

ENVIRONMENTAL AND CONSERVATION LAW

Number 2 March 1996

INTENSIVE LIVESTOCK OPERATIONS IN NORTH CAROLINA: CASES AND MATERIALS

■ Milton S. Heath, Jr.

Introduction	2
The Current State of the Law	2
Federal Regulation of Water Pollution from Animal Feedlot Wastes	3
State Regulation of Water Pollution: the "Anti-Straight Pipe Law"	3
State Regulation of Water Pollution: the ".0200" or "Non-discharge" Rules	4
NC Soil and Water Conservation Commission Guidelines for Animal Waste	5
SCS (NRCS) Field Office Technical Guide	6
Federal and State Air Pollution Control: Regulation of Odors	6
Related North Carolina Legislation: "Bona Fide Farms," and the "Right-to-Farm" Law	6
1995 Legislation Concerning Feedlots	7
Recent Litigation	8
Recent County Rules and Ordinances	8
Is There Legal Authority for County Rules and Ordinances?	9
Appendix A: Intensive Livestock Ordinances and Rules	10
Appendix B: Public Health Nuisances	13

Introduction

This is the second in a series of bulletins published by the Institute of Government. The particular subject that triggers this publication is an area of increasing economic activity that has both plusses and minuses for a number of communities in North Carolina in the mid-1990's: concentrated livestock and poultry facilities, often referred to as "intensive livestock operations" or "ILO's." The plus side of this picture is added gainful economic activity in rural areas long beset by chronic underemployment, now aggravated by the declining tobacco economy. The minus side includes potential intrusion on the use and enjoyment of land by immediate neighbors of ILO's, and in some cases by others, as a result of water quality impairment and offensive odors associated with some ILO's.

In keeping with the Institute's traditional role as an educational (not an adversary) organization, this bulletin does not take sides in the ILO debates that have been intensifying, not only in impacted communities, but statewide.¹ It is a progress report on the current state of the law that only seeks to summarize and analyze recent litigation, existing and proposed legislation, state rules, and local ordinances and rules concerning intensive livestock operations (ILO's) in North Carolina. (The bulletin refers to these facilities interchangeably as "ILO's," "animal feedlots" or "large feedlots.")

The primary target audience includes state and local officials who are asked by their constituents to respond to the concerns of ILO owners and their spokespersons, neighbors and environmentalists. It is hoped that the bulletin will also be useful to interested citizens, legislators and the media.

The Current State of the Law: A Summary

As of July 1995 the current state of the law concerning ILO's in North Carolina can be summarized in eight points:

- (1) What makes a facility an "intensive" livestock operation is a matter of definition, varying from one state or local rule to another. A commonly used definition sets thresholds for application of rules to facilities such as: those with a minimum capacity of 250 swine, 100 head of cattle, 75 horses, 1,000 sheep, or

¹*Raleigh News and Observer*, "Boss Hog: North Carolina's Pork Revolution." Reprint edition, March 19, 1995 (20 pp., a compilation of a series of articles, editorials and letters.)

30,000 birds with liquid waste systems. Some rules subdivide these thresholds into a range of numbers that set variable standards for different sizes of feedlots.

- (2) There is no federal legislation directly regulating animal feedlots.
- (3) There is no North Carolina legislation directly regulating animal feedlots, but there is a North Carolina statute restricting the nuisance liability of agricultural operations, including feedlots--the "Right-to-Farm Law." Bills to regulate feedlot operations were considered in 1995, 1993 and 1973, but none has been enacted yet. The 1995 General Assembly enacted legislation requiring mediation before lawsuits over hog farms can be brought, establishing setbacks for large hog feedlots, and requiring agricultural waste applicators to be certified.
- (4) The North Carolina Right-to-Farm Law has been twice interpreted by decisions of the North Carolina Court of Appeals. These decisions found the Right-to-Farm Law inapplicable to a hog feedlot that was established *after* a neighboring boys' camp was begun, and to a former turkey farm that was converted to a large hog ILO *after* a neighbor moved in.
- (5) One or more common law nuisance suits against animal feedlots (mainly involving odors) is pending before Superior Court judges. A Johnston County jury found for the defendant in one of these cases in May 1995.
- (6) Air Pollution Rules: There is no federal odor control program under the Clean Air Act, and the North Carolina clean air program gives but limited attention to odor problems. In the North Carolina air pollution control rules there is only a one sentence prohibition against operating any "plant" without suitable measures for controlling odorous emissions. T 15A NCAC 02D .0523. This rule is interpreted as applying only to industrial units, such as chemical plants, and not to animal or poultry growers.
- (7) *Water Pollution Control Rules*: There are federal and state statutes and rules that regulate water pollution caused by animal feedlots. The main elements of these provisions are an NPDES permit system for feedlot *discharges* that exists only on paper (no such permits have been issued in North Carolina); a statutory prohibition against willful discharges of pollutants to waters by

pipes or ditches; and a set of *non-discharge* rules that encourage non-discharging lagoon systems as a means of minimizing water pollution from feedlots. The non-discharge rules apply now to new systems, and will require existing systems to have approved waste management plans by 12/31/97. The non-discharge rules lack the enforcement posture that is typical of modern water pollution control laws. They contemplate that systems with approved plans will not be required to obtain permits; rather, these systems will be "deemed permitted." (These rules may be re-examined and strengthened in light of a series of well-publicized spills from lagoons during the summer of 1995.)

- (8) *Local Ordinances and Rules:* A number of counties, mainly eastern, have been considering proposed ILO ordinances or rules in recent years. Several counties adopted temporary moratoria (now expired) on installation of new ILO's, pending further study. County boards of health in Halifax, Scotland, and Robeson counties adopted local ILO rules. Several other counties are considering proposed local rules or ordinances.

