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In July 1881, Joseph Hays and four of his neighbors in Louisville, Kentucky, filed a legal action against Frank Seifried, owner of a slaughterhouse, alleging that Seifried threw the intestines and other parts of slaughtered animals into tanks and boxes on his premises and that "the putrid and decayed flesh produced a foul and nauseous stench, such as poisoned the atmosphere for many feet in every direction . . . embracing [their] dwellings."[1] The odor was so foul that it caused the neighbors to close the doors and windows of their dwellings during the evenings that spring of 1881. Even the doors and windows of a nearby church had to be closed. The stench was so horrific that it produced nausea in the residents and rendered their homes almost uninhabitable.[2] Hays and his neighbors brought a nuisance action against Seifried, seeking to restrain him from using his slaughterhouse improperly. The court found that the odor was caused by Seifried's boiling of the skins and bones of dead animals without using the proper disinfectants. The court did not order Seifried to cease his business, but it did order him to cease operating it in a manner that used the slaughtered animals or parts of them to create the offensive and poisonous odor.[3]

One hundred and twenty years later, residents of several counties in Kentucky raised the same complaints about foul odors emanating from neighboring agricultural operations. A resident of Hopkins County complained: "The odor from factory hog and chicken operations is nauseating and at times makes one's throat burn for days. People don't even want to be outside. Children waiting for the school bus have become sick on mornings when the air is still."[4] Another resident stated that she and the residents of her county were very concerned about the chicken manure that is spread on the farms: "Not only is the stench bad, but the citizens living near these farms can't go out of doors after the chicken manure is spread."[5] Others living near these poultry operations raised similar grievances: "Eight chicken houses were constructed in front of my house. Trees were bulldozed down and set afire. The smoke affected my husband, who suffers from emphysema. Manure is hauled out on weekends, preventing me and my children and grandchildren from being able to enjoy the outdoors on our property."[6]

These residents are complaining about the impact of the operations of their newest neighbors - concentrated animal feeding operations (CAFOs). The number of CAFOs in Kentucky, currently estimated at 250, has increased over the past few years due to the increased siting of poultry houses, particularly in the western area of the state. As a result, broiler production in Kentucky has increased from 1.5 million in 1990 to 188 million in 1999.[7] With increased broiler production, naturally comes an increase in waste and the problems of odor, vermin, and air and water pollution associated with that waste.

State and local officials have sought to regulate CAFOs and the problems associated with them through existing or new statutory schemes. For example, Marion, in Crittenden County Kentucky, enacted an ordinance that made it a nuisance to keep hogs within the city limits at any time from April 1 through September 30.[8] The Kentucky Natural Resources and Environmental Protection Cabinet issued emergency CAFO regulations providing siting standards for the construction of new CAFO facilities.[9] However, in order for local residents to recover their personal losses to property and health, they must decide to take matters into their own hands and seek redress through the courts. The common law of nuisance is one legal theory under which claims can be brought. This paper will examine Kentucky nuisance law and its application to CAFOs, particularly poultry agricultural operations. It also discusses the impact of Kentucky's right-to-farm law on a nuisance legal action.

Defining Nuisance

Nuisance law operates on the general principle that persons may use their property as they desire, provided that they use it in such a manner as not to injure others.[10] Its legal meaning, however, is far less clear. Nuisance law has been labeled an "impenetrable jungle,"[11] a legal concept incapable

supplemented low crude protein diets, and the use of low phytin phosphorus grain and enzymes, such as phytase or other additives. Feed management can be an effective approach to addressing excess nutrient production and should be encouraged; however, it is also recognized that feed management may not be a viable or acceptable alternative for all AFOs. A professional animal nutritionist should be consulted before making any recommendations associated with feed ration adjustment.

Other Safe Activities

Using environmentally-safe alternatives to land application of manure and organic by-products could be an integral part of the overall CNMP. Alternative uses are needed for animal manure in areas where nutrient supply exceeds available land and/or where land application would cause significant environmental risk. Manure use for energy production, including burning, methane generation and conversion to other fuels, is being investigated and even commercially tested as a viable source of energy. Methods to reduce the weight, volume, or form of manure, such as composting or pelletizing, can reduce transportation cost, and create a more valuable product. Manure can be mixed or co-composted with industrial or municipal by-products to produce value-added material for specialized uses. Transportation options are needed to move manure from areas of over supply to areas with nutrient deficiencies, a procedure called manure brokering.

