.

A. Livestock Waste Management

Illinois. Illinois feedlot regulations require operators of livestock waste handling facilities to practice odor control methods during manure removal and field application so as to not affect a neighboring farm or non-farm residence. Odor control methods include (a) soil injection or other methods of incorporating waste into the soil, including discing or blowing; and (b) considering climatic conditions including wind direction and inversions.(61)

Iowa. Iowa regulations include land disposal guidelines recommending that total nitrogen application never exceed 400 pounds per acre annually for high nitrogen use crops, and the average annual nitrogen application rate should not exceed 250 pounds per acre of available nitrogen for high nitrogen use crops.(62)

Minnesota. Manure to be used for fertilizer cannot be stored for longer than one year and cannot be applied at rates that exceed local crop nutrient requirements except where allowed by permit. Manure management plans including manure handling and application techniques, acreage available for manure application, and plans for any proposed manure storage structure are required.(63)

Texas. Texas requires a manure management plan as part of the state livestock operation permit requirement.(64) Proposed Texas regulations would limit waste applications to 110 pounds of nitrogen per acre for corn yields of 100-149 bushels per acre, and 180 pounds of nitrogen per acre for corn yields of 150-200 bushels per acre.(65) Wastes would be required to be disced into the soil within 48 hours or else the owner/operator would be required to maintain a 200 foot

buffer zone of grass or other thick vegetation between the disposal areas and the downgradient property line and/or watercourse.(66) The draft regulations would establish specific manure application requirements to minimize odors, as follows:

Disposal of waste and wastewater shall be done to prevent nuisance conditions such as odors and flies. If land application is used, the following requirements shall apply for the control of odors and flies:

- a. Apply manure uniformly and in a layer thin enough to ensure drying in 5 days or less.
- b. Avoid spreading when the wind would blow odors towards populated areas or nearby residences or businesses.
- c. Avoid spreading or applying manure immediately before weekends and holidays when people are likely to be engaged in nearby outdoor and recreational activities.
- d. Avoid spreading near heavily traveled highways.
- e. Spread or apply manure in the morning when the air is warming and rising rather than in the late afternoon.
- f. Where manure is applied to nonvegetated land, incorporate the manure into the soil during or within 24 hours of application.(67)

Finally, the draft regulations would require manure to be removed from the holding pens within five days after the animals are removed from a particular lot.(68)

B. Livestock Facility Location

Illinois. Illinois regulations require new or expanded livestock operations to be located at least 1/2 mile from a populated area and 1/4 mile from a non-farm residence.(69)

Iowa. Iowa law imposes minimum distance requirements between neighboring residences or public use areas and new (or expanding) anaerobic lagoons and earthen waste slurry basins. Anaerobic lagoons or earthen waste slurry storage basins used as part of a confinement feeding operation must be located at least 1250 feet from residences not owned by the operation and from public use areas if the operation (a) contains animal species other than beef cattle and has a capacity of less than 625,000 pounds live animal weight, or (b) contains beef cattle and has a capacity of less than 1.6 million pounds live animal weight. If the feeding operation exceeds this capacity it must be located at least 1875 feet from any residence not owned by the feeder or any public use area.

Anaerobic lagoons or earthen waste slurry storage basins may be built closer to a neighbor than the above limits dictate if a written agreement waiving these requirements is entered into with the neighbor and the agreement is recorded with the county recorder.(70) In addition, Iowa courts routinely impose a 1/4 mile separation distance for livestock waste disposal from neighboring residences.(71)

Kansas. Kansas requires (a) a minimum 100 foot separation

from the lot line, (b) a minimum disposal area of one acre per 100 head capacity (of hogs or beef cattle) plus one acre disposal area for each 20 tons dry weight of annual livestock wastes (slurries and lot scrapings), and (c) separation distances based on livestock facility capacity. The separation distances are: 1,320 feet (or 1/4 mile) for up to 1,000 head (of hogs or beef cattle), 4,000 feet (.76 mile) for 1,000-5,000 head capacity, and 5,280 feet (1 mile) for more than 5,000 head capacity. Separation distances may be reduced with the written permission of affected property owners.(72)

Minnesota. Individual counties are allowed to set restrictions on animal facility locations and to assume responsibility for processing permit applications.(73)

South Dakota. South Dakota livestock waste facility guidelines recommend that animal waste management systems be located at least 1/4 mile from neighboring dwellings, 1/2 mile from public areas, not closer than 300 feet from the owner's residence, at least 1000 feet from a public water supply well, and at least 50 feet from the lot line.(74)

Texas. Proposed Texas regulations would require wastewater retention facilities (i.e. pits or lagoons), holding pens or disposal sites to be located at least 500 feet from a public water supply well and 250 feet from a private water well.(75) New waste/wastewater facilities would be required to be located at least 500 feet from the nearest property line, and holding pens to be located at least 150 feet from the nearest property line.(76)



C. Ground Water Protection

South Dakota. Ground water monitoring wells may be required in South Dakota to determine whether an animal waste management system is contaminating ground water.(77) Animal waste management systems may also be required to be lined with bentonite or synthetic liners.(78)

Texas. Under proposed regulations, new operations cannot be located above the Edwards aquifer or an aquifer designated by the Texas Water Commission as critical under the Texas underground water management area authorities.(79) Wastewater retention facilities may not be located above regional aquifers unless they are lined.(80)

V. THE REGULATION OF NUISANCE UNDER THE NEBRASKA ENVIRONMENTAL PROTECTION ACT

At least five states (Illinois, Iowa, Kansas, South Dakota and Texas) impose livestock operation location restrictions in an effort to control odor and other nuisance concerns of neighbors. In this section we analyze whether the Nebraska Department of Environmental Quality (NDEQ) could do the same under their existing legislative authority.

The NDEQ does not impose location restrictions or other measures as a means of controlling odors or other nuisance concerns. The focus of their regulation is primarily water quality rather than air quality. This single focus is consistent with the specific provisions for livestock waste control under the Nebraska Environmental Protection Act (NEPA).(81)

NEPA also specifically provides that livestock production may not be considered a nuisance if (a) reasonable techniques are used to keep dust, noise, insects and odor at a minimum, (b) the livestock operation complies with the NDEQ water quality regulations and local county zoning regulations, and (c) the livestock operation was issued an NDEQ livestock facility construction and operating permit before the complaining party took possession of his/her land.(82) This provision provides qualifying livestock operators a defense against nuisance suits but it doesn't really relate directly to the appropriate scope of NDEQ waste control regulations under NEPA.

Under NEPA, NDEQ must "develop comprehensive programs for the prevention, control, and abatement of new or existing pollution of the air, waters and land of the state".(83) A comprehensive feedlot waste control program should therefore prevent, control and abate pollution of the air, as well as water and land.

Livestock operation odors legally constitute air pollution under NEPA. "Air pollution" is defined in NEPA as "the presence in the outdoor atmosphere of one or more air contaminants or combinations thereof in such quantities and of such duration as are or may tend to be injurious to human, plant, or animal life, property, or the conduct of business".(84) "Air contaminant" or "air contamination"

is defined by NEPA as "the presence in the outdoor atmosphere of any dust, fume, mist, smoke, vapor, gas, other gaseous fluid, or particulate substance differing in composition from or exceeding in concentration the natural components of the atmosphere".(85)

Methane gas is a byproduct of animal production and also is a greenhouse gas which contributes to global warming. Thus, methane is an air contaminant under NEPA. Ammonia (another product of animal wastes) may be a gas,(86) which makes it an air contaminant under NEPA. Finally, dust is a common problem associated with livestock operations,(87) and is an air contaminant under NEPA.

The NEPA definition of air pollution is not limited to health effects but also includes economic effects, including damage to property and business. As livestock nuisance litigation in Nebraska has amply demonstrated, improperly located or operated facilities can make a nearby residence uninhabitable, which would reduce its property value. Thus, livestock odors meet the legal definition of air pollution and air contaminant under NEPA and legally qualify for regulation under a comprehensive livestock waste control program designed to prevent, control and abate pollution of air, water and land. Unfortunately, the NDEQ livestock waste control facility regulations fall short of this statutory mandate by failing to address the odor aspect of livestock operations.

VI. GROUNDWATER PROTECTION REGULATION BY NATURAL RESOURCE DISTRICTS

Nebraska takes a unique "local control" approach to regulation of agricultural pollutants to protect groundwater.(88) Regulation in problem areas is a local option with regulatory authority given to local Natural Resource Districts (NRDs) in areas designated as special groundwater protection areas or management areas. NRD regulation in these special areas has focused primarily upon nitrate contamination.

While all NRDs are required to prepare groundwater management plans to deal with groundwater quality and quantity concerns, only the Lower Platte North, headquartered in Wahoo, has proposed a plan to deal explicitly with manure application limits to protect groundwater.(89) As these rules are developed and implemented, they may serve as a guide for future regulation by other NRDs. Several NRDs are already considering plans with increased attention to the over-application of organic fertilizer as a source of nitrate contamination in groundwater.

If the Lower Platte North Plan is approved by the Nebraska Department of Water Resources, the NRD could begin regulating organic and commercial fertilizer application in response to an increase in nitrate levels. Increased regulation would be triggered by increasing nitrate levels and different regulations could be implemented in different subareas within the district, depending on its groundwater

nitrate level. The goal of the plan is to allow farming operations to continue, but stop or limit increases in nitrate concentration in the groundwater.

Proposed Phase I regulations. In NRD subareas with nitrate levels of 0-8ppm, the proposal calls for the following restrictions:

- a. Operators using any type of fertilizer - commercial or organic - are encouraged to become certified for proper fertilizer management every four years.
- b. Fall and winter application of commercial fertilizer on sandy soils is prohibited until after March 1. For non-sandy soils; application of commercial fertilizer is prohibited until after November 1 or until soil temperature is 50 degrees or less.
- c. Application of organic fertilizer (raw manure, dried manure, sludge, or composted organic wastes will be controlled on the basis of application rates, incorporation method, types of crops or cover crop, soil types, landscape features and type of fertilizer. NRD staff indicate that these guidelines may impose manure application rates of 10 tons per acre for cattle and 8 tons per acre for hog manure.
- d. Operators must provide to the NRD a groundwater analysis for nitrogen from all wells irrigating corn, soybeans or grain sorghum every 4 years. A soil analysis on fields growing these same crops must also be provided every 4 years.
- e. All operators are encouraged to report their organic or commercial fertilizer and pesticide application rates per acre to the NRD before December 31 of each year.

Proposed Phase II Regulations. In subareas with nitrate levels of 8.01-10ppm the following restrictions would apply:

- a. Operators must be certified for fertilizer management annually.
- b. Operators must provide soil and ground water samples for fields in corn, soybeans or grain sorghum on an annual basis.
- c. Application of organic fertilizer will be restricted as in Phase I. In addition, the amount and timing of application will have to be adjusted to the nitrogen levels in the soil and groundwater. Application on frozen soils will only be allowed on a case by case basis.
- d. In some cases, a preplant application of commercial fertilizer will require the use of inhibitors.

Proposed Phase III Regulations. In subareas with nitrate levels of 10.01 or more the following regulations have been proposed:

- a. All the Phase II restrictions will apply. In addition, all preplant application of commercial fertilizer must include dealer certification that an inhibitor was used. Fall application of commercial fertilizer will be banned. Spring application of commercial fertilizer will be prohibited until March 1, with split application or the use of an inhibitor.
- b. All fertilizer application must be calibrated.

As mentioned above, several other NRDs are recognizing that manure overapplication is a potential source of nitrate contamination. The Middle Republican NRD is proposing to require producers to consider nitrogen credits from manure application in annual soil sampling and nitrogen use reporting in the Hitchcock and Red Willow areas. The Tri-Basin NRD works cooperatively with feedlots regarding taking credit for livestock waste application in their fertilization practices. The Little Blue and Lower Republican NRDs encourage accounting for nitrogen credits in livestock waste application in the Superior-Hardy area. Other NRDs, including the Lower Niobrara, Upper Elkhorn, and Upper Loup indicate they may develop manure application programs in the future.

FOOTNOTES

1. 1992 Water Quality Report at p. 250
2. NDEQ, 1992 Nebraska Waters Quality Report, (Oct. 1992) at p. 249.
3. NRS §§81-1501-1532
4. NRS §81-1504(2) (emphasis added)
5. NRS §81-1505(10)
6. 130 Nebraska Admin.code Ch. 1 ¶016 (3/26/89)
7. NRS §81-1510
8. "Livestock wastes" are defined by the regulations as: "[1] animal and poultry excreta and associated feed losses, [2] bedding, [3] spillage or overflow from watering systems, [4] wash and flushing waters, [5] sprinkling waters from livestock cooling, [6] precipitation polluted by falling on or flowing onto a livestock operation, and [7] other materials polluted by livestock or their direct products." Id. ch. 1 ¶018.
9. More specifically, NDEQ feedlot construction permits and operating permits are required for all existing and proposed livestock operations when uncontrolled runoff of livestock wastes: (1) violates or threatens to violate the Nebraska surface water quality standards (title 117 of the Nebraska Administrative Code.) (2) violate or threatens to violate the Nebraska ground water quality standards (title 118 of the Nebraska Administrative Code.) (3) discharges into waters of the state, or (4) violates the Nebraska Environmental Protection Act."
10. 130 NAC ch. 1 ¶031.
11. Id. ch. 3 ¶001.01. All livestock waste control facilities must also comply with SCS technical guides. Id. ch. 8 ¶002 for open lot requirements; and id. ch. 9 ¶002 for semi- or totally housed livestock operations.
12. "Open lots" are defined by the livestock waste regulations as "pens or similar confinement areas with dirt, or concrete (or paved or hard) surfaces wherein animals or poultry are substantially or entirely exposed to the outside environment except for possible small portions affording some protection by windbreaks or small shed-type areas." Id. ch. 1 ¶023.

13. The NDEQ livestock waste regulations define "semi- or totally-housed livestock operations" as "totally or partially roofed buildings which may be open or completely enclosed on the sides wherein animals or poultry are housed over solid concrete or dirt floors, slatted (partially open) over pits or manure collection areas in pens, stalls or cages, with or without bedding materials and mechanical ventilation." Id. ch. 1 ¶027.
14. Id. ch. 1 ¶028.
15. The livestock waste regulations define "debris basin" as "an individually designed low gradient, broad, flat channel with a support ridge on the lower side, which functions to trap and store settleable solids, (both manure and sediment), for subsequent removal." Id. ch. 1 ¶004.
16. The livestock waste regulations define "holding pond" as "an impoundment made by constructing an excavated pit, dam, embankment or combination of these for temporary storage of liquid livestock wastes." Id. ch. 1 ¶ 010.
17. Id. ch. 8 ¶ 001. The other waste control facilities include (1) diversion terraces, (2) holding ponds, (3) debris basins, (4) liquid manure storage pits, (5) lagoons, or (6) such other devices used to control livestock wastes. Id. ch. 1 ¶ 017. "Diversion terraces" are defined as "an individually designed grade channel with a supporting ridge on the lower side, constructed across the slope with a nonerosive grade." Id. ch. 1 ¶ 009. Lagoons are defined in note 21. Liquid manure storage pits are defined as "earthen or lined pits located wholly or partially beneath a semi- or totally-housed livestock operation or at some removed location used to collect waste production." Id. ch.1 ¶ 013.
18. NDEQ, Guidelines for Livestock Waste Management in Nebraska (1977) at pp. 7-9.
19. Liquid manure storage pits are defined in note 17.
20. This requirement does not apply to poultry in cages or on slotted floors over pits. Id. ch. 9 ¶. 001.01.
21. "Lagoons" are defined as "an impoundment made by constructing an excavated pit, dam, embankment or combination of these for treatment of livestock wastes by anaerobic, aerobic or facultative digestion." Id. ch. 1 ¶ 013. Lagoons for biological treatment must meet the required lagoon volume as outlined in the WP-42 Data Sheet for Livestock Waste Control Facilities. Id. ch. 9 ¶ 001.02. These Guidelines note that lagoons are used primarily for semi- and totally-confined swine operations, and discusses the differences between aerobic and anaerobic lagoons. The Guidelines note that anaerobic lagoons may generate substantial odors, and that aerobic lagoons are relatively odor free but "may be impractical for large livestock operations due to the large surface area required [for manure disposal]." Anaerobic lagoons "will accommodate larger quantities of livestock waste but will usually produce some septic odors. If very concentrated slurry wastes are imposed on the system, very objectionable odors may occur and sludge may have to be removed more frequently." Guidelines at p. 9.
22. 130 NAC ch. 9 ¶ 001.01-.03.
23. Id. ch. 9 ¶ 001 for housed facilities and Id. ch. 8 ¶ 001 for open facilities. The livestock waste control facility must also meet the storage requirements as outlined in the WP-41, Data Sheet for Livestock Waste Control Facilities. Id. ¶ 002.
24. Appendix A of 130 NAC provides a state map delineating the amount of rainfall for a 25 year 24 hour rainfall event across the state.
25. 130 NAC ch. 8 ¶ 003.
26. Id. ch. 9 ¶ 003.
27. Id. ch. 8 ¶ 004; ch. 9 ¶ 004. The livestock waste regulations define "disposal area" as the "land utilized for the disposal of livestock wastes." Id. ch. 1 ¶ 008.
28. See id. ch. 12 ¶ 006.
29. For a discussion of livestock waste application to cro-land see Guidelines at pp. 14-15.
30. See id. ch. 11.
31. NDEQ establishes water quality standards for every stream in Nebraska. These standards range from high quality waters suitable for fishing and swimming to lower quality waters suitable for agricultural uses. NDEQ tries to manage the discharge of pollution from all sources (municipal, industrial and agricultural) to maintain these water quality standards.
32. Id. ch 10 ¶ 001. Regarding ground water contamination, the regulations require that "The facility shall be located on soils which will seal through sedimentation and biological action. Where self sealing is not possible, artificial methods or material shall be used to insure that percolation does not exceed 0.25 inches per day." Id. ch. 10 ¶ 001.04.
33. Id. ch. 6 ¶ 001.
34. Id. ch. 6 ¶ 002.
35. Id. ch. 6 ¶ 003.01-.04.
36. The livestock waste regulations require that manure be disposed of on "dewatering days" defined as "those days which have suitable weather and soil conditions for disposal of accumulated livestock wastes." Id. ch. 1 ¶ 006.
37. Id. ch. 12 ¶ 001-005.
38. Id. ch. 12 ¶ 006.01-.03.
39. 130 NAC ch. 7 ¶ 001.01-.07.
40. 33 U.S.C.A. Section 1342 (national pollutant discharge elimination system). Thirty-eight states have assumed administration of the NPDES program from EPA; EPA administers the NPDES water quality program itself in the remaining states. Arbuckle, "Water Pollution Control" in Arbuckle et al., *Environmental Law Handbook* (12th Ed. 1993) at 164n30; 58 Fed.Reg. 7612 (2/8/93).
41. 40 CFR 122 App. B
42. 40 CFR 412. See also 121 NAC (Effluent Guidelines and Standards) ch 2. ¶ 017.01 (feedlots) (January 5, 1992).
43. 130 NAC ch. 2 ¶ 002.

