



Our Noble Purpose.

Minnesota's Feedlots – Where We Are and Where We May Be Going under State and Federal Law

April 23, 2018

Passion Drives Our Purpose™



What Is a Private Nuisance Claim?

A “nuisance” is “[a]nything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.” -- Minn. Stat. § 561.01

“[A]ny person whose property is injuriously affected or whose personal enjoyment is lessened by [a] nuisance” may bring a private nuisance action. -- *Id.*

- If successful, a person bringing a private nuisance action may obtain a judgment to abate or enjoin the nuisance and an award of monetary damages. -- *Id.*

Three Required Elements of a Private Nuisance Claim?

1. Existence of one of the following nuisance conditions:
 - A. Condition that is harmful to the health of a neighboring property owner; or
 - B. Condition that is indecent or offensive to a neighboring property owner's senses; or
 - C. Condition that is an obstruction to the free use of neighboring property.

Common Nuisance Conditions Alleged Against Livestock Producers

1. Odor
2. Emission of Air Pollutants
3. Adverse Health Conditions
4. Flies and Vermin
5. Noise
6. Light

Three Required Elements of a Private Nuisance Claim?

2. The nuisance condition materially and substantially interferes with the comfortable enjoyment of life or property.
 - This element is assessed based on “the standards of ordinary people in the area in which the property is located.”

Three Required Elements of a Private Nuisance Claim?

3. Defendant wrongfully created the nuisance condition.
 - A. Intentional Nuisance
 - i. *Purposely caused the nuisance; or*
 - ii. *Knew that his/her conduct was causing the nuisance; or*
 - iii. *Knew that the nuisance was “substantially certain to result.”*
 - B. Negligent Nuisance
 - i. *Does something a reasonable person would not do in similar circumstances; or*
 - ii. *Fails to do something a reasonable person would do in similar circumstances.*
 - C. Other Wrongful Conduct

Public vs. Private Nuisance

A public nuisance is the maintenance of a nuisance condition that has a general effect upon the public.

- A nuisance may be both public (i.e., generally impacting the public) and private (i.e., having a peculiar effect on the use and enjoyment of a particular property).

There is no private cause of action for a public nuisance. Rather, a public nuisance may only be challenged in a criminal prosecution or a civil abatement action by a public body.

Minnesota Right-to-Farm Law

“An agricultural operation is not and shall not become a private or public nuisance after two years from its established date of operation as a matter of law” if each of the following conditions are satisfied (Minn. Stat. § 561.01, subd. 2(a)):

1. The operation “is located in an agriculturally zoned area”; and
2. The operation “complies with the provisions of all applicable federal, state, or county laws, regulations, rules, and ordinances and any permits issued for the agricultural operation”; and
3. The operation “operates according to generally accepted agricultural practices.”

Minnesota Right-to-Farm Law

“For a period of two years from its established date of operation, there is a rebuttable presumption that an agricultural operation in compliance with the [statutory] requirements . . . Is not a public or private nuisance.” -- Minn. Stat. § 561.01, subd. 2(b)

Minnesota Right-to-Farm Law

The “established date of operation” is “the date on which the agricultural operation commenced.” -- Minn. Stat. 561.01, subd. 1(b)

- BUT “[i]f the agricultural operation is subsequently expanded or significantly altered, the established date of operation for each expansion or alteration is deemed to be the date of commencement of the expanded or altered operation.”
- A “significant alteration” does not include any of the following actions:
 - *Transfer of an ownership interest to a relative;*
 - *Temporary cessation or interruption of cropping activities;*
 - *Adoption of new technologies; or*
 - *Change in the crop product produced.*



Exceptions to the Minnesota Right-to-Farm Law

The protections of the Right-to-Farm law do not apply “to an animal feedlot facility with a swine capacity of 1,000 or more animal units . . . or a cattle capacity of 2,500 animals or more.” -- Minn. Stat. 561.01, subd. 2(c)

The protections of the Right-to-Farm law do not apply to the following times of legal proceedings:

- Criminal prosecutions for public nuisances;
- Actions by public authorities to abate public nuisances; or
- Enforcement of local zoning ordinances.