As many of these alternatives to conventional manure management activities have not been fully developed or refined, industry standards do not always exist that provide for their consistent implementation. Except for the NRCS conservation practice standard Composting Facility (Code 317), NRCS does not have conservation practice standards that address these other use options. This element of a CNMP should be presented as a consideration for the AFO owner/operators in their decision-making process. No specific criteria need to be addressed unless an alternative use option is decided upon by the AFO owner/operator. When an AFO owner/operator implements this element, applicable industry standards and all federal, State, and local regulations must be met.

Integration of CNMP Elements

Many conservation practices are used together to make up a waste management system. Resource management systems consist of the proper combination of conservation practices needed to solve identified resource problems. How these practices interact is important to the overall effectiveness of the system. The planner must be aware of these interactions so that the system will function as designed.

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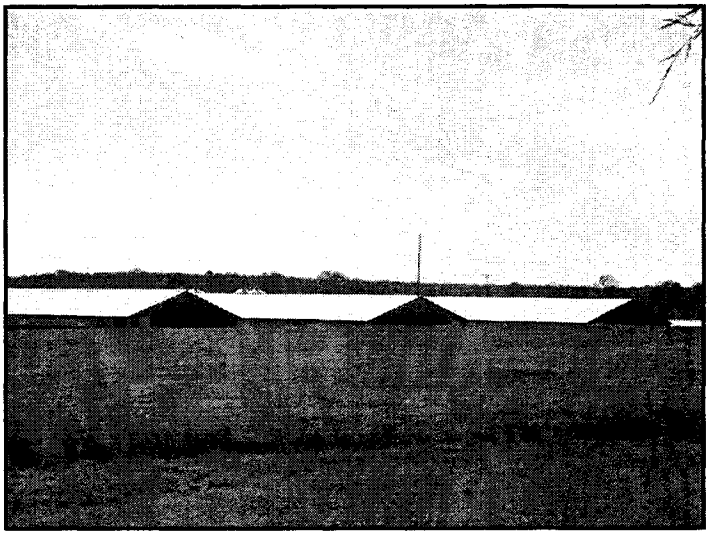


of exact definition. Perhaps the easiest understood (and most quoted) definition of nuisance was given by a justice of the United States Supreme Court in 1921 who wrote: "A nuisance may be a right thing in the wrong place, like a pig in the parlor instead of the barnyard."[12] Interpreted this way, an otherwise lawful business or industry may not be a nuisance in and of itself, but may become a nuisance because of its particular location or because of its method of operation at that location.

Nuisance law has two branches - public nuisance and private nuisance. A public nuisance is an unreasonable interference with a right common to the general public and is generally brought by the state on behalf of its citizens. Landowners claiming harm to their land from the operations or activities on neighboring land would bring an action under private nuisance which is based upon an invasion of the individual's property or upon a disturbance of rights in land.

a. Public Nuisance

If an activity involves a significant interference with the safety or health of the general public or works some substantial annoyance or inconvenience to the public, it may be a public nuisance.[13] The entire community need not be affected by the activity as long as the nuisance interferes with those who come in contact with it while exercising a public right.[14] An activity which impacts the morals of a community may also be considered a public nuisance as well as an activity proscribed by statute or ordinance.

A public nuisance action is usually brought by the Commonwealth on behalf of its citizens. However, a private citizen may bring such an action if that citizen can show that he suffered peculiar injury apart from the injuries the general public suffered from the nuisance.[15] Pecuniary loss to the complainant may be the type of injury which is different in kind to allow a private citizen to proceed under a public nuisance claim, unless such loss is common to the whole community.[16]

b. Private Nuisance

Private nuisance law has developed into a balancing of the rights of neighboring landowners. One neighbor is asserting the right to use land for a lawful activity. The other is asserting the right to the undisturbed enjoyment of that land, seeking some reasonable comfort and convenience which is occupying it. For years, courts have struggled to balance these competing rights.