44. NDEQ, "1992 Nebraska Water Quality Report" (Oct. 1992) at p. 244.
45. NRS §81-1511.
46. 130 NAC ch. 15 ¶ 001. Regarding penalties for permit and other violations see NRS §81-1508(1).
47. 1992 Water Quality Report at p. 250.
48. *Id.* at p. 249.
49. 58 Fed.Reg. 7610 (Feb. 8, 1993). EPA is divided into 10 regional offices, responsible for administration of EPA programs in those states included in the region. Region 6 includes Arkansas, Louisiana, New Mexico, Oklahoma and Texas. Arkansas is the only Region 6 state that administers the NPDES program on its own. Nebraska is in Region 7, which also includes Iowa, Kansas and Missouri.
50. 58 Fed.Reg. 7615, 7614 (Feb. 8, 1993).
51. 40 CFR 122 App. B (a). The numerical equivalent for 1000 animal units of common commercial livestock are: (1) 1,000 slaughter and feeder cattle; (2) 700 mature dairy cattle (whether milked or dry cows); (3) 2,500 hogs each weighing over 55 pounds; (4) 500 horses; (5) 10,000 sheep or lambs; (6) 55,000 turkeys; (7) 100,000 laying hens or broilers if the facility has continuous overflow watering; (8) 30,000 laying hens or broilers if the facility has a liquid manure system; and (9) 5,000 ducks. *Id.*
52. NPDES General Permit for Discharges From Concentrated Animal Feeding Operations I(B)(3) at 58 Fed.Reg. 7627.(Feb. 8, 1993) [hereinafter cited as CAFO General Permit].
53. CAFO General Permit I(B)(4), 58 Fed. Reg. 7627.
54. CAFO General Permit I(B)(5), 58 Fed.Reg. 7627.
55. CAFO General Permit I(B)(1)-(2), 58 Fed.Reg. 7626
56. CAFO General Permit II(B), 58 Fed.Reg. 7628.
57. CAFO General Permit II(A), 58 Fed.Reg. 7628.
58. CAFO General Permit II(B), 58 Fed.Reg. 7629. EPA removed proposed manure land application BMP's from the final regulation due to opposition from livestock groups. Instead, EPA included a list of extension and related publications for each state. Comment II(D)(13), 58 Fed.Reg. 7625.
59. CAFO General Permit II(B), 58 Fed.Reg. 7629-33.
60. *Nonpoint Source News-Notes*, March-April 1993, pp. 13-14. CZARA of 1990 § 6217(g). EPA-840-B-92-002 January, 1993.
61. Illinois Environmental Protection Agency, "Title 35: Environmental Protection, Subtitle E: Agriculture Related Pollution" §501.405(b) (Dec. 1991). The original administrative proposal would have required livestock wastes to have been incorporated into the soil within 24 hours of application if applied within 1/4 mile of a populated area or inhabited residence. Illinois Environmental Protection Agency, "Title 35: Environmental Protection, Subtitle E: Agriculture Related Pollution" §501.405(b) (draft Jan. 1990).
62. Iowa Department of Natural Resources, Environmental Regulations and Guidelines for Animal Feeding Operations in Iowa (March 1992) at p. 11.
63. Minnesota Pollution Control Agency--Water Quality Division, Chapter 7020.0400 and 0500.
64. Texas Water Board, "Feedlots and Concentrated Animal Feeding Operations Permit Application" (August 1989) at p. 11.
65. Texas Water Commission, "Draft Livestock and Poultry Production Operations" §321.39(d)(7). See also *id.* at pp. 24-25.
66. *Id.* §321.39(7).
67. *Id.* §321.39(8).
68. *Id.* §321.44(e)(5).
69. Illinois Environmental Protection Agency, "Title 35: Environmental Protection, Subtitle E: Agriculture Related Pollution" §501.401(e)(1) (Dec. 1991).
70. Iowa Department of Natural Resources, Environmental Regulations and Guidelines for Animal Feeding Operations in Iowa (March 1992) at p. 9.
71. Hamilton, "A Livestock Producer's Legal Guide to Nuisance, Land Use Control, and Environmental Law" (Drake University Law School 1992) at p. 65.
72. Kansas Department of Health and Environment, "Design Standards for Confined Livestock Feeding Operations" (undated) at pp. 2-4.
73. Minnesota Pollution Control Agency--Water Quality Division, Chapter 7020.0100 and 7020.1500.
74. South Dakota Department of Environment and Natural Resources, "Recommended Design Criteria for Animal Wastewater Pollution Control Facilities and Ground Water Monitoring Wells" at XVII-3.
75. Texas Water Commission, "Draft Livestock and Poultry Production Operations" §321.36(e).
76. *Id.* §321.36(h).
77. South Dakota Department of Environment and Natural Resources, "Recommended Design Criteria for Animal Wastewater Pollution Control Facilities and Ground Water Monitoring Wells" at XVII-2 to -3.
78. *Id.* at XVII-4.
79. Texas Water Commission, "Draft Livestock and Poultry Production Operations" §321.36(i)(j).
80. *Id.* §321.36(f).
81. See note 5 and accompanying text.
82. NRS §81-1506(b).
83. NRS §81-1504(2) (emphasis added).
84. NRS §81-1502(2).
85. NRS §81-1502(1).
86. Nebraska Department of Environmental Control, "Guidelines for Livestock Waste Management in Nebraska" (July 1977) at p. 12.
87. *Id.* at p. 11.
88. NRS §§ 46-673.01 et seq. (1988 and 1992 Cum. Supp.).
89. Lower Platte North, NRD, Plan for Groundwater Management in the Lower Platte North Natural Resource District.

Chapter 2

RURAL ZONING IN NEBRASKA

I. INTRODUCTION

Twenty-eight counties in Nebraska have adopted zoning ordinances regulating the use of rural land.(1) Nearly all of them attempt to regulate the placement or operation of confined livestock operations (usually called "feedlots," no matter what species of animals is involved) as well as many potentially incompatible neighboring uses.

The tools these counties have used vary considerably and many are quite sophisticated in distinguishing between different kinds of farm operations or between farm and non-farm dwellings. Take for example, the various definitions of a "feedlot." Several counties exclude farmer feeders from the more restrictive regulations by defining a feedlot to include only custom feeders, or feeders who purchase all or most of their feed, or feeding "when not in conjunction with a farming operation." Several use a livestock-per-acre ratio to define a feedlot, which addresses not only the odor and runoff concerns associated with the concentration of livestock but also the capacity for manure disposal.

Some counties have adopted zoning ordinances to keep new residences from being located near a confined livestock operation. Others restrict the location of livestock operations relative to existing homes, and in some cases only non-farm dwellings are protected. Zoning ordinances have also been used to establish regulations to minimize flies and odors; three counties have adopted confined livestock operating restrictions addressing these nuisance concerns.

Virtually every rural zoning ordinance now in place in Nebraska states as its goal the protection of agricultural operations from encroachment by incompatible uses. Yet none of them allows the unfettered placement of confinement feeding operations. All of them, in their own way, attempt to avoid future land use conflicts in a manner that allows a great deal of local control and public input.

The intent of this chapter is to introduce you to the tools of rural zoning. You may want to put some of them to use in your own community or you may need to understand the rules already in place in your county. Whatever your need, this chapter should only be a starting place. It is not intended as an up-to-date legal reference on the ordinances in place in Nebraska. Portions of the ordinances are summarized in the Appendix and we have prepared a chart which summarizes a few of the key features of each county's approach. But if these regulations are at issue to you personally, or in your neighborhood, and especially if you are in an administrative or legal proceeding, the full, updated ordinance should be obtained from your County Zoning Administrator.

II. WHY ZONE?

While the stated purpose of Nebraska's rural zoning ordinances is to protect agriculture from encroachment by incompatible uses, there are other competing purposes--to control pollution, protect land values, or enhance the "quality of life," for example. And because zoning ordinances grant, withhold or clarify land development rights, they have the effect of reducing land use conflicts.

Rural zoning is also used as a form of economic planning. A county's development plan and zoning ordinances may protect the county's tax base from competing uses, or help to plan or better manage the need for public facilities.

III. THE COUNTY PLAN AND THE PLANNING COMMISSION

The adoption of a rural zoning ordinance begins with the County Board of Supervisors. To initiate the process, the County Board of Supervisors must appoint a Planning Commission charged with the responsibility of developing a comprehensive development plan. County residents may ask the Board to initiate the process by appointing a Planning Commission and there are numerous opportunities for public input throughout the process of developing the comprehensive plan and rural ordinances.

Planning Commission members must be county residents, and since the primary focus of concern in county planning and land-use regulation is the unincorporated area, a majority of the commission must be residents of the unincorporated or rural areas.(2) They serve a three year term but can be removed for "cause"(3) by a majority of the County Board or the Planning Commission.(4)

The comprehensive development plan is the Commission's vision of how the county should develop. Some county residents may wish to keep things as they are with little change, while others may wish for more development and considerable change from current conditions. Either objective is generally permissible; the comprehensive plan defines which direction future land use will take, including keeping some areas as they are but allowing considerable change in other areas. The zoning ordinance, when ultimately adopted by the county board, should be consistent with the comprehensive plan. But the Nebraska Supreme Court has held that where a citizen's property rights are at issue, zoning regulations will override the comprehensive plan.

By law, the plan must provide for: (a) land uses, (b)

transportation needs and, (c) public facilities needs. NRS §23-114.02. The land-use element designates the proposed general distribution, general location, and extent of the uses of land for agriculture, housing, commerce, industry, recreation, education, public buildings and lands, and other categories of public and private use of land. NRS §23-114.02(1).

The comprehensive plan's transportation element must identify the general location, character, and extent of existing and proposed major streets, roads, and highways, and air and other transportation routes and facilities. NRS §23-114.02(2).

The public facilities element of the comprehensive plan must identify the general location, type, capacity, and area served by present and projected or needed community facilities, including recreation facilities, schools, libraries, other public buildings, and public utilities and services.

The comprehensive development plan must include both graphic (i.e. a map) and written descriptions and must be designed to accommodate anticipated long-range future growth based upon documented population and economic projections. NRS §23-114.02(3).

The plan must also include the proposed methods for its implementation, including the recommended zoning regulations, building codes, or a capital improvement program.

In developing the comprehensive plan, the Planning Commission can conduct or commission studies and must seek public input. By law, it must issue a preliminary report on its findings and hold public hearings before submitting its final report to the County Board of Supervisors for approval.(5) The County Board must also hold public hearings prior to adoption of the plan.

In adopting any zoning ordinance as recommended by the Planning Commission, the County Board must consider, among other things: (a) soil conservation, (b) water conservation, (c) surface water drainage and removal and, (d) other uses in the unincorporated rural areas. NRS §23-114

IV. ZONING ORDINANCES, PERMITS AND OTHER PLANNING TOOLS

A. Districts.

A rural zoning ordinance may regulate land use, building construction and building use. NRS §23-114.01(1). It will typically divide the county into districts such as agricultural, residential, commercial or industrial. Districts may also be divided into subdistricts such as Agricultural-1 and Agricultural-2. Separate regulations may apply to each district or subdistrict, depending on the goals to be served by the plan.(6) The ordinance may require that permits be obtained from the County Board or Planning Commission for certain land uses or activities. Some uses may only be allowed by permit and only if they meet certain requirements

or conditions.

All uses that fit within the district's general classification are usually allowed. But this is not always the case, particularly with respect to confined livestock operations. Hall County, for example, has four "agricultural" subdistricts. A confined livestock operation is a permitted use in only one of them. In another, conditions are imposed upon these "feedlots", and in the third and fourth, animal husbandry is prohibited entirely.

B. Exemptions

If a confined livestock operation or other land use is outside the definition of an authorized use, the landowner must obtain from the Planning Commission or, more commonly, the County Board, a special exemption or permit. Most counties with rural zoning ordinances prohibit confined livestock operations even in agricultural districts and subdistricts unless special exemptions are obtained by the owner. These exemptions are called "special use permits" or "conditional use permits".

Only land uses for which exemptions are authorized by the ordinance can be granted a special or conditional use permit by the County Board. And typically the ordinance will set special conditions or requirements to be met before a permit can be authorized. NRS §23-114.01(4). Keith County, for example, imposes location and set back requirements for confined livestock operations. Keith County "feedlots" must also comply with all Nebraska Department of Environmental Quality (DEQ) regulations before a permit can be issued. Other counties set conditions in the permit to limit any nuisance created by a confined livestock operation, such as flies or odors.

Probably the most common reason for conditional or special use permits is to insure a minimum distance between confined livestock operations and dwellings. In some cases this is accomplished by withholding permits for a "feedlot" or a dwelling if they are within a specified distance from one another. In Howard County, a confined livestock operator can't get a permit if the "feedlot" is within 300 feet of a residential or retail business structure. In other cases, the same goal is accomplished by setting minimum lot sizes for single family dwellings to provide a buffer between the dwelling and confined livestock operation. In Douglas County, Subdistrict AF-1, for example, a single family dwelling is a conditional use. A permit will not be issued unless the lot size is, at a minimum, two acres.

C. Existing or "Non-conforming Uses."

Zoning ordinances are not retroactive. Land uses or activities existing at the time the ordinance is adopted but not authorized by the new ordinance, even as a special or

conditional use, are called "non-conforming uses." Nebraska law provides that if a nonconforming use is discontinued for any twelve month period after the zoning ordinance is adopted, the right to maintain the nonconforming use is forfeited, and future use of the building or land must conform to the zoning ordinance. NRS §23-173.01.

The zoning ordinance may also regulate nonconforming uses. It may require termination of nonconforming uses, either by (a) specifying the period in which nonconforming uses shall cease, or (b) providing a formula whereby the termination of a nonconforming use may be timed to allow for the recovery or amortization of the property owner's investment. Non-conforming uses may also be allowed to continue indefinitely.

D. Zoning Appeals and Variances

The County Board must appoint a 5-member "board of adjustment" to: (a) decide zoning appeals; (b) interpret zoning maps; and (c) grant hardship variances to zoning regulations. A hardship variance will be necessary for any use prohibited by the ordinance and not allowed as a special or conditional use. Landowners seeking a hardship variance must meet a much higher standard than those generally required for a conditional or special use. For example, in Clay County, anyone wishing to build a home within 1/4 mile of an existing confined livestock operation in subdistrict GA must apply for a variance. By signing the variance permit, the home builder waives all rights to pursue any legal action against the livestock owner because of the location, odors, or other factors characteristic of confined livestock.

Hardship variances are discretionary. They may be granted where the strict application of the zoning regulation would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardships upon a landowner. But even then the variance can only be granted if it does not result in substantial detriment to the public good or substantially impair the intent and purpose of zoning regulations. NRS §23-168.03. Four of the five members of the board of adjustment must agree to give a hardship variance. NRS §23-168.01.

V. RURAL ZONING ORDINANCES AND LIVESTOCK

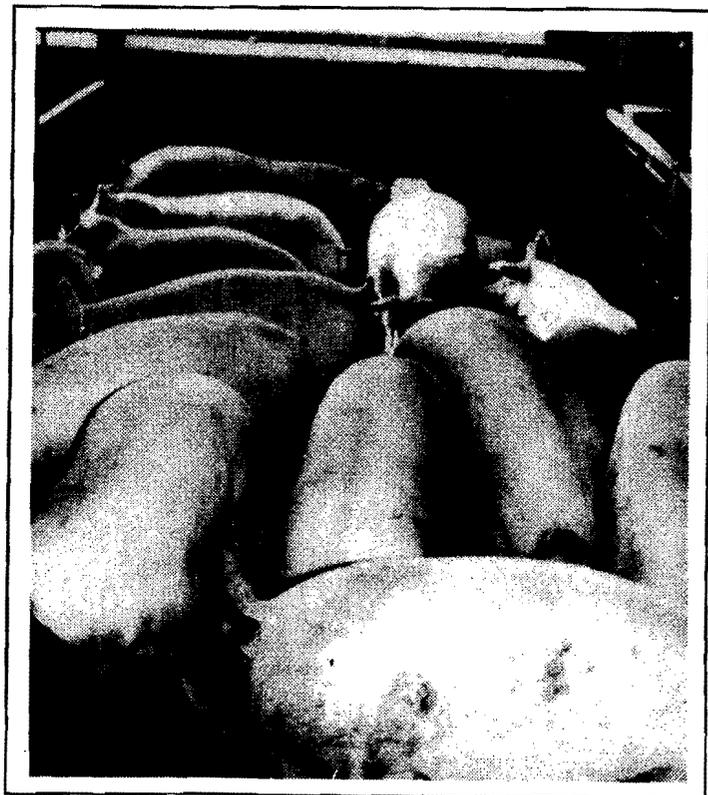
While flies and odors may be characteristic of any livestock operation, the Nebraska county zoning ordinances focus their regulations for the most part on commercial confined livestock operations, and rarely on livestock operations more generally. In most cases, livestock operations are permitted without being subject to special regulations or a special use permit unless the livestock operation meets the county's definition of a "feedlot". You can tell a lot about a county's zoning goals by examining its

definition of a "feedlot."

Saunders, Sarpy, Madison and other counties, for example, exclude farmer feeders from the more onerous regulations by defining a feedlot to include only custom feeders, feeders who purchase all or most of their feed, or feeding that is "not in conjunction with a farming operation." Several use a livestock-per-acre ratio to define a feedlot, which addresses not only the odor and runoff concerns associated with the concentration of livestock, but also the capacity for manure disposal.

As noted earlier, county zoning regulations may require permits before "feedlots" are begun or expanded. The county may establish certain requirements before special use permits for a confined livestock operation be given, e.g. that operations of certain sizes be a specified distance from a dwelling. Cass County even imposes a residency requirement on the livestock operator. Similarly, county zoning regulations may require that new residences be located a specified distance from existing operations. Such distance could be varied depending on the operation's size. These requirements are noted in the chart summary.

The zoning ordinance may also specify how many livestock can be kept confined at any particular time, and that another permit would be required to expand the operation beyond a certain size. The zoning ordinance could also specify that certain management practices be required to minimize flies, odors and other nuisances. Alternatively, the operator could be required to submit a management plan for review and approval as part of the permit process. These and other requirements are noted in the Appendix.



VI. ENFORCEMENT

County zoning regulations are generally administered through permits. Permits may be denied if the proposed activity would violate zoning regulations. A county may appoint a county zoning administrator to oversee the implementation of the county's zoning ordinances. NRS §23-114.04.