Other Common Defenses

“Coming to the Nuisance”

Intervening/Contributing Cause

Contributory/Comparative Negligence

Preemption

- Noise Standards Established by State Regulations

Waiver/Estoppel/Consent



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Minnesota Nuisance Law, in General

Courts have long recognized private nuisance claims to protect a property owner against interference with his use and enjoyment of his property.

- In Minnesota, a nuisance has been defined by statute as “[a]nything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.”
- The determination of whether something is a nuisance focuses on the resultant harm rather than the kind of conduct which causes the harm.
- The determination of whether something is indecent or offensive is made objectively and from the perspective of ordinary people in relation to the area where they reside.

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Recent Nuisance Cases of Interest

Winter v. Gourley Premium Pork, LLC (Todd County, MN)

- In 2013, Gourley built a 4,000 head feedlot in Todd County, Minnesota. The feedlot was subject to extensive environmental review and litigation from neighbors about water appropriation permits before it was constructed.
- Once the feedlot became operational, four neighbors (funded by the Humane Society of the United States and other activist groups) brought a nuisance suit against the feedlot.
- Annual air emissions monitoring data from the facility confirmed that the feedlot was in compliance with the hydrogen sulfide air emission standards under Minnesota law.



Minnesota's Feedlots

Recent Nuisance Cases of Interest

Winter v. Gourley Premium Pork, LLC (Todd County, MN)

- The district court granted summary judgment from Gourley on several claims but denied summary judgment on the odor-based nuisance claims.
- Following a 10-day jury trial, the jury found that the feedlot was not a nuisance.



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Recent Nuisance Cases of Interest

- After one successful nuisance case in Iowa (*McIlrath v. Prestage Farms of Iowa, L.L.C.*, 889 N.W.2d 700 (Iowa Ct. App. 2016)), multiple juries in Iowa and Illinois have found against nuisance cases arising from swine feedlots that were constructed in predominantly agricultural areas.



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Recent Zoning Case of Interest

Rosenquist v. Circle K. Family Farms, No. A17-0279, 2017 WL 6418872, at *1 (Minn. Ct. App. Dec. 18, 2017), review denied (Mar. 20, 2018)

- In November 2015, Circle K submitted a CUP application to Goodhue County, seeking to construct a hog-confinement facility that would house up to 4,700 finishing hogs, or 1,410 animal units.
- The MPCA concluded that the project did not pose a risk of potential significant environmental effects, and Circle K was not required to conduct an Environmental Impact Study.
- On February 21, 2017, Goodhue County approved the CUP, and landowners located near the proposed facility site challenged that approval, arguing that the approval was unreasonable, arbitrary, and capricious because the facility would:

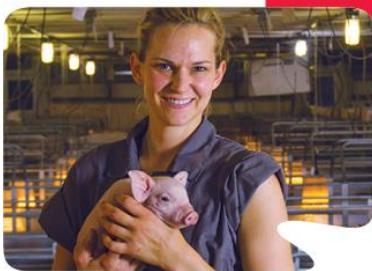


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Recent Zoning Case of Interest

Continuation

- *Violate a county odor-offset ordinance applicable to “feedlots” when considering odor from the facility’s rendering pit;*
- The ordinance defined a feedlot as a “[l]ot or building or combination of lots and buildings intended for the confined feeding, breeding, raising or holding of animals and specifically designed as a confinement area in which manure may accumulate, or where the concentration of animals is such that a vegetative cover cannot be maintained within the enclosure.”
- *Pose environmental concerns; and*
- *Substantially diminish property values and create a nuisance.*



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Recent Zoning Case of Interest

Continuation

- The Minnesota Court of Appeals upheld the CUP, holding that:
 - *Circle K's rendering pit was not part of the "feedlot" under the odor-offset ordinance's definition—and thus did not need to be considered with regard to the ordinance—because the rendering pit was a concrete structure with no roof (and was therefore not enclosed);*
 - *The MPCA had already found that the facility would not pose an environmental risk; and*
 - *There was no concrete evidence that Circle K's facility would diminish property values or cause a nuisance.*
- The Minnesota Supreme Court subsequently declined to hear the case.