Kentucky courts have balanced two broad factors upon which to base the existence of a nuisance: 1) the reasonableness of the defendant's use of the property, and 2) the gravity of the harmful effect of the defendant's activity on the complainant.[17] Applying this two-prong test requires a further balancing of several considerations, but in the long run boils down to a question of degree. The two factors of reasonableness and gravity are considered in light of the following circumstances:

- the lawful nature and location of the defendant's business;
- the manner of the operation of the defendant's business;
- the importance to the community of the defendant's business;
- the kind, volume, time, and duration of the particular annoyance;
- the respective situations of the parties; and
- the character, including applicable zoning, of the locality.[18]

Despite the two branches of nuisance law and their differing requirements, the courts are not always clear about making a distinction between the concept of a private nuisance and a public nuisance. Obviously, an activity can have an impact on the well-being of the general public and on the landowner's right to use and enjoy his own property. One Kentucky court noted that a plaintiff does not lose his right as a landowner simply because other landowners suffer the same kind of damage; the plaintiff may proceed upon either a public or private nuisance action, or both.[19]

c. Damages and Injunctions

Under traditional nuisance law, a landowner can be ordered by the court to cease operations if these actions created a nuisance which caused substantial damages.[20] Injunctive relief does provide a difficult question since shutting down an operation can negatively impact a community, its employment base, and its economy. In Bartman v. Shobe,[21] the court pointed out that the interests of the parties and the public must be balanced in granting or withholding the equitable remedy of injunction; that the interest of the community and the public at large must be thrown into the scale.

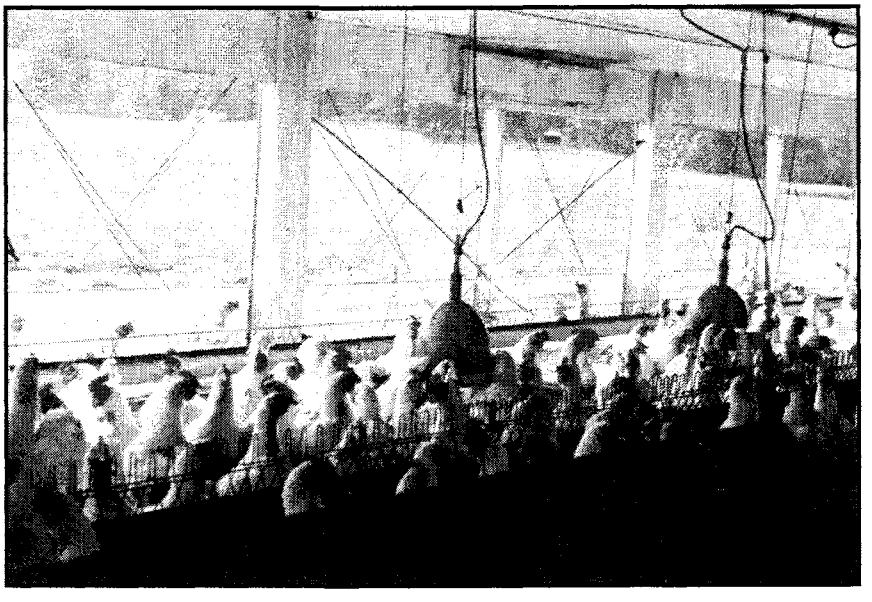
One court which allowed an injunction, balanced the nature and importance of the nuisance-causing activity, in that instance a municipal sewage plant, against the harm to the complaining neighbors. That court allowed the injunction because the degree of the harm to the plaintiff was patently unreasonable, the cause of the harm was not a necessary or expected condition of the operation, and was remedial at relatively insignificant cost.[22] The court also noted that the defendant in that case had been afforded adequate opportunity to remedy the harm.[23]

Often the injunction does not completely shut down the operations, but orders the owner to operate in a manner that does not interfere with the rights of others to use and enjoy their property. In C. Rice Packaging Co. v. Ballinger, for example, a slaughterhouse and packing plant operating in Covington, Kentucky, in 1949 was merely enjoined from operating its plant in a manner which caused offensive odors and noises to emanate from it. In other words, the court did not shut the plant down.