Violations of any zoning requirement, including making a use of land not authorized by the zoning ordinance, is a class III misdemeanor (up to \$500 fine, up to three months in jail, or both). Zoning regulations may also be enforced by court order and actions may be brought in court by affected landowners. NRS §23-114.05.

VII. ZONING AND PRIVATE PROPERTY RIGHTS

The Nebraska Supreme Court has ruled that a landowner's right to use private property is subject to reasonable regulation. The burden to prove that a zoning regulation is unreasonable is on the party attacking its validity. In other words, zoning regulations are presumed to be reasonable and legal. The landowner attacking the zoning regulation or restriction must prove that it is unreasonable and therefore illegal. Stahla v. Board of Zoning Adjustment, 186 Neb. 219, 182 N.W.2d 209 (1970).

When there is a conflict between a comprehensive plan and a zoning ordinance, the Nebraska Supreme Court has ruled that the zoning regulation takes precedence when questions of a citizen's property rights are at issue. Stones v. Plattsmouth Airport Authority, 193 Neb. 552, 228 N.W.2d 129 (1975). In other words, a comprehensive plan may effectively be amended through zoning regulations.

FOOTNOTES:

1. The counties that have adopted rural zoning ordinance are: Adams, Brown, Cass, Cheyenne, Clay, Dakota, Deuel, Dodge, Douglas, Hall, Hamilton, Howard, Kearney, Keith, Lancaster, Lincoln, Madison, Merrick, Otoe, Pierce, Saline, Sarpy, Saunders, Scotts Bluff, Seward, Stanton, York and Washington. Nebraska statutes relating to rural or county zoning are scattered, and include Neb.Rev.Stat. §§ 23-114 to -114.05 (comprehensive planning commission; rural zoning ordinance); 23-68.01 to -168.04 (board of adjustment); 23-172 to -174 (publication of zoning ordinance; nonconforming uses); 23-174.02 (adoption of zoning resolution); and 23-373 and 23-376 (suburban development). See also Neb.Rev.Stat. §§ 23-164, 165 (district boundaries); 23-170 (more restrictive county zoning ordinance takes precedence over less restrictive state statute and more restrictive statutory requirement governs a less restrictive county zoning ordinance); 23-174.01 to -174.09 (special rules for rural zoning in counties with primary class cities); 23-174.10 (public health zoning regulations); 23-372 to -377 (suburban development).
2. Except for joint City-County Planning Commissions.
3. "Cause" would include inefficiency, neglect of duty, malfeasance in office or other good and sufficient cause upon filing of charges with the County Board and after a public hearing. NRS §23.114.01(1).
4. Planning Commission members are not paid, but are reimbursed for reasonable expenses. Commission members may not hold any municipal or county office, except that a member may be a member of another city, village or other planning commission. The term of office is three years. All planning commission members hold



office until their successors are appointed. Vacancies occurring otherwise than through the expiration of term shall be filled for the unexpired term by individuals appointed by the county board. NRS §23-114.01(1).

5. The County Board may not hold its public meetings or take final action regarding the comprehensive development plan, capital improvements program, subdivision regulations, building codes, or zoning ordinances until it has received the recommendations of the Planning Commission. NRS §23-114.01(2).
6. County zoning regulations do not apply within the limits of any incorporated city or village, or within the area over which a city or village has been granted zoning jurisdiction and is exercising such jurisdiction. When a city or village exercises zoning authority over an unincorporated area by the adoption or amendment of a zoning regulation, its regulations supersede those of the county. NRS §23-114.

APPENDIX

Survey of Nebraska County Feedlot Zoning Provisions

Twenty-eight Nebraska counties have adopted zoning ordinances as summarized below. In the following discussion, if a land use is described as a "conditional use," a conditional use permit is required from the county before the use may be established. The permit requirement normally does not apply to existing uses, i.e. it is not retroactive. If a land use is described as a "permitted use", the use may be generally engaged in throughout the district, and no special use permit (such as a conditional use permit) is needed from the county. For example, most agricultural land uses would be a permitted use within an agricultural district. But certain agricultural land uses, such as confined livestock feeding, may be a conditional use. In that case, any livestock feeding operation that meets the definition of a confined livestock feeding operation would be required to obtain a special use permit in order to be established. The permit could be denied if the proposed feedlot would not meet the county special use permit requirements for feedlots.

Adams County

The Adams County zoning ordinance establishes two agricultural districts, AG-1 agricultural and AO-1 agricultural open space.

In agricultural AG-1 districts there is a minimum lot size of 20 acres; and two acres for a non-farm residence. Adams County Zoning Ordinance at p. 12. Feedlots are conditional uses, and a permit is required. Id. at pp. 12,28. Permit applications must include a site plan, and a public hearing on the conditional use is required. Id. at pp. 28-29.

For agricultural open space (AO-1) districts, feedlots are

conditional uses and DEQ approval is required. Id. at 10. The term feedlot is not defined.

Brown County

Intent. The AG agricultural district is designated for agricultural use and is intended to encourage a vigorous agriculture industry throughout the county and to preserve and protect agriculture production from encroachment by incompatible users. §5.11.

No permits are required within an AG district for feedlots not exceeding the following capacities: cattle, 1000 head; market hogs, 1000 head; sheep, 1000 head; dairy cattle or breeding hogs (maximum based upon number of producing females), 100 head; poultry, 2000 birds. §5.12(1). If a feedlot is expanded beyond these amounts, or a new feedlot exceeding these amounts is intended, a permit is required. §5.14(11).

Feedlots or confined livestock feeding on a year round basis are prohibited in RC-1 and RC-2 rural conservation districts. §5.22(2), 5.32(2). Intensive livestock facilities/operations are excluded from RR rural recreation districts. §5.42(1).

Cass County

Feedlot definition. Feedlots are defined as the confinement of horses, sheep, pigs and other food animals in building, lots, pens, pools or ponds which normally are not used for raising crops or for grazing animals. Cass County Zoning Ordinance at p. 12.

The ordinance also defines a commercial feedlot as land where the principal use is the feeding of livestock (1) for other than the farm operator, (2) involving more than 1000 head of livestock [presumably cattle], or (3) over 2000 head of swine, sheep or rabbits, or (4) the feeding of over 1500 head of a combination of cattle, swine, sheep or rabbits, or (5) the raising and feeding of over 2000 poultry, fish or other animals, (6) **when not in conjunction with a farming operation.** Id. at 13. A commercial feedlot or feed yard is a place where the principal business is the feeding of livestock and the feeding is not done as a subordinate activity to the production of crops on the premises of which the feedlot is a part. Id. at 13.

The ordinance also includes feedlot animal density requirements. Any person on any farm or acreage exceeding the following animal-to-acre ratio is considered to be operating a feedlot. **Livestock per acre:** (1) one acre to less than 20 acres: 1.5 cattle per acre or 3.0 sheep, swine or goats per acre; (2) 20 acres to less than 40 acres: 2.5 cattle per acre or 5.5 sheep, swine or goats per acre; and (3) 40-160 acres: 4.5 cattle per acre or 9 sheep, swine or goats per acre. **Combined livestock per acre:** (1) one acre to less than 20 acres: 2.5 cattle, sheep, swine and goats per acre (but no more than 1.5 cattle per acre); (2) 20 acres to less than 40 acres: 3.5 cattle, sheep, swine and goats per acre (but not more than 2.5 cattle per acre); and (3) 40-160 acres: 7 cattle, sheep, swine and goats per acre (but no more than 4.5 cattle

per acre). One head of cattle or two head of swine or sheep per acre over 160 acres can be fed to a maximum of 1000 cattle or 2000 swine or sheep, or 1500 head of cattle, swine or sheep combined. Finally, the land being farmed by the livestock operator must be located within a 10 mile radius of the livestock operation. The regulations also establish animal density ratios for horses and poultry.

Cheyenne County

Intent. Agricultural districts (A) are intended to satisfy the basic needs of the Cheyenne County farming-ranching operations. With agriculture being one of the county's main industries, it is vital that agricultural operations be allowed and protected from encroachments from non-agricultural uses. Therefore, the mixture of intensive residential and other urban uses with agriculture is not permitted in agricultural districts (A), nor is rezoning to urban use encouraged, unless it complies with the comprehensive plan. §1.

Feedlot Definition. Feedlot is defined as an animal confinement facility that is used for such confinement for a period of at least 30 consecutive days, and where feeding of the animals confined is other than by grazing. To be classified as a feedlot, the maximum numbers of animals in confinement at any one time must exceed 100 beef or dairy cattle, 500 swine, 2000 sheep, 3000 turkeys, or 10,000 chickens, ducks or geese. §8.

Feedlot classification. Feedlots are classified by size. Expansion into another class requires a new feedlot conditional use permit. §8.

Class	Beef/dairy cattle	Swine	Sheep	Poultry
A	100 to 500	500 to 1000	2000 to 3000	10000 to 15000
B	500 to 1500	1000 to 2000	3000 to 5000	15000 to 20000
C	1500 to 3000	2000 to 3000	5000 to 7000	20000 to 25000
D	3000 to 5000	3000 to 5000	7000 to 9000	25000 to 30000
E	5000 or more	5000 or more	9000 or more	30000 or more

Regulations Feedlots are generally allowed within agriculture (A) districts without a permit. Sect. 2(2). However, conditional use permits are required for feedlots within three miles of an incorporated city, or within three miles of a concentration of ten or more residences within 1/4 square mile. Sect. 3(9). In addition, permits are required for feedlot expansion into a new feedlot class. Conditional use permits are issued for three years. A new permit must be applied for 90 days before the existing permit expires.

Clay County

Agricultural districts. Clay county has two agricultural districts: GA general agricultural and AI agricultural

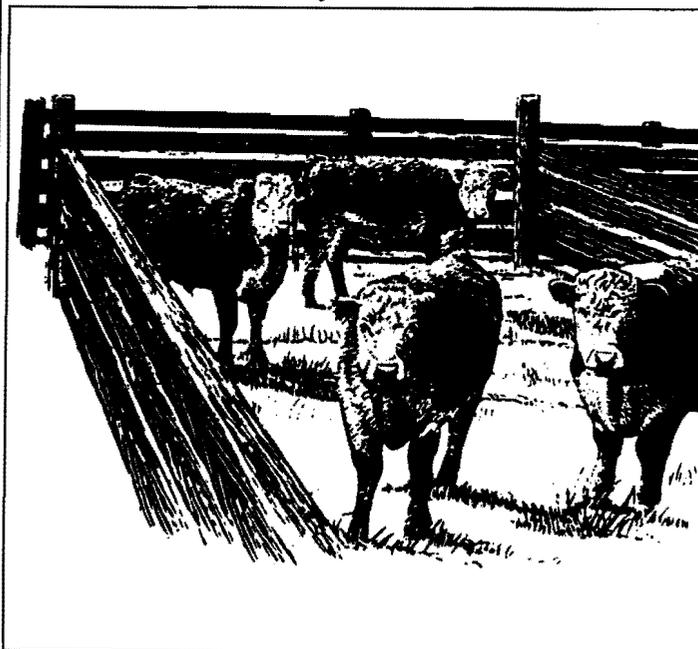
industrial. Clay County Zoning Ordinance §5.

GA feedlot restrictions. Feedlots of up to 1200 animal units are permitted in GA, and feedlots of up to 2500 animal units are allowed in GA by conditional use permit. §§ 5.12, 5.14. The term animal unit describes the relationship between various animals that are being held or fed. Slaughter steers and heifers are assigned the base unit of 1.0; cow-calf herds=1.3; dairy cattle=1.4; swine=0.4; sheep = 0.1; all fowl = 0.05. Each of the following would all equal 500 animal units; 500 steers; 384 cow-calves; 357 dairy cattle; 1250 swine; 5000 sheep; and 10,000 turkeys. §18.

New or expanded feedlots or commercial feeding in excess of 500 animal units must be located no closer than 1/4 mile from the nearest occupied residential, commercial or industrial building, other than that occupied by the feedlot owner or operator. The 1/4 mile distance is measured from the nearest edges of the feedlot and the building.

Residences are subject to a 10 acre minimum lot size. §5.16. Persons desiring to build a new residence or move an old residence closer than 1/4 mile from an existing feedlot (other than the feedlot owner) must apply for a variance. By signing the variance permit the applicant waives all rights to pursue any legal action against the feedlot owner because of its location, odors, or other factors characteristic to livestock and feedlots. §5.17.

AI feedlot restrictions. Feedlots and commercial feeding may be authorized by special use permit in AI (no animal-unit maximum). §5.24. All AI activities are subject to odor performance standards. The emission of odors that are generally agreed to be obnoxious to any considerable number of persons is prohibited. Observations of odor are made at the property line of the establishment causing the odor. As a guide to odor classification, strong odors or putrefaction and fermentation tend to be obnoxious, while odors from baking or roasting nuts and coffee generally are not considered obnoxious. §5.26.



Dakota County

Intent. The AG, Agricultural Zone is designed to preserve agricultural land, to protect agricultural operations from encroachment of incompatible uses, to conserve agricultural resources and to provide appropriate locations for certain kinds of establishments primarily serving agricultural producers. Dakota County Zoning Ordinance §500.

Feedlot Definition. The confined feeding of food, fur or pleasure animals in buildings, lots, pens, pools or ponds, which normally are not used for the raising of crops or for the grazing of animals. For the purpose of this Resolution, the term feedlot shall include the confined feeding of 150 or more feeder cattle, 100 or more dairy cattle, 100 or more beef cows, 500 or more swine, 2000 or more sheep, 3000 or more turkeys, or 10,000 or more chickens, ducks or geese. Dakota county zoning ordinance §201(37).

Regulations. Feedlots are permitted in the AG zone so long as they meet the requirements of §550.5. §500.1(3). Corrals (including feedlots) in which animals are kept at a density of over 10 head per acre or where feed bunkers or water are placed so that animals naturally tend to bunch up to such density, shall not be closer than 300 feet from any lot line adjoining properties that are used for residential, commercial or light manufacturing purposes. §550.5(1). Such corrals shall maintain drainage so as to avoid excessive concentration of contained water and such drainage shall be so arranged that contaminated water does not drain into water courses in a manner that reaches neighboring properties at a concentration noticeable to normal senses. §550.5(1)(a). Manure in such corrals shall not be allowed to accumulate to objectionable proportions and each feeding pen shall be scraped at least once a month, weather and crops permitting. §550.5(1)(b). Adequate fly spray shall be applied to all of the feeding area during fly season and more often if necessary to control the fly population. §550.5(1)(c). All dead animals shall be removed within 24 hours. §550.5(1)(d). Feed shall be limited to fresh smelling materials and shall not include sour silage, fermented sugar beet pulp, paunch manure, garbage, or other materials that have a tendency to create objectionable odors. §550.5(1)(e). Feedlots shall not be located closer than 500 feet from residential structures that are not included in the farming operation of which the feedlot is a part. § 550.5(1)(f).

Residential spacing. Residential structures must be located at least 500 feet from any existing feedlot. §500.4(4).

Deuel County

Feedlot definition. Feedlots are defined as an animal confinement facility which is used for a period of at least 30 consecutive days, and where feeding is by other than grazing. The numbers of animals on feed to constitute a feedlot are: 100 or more beef or dairy cattle; 500 or more swine; 2000 or more sheep; 3000 or more turkeys; or 10,000 or more chicken, ducks or geese. Deuel County Zoning Ordinance at 30. Livestock operations are authorized as a matter of right within agricultural districts, although subject

to some location restrictions. Deuel County Zoning Ordinance at 7.

Feedlot restrictions. Certain feedlots and dairies are subject to conditional use permit requirements, and must meet location, setback, and setback planting requirements. Conditional use permits are required only for feedlots and dairies within 3 miles of an incorporated city or village, or within 3 miles of a concentration of 10 or more residences within one quarter mile square. Id. at 9.

In addition, feedlots and dairies must be set back at least 50 feet from any state or federal highway, and 150 feet from the intersection of two county roads. A windbreak, hedge, or planting of trees must be maintained in the setback along state and federal highways to visually screen the feedlot operations from public view.

Finally, prior to issuance of a building permit the applicant must show evidence that the proposed operation will comply with DEQ standards. Id. at 30.

Spacing Requirements There is a 40,000 square feet minimum non-farm-ranch residence lot size with 160 acre reservation requirement. Id. at p. 8.

Dodge County

Agricultural districts. Dodge county has two agricultural districts, A-C and AA-C. Dodge County Zoning Ordinance at II-3, II-5.

Feedlot definition. Feedlots are defined as the confined feeding of food, fur or pleasure animals in buildings, lots, pens, pools or ponds, which normally are not used for the raising of crops or for grazing animals. The term feedlot includes the confined feeding of more than 150 or more feeder or fat cattle, 100 or more beef cows, 100 or more dairy cattle, 500 or more swine, 2000 or more sheep, 3000 or more turkeys, or 10,000 or more chickens, ducks or geese. Id. at II-60.

A-C feedlot restrictions. This district is designed to be used near incorporated areas. General livestock production is a permitted use, but conditional use permits are required for feedlots, confined hog feeding facilities, and feedlot runoff control ponds and basins as required by DEQ. In addition, new or expanded feedlots, confined hog feeding facilities and related feedlot runoff ponds and basins required by DEQ must be located at least 1/4 mile from the nearest occupied residential (excluding residence of owner or operator), commercial or industrial building or public school as measured from the nearest edge of the lot lines. Id. at II-3 to II-5.

AA-C feedlot restrictions. This district is designed to be used in a major portion of the unincorporated area of the county. Livestock production, feedlots, confined hog feeding facilities, and feedlot runoff control ponds and basins required by DEQ are all permitted within the district. However, as in district A-C new or expanded feedlots, confined hog feeding facilities and related feedlot runoff ponds and basins required by DEQ must be located at least 1/4 mile from the nearest occupied residential (excluding

residence of owner or operator), commercial or industrial building or public school as measured from the nearest edge of the lot lines. Id. at II-6 to II-7

Douglas County

Agricultural Districts. Douglas County has two agricultural districts, AF1 agriculture-farming 1 and AF-2 agriculture-farming 2.

Feedlot Definition There is no definition of what constitutes a commercial feedlot.

AF-1 Feedlot restrictions Commercial feedlots are allowed in AF1 provided that the feedlot or accessory uses are located at least 500 feet from any non-farm dwelling and at least one-half mile from any AF2 or residential district. Douglas County Zoning Regulation §7(A)(2) at p. 5.

Commercial dairy and poultry farms are allowed in AF1 provided that the buildings are at least 100 feet from the property line and 300 feet from any AF2 or residential district. §7(A)(7) at p. 5.

AF-2 Feedlot restrictions Commercial feedlots are prohibited in district AF-2 §7(A)(2) at 5. Commercial dairies (but not poultry farms) are allowed as conditional uses in AF2 provided that the buildings are at least 300 feet from any dwelling and from any residential district. §8(B)(4) at 7.