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CERCLA and EPCRA Reporting Requirements

Congress enacted CERCLA—the Comprehensive Environmental Response, Compensation, and Liability Act—in 1980 in response to large hazardous waste disasters.

- CERCLA requires persons in charge of a “facility” to report releases of “hazardous substances” above specified quantities to the National Response Center and the EPA.
- Both ammonia and hydrogen sulfide are designated as a hazardous substance under CERCLA and have reporting thresholds of 100 pounds per day.



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CERCLA and EPCRA Reporting Requirements

Congress enacted EPCRA—the Emergency Planning and Community Right-to-Know Act—in 1986 to aid emergency planning and response efforts by state and local governments and to provide the state and local emergency response agencies with information about potential chemical hazards in their communities.

- Similar to CERCLA, EPCRA requires the owner or operator of a “facility” to report releases of “extremely hazardous substances” above specified quantities to state and local emergency response officials.
- Both ammonia and hydrogen sulfide are designated as an extremely hazardous substance under EPCRA and have reporting thresholds of 100 pounds per day.

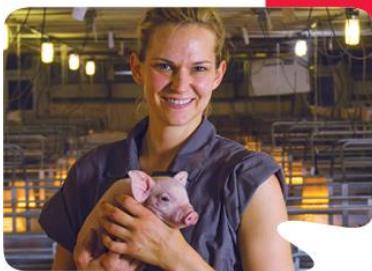


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CERCLA and EPCRA Reporting Requirements

In December 2008, the EPA published a regulation that (1) exempted all farms from CERCLA reporting requirements with regard to releases into the air of hazardous substances from animal waste and (2) exempted most farms (except for concentrated animal feeding operations) from EPCRA reporting requirements with regard to releases into the air of hazardous substances from animal waste.

- In April 2017, the United States Court of Appeals for the District of Columbia Circuit held that this regulation was invalid. That decision was stayed until January 22, 2018.
- When the regulation was invalidated, the EPA reversed some of its prior interpretations of EPCRA, and its current administrative guidance now indicates that routine air emissions generated from animal waste on farms do not require reports to state and local governments because animal waste is a substance that “is used in routine agricultural operations” and therefore is not an “extremely hazardous substance.”



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CERCLA and EPCRA Reporting Requirements

The 2018 Farm Bill passed March 23, 2018, contains a new law that specifically exempts “air emissions from animal waste (including decomposing animal waste) at a farm” from the reporting requirements under CERCLA.

- The new law does not also create a similar statutory exemption from EPCRA, but the EPA continues to interpret EPCRA to exempt releases from animal waste on farms from its reporting requirements.

Aside from CERCLA and EPCRA, the Minnesota Pollution Control Agency has adopted standards that generally prohibit the release of hydrogen sulfide in excess of (i) a 30-minute average of at least 30 parts per billion twice in 5 days or (ii) a 30-minute average of at least 50 parts per billion twice per year.



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Where We Are and Where We May Be Going

- Real Battle is two-fold: national land use policy; and what makes the food we eat.
- States are attempting to create local pockets of regulation raising commerce clause issues.
- Federal Congressional and Regulatory arenas is where this will be fought out.



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Where We Are and Where We May Be Going

Continuation

- Players: Industry; NGOs; Regulatory Agencies, the Courts, and – perhaps, most importantly, the Consumer
- Examples:
 - WOTUS – Waters Of The United States
 - Use of Antibiotics
 - Defining “organic” – “natural” land other terms characterizing food quality