Kentucky law does not allow for compensation for annoyance, discomfort, sickness, or emotional distress in a private nuisance action.[24] Compensation may only be considered in determining the diminution in value or use of the land to the plaintiff.[25] The law does allow a claimant to recover punitive damages for a private nuisance if the defendant acts with oppression, fraud, or malice.[26]

By statute, Kentucky law allows particular damages for private nuisance action, reflecting the principle that nuisance actions protect property rights. For a permanent nuisance, damages are measured by the reduction in the fair market value of the claimant's property caused by the nuisance, not exceeding the fair market value of the property.[27] For a temporary nuisance, compensatory damages are measured by how much the value of the property is reduced by the presence of the nuisance if the claimant occupied the property during the continuance of the nuisance. If the claimant did not, compensatory damages shall be measured by the diminution in the fair rental value of the property.

The nature of the nuisance determines whether it is a temporary or a permanent nuisance.[28] A temporary nuisance is a continuing one which results from an improper installation or method of operation and can be remedied at a reasonable expense.[29] For a temporary nuisance, a nuisance suit may be brought for each recurring injury. Odors, rats, and flies are considered temporary nuisances.[30] Permanent structures may create either temporary nuisances or permanent nuisances. A permanent structure properly constructed and operated may be a permanent nuisance.[31] For a permanent structure, whatever damages result from its construction must be treated in it's entirety.[32]



Applying Nuisance Law to Poultry Operations

A 1966 case, Valley Poultry Farms, Inc. v. Preece, concerning chicken houses in Boyd County is instructive in demonstrating how a court might apply private nuisance law and its balancing nature to agricultural operations. In that case, the location of the agricultural operation was probably the most important factor in the court's deliberations. Valley Poultry Farms constructed four chicken houses in a rural part of the county. The chicken houses were located about 300 feet from the main residence of one of the complaining neighbors and about 150 feet from a rental house. The prevailing wind was from the chicken house toward the residences.[33] The neighbors complained of noise, dust, odor, and insects. The noise,

which began at 4:00 am, woke the neighbors from their sleep. The odors were so bad that windows had to be kept closed and meals were unfit to eat. The chicken manure attracted so many flies that clothes could not be hung out to dry without being "flecked" with flies.[34]

The chicken houses owned by Valley Poultry Farms were found by the court to be a permanent nuisance even though the farm operated its chicken houses with due care. The court first noted that although the business was itself lawful and an otherwise reasonable use of land, it could be rendered unreasonable by the gravity of its harm upon the use and enjoyment of the land by neighboring landowners.[35]

In the case, the Kentucky Farm Bureau Federation filed an *amicus curiae* (friend of the court) brief on behalf of Valley Farm stressing the importance of the poultry industry to Kentucky. The Federation contended that to rule against the farm would be tantamount to declaring all chicken houses nuisances, i.e., that chicken houses per se are inherently nuisances, and thus could not be operated in Kentucky.[36] The Court of Appeals noted that the trial court had instructed the jury to consider the lawful nature of the chicken industry, the importance of its business, and its influence on the growth and prosperity of the commonwealth. However, the court affirmed the lower court's judgment that the location of the chicken houses, along with the noise, dust, odors, and insects, constituted a private nuisance to the neighbors because they were in such close proximity to them.[37]

The Valley Farms case was decided before the introduction of full-scale CAFOs. The conclusion could easily follow that if the operations of chicken houses were nuisances in1966, the operations of even larger CAFOs are nuisances in 2001. A recent Tennessee case applied the common law nuisance analysis to CAFOs and like the Kentucky court in 1966, found these operations to be a nuisance. In the Tennessee case, the Cissoms sued their neighbors, the Millers, who had constructed five small chicken houses which held approximately 45,000 chickens and five larger ones which held approximately 122,000 chickens.[38] The five large chicken houses emitted foul odors and caused a visible cloud of contaminated gas, containing feathers, dust, and chicken droppings. The houses also changed the contour of the Millers' property from a natural drainage pattern to a pattern resulting in increased rainwater runoff. The five larger chicken houses were constructed on the Millers' land after the Cissoms acquired their property.