Spacing Requirements. Single family dwellings are allowed in AF1 as a conditional use subject to a 2 minimum acre lot size. §7(B)(1), (D) at 6. Single family dwellings are allowed in AF2 subject to a 2 acre minimum lot size. §8(A)(2), (D) at 7-8.

Hall County

Agricultural districts. Hall county has four agricultural districts, AG-1 agricultural, AG-2 agricultural, TA-1 transition agricultural, and TA-2 transition agricultural. Hall County Zoning Resolution at p. 10-13.

Feedlot definition. Feedlots are defined as the confined feeding of food, fur or pleasure animals in buildings, lots, pens, pools or ponds, which normally are not used for the raising of crops or for grazing animals. The term feedlot includes the confined feeding of 150 or more feeder or fat cattle, 100 or more beef cows, 100 or more dairy cattle, 500 or more swine, 2000 or more sheep, 3000 or more turkeys, or 10,000 or more chickens, ducks or geese. Id. at 5-6.

AG-1 feedlot restrictions. The purpose of the AG-1 district is (1) to preserve lands best suited for agricultural uses of all types including feedlots and commercial livestock feeding; (2) to prevent the encroachment of mutually incompatible uses, and (3) to continue to provide for agricultural uses as a major asset to the county's economy. Feedlots and commercial livestock feeding are permitted in AG-1 without a conditional use permit. Id. at p. 10.

AG-2 feedlot restrictions. The purpose of the AG-2 district is to preserve lands best suited for agricultural uses from encroachment by incompatible uses, and to "preserve in agricultural use land suited to eventual development in other uses when it is practical and economical to provide

utilities, major streets, school and other facilities so that reasonable compact development will occur and the fiscal integrity of the county preserved." Conditional use permits are required for feedlots and commercial livestock feeding in AG-2. Id. at 11.

Conditional uses are granted by the county board of supervisors after a public hearing. In determining whether to grant the conditional use permit the board must consider, among other things, (1) the effects of odor of the proposed conditional use upon adjoining properties and properties generally in the district, and (2) general compatibility with adjacent properties and other properties in the area. Id. at 38.

Transition agricultural feedlot prohibitions. The intent for the TA-1 and TA-2 districts is to provide for a transition from primarily agricultural uses to low density residential and other development in keeping with the growth of the county. This district permits both farms and non-farm dwellings and those agricultural uses which do not tend to be a nuisance for residential populations. Animal husbandry, including feedlots, is prohibited in both TA-1 and TA-2. Id. at 12-13.

Hamilton County

Intent. The intent of the Hamilton County Agricultural District (AG) is to protect agricultural lands and lands consisting of natural growth from incompatible land uses in order to preserve land best suited to agricultural and public uses and land in which the natural environment should be continued and to control development of commercial and industrial development to those areas where they are best suited for reasons of practicality and municipal fiscal integrity. §601.

Feedlot definition. Special use permits are required for feedlots subject to NDEQ feedlot regulations. §604(7). Feedlots are defined as the confinement of horse and food animals in building lots, pens, pools, or ponds that normally are not used for raising crops or grazing animals. §2402

Howard County

Intent. The Howard County zoning ordinances establishes one agricultural district, A-1 exclusive agricultural. Howard County Zoning Ordinance at 13. The purpose of the A-1 district is to recognize the transition between agricultural uses of land and communities, to encourage the continued use of land suitable for agriculture but to limit land uses that may be a detriment to efficient pursuit of agricultural production.

Feedlot definition. Feedlots are defined as the confined feeding of food, fur or pleasure animals in buildings, lots, pens, pools or ponds, which normally are not used for the raising of crops or for grazing animals. The term feedlot includes the confined feeding of 150 or more feeder or fat cattle, 100 or more beef cows, 100 or more dairy cattle, 500 or more swine, 2000 or more sheep, 3000 or more turkeys, or 10,000 or more chickens, ducks or geese. Id. at 5.

Feedlot special use permits. Special use permits are

required for feedlots, although livestock operations smaller or other than those defined as feedlots are explicitly allowed without a permit. Special use permits may not be granted for activities within 300 feet of a residential or retail business structure if such use or activity results in continuous odors, dust or noise. Id. at 13.

Special use permit criteria. Criteria for granting zoning exemptions through special use permits are general and do not directly relate to feedlots. Factors to be considered in determining whether to grant a special use permit (for any conditional use) include, but are not limited to, (1) conservation of property values, (2) provision of adequate light and air, (3) prevention of over-crowding and excessive intensity of land use, (4) invasion by inappropriate use, and (5) value, type and character of existing or authorized improvements and land uses. Id. at 61.

Kearney County

In Kearney County, no dry lot feeding operation or other structures from which may emanate noxious odors can be erected within 660 feet of a residence located on the property of an adjoining owner. §401.01. Dry lot feeding operation is defined as any fenced in pen or enclosure in which more than five head of cattle, hogs, turkeys or other domestic animals, or 50 fowl are kept for more than 10 hours, in which such animals of fowl are fed and watered. §202.08.

Keith County

Intent. Keith county's intent in agricultural districts is to protect farming and ranching operations from encroachment by nonagricultural uses. Keith County Zoning Ordinance at p. 4-5.

Feedlot definition. Feedlots are defined as an animal confinement facility which is used for a period of at least 30 consecutive days, and where feeding is by other than grazing. The numbers of animals on feed to constitute a feedlot are: 100 or more beef or dairy cattle; 500 or more swine; 2000 or more sheep; 3000 or more turkeys; or 10,000 or more chicken, ducks or geese. Id. at 43.

Feedlot restrictions Livestock operations are authorized in agricultural districts. Id. at 5. However, conditional use permits are required for feedlots and dairies within 3 miles of an incorporated city or village or within 3 miles of a concentration of 10 or more residences within a 1/4 mile square acre. Id. at 7.

In addition, new feedlots and dairies, as well as feedlots and dairies subject to conditional use permit requirements, must meet location, setback, and setback planting requirements. Feedlots and dairies must be located at least 600 feet from existing residences on another lot unless written permission has been obtained from the legal owner. Feedlots and dairies must be set back at least 50 feet from any state or federal highway right-of-way, and at least 25 feet from any county road. A windbreak, hedge, or planting of trees must be maintained in the setback along state and

federal highways to visually screen the feedlot operations from public view. Finally, prior to issuance of a building permit, the applicant must show evidence that the proposed operation will comply with DEQ standards. Id. at 43-44.

Spacing Requirements Non-farm or ranch residences are subject to a 40,000 square foot minimum lot size with a 40 acre agricultural reservation. Id. at 5-6.

Lancaster County

Feedlot definition. Commercial feedlot is defined as a use where the principal business is the feeding of livestock or poultry for sale or slaughter or butcher. Commercial feedlot shall not include dairy herds or the keeping of livestock other than for slaughter or butcher. §2.049.

Feedlot Restrictions. Commercial feedlots are not permitted in AG agricultural districts but may be allowed in areas designated within AG districts as agricultural in the comprehensive plan future land use map if a special use permit is obtained. §4.003(a), 4.009(a). The special use permit application must contain a statement from NDEQ that livestock facility controls are not needed or that the livestock facility's permit application has been approved by NDEQ. §13.001(32).

Confined livestock feeding facilities for animals or poultry are not allowed in AGR agricultural residential districts. §5.003(a).

Lincoln County

Intent. The Lincoln County ordinance establishes three agricultural districts: A-1 agricultural, A-2 agricultural, and A-R agricultural. The intent of the A-1 district is to protect agricultural uses in the county by restricting and regulating density, land coverage and land use. This district is to protect the more sensitive land area of the county which is subject to wind and water erosion and land subject to flooding. Lincoln County Zoning Ordinance §19.1. The intent of the A-2 district is to protect agricultural uses in the county by restricting and regulating density, land coverage and land use. §20.1. The purpose of the A-R district is to protect agricultural uses in the county by restricting and regulating density, land coverage and land use. This district includes the provision for recreational areas and wildlife habitats, to conserve wildlife and preserve areas of natural beauty. §21.1.

Livestock feeding yard definition. Livestock are defined as domestic animals of types customarily raised or kept on farms for profit or other purposes. §3.56. Livestock feeding yard is defined as an enclosure or structure designed or used for holding livestock for purposes of concentrated feeding or fattening of livestock for marketing or for dairying purposes. §3.57. This general definition applies to all three agricultural districts.

Livestock feeding yards. Livestock feeding yards of 1000 head or more are subject to A-1 and A-2 district conditional use permits (similar to special use permits). § 19.4(e); 20.4(g). All livestock feedlots are subject to conditional use permits in the A-R district. §21.4(n).

Conditional Use Permit Procedures. In determining whether to grant a conditional use permit the proposed use, among other things, cannot cause substantial injury to the value of other property in the neighborhood in which it will be located. §8.7(3). All property owners within 300 feet of the proposed conditional use must be notified by the applicant of the conditional use permit application. Lincoln County Conditional Use Application and Instructions.

Madison County

Intent. Madison county has one agricultural district, A-1. It is the intent of the A1 district regulation to protect A1 agricultural areas. Madison County Zoning Ordinance at p. 12.

Feedlot definition. A feedlot is defined as the confined feeding of animals in buildings, lots or pens which are not used for the raising of crops or the grazing of animals. Except for temporary confinement, such as during seasonal adverse weather, the term "feedlot" includes the confined feeding of (1) livestock for other than the farm operator, (2) livestock when not in conjunction with the farm operation, (3) over 150 feeder or fat cattle, (4) over 150 cows, (5) over 150 dairy cows, (6) over 500 swine, (7) over 2000 sheep, (8) over 3000 turkeys, (9) over 10,000 chickens, ducks or geese. Id. at 3.

In addition, any person on any farm or acreage exceeding the following animal-to-acre ratio shall be considered to be operating a feedlot and required to obtain a special use permit: **livestock per acre:** (1) 1-5 acres: no sheep, cattle or swine; (2) 6-10 acres: 1.5 cattle per acre or 3.0 sheep or swine per acre; and (3) 11-40 acres: 2.5 cattle per acre or 5.5 sheep or swine per acre; **combined livestock per acre:** (1) 1-5 acres: no sheep, cattle and/or swine; (2) 6-10 acres: 2.5 cattle and/or sheep and/or swine per acre (and no more than 1.5 cattle per acre); and (3) 11-40 acres: 3.5 cattle and/or sheep and/or swine per acre (and no more than 2.5 cattle per acre); **per farm or acreage:** (1) 1-5 acres: one horse and two cattle or swine or sheep; (2) 6-10 acres: three horses and no cattle, swine or sheep; and (3) 11-40 acres: six horses and no cattle, swine or sheep. Id. at 3.

Feedlot restrictions. Feedlots are authorized by special use permit subject to DEQ feedlot regulations and to county "minimal sanitation and odor [control] practices (to establish a healthful environment around the feedlot)."

Manure must be removed or disposed of in one of the following ways: (1) spraying or spreading on land followed by discing or plowing when on cultivated land; (2) grinding or dehydrating in properly designed dehydrators; or (3) stockpiling in a compost plant in an isolated area at least three miles from a residential area.

Insect and rodent control requirements are (1) proper manure removal and disposal, and (2) use of chemical sprays and poisons according to procedures and recommendations of a biologist experienced in insect and rodent control.

Drainage requirements are: (1) grading and compacting all ground surfaces within pens and maintaining such

surfaces to insure proper drainage and (2) controlling surface runoff so that no appreciable amount of soil is carried into any roadway ditch or drainage area where it will deposit and form sludge banks where flies and mosquitoes can breed. Id. at 13.

Spacing requirements Feedlots may not be located within 1320 feet (1/4 mile) of a residence, and a residence may not be located within 1320 feet of a feedlot unless the residence is accessory to the feedlot. Id. at 14a.

Nonagricultural residences are not permitted within the A1 district except by special use permit (40 acre minimum lot size). Id. at 14-14a.

Merrick County

Merrick County has two agricultural districts, AG-1 and AG-2. A feedlot is defined as the confined feeding of 150 or more feeder or fat cattle, 100 beef or dairy cattle, 500 swine, 2,000 sheep, 3,000 turkeys or 10,000 poultry. Merrick County Zoning Ordinance at 1-2.

In district AG-1 feedlots are permitted subject to DEQ feedlot regulations. In district AG-2 feedlots are also subject to conditional use permit requirements. If the feedlot is located within a mile of a city or village the conditional use permit hearing is before the city council or village board. Id. at 2-1 to 2-2.

Residences are subject to a 20,000 square foot minimum lot size. Id. at 2-2.

Otoe County

Intent Otoe County has delineated the Open Space Agricultural District for the purpose of preserving agricultural resources. Basic income horticulture, crop production, cultivation, tree farming and/or orchards, bulk grain storage and irrigation projects are all permitted uses. The operation of a commercial feedlot requires a special use permit. Otoe County Zoning Ordinance §5.01.

Commercial Feedlot: The confined feeding of more than a specified number of food animals in buildings, lots, pens, pools or ponds which are normally not used for raising crops or for grazing animals.

- a. When the confined feeding is part of a normal farm operation, it will be considered a commercial feedlot when confined feeding exceeds 500 or more feeder or fat cattle, 300 or more dairy cattle, or 1000 or more sheep or swine, 20,000 or more poultry. Where two or more types of animals are confined, the total of the animals in each category, as a percentage of the minimum listed for that category, cannot total more than 100 percent.
- b. When confined feeding occurs not as a part of a normal farm operation, it shall be considered a commercial feedlot when the confined feeding exceeds 250 or more feeder or fat cattle, 150 or more dairy cattle, 500 or more sheep or swine, or 10,000 poultry. Where two or more types of animals are confined, the total of the animals in each category, as a percentage of the minimum listed for that category, cannot total more than 100 percent.

Confined feeding as a part of a farm operation and smaller than the numbers listed above shall be considered to be a part of a normal farm operation. It shall also be considered a normal farm operation when at least 50% of the feed required to sustain the confined livestock is grown by the owner of the commercial feedlot site. In no case may a feedlot expand to exceed in number twenty (20) times the numbers listed in (a) or (b) in the above definition of a commercial feedlot. §1.06 at p.2.

Commercial feedlots are permitted in the Open Space Agricultural District by special permit, subject to the following:

Permit will be denied where the outside boundary of the commercial feedlot is within 1/2 mile of any non-owned (not owned by the operator) residential dwelling, except where the non-owned residence is part of another commercial feedlot.

Permit will be denied where the outside boundary of the commercial feedlot is within 1 mile of any conventional residential or any residential planned part district, or any operating school.

Permit will be denied where the outside boundary of the feedlot is within 2 miles of the limits of any incorporated municipality, or within 3 miles of the limits of any city of the first class.

Permits will be reviewed for renewal by the Otoe County Planning Commission every two years and will be automatically renewed if:

The necessary minimum number of livestock are being regularly maintained, and

There is a record of compliance with state and federal health and safety standards and regulations,

There has been no significant urban expansion clearly in the direction of said feedlot.

Feedlot permits not automatically renewed under this criteria must undergo a new hearing and approval procedure unless the County Planning Commission issues a temporary conditional permit valid for a period of 2 years. The Commission may grant up to a maximum of ten temporary conditional permits. §5.04(h).

Pierce County

Intent. The purpose of the A-1 agricultural district is to protect agricultural uses in the zoning area through control of population, land use and land coverage, and major roadways.

Feedlot Restrictions. The planning commission by special use permit, may authorize feedlots subject to such conditions the commission deems necessary, including setbacks, landscaping, screening, fencing, maintenance provisions, and other similar requirements. §3 (15) (i). Animal feedlots are subject to state license requirements and to the following minimum sanitation and odor practices to establish a healthy environment around the feedlot. Location requirements are: (1) 1/4 mile spacing from existing residences; (2) no residence may be constructed within 1/4 mile of a feedlot; and (3) residential construction is permitted with the feedlot

operation when the feedlot operation and dwelling are under the same ownership.

Operation requirements are: (1) manure shall be removed or disposed of in one of the following manners: (a) spraying or spreading on land followed by discing or plowing except on unbroken ground; (b) grinding or dehydrating in properly designed dehydrators; (c) stockpiling in a compost plant in an isolated area at least one mile from a residential area; (2) insect and rodent control: (a) removal of manure and disposal as outlined above; and (b) use chemical sprays and poisons in accordance with procedures and recommendations of a biologist experienced in insect and rodent control.

Drainage requirements are: all ground surfaces within pens shall be so graded and compacted to insure proper drainage and maintained as such; and (b) surface runoff shall be so controlled that no appreciable amount of soil or manure is carried into any roadway ditch or drainage area where it will deposit and form sludge banks where flies and mosquitoes can breed. §3(15)(i).

Saline County

Intent. Saline County has one agricultural district - Open Space Agriculture. The intent of the agricultural district is to preserve agricultural resources free from urban development. Saline County Zoning Regulations §5.01.

Feedlot definition and restrictions. General livestock production is a permitted use unless the livestock facility meets the definition of a feedlot. §5.02. A feedlot is defined as the confined feeding of 250 or more feeder or fat or beef cattle, 150 dairy cattle, 1500 swine, 2500 sheep or 5000 or more turkeys. §1.07 at p.3. Feedlots are considered special uses for which a special use permit is required from the Saline County Board. §5.04.

Feedlot exemption procedures. The county zoning administrator must notify all property owners within one mile of the proposed feedlot of the special use permit application. The planning commission must hold a hearing on the feedlot exemption application and present its recommendations to the county board before the board decides whether to grant the exemption. If a feedlot special exemption is granted, the feedlot location and its surrounding one mile radius must be indicated on the county zoning map. §5.04(i).

Spacing requirements and residences. Feedlots must be located at least one mile from an incorporated city or village. Waste lagoons must be located at least 50 feet from any county, state or federal road right-of-way, and at least 30 feet from another other public right-of-way. §5.09.

Residences are not a permitted use in the agricultural district and must have a special use permit. §5.04(4)(d). Residences within one mile of the feedlot, other than homes accessory to the feedlot operation itself, are not a permitted use in the agricultural district without a special use permit. §5.04(1). Educational, religious and other public or semi-public uses must also be located at least a mile from a feedlot and obtain a special use permit. §5.04(4)(d).

Sarpy County

Districts. Sarpy County has three agricultural districts: AG agricultural farming, AGD agricultural development, and AGR agricultural residential. Sarpy County Nebraska Zoning Ordinance and Subdivision Regulations §8.

Feedlot definition. The terms feedlot or commercial feed yard are defined as a place where the principal business is the feeding of livestock and the feeding is not done as a subordinate activity to the production of crops on the premises of which the feedlot is a part. Id. at 135.

AG feedlot restrictions. The purpose of the AG district is the conservation and preservation of the agricultural areas of the county and to retain its economic benefit to the county. §9. Livestock feeding and raising are permitted without a special use permit where a portion of the feed is raised and the livestock feeding and raising are part of the normal operation of the agricultural use. §9.1.11. A special use permit, however, is required for commercial feedlots, swine and poultry facilities, and similar farms. §9.2.20.

AGD feedlot restrictions. The purpose of the AGD district is "to preserve areas presently suitable for all agricultural uses by permitting only a limited infringement of other agriculturally related land uses." §10. Livestock feeding and raising are permitted without special use permit where a portion of the feed is raised and the livestock feeding and raising are part of the normal operation of the agricultural use when located 1/2 mile from the limits of a city or village. §10.1.12. A special use permit, however, is required for commercial feedlots, swine and poultry facilities, and similar farms. §10.2.8.

AGR feedlot restrictions. The purpose of the AGR district is "to provide a transition from land used for agriculture to a low density residential use with a limited infringement of other uses." §11. Barns for livestock are allowed but the animal density cannot exceed one animal for the first acre of land and one additional animal for every two additional acres. §11.3.5. Poultry houses and rabbit houses are also authorized on a similarly limited basis. §11.3.5.

Special use permits. The county board may grant special use permits for authorized special uses after a public hearing. §§38.1.1, 38.1.3. A special use permit may not be granted by the board unless the board finds, among other things:

- (1) that the special use will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purpose already permitted, nor substantially diminish and impair property values within the neighborhood;
- (2) that establishing the special use will not impede the normal and orderly development in improvement of the surrounding property for uses permitted in the district;
- (3) that adequate utilities, access road, drainage and/or necessary facilities have been or are being provided;
- (4) that the proposed use will not involve air pollution by dust, vapors or other substances which are injurious to health, animals, vegetation or other property or which can cause soiling, discomfort or irrigation;
- (5) the proposed use will not involve any malodorous gas or

matter which is discernible on any adjoining lot or property, and

- (6) that the special use shall not involve any activity substantially increasing the burden on any public utilities or facilities unless provisions are made for any necessary adjustments. §§38.5.1.2-4, 38.5.1.10-11.

Minimum lot size requirements AG provides for general agricultural purposes with a 20 acre minimum lot size and interim uses under special or conditional permits. §8.1.1 District AGD provides for farming and agricultural related activities with a 10 acre minimum lot size and interim uses under special or conditional permits. §8.1.2. District AGR provides for agriculture, low density residential development, and has a three acre minimum lot size. §8.1.3.

Saunders County

Intent. Saunders County has one agricultural district, A-1. The intent of the A-1 district is (1) to preserve areas best suited for agricultural uses of all types including feedlots and commercial livestock feeding, (2) to prevent the encroachment of mutually incompatible uses, and (3) to continue to provide for agricultural uses as a major asset to the county's economy. Saunders County Zoning Ordinance at p. 20.

Feedlot definition. A commercial feedlot is defined as land where the principal use is the feeding of livestock (1) for other than the farm operator, involving (2) more than 1000 head of livestock [presumably cattle], or (3) over 2000 head of swine or sheep, or (4) the feeding of over 1500 head of a combination of cattle, swine, sheep or rabbits, (5) when not in conjunction with a farming operation. Id. at 6.

In addition, any farming operation where the animal density exceeds the following ratios is considered to be operating a commercial feedlot: **livestock per acre:** (1) 11-20 acres: 1.5 cattle per acre or 3.0 sheep or swine per acre; (2) 20-40 acres: 2.5 cattle per acre or 5.5 sheep or swine per acre; and (3) 40-160: 4.5 cattle per acre or 9.0 sheep or swine per acre; **combined livestock per acre:** (1) 11-20 acres: 2.5 cattle and/or sheep and/or swine per acre (and no more than 1.5 cattle per acre); (2) 20-40 acres: 3.5 cattle and/or sheep and/or swine per acre (and no more than 2.5 cattle per acre); and (3) 40-160 acres: 7 cattle and/or sheep and/or swine per acre (and no more than 4.5 cattle per acre); **per farm:** (1) 11-20 acres: three horses; (2) 20-40 acres: six horses; and (3) 40-160 acres: 10 horses. In addition, one head of cattle or two head of swine or sheep per acre over 160 acres can be fed to a maximum of 1000 cattle or 2000 swine or sheep, or 1500 head of cattle, swine or sheep combined. Finally, the land being farmed by the livestock operator must be within a 10 mile radius of the livestock operation. Id. at 6. The zoning ordinance also establishes animal density ratios for poultry.

Feedlot restrictions and spacing requirements.

Commercial feedlots require a special use permit. Commercial feedlots must be located at least 1000 feet from the nearest dwelling other than that of the owner or operator,

and at least one mile from the nearest non-agricultural use. All commercial feedlot operations must be confined to the area identified in the permit application, including waste disposal, except that feed may be hauled in. Id. at 21.

Scotts Bluff County

Intent. The intent of the confined livestock provisions of the Scotts Bluff County zoning ordinance is to encourage the location of confined livestock feeding operations in Scotts Bluff County, which recognizes that livestock feeding will promote agribusiness within the county. However, it is also recognized that livestock feeding must be considered along with other interests found in the county, such as residential uses found within certain areas of the county. Scotts Bluff County Zoning Ordinance §5.101(19)(a).

Feedlot definitions. Confined livestock feeding refers to the feeding of beef cattle in lots or pens or yards or other enclosures open to the air, in which a contiguous area is devoted to such feeding. Feedlots are categorized by capacity: Class I is 25-300 head; Class II is 25-1000 head; and Class III is more than 1000 head. The feeding of beef cattle shall be confined to situations of feeding in areas which are not normally used for the raising of crops or the raising of animals. Seasonal feeding of beef cattle is not considered confined livestock feeding. §5.101(19)(b)(3).

Feedlot Restrictions. Special permits are required for confined livestock feeding of beef cattle. Class I feeding may be allowed by permit only in agricultural-residential (AG) districts. Class II and III feeding may be allowed by permit only in agricultural (A) districts. §5.101(19)(c)(2).

Confined feeding of beef cattle permits are subject to the following conditions: (1) the feedlot must be located with the recognition given to the prevailing winds in the area, so as to minimize the possibility of interference with nearby residential use; (2) the feedlot or any portion of it must be located to provide adequate safeguards for the following: (i) diversion of outside surface water from entering the feedlot; (ii) adequate drainage within the feedlot, with the use of mounds suggested; (iii) adequate provisions for debris basins to intercept total feedlot runoff; (iv) adequate detention ponds designed to temporarily hold runoff from the feedlot; and (v) provide adequate means to dispose of feedlot runoff; (3) a sufficient water supply to supply the number of cattle authorized in the permit; and (4) demonstrate reasonable feedlot operation techniques to minimize dust, odor, insects, and noise. §5.101(19)(d). Failure to correct any of these requirements after notice is cause for permit revocation. §5.101(19)(e)(2).

Seward County

Feedlot definitions. Commercial feedlots are defined as a commercial operation offering the service of feeding animals owned by another for market in a confined feeding situation, normally using most of its feed or farm products not grown or produced on the same land or contiguous land but reduced commercially. Seward County Zoning Regulations

and Subdivision Regulations §22.109. Commercial feedlot boundaries are defined as the perimeter of a commercial feedlot outside of all pens, lagoons, debris basins, water handling areas, manure storage areas, and support structure. §22.110 at 16.

A confined livestock feeding facility is defined as a facility providing a confined area for feeding or holding animals, but not used for growing crops or vegetation for animal feeding with the capacity to hold the following numbers of animals at any one time: 250 slaughter cattle; 175 dairy cattle and beef breeding stock; 1250 swine over 55 pounds; 2500 sheep; 13,750 turkey in open lots; 12,500 ducks; 25,000 laying hens and broilers with cage facilities and unlimited constant flow watering; and 5,000 laying hens and broilers with cage facilities and liquid manure handling system. §22.111.

Feedlot restrictions. Commercial feedlots cannot be established within two miles of an incorporated area within the county, and within one mile of a church seminary, camp or convent or a public or parochial school or college. Lot runoff, control ponds, and basins shall meet DEQ and EPA requirements. A hearing will be held before the permit is issued. Each applicant must provide a plat showing where structures, pits, boundaries etc. will be located. §7.202.

Confined livestock feeding operations cannot be established within one-half mile from an incorporated area within the county or from a residential use not of the same property. Confined livestock feeding operations cannot be established within one mile of a church seminar, camp or convent or a public or parochial school or college. Lot runoff, control ponds, and basins shall meet DEQ and EPA requirements. A hearing will be held before the permit is issued. Each applicant must provide a plat showing where structures, pits, boundaries etc. will be located. §7.203.

Residences. In agriculture farming district (A-1), farm single-family dwellings must be on 20 acres lots and located at least one-half mile from the outer boundary of a commercial feedlot not of the same property. §7.101A. Non-farm dwellings are conditional uses, subject to a three acre minimum lot requirement, and must be located at least three-fourths of a mile from the outer boundary of a commercial feedlot not of the same property. §7.201. Dwellings and non-farm dwellings within the agricultural district are subject to a three acre minimum lot size. §7.4.

Church seminaries, camps or convents cannot be established within one mile of the centermost point of a commercial feedlot or confined feeding of livestock. §7.207 at 6. Public or parochial schools or colleges cannot be established within one mile of a commercial feedlot or confined feeding of livestock. §7.208.

Stanton County

Intent. The county has adopted a general policy statement regarding "commercial feeding operations and adjacent land use." The county's policy is to minimize land use conflicts between commercial feeding operations and adjacent land

uses by requiring proper separation distance between possible conflicting uses. Separation distances between feed lots and housing units should be maintained regardless of which land use is established first. The intent of the policy is to carefully review the possibility of conflict at the time of development and make zoning and subdivision decisions based on available information. Commercial feeding operations should not expand without permission of the County under zoning regulations. Stanton County Zoning Ordinance at p. 18.

Feedlot definition. Commercial feedlot is defined as “the confined feeding for food, or for pleasure, of animals in buildings, lots, pens, pools, or ponds which normally are not used for raising crops or pastureland. For the purpose of this Resolution, the term feedlot shall include the confined feeding of 50 or more feeder or fat cattle, 50 or more beef breeding animals, two years or older, which are confined for more than one day, 30 or more dairy cattle, 300 or more swine, 500 or more sheep, 1,000 or more poultry, or an equivalent in combined animal units.” Id. at 32.

Feedlot restrictions and spacing requirements. Conditional use permits are required for commercial feedlots agricultural A-1 districts. The feedlot must be at least 500 feet from any dwelling other than a farm dwelling, and at least one-half mile from any residential R-1 district. Id. at 9. This would provide some protection for non-farm dwellings but not farm dwellings.

Minimum lot size requirements. Stanton county has a 40 acre minimum lot size for residences in agricultural districts. Id. at 9.

Washington County

Feedlot restrictions. Washington county has two agricultural districts, agricultural farming A-1 and agricultural commercial A-2. Washington County Zoning Ordinance §§1.009 and 1.010. Special use permits are required in A-1 for (1) commercial feedlots and (2) the confined feeding of 50 or more head of livestock when located within one-half mile of an incorporated area or non-farm dwelling. §1.009. Special use permits are required in A-2 for (1) stock yards, (2) commercial feedlots and (3) the confined feeding of 50 or more head of livestock when located within one-half mile of the limits of a city or village. §1.010.

Special use permit procedures. In reviewing special use permit applications the Planning Commission and County Board must find, among other things, that:

- (1) the proposed use will not be injurious to the use and enjoyment of other property in the immediate area for the purpose already permitted, or will not substantially diminish and impair property values within the neighborhood;
- (2) that the proposed use will not involve air pollution by dust, vapors or other substances which are injurious to health, animals, vegetation or other property or which can cause soiling, discomfort or irritation; and

- (3) the proposed use will not involve any malodorous gas or matter which is discernible on any adjoining lot or property. Id. at 43.

York County

Agricultural districts. York county has three agricultural districts: GA general agriculture, TA-1 transitional agriculture and TA-2 transitional agriculture. York County Zoning Ordinance §§5.10, 5.20 & 5.30.

Animal units definition. The term animal unit describes the relationship between various animals that are being held or fed. Slaughter steers and heifers are assigned the base unit of 1.0. The multipliers for determining animals are: slaughter steers and heifers = 1.0; cow-calf herds = 1.3; dairy cattle = 1.4; swine = 0.4; sheep = 0.1; all fowl = 0.05. Each of the following would all equal 500 animal units: 500 steers; 384 cow-calves; 357 dairy cattle; 1,250 swine; 5,000 sheep; and 10,000 turkeys. §17 at 24.

GA feedlot restrictions. The intent of the GA district is to preserve lands best suited for agricultural use, including feedlots and commercial livestock feeding, to prevent encroachment of incompatible land uses, and to continue to provide for agricultural use as a major asset to the county's economy. §5.10. Feedlots up to 2500 animal units and commercial livestock feeding up to 2500 animal units are permitted uses. §5.12. Special use permits are required for feedlots and commercial livestock feeding exceeding 2500 animal units. §5.14. New or expanded feedlots or commercial feeding in excess of 500 animal units and lagoons must be located no closer than 1/4 mile from the nearest occupied residential, commercial or industrial building other than that occupied by the feedlot. The 1/4 mile distance is measured from the nearest edges of the feedlot or lagoon and the residence. §5.17.

TA-1 feedlot restrictions. The intent of the TA-1 district is to provide for continued agricultural land use while recognizing the transition between agriculture and development if the Interstate 80 interchanges. §5.20. Feedlots and commercial livestock feeding are authorized by special use permit only. §§5.22, 5.24. There is no general minimum distance requirement.

TA-2 feedlot restrictions. The intent of the TA-2 district is to recognize the transition between agriculture land uses and community land uses, to encourage continued agriculture use but to limit land uses that may be a detriment to normal community expansion. §5.30. Feedlots and commercial livestock feeding are authorized by special use permit only. §§5.32, 5.34. There is no general minimum distance requirement.

ZONING ORDINANCES

COUNTY/ DISTRICTS	FEEDLOT DEFINED	RESTRICTIONS	SPACING
ADAMS COUNTY AG-1 Agricultural AO-1 Agricultural Open Space	Not defined	In AG-1, feedlots are a conditional use. A permit and public hearing are required. In AO-1 a feedlot is also a conditional use. Permit and DEQ approval are required.	AG-1 - 20 acre minimum lot size, 2 acre minimum non-farm residence.
BROWN COUNTY AG-Agricultural District	Not defined	Permit required only for feedlot exceeding certain size (see appendix).	
CASS COUNTY	Definition uses a graduated livestock per acre ratio - see appendix. A commercial feedlot has more than 1000 cattle, 2000 swine sheep or poultry when not in conjunction with a farm operation.	Feedlots require a conditional use permit. The operator must live w/i a 10 mile radius of the lot.	
CHEYENNE COUNTY A - Agricultural District	Confinement facility used for 30 consecutive days, other than for grazing. Certain number of animals required (see appendix).	Feedlots classified by size. Expansion into next size requires conditional use permit.	
CLAY COUNTY GA - General Agricultural AI- Agricultural Industrial	Not defined	AI - authorized by special use permit, subject to odor performance requirements. GA - up to 1,200 animal units permitted w/o a permit, up to 2,500 by conditional use permit.	GA- new or expanded lots of 500 head must be 1/4 mi. from residence. A 10 acre min. residential lot size no closer than 1/4 mi. from existing lot w/o variance and waiver of right to sue.
DAKOTA COUNTY AG-Agricultural Zone	Confined feeding of food, fur, pleasure animals in areas not used for raising crops or grazing animals. Certain number of animals required (see appendix).	Feedlots permitted in AG but not within 300 feet of residential or commercial lot line. Restrictions on waste management, feed used, and fly controls.	Residences (other than as part of operation) must be located at least 500 feet from feedlot.
DEUEL COUNTY	Confined feeding of 100 or more beef or dairy cattle, 500 or more swine, 2000 sheep or 10,000 or more chicken, ducks or geese or 3000 turkeys.	Feedlots authorized as a matter of right subject to location requirements.	Feedlots and dairies must be set back at least 50 feet from highway. Plantings are also required to screen public view.
DODGE COUNTY A-C Agricultural AA-C Agricultural	Confined feeding of more than 150 feeder or fat cattle, 100 or more beef or dairy cattle, 500 or more swine, 2000 or more sheep, 3000 or more turkeys, or 10,000 or more chickens, ducks or geese.	A-C- feedlots require a conditional use permit, control ponds and basins as required by DEQ. AA-C - feedlots a permitted use.	AC and AA-C - new feedlots, runoff ponds and basins must be located 1/4 mi. from nearest residence or commercial industrial or public school building.

COUNTY/ DISTRICTS	FEEDLOT DEFINED	RESTRICTIONS	SPACING
DOUGLAS CO. AF1 Agricultural AF2 Agricultural	Not defined	AF1 - commercial feedlots, dairy and poultry a permitted use. AF2 - Commercial feedlots and poultry prohibited. Dairies allowed as a conditional use.	AF1 - dwelling a conditional use, 2 acre min. lot size. Feedlots must be 500 ft., dairy and poultry 300 ft. from residential district. AF2 - dairies must be 300 ft. from any dwelling. 2 acre min. lot size.
HALL COUNTY AG1- Agricultural AG2- Agricultural TA1 - Transition agricultural TA2- Transition Agricultural	Confined feeding of more than 150 feeder or fat cattle, 100 or more beef or dairy cattle, 500 or more swine, 2000 or more sheep, 3,000 or more turkeys, 10,000 or more chickens, ducks or geese.	AG-1 feedlots a permitted use. AG-2 feedlots require a conditional use permit. TA1 and TA2 - all animal husbandry is prohibited.	
HAMILTON CO. AG-Agricultural District	Confinement of horse and food animals in areas not used for raising crops or grazing.	Special use permits required for feedlots subject to NDEQ regulation.	
HOWARD CO. A1 - Exclusive Agricultural	Confined feeding of more than 150 feeder or fat cattle, 100 or more beef or dairy cattle, 500 or more swine, 2000 or more sheep, 3,000 or more turkeys, or 10,000 or more chickens, ducks or geese.	Feedlots must obtain a special use permit.	Permit denied if w/i 300 ft. of residential or retail business and activity results in continuous odors, dust or noise.
KEARNEY COUNTY	Dry lot feeding is enclosed feeding of certain number of animals (see appendix).		No operation which may cause odor allowed within 660 feet of residence of adjoining owner.
KEITH CO.	Confined feeding of 100 or more beef or dairy cattle, 500 or more swine, 2,000 or more sheep, 3,000 or more turkeys, or 10,000 or more chickens, ducks or geese.	Feedlots/dairies w/i 3 mi. of incorporated or residential area are subject to conditional use permit requirements with respect to location, set back, plantings and compliance w/ DEQ.	Non-farm residences subject to 40,000 sq. ft. minimum lot size. 40 acre agricultural reservation.
LANCASTER COUNTY AG-Agricultural District AGR-Agricultural Residential	Commercial feedlot is where principal business is feeding of livestock or poultry for sale, slaughter, or butcher. Does not include dairy herds.	Commercial feedlots not permitted in AG except through special use permit in certain areas. NDEQ must certify no waste controls needed or state permit approved. Confined feeding not permitted in AGR.	