The Court of Appeals of Tennessee affirmed a lower court's ruling that the odor from the new chicken houses was a temporary nuisance. There was overwhelming proof from a number of witnesses about the odor from the new chicken houses, which were much closer to the house owned by the Cissoms than the three smaller chicken houses. Miller himself testified that there was an odor for approximately one and one-half weeks on an every eight-week cycle when the chickens were being loaded for market.[39] Thus, "foul, unhealthy, and offensive" odors can cause the poultry operations to become nuisances because of the proximity of their location to their neighbors' residences.

In Cissom v. Miller, an action against the Millers for the operation of the chicken houses located on their lands prior to the acquisition of the property by the Cissoms was barred by a Tennessee statute intended to protect agricultural operations from nuisance actions by encroaching development. The particular law at issue is the right-to-farm act.

Right-To-Farm Laws and Nuisance Law

Because of increasing concern with the loss of agricultural lands to non-agricultural uses, especially encroaching residential subdivisions, state legislatures have attempted to slow the loss by enacting right-to-farm laws, such as the one at issue in the Cissom case. Although the exact language of the various state laws may differ, the basic goal of these statutes is to protect farmers and farm operations from nuisance liability.[40]

Many of these statutes prevent the conversion of farmland to non-agricultural uses by codifying the "coming to the nuisance" defense.[41] This common law defense, if permitted absolutely, bars recovery of damages by a complaining neighbor who moved into an area where a particular industry or agricultural operation was previously located. Without the defense, an operation that was well-suited to its location becomes a nuisance when it interferes with the rights of landowners who later acquire property near that location.[42] Other jurisdictions do not consider "coming to the nuisance" as an absolute barrier to recovery of damages, but as an important factor to be balanced along with all the other considerations for determining whether a particular activity is a nuisance.[43]

Kentucky originally enacted a right-to-farm law in 1980 that governed nuisance actions and the ability of local governments to abate agricultural nuisances. The policy behind the statute was to conserve, protect, and encourage the development and improvement of agricultural lands in Kentucky for the production of food and timber:

When nonagricultural land uses extend into agricultural and silvicultural areas, agricultural and silvicultural operations often become the subject of nuisance suits or legal actions restricting agricultural or silvicultural operations. As a result, agricultural and silvicultural operations are sometimes

either curtailed or forced to cease operations.[44]

In effect, the statute prohibits agricultural operations from becoming a public or private nuisance because of changed conditions in the area if the agricultural operation has been in operation for more than one year and the operation was not a nuisance at the time it began operating. "Agricultural operation" is defined in the statute to include any facility that is used for the production of poultry, poultry products, and livestock products and is performed in a reasonable and prudent manner customary among farm operators.[45]

The question of whether this definition applies to CAFOs arose in an Opinion of the Attorney General of the Commonwealth that addressed the issue of whether the statute prohibits counties from regulating industrial-scale hog operations. The August 21, 1997, opinion critiques the language of the statute, calling it "inarticulate." The opinion concluded by rendering the decision that local governments are not precluded from regulating industrial-scale operations. The opinion goes on to describe industrial-scale hog operations:

Called by various names - industrial hog farm, mega-farm, industrial-scale farm - the operation we will describe hardly deserves to be called a farm at all. An industrial-scale hog operation is less a farm than a manufacturing facility. Gone is the bucolic image of the lowing herd winding slowly o'er the lea. Gone is the symbiosis between farmer and land. For the most part, condition of the land is immaterial on an industrial-scale hog operation; the operation could be carried out effectively on a shingle of solid rock.[46]

With that description, it is not surprising that the opinion concludes that the practice of industrial-scale hog farming is neither reasonable nor prudent. Furthermore, these large scale operations are not considered acceptable or customary. Thus, these large-scale hog operations are not the agricultural resources intended to be protected under the statute; they are instead industrial operations.

The Attorney General's opinion did not address the issue of the application of the statute to private nuisance actions. However, the argument could be made that if CAFOs are not protected "agricultural resources" when counties seek to regulate them by zoning or other means, then they are likewise not protected "agricultural resources" when neighboring landowners seek redress under claims of common law nuisance. The same analysis would apply.