COUNTY/ DISTRICTS	FEEDLOT DEFINED	RESTRICTIONS	SPACING
LINCOLN CO. A-1 - Agricultural A-2 - Agricultural A-R - Agricultural	An enclosure or structure designed for holding livestock for purposes of concentrated feeding or fattening of livestock for marketing or for dairying.	A-1, A-2 lots in excess of 1000 head and all A-R lots require conditional use permit, must not cause substantial injury to the value of other property in the area. Neighbors must be notified of the application.	
MADISON CO. A1 - Agricultural	Confinement of more than 150 feeder, beef or dairy cattle, 500 swine, 2,000 sheep, 3,000 turkeys, 10,000 poultry when not in conjunction with a farm operation. Also animal to acre ratio. See Appendix.	Feedlots authorized by special use permit subject to DEQ standards and the County's own sanitation and odor standards for manure removal, rodent control and drainage.	Non-farm residence requires a special use permit. 40 acre minimum lot size. A feedlot may not be located within 1,320 feet of a residence or vice versa.
MERRICK CO. AG1 - Agricultural AG2 - Agricultural	Confined feeding of 250 or more feeder, fat, or beef cattle, 150 dairy cattle, 1500 swine, 2500 sheep, 5,000 or more turkeys.	AG1 - feedlots permitted subject to DEQ standards. AG2 - feedlots require a conditional use permit if w/i 1 mi. of city or village and a hearing before City Council or Village Board.	A 20,000 square foot minimum lot size for residences.
OTOE COUNTY Open Space Agricultural	Commercial feedlot: where 50% of feed requirement grown by owner - 500 feeders or fat cattle, 300 dairy cattle, 1000 swine or sheep, 20,000 poultry; When feed purchased numbers reduced by 1/2.	Commercial feedlots must obtain a special use permit. The Planning Commission must hold a hearing on the application and make recommendations to the County Board. If less than defined a permitted use. If w/i definition must obtain a special use permit - renewed every 2 yrs. Maximum limit, 20 x numbers in definition.	Feedlot must be 1/2 mi. from any dwelling; 1 mi. from any residential area, school or 2mi. from village; 3 mi. from city.
PIERCE COUNTY A-1 Agricultural District	Not defined.	Special use permits required subject to necessary conditions of maintenance, setbacks, etc. Restrictions on chemical use, waste management, rodent and insect control, and drainage.	One-quarter mile from existing residences and vice versa.
SALINE CO. Open Space Agricultural	Confined feeding of 250 or more feeder, fat, or beef cattle, 150 dairy cattle, 1500 swine, 2500 sheep, 5,000 or more turkeys.	Special use permit required from county board. Property owners within one mile notified. If exemption granted, 1 mile feedlot radius indicated on zoning map.	Non farm dwellings not permitted in ag. district w/o an exemption and must be located at least 1 mi. from a feedlot. Same requirements for educational, religious and other public uses.

COUNTY/ DISTRICTS	FEEDLOT DEFINED	RESTRICTIONS	SPACING
SARPY COUNTY AG - Agricultural Farming AGD - Agricultural Development AGR - Agricultural Residential	A location where the principal business is the feeding of livestock not as a subordinate activity to the production of crops on the premises of which the feedlot is a part.	AG - feedlots must get a special use permit unless some feed is raised by the operator. AGD - feedlots must have special use permit. AGR - all livestock operations subject to animal to land ratio, (see Appendix).	.AGD - farmer feeders must be 1/2 mile from city or village limits. AG - 20 acre min. lot size. AGD - 10 acre min. lot size. AGR - 3 acre min. lot size.
SAUNDERS CO. A1 - Agricultural	Feeding of more than 1000 cattle, 2000 swine or sheep, 1500 head in combination when not in conjunction with a farming operation.	Commercial feedlots must obtain a special use permit. All livestock operations must meet animal density standards. See Appendix.	Commercial feedlots must be 1000 ft. from the nearest dwelling and 1 mi. from nearest non-agricultural use.
SCOTTS BLUFF COUNTY AG-Agricultural Residential A-Agricultural	Feeding of beef cattle in contiguous areas open to the air. Seasonal feeding not included. Classed by size. See Appendix.	Special use permit required. Small feedlots only in AG. Restrictions on drainage, water supply, management.	
SEWARD CO. A1 - Agricultural	Commercial Feedlot: Confined feeding of animals owned by another, with feed purchased commercially. Confined feeding: more than 250 slaughter cattle, 175 dairy or beef cattle, 1,250 swine, 2,500 sheep, capacity. See Appendix for other animal capacities.	Commercial feedlot and confined feeding must obtain a permit, meet DEQ and EPA standards. A hearing must be held before a permit will issue.	Commercial feedlot may not be established within 2 mi., or in the case of confined feeding w/i 1/2 mi. from incorporated area, and neither w/i 1 mile of church or public school. See Appendix for min. lot sizes.
STANTON CO. A1 - Agricultural	Confined feeding: more than 50 cattle, 50 beef cows, 30 dairy cattle, 300 swine, 500 sheep, 1000 poultry.	Commercial feed-lots must obtain a conditional use permit.	Feedlots must be 500 feet from any non-farm dwelling and at least 1/2 mi. from any residential district.
WASHINGTON CO. A-1 Agricultural Farming A-2 Agricultural Industrial	Not defined	A-1 & A-2 - Special use permit required for feedlots and confined feeding of 50 or more head when w/i 1/2 mi. of incorporated area or non-farm dwelling. A-2 - Special use permit also required for stockyards.	
YORK CO. GA - General Agricultural TA-1 - Transitional Agriculture TA-2 - Transitional Agriculture	Uses formula to determine animal units. For example, 500 animal units = 500 steers, 384 cow/calf, 357 dairy cattle, etc. See Appendix.	GA - up to 2,500 animal units, a permitted use. If more, must get special use permit. TA-1 & TA-2 - By special use permit only.	GA - new, expanded or more than 500 animal units no closer than 1/4 mi. from dwelling or commercial bldg.

Chapter 3

NEBRASKA NUISANCE LAW AND LIVESTOCK

I. INTRODUCTION

Nebraska nuisance law may be the primary means of protecting landowners from the nuisance effects of confined livestock operations. Only about 30 counties in Nebraska have enacted zoning ordinances affecting these operations and the Nebraska Department of Environmental Quality has not imposed spacing requirements or taken other steps to address air quality standards with respect to large confined livestock operations. Nuisance law then, is an important option which interestingly has been used more often by farmers neighboring large operations than by non-farmer transplants to rural Nebraska. Even modifications to Nebraska nuisance law passed by the Unicameral preserve the rights of existing neighbors to challenge placement or expansion of these facilities next door.

II. WHAT IS A NUISANCE?

Generally, a nuisance is an unjustifiable interference with someone else's right to use their own land.(1) A nuisance can be a public nuisance in the sense that it affects the broader community - a municipality, for example - or a private nuisance affecting only a few individuals.(2)

Confined livestock operations have been a principal subject of nuisance litigation in Nebraska.(3) Anhydrous ammonia facilities(4), slaughterhouses (5), grain drying(6), and soil/pesticide drift(7) have also been the subject of nuisance suits.

There are no hard and fast rules on the level of interference with a neighboring use necessary to constitute a nuisance. While "some" odors or other unpleasant aspects of livestock keeping will be tolerated, excessive, intensive and continuous odors or other problems that interfere with a neighbor's day to day use and enjoyment of his property are vulnerable to a nuisance complaint.(8)

The standard is that of "an ordinary person." Would an ordinary person find their home to be physically uncomfortable and undesirable as a residence? Ultimately, it is determined on a case by case basis by a judge (in a trial with no jury) or jury.

Based on cases so far there are a number of factors that will be considered in deciding whether a livestock operation is a nuisance: intensity and frequency of the odors, size of the operation, the manure handling system, distance from the neighbor, who was there first, whether the operator has complied with Nebraska Department of Environmental Quality regulations and local rural zoning requirements, and

whether the operator has taken steps to minimize the nuisance. If the court does find a nuisance, it will in most cases give the producer a chance to correct the problem, e.g. by relocating waste lagoons.

Nuisance in Nebraska has been defined by both the courts and by statute. The Nebraska Supreme Court's definition of a nuisance has varied over time. For many years, the Court held that as long as a business was not managed in a negligent manner it could not be characterized as a nuisance. This is no longer the law. Today, non-negligence is no longer a defense against a nuisance lawsuit. Nor is being located in a rural area. While modified somewhat by statute, it is now established caselaw in Nebraska that even in a rural area one cannot conduct a business enterprise in such a manner as to substantially interfere with existing neighbors.

The Nebraska Unicameral has also defined a nuisance. The Nebraska Statutes §28-1321 states:

- (a) *A person commits the offense of maintaining a nuisance if he erects, keeps up or continues and maintains any nuisance to the injury of any part of the citizens of this state.*
- (b) *The erecting, continuing, using, or maintaining of any building, structure, or other place for the exercise of any trade, employment, manufacture, or other business which, by occasioning noxious exhalations, noisome or offensive smells, becomes injurious and dangerous to the health, comfort, or property of individuals or the public; the obstructing or impeding, without legal authority, of the passage of any navigable river, harbor, or collection of water; or the corrupting or rendering unwholesome or impure of any watercourse, stream, or water; or unlawfully diverting any such watercourse from its natural course or state to the injury or prejudice of others; and the obstructing or encumbering by fences, building, structures or otherwise of any of the public highways or streets or alleys of any city or village, shall be deemed nuisances.*
- (c) *A person guilty of erecting, continuing, using, maintaining or causing any such nuisance shall be guilty of a violation of this section, and in every such case the offense shall be construed and held to have been committed in any county whose inhabitants are or have been injured or aggrieved thereby.*
- (d) *Maintenance of nuisances is a Class III misdemeanor.*
- (e) *The court, in case of conviction of such offense, shall order every such nuisance to be abated or removed [adopted 1977].(9)*

In addition, a Court may find that activities violating a Nebraska statute or local ordinance constitute a public

nuisance even though the statute does not explicitly make it so. Failure to follow Department of Environmental Quality regulations, for example, with respect to protecting water quality from manure runoff near confined livestock operations could endanger the public health and constitute a public nuisance. In these cases, the Court will use the statute to set the standard, rather than the "ordinary person" test. The activity needn't violate a statute, however, to qualify as a nuisance.

III. NUISANCE AND LIVESTOCK OPERATIONS

Nebraska nuisance law with respect to livestock is made up of a mixture of both judge-made common law and statutes passed by the Nebraska Unicameral. Producers need to understand the implications of the case law (judge-made law) as well as two amendments to the Nebraska Environmental Policy Act and the 1982 Nebraska Right to Farm Act. These legislative enactments were passed in response to producer concerns over recent court decisions involving a confined livestock operation nuisance.

A. Early Cases.

For many years, the Nebraska Supreme Court held that if a confined livestock operation was properly maintained and operated, it legally would not constitute a nuisance regardless of the odors and flies generated and regardless of its location. But since 1950, the court has ruled that any business can be a nuisance no matter how well it is operated.

The first livestock operation case was the 1908 decision of *Francisco v. Furry*.⁽¹⁰⁾ Defendants fed cattle and hogs in a residential area in the city of Franklin. Plaintiffs sought to stop the operation from continuing. When this case reached the Nebraska Supreme Court, it acknowledged that a livestock operation could constitute a nuisance but stated that the nuisance would occur only when the operation was improperly maintained or conducted. This opinion is where the confusion between nuisance and negligence was introduced into the Nebraska common law of private nuisance.

The second case involving livestock and nuisance is the 1943 decision of *Yrana v. Grain Belt Supply Co.*⁽¹¹⁾ Plaintiffs, rural Sarpy county residents, sought to stop defendant's hog feeding lot. The trial court dismissed the complaint after visiting the operation. On appeal, the Supreme Court upheld this decision, and quoting from *Francisco v. Furry*, said, "This court has held that cattle- and hog-feeding yards are not in themselves a nuisance, and that they become such only when improperly maintained or conducted."⁽¹²⁾ The court was perpetuating the confusion

between nuisance and negligence initiated in *Francisco*.

Finally, in the 1950 decision of *Sarraillon v. Stevenson*,⁽¹³⁾ the court concluded that an activity could constitute a nuisance despite its non-negligent operation. Stevenson operated a livestock slaughterhouse and cold storage facility in a residential area in Nebraska City. The plaintiffs were neighbors to the slaughterhouse, and had established homes there before Stevenson started operating. The court's opinion details the livestock slaughtering operation, the handling of slaughter wastes, the problems with rats and dogs feeding on such wastes, and the associated odors.⁽¹⁴⁾ The trial court found that these conditions had "depreciated greatly the value of the property of the appellees [neighboring plaintiffs] and no residence has been constructed in the vicinity of this plant since it commenced the packing house business."

Stevenson's neighbors asked the court to stop the livestock slaughtering activity and the cold storage plant. The trial court ruled that the slaughterhouse violated city zoning requirements because it was not located in an industrial district and stopped the slaughtering operation but not the cold storage operation. The Supreme Court upheld that decision.

Most importantly, the Supreme Court in *Sarraillon* found that non-negligent operation of the slaughterhouse was not an adequate defense against the nuisance suit. The Court said:

An industry of this sort may not be conducted at any place or at all places merely because it is legitimate and lawful. The selection of the place of business is not necessarily left to the owner alone. That subject is often a matter of both private and public concern. . . . No amount of skill, effort, or attention, according to the evidence of this case, wholly eliminate the distressing conditions of a packing plant in close proximity to the residences. . . . A legitimate industry is generally not a nuisance, but it may become a nuisance in fact by reason of the manner of its operation and conditions...that unavoidably result from its operation, especially in a residential or other closely occupied area [emphasis added].⁽¹⁵⁾

The Court's rejection in *Sarraillon* of the idea that a business had to be operated negligently in order to be a nuisance set the legal stage for the later livestock operation cases. Although the decision does not explicitly overrule *Yrana* and *Francisco*, it implicitly did so.

The *Sarraillon* court established one other important principal applied later in livestock nuisance cases: whether the business operator should be given the opportunity to improve their method of operation to control or minimize the nuisance. The Court said:

In the first instance, at least, [a court] will require the cause of the grievance to be corrected and will enjoin conduct of the enterprise perpetually after it has been proven that no application or endeavor,

science, or skill can effect a remedy or that the owners cannot be induced to conduct it properly.(16)

This has been the standard approach of the Nebraska Supreme Court in livestock operation cases: to give the operator the opportunity to abate the nuisance. As discussed below, this has been done in some cases. Unfortunately for Stevenson, there was nothing he could do to minimize the nuisance generated by the packing plant. He testified that he was operating the business the best way he could.

The Nebraska Supreme Court in *Sarraillon* upheld the injunction and concluded that:

There is a class of business, of which slaughterhouses and fertilizing plants are examples, which, from their very nature, cannot generally be conducted except in more or less isolated places. No matter how scientifically the plants are constructed, or how hygienically they are operated, they emit noxious, noisome, and offen sive, and to many persons, nauseating odors. They produce disturbing noises [of animals being slaughtered] and often cause an invasion of insects and rodents. Few people can or will reside or stay within the reach of them except under the compulsion of necessity.(17)

As this case indicates, a perfectly legitimate and well managed business may become a nuisance simply by being located in the wrong place. This is the central theme of the modern livestock nuisance cases: Can large confined livestock operations co-exist with their rural neighbors? Or to paraphrase the *Sarraillon* Court--are they a class of business which by their very nature cannot be conducted except in more or less isolated places.

B. From Packing Plants to Livestock Operations

A 1969 decision, *City of Lyons v. Betts*,(18) extended the principles first enunciated in *Sarraillon* to a hog feeding operation. In January 1954, Betts began a feed business within the city of Lyons and established a hog farrowing and feeding operation on separate property which was at that time outside the Lyon's city limits. In 1964, the property upon which Betts conducted his hog operation (and which abuts highway 77) was annexed into the city.

A Lyons city ordinance prohibited the keeping of livestock within the city limits. The city sought, pursuant to the nuisance statute, to stop the hog operation as a public nuisance. The trial court ruled in favor of the city and the hog operator appealed to the Nebraska Supreme Court. Betts argued that he had a grandfather right to maintain the hog operation.

The Supreme Court ruled, however, that the city had been in existence longer than the hog operation, as were many of the residences and businesses in the annexed

area. The Court said:

Were such grandfather rights to be recognized under such circumstances, the orderly growth of all municipal corporations would be jeopardized. Defendants are not being deprived of their property. Its use is simply being restricted to prevent the maintenance of a nuisance. Ordinarily a property owner does not have and cannot acquire a vested right, or a constitutional privilege, to maintain or continue a nuisance.(19)

Interestingly, the issue would probably go against the city today under either the livestock nuisance statute or the Nebraska Right to Farm Act, as discussed below.

C. From Urban to Rural: The Modern Livestock Operation Cases

The Nebraska Supreme Court in the 1950 *Sarraillon* decision first ruled that a business could constitute a public nuisance even if it were not operated negligently. The public nuisance case of *City of Lyons* extended these principals to a hog feeding operation. Both of these cases involved nuisances in an urban setting and observers in the livestock



industry may have assumed that the holding in Sarraillon and City of Lyons would be limited to the urban situation. This was not to be the case.

In 1976 the Nebraska Supreme Court issued its first modern rural livestock operation nuisance decision, one that would generate a significant legislative response and a continuing controversy regarding confined livestock operation location and regulation that continues to this day.

Botsch I. In a historic 5-2 decision, the Nebraska Supreme Court in the 1976 case of Botsch v. Leigh Land Company,⁽²⁰⁾ held that a rural livestock operation could be a nuisance despite a rural location and despite non-negligent operation.

The Botsches were Colfax county farmers with a general farming operation, including a small livestock operation. The Leigh Land Company had a cattle feeding operation across the road from the Botsches where between 408 to 3,746 cattle were fed. The feedlot had four waste lagoons. Although not explicitly stated in the opinion, the feedlot apparently was significantly expanded in 1969. ⁽²¹⁾

The Botsches sued to stop the feedlot operation. After they presented their case, the trial court dismissed the lawsuit, ruling that as a matter of law a nuisance did not exist because the Botsches had not proven that the defendant's feedlot was negligently operated.

The Nebraska Supreme Court reversed the trial court. Citing Sarraillon the court said "the exercise of due care by the owner of a business in its operation is not a defense to an action to enjoin its operation as a nuisance."⁽²²⁾ They also held that the Botsches had presented enough evidence to establish a nuisance case and sent it back to the trial court for further determination.

Perhaps most significantly, the Court ruled that a feedlot located in a rural area could be a nuisance. It said:

Defendants assert that since livestock feeding is essentially a rural activity and their project is located in a rural area, it cannot be denominated a nuisance and enjoined. It is true that rural residents must expect to bear with farm and livestock conditions normally found in the area where they reside. In the area under consideration almost every farm has a relatively small cattle-feeding operation, but nothing approaching in size the defendants' large commercial operation or resulting in comparably objectionable features. Even in an industrial or rural area one cannot conduct a business enterprise in such a manner as to materially prejudice a neighbor [emphasis added].⁽²³⁾

D. The 1977 Livestock Nuisance Statute

Botsch I was very controversial because it meant that a well managed confined livestock operation could legally constitute a nuisance even though it was located in a rural

area. The political reaction to Botsch I was quick in coming. Livestock groups supported LB132, which in 1977 amended §81-1506(1)(b) of the Nebraska Environmental Protection Act as follows:

[It shall be prima facie evidence that] a livestock operation is not a nuisance if:

- (i) Reasonable techniques are used to keep dust, noise, insects and odor at a minimum;
- (ii) It is in compliance with applicable regulations adopted by the [Environmental Quality] council and zoning regulations of the local governing body having jurisdiction; and
- (iii) The action is brought by or on behalf of a person whose date of lawful possession of the land claimed to be affected by a livestock operation is subsequent either to the issuance of an appropriate permit by the department [of Environmental Quality] for such operation, or to the operation of the feedlot and an on-site inspection by the department is made, before or after filing of the suit, and the inspection reveals that no permit is required for such operation.⁽²⁴⁾

From 1977 to 1980, compliance with this statute constituted sufficient evidence that a livestock operation was not a nuisance. This evidence could be rebutted by a plaintiff at trial. In 1980 this provision was amended by deleting the words: "It shall be prima facie evidence that:" The effect of this amendment was to give livestock feeders more than just an evidentiary edge - it established that any operation that met the terms of the statute could not be considered a nuisance.

The basic intent of the current version of §81-1506(1)(b) nuisance provision is to give existing livestock operations some protection against nuisance litigation. However, the protection is not automatic. Several requirements must be met. First, the operator must use reasonable techniques to minimize dust, noise, insects and odors. Whether reasonable techniques have been used is a question to be determined by a jury or by the judge.

Secondly, the operator must be in compliance with all local zoning requirements and NDEQ requirements. This would include notifying NDEQ of the operation's existence and having the operation inspected for compliance with water quality requirements. Thus §81-1506(1)(b) provides some incentive for operators to comply with the NDEQ livestock operation inspection program, which is certainly appropriate.

Finally, the date of the plaintiff's lawful possession of the property sought to be protected from the nuisance must be earlier than either (a) the date an NDEQ permit was granted or (b) the date of the NDEQ inspection when NDEQ officials determined that no permit was required. NDEQ began livestock operation inspections as early as 1971,⁽²⁵⁾ but the date a particular operation was inspected or had an NDEQ permit issued would have to be determined individually for each operation.

For the operator, protection from nuisance liability is

achieved if the operator uses reasonable techniques to minimize nuisance, complies with applicable NDEQ and local regulations, and has an NDEQ permit or was inspected by NDEQ before the plaintiff took possession of plaintiff's property. If the operator fails on any of these points he or she loses protection from a nuisance suit. The nuisance provision encourages operators to use best management practices to minimize nuisance, as well as to comply with local zoning and NDEQ regulations. This statute also discourages potential plaintiffs from locating a residence where it might be adversely affected by an existing confined livestock operation.

The livestock nuisance provision, §81-1506(1)(b), probably would not protect existing operations where a community expands out to meet the livestock operation as was the case in the 1969 *City of Lyons* case. Even though much of the new development would be subsequent to the operation, the zoning could be changed (e.g. from agricultural to municipal, etc.) and if the livestock operation were not granted an exemption, it would no longer be in compliance with local zoning regulations and thus would lose the protection of §81-1506(1)(b). However, the operation in this situation might be protected under the Nebraska Right to Farm Act as discussed below.

It is important to note that in all the livestock cases that have come to the Nebraska Supreme Court, the operation has always been subsequent in time of possession to the plaintiff; i.e. the operation has been either initiated or expanded after the plaintiff's occupancy. The nuisance provision was not intended to protect the operator in such circumstances.

One uncertainty, however, regarding §81-1506(b)(1) is whether it will protect livestock expansion. The issue is whether the expanded operation will be treated under a grandfather theory as an operation that originally qualified for §81-1506(1)(b) protection and continues to qualify for

such protection, or whether the expanded operation is treated as a new operation which must requalify - and which would probably be subsequent in time to the complaining neighbor. If the expansion is significant, involving new construction etc., the expansion will probably be treated as a new operation that will need to requalify for separate §81-1506(1)(b) protection.

While livestock groups understandably were unhappy with the *Botsch I* decision, it is important to appreciate that their legislative reactions did nothing to undo that holding. The 1977 nuisance legislation did not overrule *Botsch I* since §81-1506(1)(b) did nothing to change the legal rights of those whose real estate possession predated either the operation or its NDEQ inspection or permit. The *Botsches* would have had the same opportunity to litigate the nuisance issue with Leigh Land Company after either the 1977 or 1980 §81-1506(1)(b) nuisance amendments.

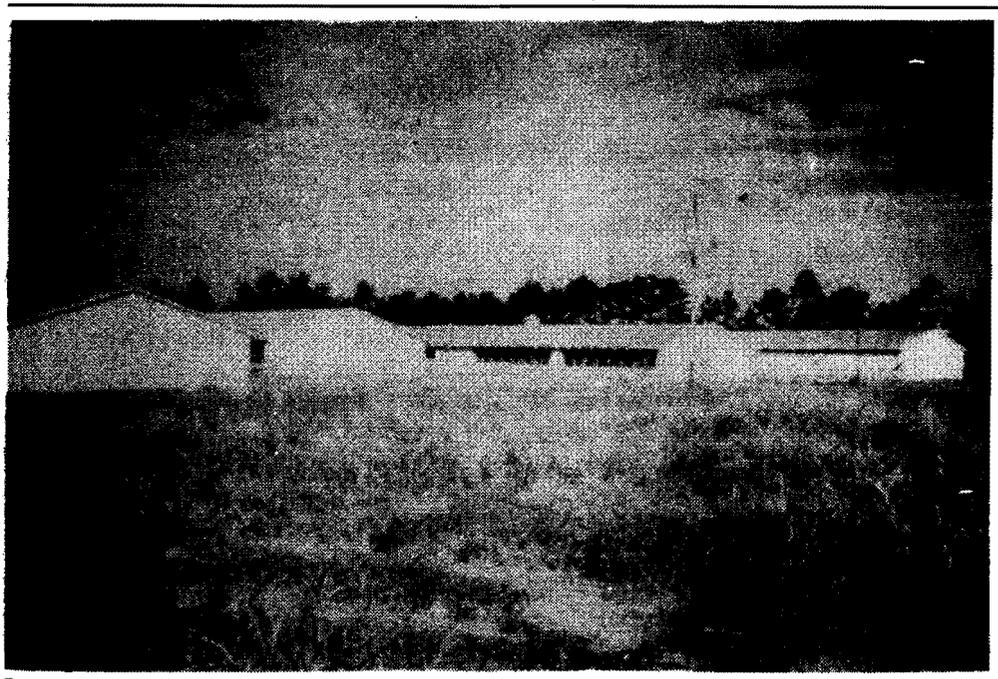
While one can argue that livestock interests may have been attempting to send a message to the courts that a well managed livestock operation that complies with all applicable legal requirements should not constitute a nuisance, §81-1506(1)(b) stops far short of that position. In fact, §81-1506(1)(b) is more moderate than the typical state right to farm legislation, including Nebraska's Right to Farm Act.

E. *Botsch II* and Descendants of *Botsch*

Despite §81-1506(1)(b) the Nebraska Supreme Court has not retreated from its decision in *Botsch I* that even in a rural area, a livestock operation can be a nuisance. (26) Unless the operator can minimize the nuisance, improperly located operations must be relocated or discontinued as the following cases illustrate:

1. *Botsch II* (1980).

After the *Botsch I* case was returned to the trial court, the defendants offered no testimony regarding whether they could modify their livestock operation to prevent the nuisance. Therefore, the trial court ordered the defendants to drain their four lagoons, prohibited them from using the lagoons in a livestock operation, and awarded plaintiffs \$4,800 for temporary damages up to the date of the trial. On appeal the Supreme Court noted:



In this case, having found the existence of a nuisance, we offered the defendants the opportunity to demonstrate how they could dispense with the nuisance-creating factors. They refused to present any evidence and thereby chose not to accept this opportunity. Accordingly, the only conclusion we can draw from the record is that the defendants, faced with the alternatives expressed and implied by our former opinion, are of a mind that the "nuisance-causing factors" may not be dispensed with by any "other means." Accordingly, the trial court should have entered an order enjoining the defendants from operating the feedlot in any manner until and unless they can demonstrate, upon proper application and showing, that the same can be done without injury and harm to the plaintiffs as it now exists.(27)

The Supreme Court affirmed the trial court's order as modified, in essence prohibiting continuation of the operation until the nuisance was controlled or abated.

2. Gee v. Dinsdale (1980).

The Gees, Merrick county farmers, built their home in 1963, facing south and east to take advantage of the prevailing summer winds. The land across the road was used as cropland when their home was built. In the spring of 1965 Dinsdale began constructing cattle pens housing 2,500 to 3,500 cattle within 1,000 feet of Gee's home, despite his objections. Gee sought damages for the odors, dust, flies and rodents coming from the operation.

Dinsdale stated in a pretrial deposition that he was unconcerned regarding the effect his feedlot would have on the Gees' residence across the road.(28) Dinsdale's indifference to the impact his operation would have on the neighbor's home apparently impressed the jury, which awarded \$50,000 in damages to the Gees, probably enough to allow them to rebuild their house elsewhere.

The Nebraska Supreme Court upheld the jury verdict, reiterating its statement from Botsch I that "even in an industrial or rural area, a business enterprise could not be conducted in such a manner as to materially prejudice a neighbor."(29)

3. Franklin Pork I (1981).

Plaintiffs were Franklin county farmers. Their farm was purchased in March of 1974 and they began living there in July of 1974. Defendant was incorporated July 11, 1974 and subsequently purchased the land north of plaintiff's farm on August 15, 1974.

Over plaintiffs' objections, defendants constructed a hog facility with 800 sows and 6,000 to 7,000 hogs. The plaintiffs' home was located between 1,030 and 1,430 feet from the defendant's nearest holding pond. The trial court

ruled that the hog facility was a nuisance, but did not close the hog facility so as to give the operators the opportunity to control the nuisance.

The trial judge appointed himself to a monitoring committee to determine whether the changes in defendant's hog operation reduced the nuisance.

The Nebraska Supreme Court held that the trial judge's appointing himself to the monitoring committee was an error, but otherwise followed the legal philosophy contained in Botsch I.(30)

4. Botsch III (1981).

As a result of Botsch II, the defendant livestock operator was required to either control the nuisance or else discontinue operations. In response to the court order, three of the original four livestock waste lagoons were relocated away from plaintiff's residence, a portion of the livestock operation was relocated, and the former lagoons and livestock facility were filled and converted to pasture. The fourth lagoon was converted into a debris basin with a discharge tube installed. The manure was bladed up, combined with dirt, and mounded spring and fall.

With the relocation, the operation was 382 feet from the road separating the properties of the parties. Many witnesses testified that they no longer noticed the livestock waste odor from the road. Defendants presented considerable expert testimony regarding the effects the operation's relocation and improved management practices had in reducing nuisances. Plaintiffs conceded that the situation had improved, but that there were still "some flies, odors, and dust."

The trial judge ruled that the nuisance had been stopped. The Nebraska Supreme Court agreed. The Court stated that the defendants were not required to operate their livestock facility with zero flies, odors or dust, but were required to control the nuisance so as to not interfere with the neighbor's residence.(31) Botsch III indicates the extent to which operators with improperly located operations might have to go to salvage their operation from a successful nuisance proceeding.

5. Franklin Pork II.

In the 1985 Franklin Pork II decision,(32) the operator was under court order to discontinue the nuisance or discontinue the operation. The defendant did not undertake the relocation changes that the successful defendant did in Botsch III. Even though livestock operation management improved, the operation itself was so large and so close to the neighbor's residence that the facility still constituted a nuisance, regardless of the method of operation.

The livestock operator's own expert witnesses conceded that it would be impossible to operate this facility (800 sows and 6,000-7,000 hogs) without creating an odor problem for

farm residences located within a half mile (2640 feet) of the operation.(33) The plaintiff's home was 1030-1400 feet from defendant's closest holding pond.

The Nebraska Supreme Court affirmed the order of the trial court closing the livestock operation. The court noted that due care (i.e. lack of negligence) in operating a business is not in and of itself a defense to nuisance. The defendants had 20 months to control the nuisance and were unable to do so. The court stated "it is inconceivable that so many hogs could be kept in the defendants' facility in such close proximity to the plaintiffs and not be offensive."(34) The defendant's only options were to relocate the operation or to discontinue it.

F. The Nebraska Right to Farm Act (1982)

In cases where the livestock operation existed in rural areas that gradually became more urban over time, courts have often ruled that the livestock operation became a nuisance because of the changed conditions and had to be relocated at the livestock operator's expense. This approach was followed in the 1969 Nebraska Supreme Court *City of Lyons* decision.

All 50 states have adopted "right to farm" statutes which generally state that a livestock operation does not become a nuisance if an area changes from rural to urban.(35) The Nebraska Right to Farm Act essentially repeals the *City of Lyons* decision, at least regarding farming operations.

In 1982 the Nebraska Right to Farm Act was enacted.(36) Nebraska Statutes §2-4403 provides that:

A farm or a farming operation(37) is not a public or private nuisance if the farm or farming operation existed before a change in the land use or occupancy of land in and about the locality of such farm or farm operation and before such change in land use or occupancy of land the farm or farm operation would not have been a nuisance.(38)

Section 2-4403 has only two qualifications for a farming operation (including confined livestock operations) to receive its protection: (a) that the farming operation existed before the changed land use or change in occupancy giving rise to the nuisance litigation and (b) that the farming operation would not have constituted a nuisance prior to the land use change. There is no requirement that best management practices be used or that other legal requirements are met.

Since the major nuisance factor with livestock operations seems to be when they are located too close to a neighbor, a livestock operation would probably not constitute a nuisance until a neighbor moves in. This issue, though, has yet to be considered by the Nebraska Supreme Court.

The Right to Farm Act provides existing livestock operations more protection than the nuisance statutes, if the operation was there first. However, this protection probably would be lost if the operation is significantly expanded. Then it is the livestock operation that constitutes the changed land

use, not the neighboring residence.(39)

The Right to Farm Act also provides livestock operations with protection in the public nuisance situation where a community grows out to the operation as it did in the case of *City of Lyons*. Under the *City of Lyons* public nuisance theory the operation could be denominated a public nuisance and required to be terminated. Under the §81-1506(1)(b) nuisance statute the operation could lose its protection if the property were rezoned for non-livestock use. But under the §2-4403 Right to Farm Act, if the livestock operation is first in time and did not constitute a nuisance before the area changed from rural to urban or suburban, the livestock operation would not constitute a public nuisance.

Under these conditions the community or neighbors would have to either accept the livestock operation or else buy it out (at the operator's price). Probably the community could rezone the operation and require it to be gradually terminated as a non-conforming use. But the community could not stop continued operation under the public nuisance statute as was accomplished in *City of Lyons*.

The Right to Farm Act has been used only once to date and unsuccessfully as a defense to a nuisance lawsuit. In *Flansburg v. Coffey*,(40) Coffey owned and had operated 156 acres of farmland in Gage county since 1961. In 1968, Coffey sold Flansburg 1.67 acres to be used for residential purposes. Hogs had been raised on Coffey's farm since 1961, but not from 1968 to 1975. A few hogs were raised beginning in 1975.

In 1981 Coffey began construction of a 400 head confined hog facility located 133 feet from Flansburg's house, 72 feet from the property line. This location was selected because Coffey "wanted to keep as much area as possible to farm and garden." Strong odors were produced by the hog operation, as well as flies and rats. The Flansburgs were awarded \$2000 in damages and Coffey was permanently stopped from conducting a confinement hog operation. The Nebraska Supreme Court upheld the trial court's decision.

Coffey argued that his operation was protected by the Nebraska Right to Farm Act, §2-4403. The court rejected this contention, noting that the change in land use was the start of the confined hog feeding operation, not the Flansburg's residential use.(41) The court also ruled that the hog operation constituted a nuisance, and that the permanent injunction against raising hogs and storing livestock wastes in the confinement unit was not too broad. Interestingly, neither the trial court nor Supreme Court gave defendants the opportunity to attempt to halt the nuisance, probably because the confinement unit was simply located too close to plaintiff's house.

IV. CONCLUSION

In Nebraska the courts have consistently ruled that a new and probably expanded livestock operation must be located

where it will not constitute a nuisance for existing neighbors. This is not changed by either the §2-4403 Right to Farm Act or the §81-1506(1)(b) nuisance provision. When the operation was there first it generally will not constitute a nuisance to those who have "come to the nuisance." Where a new livestock operation is installed, however, or an existing operation is expanded, the operator faces the likelihood of having to relocate if the new or expanded operation causes a nuisance to any current neighbors. In light of this, operators must make decisions about location very carefully; if they elect to ignore the potential nuisance effect of their operation on their neighbors they risk having to discontinue the operation. Operators ignore this blunt legal fact at their peril.