A recent Pennsylvania case indicates that courts are barring actions for private nuisance claims against poultry operations under right-to-farm acts. In Horne v. Halady,[47] a poultry business owned by Halady began operating in 1993 when it stocked its poultry house with 122,000 laying hens. In 1994, the owner constructed a decomposition building for waste, which included dead chickens. The next year, Horne filed a claim against Halady Farms claiming that the operation of the poultry houses interfered with the use and enjoyment of his property. Horne complained of flies, odor, and noise and also claimed that waste, including eggshells, feathers, and dead chickens, were found on his property. He alleged harm, because of the substantial depreciation in the value of his home, in the amount of $60,000.[48]

The court held that the nuisance claim was barred by the provisions of the state's right-to- farm act. The court explains that the act does not absolutely prohibit those persons negatively affected by agricultural operations from filing nuisance suits against their agricultural neighbors. Instead, the act requires that the nuisance actions must be filed within one year of the inception of the agricultural operation or if there is a substantial change in that operation during that period. In this particular case, the poultry houses began operation in 1993. The only change in the operation was the construction of a decomposition house in August 1994. Because Horne did not institute his suit until November 1995, more than one year after the change in the operation, his action was time-barred.[49]

The court found that the poultry farm was a "normal agricultural operation" under the Pennsylvania law and that it was lawfully operated. The operation was located in an area zoned for agricultural purposes. The court in reviewing the record found no indication that any government official had ever cited Halady for failing to conduct business in a lawful manner. Instead, the record revealed a letter from an inspec-

tor of the Pennsylvania Department of Agriculture which found no merits to complaints about odor and flies. The inspector concluded after a visit that the Halady farm operated within normal and reasonable levels of odor and fly control and with a pro-active management approach.[50]

Thus, the Pennsylvania court barred a nuisance action brought by landowners who acquired property in the area after the initial agricultural operation had begun. However, an existing neighboring landowner may not be barred from pursuing nuisance suits. Several courts have interpreted the right-to-farm statutes narrowly, "refusing to extend the nuisance protection to situations beyond those in which existing farms are threatened with nuisance suits by encroaching non-agricultural uses."[51] In other words, the complaining existing neighbor asserted that he did not "come to the nuisance," but rather the "nuisance came to him" when the nature of the activity changed from traditional farming to a full-scale industrial operation. A North Carolina court found that argument persuasive when it held that the state's right-to-farm act did not cover situations in which a party fundamentally changes the nature of the agricultural activity which had been covered by the statute.[52] The fundamental change that occurred in that case resulted when a landowner who previously operated turkey houses changed his farming operation to that of a hog production facility.[53]

Conclusion

Landowners suffering from the odor, noise, flies, and pollution from neighboring CAFOs may hope to find relief in the courts for the harm caused to their property. However, seeking redress through litigating under the common law doctrine of nuisance is not without risks and uncertainties. First, litigation generally is time-consuming and costly. A resolution of the problem is rarely immediately forthcoming. Second, depending upon a court's interpretation of the state's right-to-farm act, the nuisance claim may be barred by the time limitations of the statute. Third, even if the action goes forth, compensatory damages for private nuisances are limited to existing property values. An injunction, which a court may issue particularly if the operation is found to be a public nuisance, may be difficult to enforce. Last, neighbors may be reluctant to sue neighbors in small, tight-knit communities. In struggling rural Kentucky communities, operating CAFOs may be viewed as an acceptable alternative to growing tobacco. An individual who challenges CAFOs might be regarded as threatening the economic welfare of the area.

Nuisance law seeks to balance the competing rights of neighboring landowners. The owners of CAFOs may assert a right to use their lands for agricultural purposes, but under a nuisance analysis, that right will be weighed against the right of the neighboring landowners to enjoy the comfort and convenience of their property. A Kentucky justice must have foreseen the tension between these neighboring land uses when he wrote in 1963:

> **There was a time when a man's right to the unmolested enjoyment of his property was nearly absolute, but the industrial revolution changed all this, and there came a time when industry could do no wrong so long as its activities were lawful and it committed no direct trespass. Today the policy of the law is to achieve a reasonable balance between the peace and dignity of the individual, especially in the enjoyment of his home and community, and the needs of commerce.**[54]

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