FOOTNOTES

1. 1 Rogers, *Environmental Law* §2.2 (1986) at page 33.
2. Public officials may sue to restrain a public nuisance. The defenses of prescription, estoppel and laches (which in very general terms means that the plaintiff waited too long to complain) are not available in public nuisance cases. Otherwise, there is little substantive difference between a public and private nuisance. A nuisance can also be both a public and a private nuisance. See also, *City of Syracuse v. Farmers Elevator Company*, 182 Neb. 783, 157 N.W.2d 394 (1968).
3. *Francisco v. Furry*, 82 Neb. 754 (1908); *Vrana v. Grain Belt Supply Co.*, 10 N.W.2d 474 (Neb. 1943); *City of Lyons v. Betts*, 184 Neb. 746, 171 N.W.2d 792 (1969); *Botsch v. Leigh Land Co.*, 195 Neb. 509, 239 N.W.2d 481 (1976); *Botsch v. Leigh Land Co.*, 205 Neb. 401, 288 N.W.2d 31 (1980); *Gee v. Dinsdale Bros. Inc.*, 207 Neb. 244, 298 N.W.2d 147 (1980); *Cline v. Franklin Pork*, 210 Neb. 238, 313 N.W.2d 667 (1981); *Botch v. Leigh Land Co.*, 210 Neb. 290, 313 N.W.2d 696 (1981); *Cline v. Franklin Pork*, 219 Neb. 234 (1985); *Flansburg v. Coffey*, 220 Neb. 381, 370 N.W.2d 127 (1985). See also, Norman W. Thorson, "Private Nuisance: An Application to Feedlots in a Rural Area [*Botsch v. Leigh Land Co.*, 195 Neb. 509, 239 N.W.2d 481 (1976)]," 55 Neb.L.Rev. 746 (1976); Denis P. Burke, "Common Scents: An Analysis of the Law of Feed Lot Odor Control," 10 Creigh.L.Rev. 539 (1977) and Restatement of Torts (2d) §821D, quoted in *Hall v. Phillips*, 231 Neb. 269, 272, 436 N.W.2d 139, 142 (1989).
4. *City of Syracuse v. Farmers Elevator, Inc.*, 182 Neb. 783, 157 N.W. 394 (1968).
5. *Matthews v. Mozer*, 111 Neb. 71 (1923); *Sarraillon v. Stevenson*, 153 Neb. 182, 43 N.W. 509 (1950).
6. *Daugherty v. Ashton Feed Co.*, 208 Neb. 159, 303 N.W.2d 64 (1981). See also *Webb v. Lambsey*, 181 Neb. 385, 148 N.W.2d 835 (1967) (alleged spite fence not a nuisance).
7. *Hall v. Phillips*, 231 Neb. 269, 436 N.W.2d 139 (1989).
8. See *Botsch v. Leigh Land Co*, 210 Neb. 290, 313 N.W.2d 696 (1981).
9. Specific activities that have been identified in Nebraska statutes as nuisance activities include: unauthorized behavior at county or state fair (§2-220); prairie dogs (§2-1062); weeds (§2-1081); building too close to an airport (§3-205); conducting bingo without a license (§9-230); conducting a raffle or lottery without a license (§9-422); unauthorized cemeteries (§12-501); uncut weeds on city lots (§14-102); poorly drained city lots (§§15-211, 16-230, 17-563); accumulated garbage not properly disposed of (§§15-268.01, 18-1752); litter (§17-123.01); riots and explosives (§17-566); dilapidated buildings (§18-1722); drug trafficking (§28-432); distributing obscene material (§28-821); unauthorized water impoundment (§28-1303); improper disposal of animal carcasses and other offensive material (§28-1305); unauthorized use of hunting or trapping devices (§37-610); unauthorized highway signs and markings (§39-618); unauthorized highway advertising (§38-618.01); trees and hedges obstructing view of road (§39-1812); junkyards located too close to highways (§39-2609); unsanitary restrooms for employees (§48-404); unauthorized sale of alcohol (§§58-138.03, -198); automobile operated by person with expired driver's license (§60-4,110); unauthorized transport of motor fuels (§66-4,107); barbering without a license (§71-220.01); mosquito breeding areas (§71-2918); swimming pools not meeting health requirements (§71-4307); unlicensed trailer parks (§71-4632); unlicensed ambulance (§71-5122); unlicensed commercial motor carriers (§75-309.01); infected apiaries (§81-2,169); illegally imported bees and apiaries (§81-2,171); land pollution [§81-1502(19)]; and air, water or land pollution [§81-1506(1)(a)]. See also §§18-1720 (abatement); 25-1402 (actions); 18-1720 (cities); 17-207, -208, -566 (villages); 23-335 (counties); and 23-224 (townships).
10. 82 Neb. 754 (1908).
11. 10 N.W.2d 474 (Neb. 1943).
12. 10 N.W.2d at 476.
13. 153 Neb. 182, 43 N.W.2d 509 (1950).
14. 153 Neb. at 184-87.
15. 153 Neb. at 188-89.
16. 153 Neb. at 189.
17. 153 Neb. at 190.
18. 184 Neb. 746, 171 N.W.2d 792 (1969).
19. 184 Neb. at 749.
20. 195 Neb. 509, 239 N.W.2d 481 (1976). See Thorson, *supra*. For the court's first opinion in the case (which was subsequently withdrawn but which was not materially different than its second opinion) see 195 Neb. 54, 236 N.W.2d 815 (1975).
21. See *Botsch v. Leigh Land Co.*, 195 Neb. 54, 236 N.W.2d 815, 818 (1975) (dissent), withdrawn 195 Neb. 509, 239 N.W.2d 491 (1976).
22. 239 N.W.2d at 485.

23. 239 N.W.2d at 485.
24. Neb.Rev.Stat. §81-1506(1)(b) (1978 Cum.Supp.) as amended (1992 Cum.Supp.).
25. This is probably the general cut-off date for any livestock nuisance suits unfettered by §81-1506(1)(b). See also, Helen C. Harris & Miriam Hendricksen, "Regulation of Water Pollution from Agricultural Point Sources in Nebraska: Impact of the NPDES Permit Program on Feedlot Operations," 9 Creigh.L.Rev. 83, 90-91 (1975).
26. *Gee v. Dinsdale Bros. Inc.*, 207 Neb. 224, 298 N.W.2d 147, 150 (1980).
27. 288 N.W.2d at 34.
28. "Q. At the time, let's say, in '60 or '61, when you put in the windbreak and started building the lots, were you aware that the plaintiffs live across the road?
 "A. I don't really care about the place. I never watched anything they've done. I've never reported them for any irregularities. What happens to them is just fine.
 "Q. So I take it as to who lived, that is not a factor?
 "A. Not a factor, no. No.
 "Q. You put it on your land where you felt it should go with regard to your business operation?
 "A. Right." 298 N.W.2d at 149.
29. *Gee v. Dinsdale Bros. Inc.*, 207 Neb. 224, 298 N.W.2d 147, 150 (1980).
30. *Cline v. Franklin Pork*, 210 Neb. 238, 313 N.W.2d 667 (1981).
31. *Botsch v. Leigh Land Co.*, 210 Neb. 290, 313 N.W.2d 696 (1981).
32. *Cline v. Franklin Pork*, 219 Neb. 234, 239, 361 N.W.2d 566 (1985).
33. 361 N.W.2d at 571.
34. 361 N.W.2d at 571.
35. See Hamilton, "A Livestock Producer's Legal Guide to Nuisance, Land Use Control and Environmental Law" (American Farm Bureau Federation 1992).
36. NRS §2-4401.
37. Farm or farm operation is defined as "any tract of land over 10 acres in area used for or devoted to the commercial production of farm products." Neb.Rev.Stat. §2-4402(1). Farm product is defined by §2-4402(2) as those plants and animals useful to man and includes but is not limited to forages and sod crops, grains and feed crops, dairy and dairy products, poultry and poultry products, livestock, including breeding and grazing, fruits, vegetables, flowers, seeds, grasses, trees, fish, apiaries, equine and other similar products, or any other product which incorporates the use of food, feed, fiber, or fur.
38. NRS §2-4403.
39. See *Flansburg v. Coffey*, 220 Neb.381, 370 N.W.2d 127 (1985), discussed below.
40. 220 Neb. 381, 370 N.W.2d 127 (1985).
41. The Nebraska Supreme Court reached the same conclusion in *Franklin Pork III*. 361 N.W. 2d at 572.

Chapter 4

INITIATIVE 300 AND LIVESTOCK FEEDING

"The people of Nebraska have made a reasonable judgment that prohibiting non-family corporate farming serves the public interest in preserving an agriculture where families own and farm the land."

- *MSM Farms v. Spire*, 927 F2d 330,335 (8th Cir. 1991)

I. INTRODUCTION

Family farm advocates made repeated attempts in the 1970's and early 1980's to push for adoption of legislation restricting non-family farm corporations from owning or operating farm land through the Nebraska Unicameral. Each attempt failed, due in part to the position taken by then Attorney General, Paul Douglas, that these measures were of "suspect constitutional validity." (1)

In 1982, the voters took matters into their own hands, passing by initiative an amendment to the Nebraska Constitution. Article XII, §8 of the Nebraska Constitution, still known popularly by its ballot designation as Initiative 300, prohibits non-family farm corporations from owning farmland and/or engaging in farming or ranching.

While prohibitions on corporate farming are not unique to the agricultural Midwest, (2) to have these restrictions enshrined in the state constitution is unique indeed. As a consequence, the provisions of I-300 may not be modified by statutory means by the Nebraska Unicameral, but only by a vote of the people of Nebraska on a subsequent amendment to the constitution. (3)

While there has been at least one attempt to circumvent the provisions of I-300 in the Unicameral (4) and a failed petition drive to put a repeal of I-300 on the ballot, the most important battleground in upholding the Amendment has been in the courts where its provisions have been attacked, interpreted and ultimately upheld as constitutional. (5)

A description of I-300 is included in this Handbook because it has been raised as a potential barrier to the corporate construction of large scale livestock confinement facilities in Nebraska. While I-300 does not prohibit the ownership or operation of large scale confinement units under a general partnership or other non-prohibited business form, it does restrict the formation of corporations and limited partnerships, both of which offer limited liability and tax advantages. I-300's usefulness in this area is in holding unrelated and distant investors personally responsible for the kinds of environmental and nuisance problems these facilities can generate.

II. CORPORATE FARMING PROHIBITIONS

Article XII, §8 of the Nebraska Constitution provides that no corporation or limited partnership (other than a family farm or ranch corporation or limited partnership) "shall acquire, or otherwise obtain an interest, whether legal, beneficial or otherwise, in any title to real estate used for farming or ranching in this state, or engage in farming or ranching."

A. Corporations and limited partnerships.

Corporations include any foreign or domestic corporation or any partnership in which a corporation is a partner. Limited partnerships include any foreign or domestic limited partnerships. (Article XII, §8)

Generally, limited partners, by definition, cannot participate in the management of a partnership and cannot incur liability for debts and other claims against the business beyond their investment. Shareholders in a corporation also enjoy "limited liability" and will not normally be held personally liable for debts or other claims against the corporation beyond their investment.

Limited liability is a primary target of I-300. General partnerships where the partners remain personally liable for debts and other claims against the business are not included in I-300 prohibitions. Also exempted are family farm corporations. (See II.B.1)

B. Acquiring an interest.

I-300's definition of an "interest" in real estate is very broad. It includes, for example, a trustee's interest in land held for the benefit of another, as well as the interest of a trust beneficiary. (6)

I-300's restrictions, however, do not include the acquisition of mineral rights to agricultural land. [Article XII, §8(I)]

I-300 also permits corporations and limited partnerships to acquire liens and other security interests on agricultural land or livestock [Article XII, §8(L)] and to acquire agricultural land or livestock by process of law in the collection of debts or any procedure for the enforcement of a lien including voluntary conveyance. (7) Agricultural land so acquired must be sold within 5 years and in the interim may not be used for farming or ranching purposes, except under

C. General Partnerships.

I-300 does not prohibit general partnerships from owning farm or ranch land or engaging in farming. Article XII, §8 specifically exempts general partnerships.

D. Other Exempted Entities.

I-300 also exempts non-profit corporations [Article XII, Section 8(B)] and Nebraska Indian tribal corporations [Article XII, §8(C)].

E. Grandfathered Corporations.

Agricultural land farmed or ranched, owned or leased by a corporation or limited partnership as of November 29, 1982, the effective date of the Amendment, is exempt from I-300 so long as the land is held in continuous ownership or under continuous lease by the same corporation or limited partnership, and expansion is limited to that which is reasonably necessary to meet the requirements of pollution control regulations. Ownership includes any legal or beneficial interest in title to farmland whether directly or indirectly held. Land purchased on a contract signed as of the effective date of I-300 is considered owned on that date, even if title has not yet changed hands. [Article XII, §8]

IV. THE RATIONALE AND CONSTITUTIONALITY OF I-300

I-300 has withstood several challenges to its constitutionality. In *ONB v. Spire*, 223 Neb. 209, 389 N.W.2d 269 (1986) the Omaha National Bank argued that because I-300 placed certain restrictions on federally chartered banks, including a prohibition against banks holding agricultural land as a trustee for the benefit of another, it conflicted with the National Bank Act and violated the Supremacy Clause. The Supremacy Clause or Article VI of the U.S. Constitution requires that state law, even state constitutions, conform to federal law. ONB also argued that I-300 violated the equal protection and due process clauses of the 14th Amendment to the U.S. Constitution. The Nebraska Supreme Court rejected these arguments.

The Nebraska Supreme Court held that the National Bank Act allows federally chartered banks to exercise trust powers only if state law allows it and therefore there is no conflict. In addition, the powers granted to federal banks under the National Bank Act with respect to acquisition of land or

chattel to collect debts match the exemptions for debt collection carved out under I-300. The only potential conflict between I-300 and the National Bank Act is in the allowable holding period for land so acquired. Both the National Bank Act and I-300 require divestiture within 5 years, but under the National Bank Act creditors may be allowed an additional 5 years under certain conditions. The court said this potential conflict was too remote and "too theoretical" for the court to rule on. *ONB v. Spire*, at 389 N.W.2d 283-284.

In *MSM Farms Inc. v. Spire*, 927 F.2d 330 (8th Cir. 1991) the 8th Circuit Court of Appeals upheld the heart of the amendment against a constitutional challenge by MSM farms - a corporation of two unrelated shareholders that owned about 10 acres of agricultural land in Platte County used for a cattle breeding operation. MSM, Inc. challenged the amendment under the equal protection clause of the 14th Amendment to the U.S. Constitution. MSM argued that I-300 exempted "family farm corporations" while denying the benefits of limited liability and the tax benefits of incorporation to unrelated individuals who engage in farming. The question put to the court was: "What legitimate government purpose was served by limiting participation in a limited liability entity to members of a single family?"

To withstand this equal protection challenge the Court had to decide that the "kinship classification" was reasonably related to a legitimate government objective. The Court decided that the people of Nebraska, in passing I-300, had sought to (1) stem the problems that result from land concentration and absentee ownership, (2) deny corporations that have an ability to raise large amounts of capital an unfair competitive advantage over family farms, (3) retain and promote family ownership and operation of farms, (4) protect the rural social and economic structure and, (5) avoid a decline in stewardship and preserve the soil, water and other natural resources. These were legitimate state objectives, the Court said, and the kinship classification was a rational means of achieving it. *MSM Farms*, at 333-334.

In deciding this question, it was important to the Court that I-300 required both kinship AND involvement in the day to day labor and management of the farm or residency to qualify as a family farm corporation. The two shareholders of MSM Inc. were a prime example of what was sought to be avoided by I-300. Neither of the two incorporators lived on or near the land. One had never seen it and the other had only limited knowledge of its location and characteristics. *MSM farms*, at 334.

V. DETERMINING CORPORATE OWNERSHIP AND ENFORCEMENT

A. The Secretary of State.

The Secretary of State is required to keep on file all articles of incorporation, limited partnerships and amendments. I-300 also directs the Secretary of State to monitor the farming and ranching operations and land purchases of corporations and limited partnerships and notify the Attorney General of any possible violations. [Article XII, Section 8]

A violation of I-300 is rarely apparent from a review of the articles of incorporation or a partnership agreement. Shortly after I-300's passage, the Nebraska Unicameral repealed the corporate farming reporting law which would have required the reporting of additional information to aid the Secretary of State in his duties. In addition, no funds have been appropriated for monitoring or investigation.

Secretary of State Allen Beerman has directed that county clerks responsible for recording land transfers, mortgages and other liens notify him of any possible violations. Private citizens can also notify the Secretary of State. Potential violations are turned over to the Attorney General's office for investigation.

B. Public Records, Private Citizens.

Any citizen can view deeds, mortgages and other liens on file in the county where the land or chattel is located. The State of Nebraska also provides a centralized reporting system for liens on crops and livestock. In many instances, owners of cattle being custom fed will file a "lien" to give prospective purchasers notice of their interest in the cattle. The central reporting system can be accessed at any local county clerk's office. Private citizens may also view corporate filings and other records on file with the Secretary of State. Agricultural Stabilization and Conservation Service (ASCS) records of corporations participating in farm programs can also be obtained under the federal Freedom of Information Act, although some information may be withheld by ASCS under the Privacy Act.

C. The Attorney General

If the Attorney General has reason to believe that a corporation or limited partnership is violating I-300, he or she must commence an action in District Court to stop any pending land purchase or livestock operation, or to force divestiture of land held in violation of I-300. [Article XII, Section 8] Attorney General Stenberg has indicated that county attorneys have no enforcement authority.

D. Private Right of Action.

I-300 provides that if the Secretary of State or Attorney General fail to perform their duties under the Amendment, Nebraska citizens or entities will have standing in District Court to seek enforcement. This provision has been invoked as grounds for legal action by I-300 supporters in several cases. [Article XII, Section 8]

E. Divestiture

The District Court must order any land held in violation to be divested within two years. If the violator fails to divest within that time, title to the land reverts to the State of Nebraska. [Article XII, Section 8]

In practice, non-family farm corporations or limited partnerships can simply convert to general partnerships or transfer the farm assets to individual ownership to comply with I-300. In doing so, they sacrifice the limited liability protection of incorporating and certain tax advantages.



FOOTNOTES

1. Attorney General Paul Douglas letter to Senator Peterson, April 13, 1981.
2. Iowa, Kansas, Minnesota, Missouri, North Dakota, Oklahoma, South Dakota and Wisconsin all restrict corporate ownership and operation of farms and ranches. See, Iowa Code §§172C.1-1.5; Kansas Stat. Ann. §§17-5902-5904; Minn. Stat §500.24; Mo. Ann. Stat §§350.010-.030; N.S. Cent. Code §§10-06-01 to 15; Oklahoma State. tit. 18 §§951-56; S.D. Codified Laws Ann. §§47-9A-1 to 23; and Wis. Stat. §182.001.
3. See, ONB v. Spire, 223 Neb. 209, 389 N.W.2d 269 (1986) and Attorney General Spire, letter to John De Camp April 17, 1985.
4. Business Trust Act.
5. See, MSM Farms Inc. v. Spire, 927 F.2d 330 (8th Cir. 1991) and Omaha National Bank v. Spire, 223 Neb. 209, 389 N.W.2d 269 (1986).
6. Omaha National Bank v. Spire, 223 Neb. 209, 389 N.W.2d 269 (1986).
7. Omaha National Bank v. Spire, 223 Neb. 209, 389 N.W.2d 269 (1986).
8. Sunrise Ventures v. Spire, CA No 88-L-44(1988)
9. 2/16/88 press release of Attorney General
10. but see, A.G. Paul Douglas, letter to John De Camp Oct. 12, 1984 said that non family farm corporation could not engage in contract feeding as owner of the cattle under I-300.
11. Deputy A.G. letter to Don Wesley, Jan. 24, 1985
12. October 11, 1990 letter to Matthew Samuelson from Robert Spire.