Federal Regulation of Water Pollution from Animal Feedlot Wastes

The earliest form of regulation of feedlot wastes originated with US-EPA regulations concerning wastes discharged to streams, first adopted in 1974, and corresponding state regulations.

The original EPA effluent limitations for feedlot point sources were adopted in 1974. 40 C.F.R. Part 412. For all categories of animals and poultry except ducks, the effluent limitation was *zero discharge* of process waste water pollutants to navigable waters. 40 C.F.R. §§ 412.12(a), 412.13(a), 412.15(a). The North Carolina effluent limits for industrial waste discharges adopted the EPA standards by reference. The North Carolina regulations did not adopt 40 C.F.R. Part 412 on feedlots. (Conversation with Boyd DeVane, DEHNR Water Quality Section, June 13, 1991.)

EPA regulations also required NPDES permits for concentrated animal feedlots meeting certain numerical criteria (such as, 750 swine each weighing over 25 kilograms), that are significant contributors to pollution of the waters of the United States. 40 C.F.R. § 122.23. North Carolina adopted the EPA NPDES feedlot rule by reference, and procedures for

evaluating permit applications. Title 15A NCAC, Part 01H.0122. These rules are interpreted as "zero discharge" rules, and no NPDES permits have been issued under them. (Conversations with Boyd DeVane and David Harding, DEHNR Water Quality Section, June 13-14, 1991.)

The net result of these early federal and state rules, as applied, appears to be a policy of discouraging the use of direct discharge systems for animal wastes. These early rules, in conjunction with the .0200 Rules discussed below, reflect North Carolina's general policy of encouraging non-discharge systems for animal wastes.

In a recent decision the 2nd Circuit Court of Appeals has held that the discharge by an ILO of liquid manure through a drain and swale or by manure spreading vehicles is a point source that requires an NPDES permit under the Clean Water Act, notwithstanding the act's "agricultural stormwater" exemption. *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994). The Supreme Court denied certiorari without opinion, 115 S.Ct. 1793 (1995). This decision might signal more rigorous application of the clean water act to ILO's in citizen suit cases (such as *Southview Farm*), even if EPA does not actively follow up the 2d Circuit's interpretation. See case note: Environmental Law-Agricultural Pollution, Land and Water Law Review, Vol. XXXI, No. 1, p. 113 (1996).

State Regulation of Water Pollution from Animal Wastes: The "Anti-Straight Pipe Law," and Water Quality Standards

GS 143-215(e) contains an anti-straight piping prohibition on discharging animal or poultry wastes directly into the waters of the state. It reads as follows:

Except as required by federal law or regulations, the [EMC] may not adopt effluent standards or limitations applicable to animal and poultry feeding operations. Notwithstanding the foregoing, where manmade pipes, ditches or other conveyances have been constructed for the purpose of willfully discharging pollutants to the waters of the state, the secretary shall have the authority to assess fines and penalties not to exceed five thousand dollars (\$5,000) for the first offense.

It would seem likely that this provision would be construed as creating a special civil penalty for straight-piping animal or poultry wastes, carved out as an exception from the general civil penalty provisions for water pollution violations, as set forth in GS 143-215.6A, which authorizes potentially heavier civil

Environmental and Conservation Law

penalties. From a literal reading of GS 143-215(e) it appears that the potential enforcement of this statute could be significantly limited by the requirement that the conveyances "have been constructed for the purpose of willfully discharging pollutants to the waters of the state." There have been no reported court cases interpreting GS 143-215(e).

One other possible legal basis for pursuing animal waste discharges that pollute the waters of the state is via water quality standards. GS 143-214.1 authorizes the EMC to establish water quality standards to protect waters with assigned water quality classifications against discharges of pollutants that result in degradation of water quality. GS 143-215.1(a) in turn requires permits for causing or permitting discharges of wastes to the waters of the state that violate water quality standards. Unlike the straight-piping violations covered in GS 143-215(e), presumably the standard civil and criminal penalties would apply to violations of water quality standards.

State Regulation of Water Pollution from Animal Wastes: The ".0200" or "Non-discharge" Rules

For almost two decades EMC rules have regulated not only wastewater systems that *discharge* to the waters of the state but also features of wastewater management systems *that do not involve discharges*. G.S. 143-215.1(a), (d). These so-called "non-discharge rules" or ".0200 rules" (named after their code section number) apply to such subjects as sewer lines, treatment of petroleum contaminated soils, and animal waste management systems. T 15A NCAC 02H .0201.

Key features of the EMC animal waste management rules include the following (T 15A NCAC 02H .0217):

- (1) Animal waste systems are classified by the rules, along with the ten other types of systems, as "deemed permitted" if they meet certain requirements. That is, rather than routinely being required to go through the necessary paper work to apply to DEM for permits, their owners need not apply for permits if they meet the criteria set forth under points (2) - (7) below.
- (2) No permit is necessary if the system serves less than the following numbers of animals:
 - 100 head of cattle
 - 75 horses
 - 250 swine
 - 1,000 sheep
 - 30,000 birds, with liquid waste system.

(Note that these are the same threshold numbers as in the Scotland County health rules discussed below.) Smaller systems are encouraged to meet the .0200's standards, and systems that DEM finds have an adverse impact on water quality may have to obtain permits or have approved plans. Thus, water quality effects are a crucial factor. DEM may decide on a case-by-case basis that systems are required to obtain permits, including (but not limited to) systems that do not have an approved animal waste plan or have an adverse effect on water quality.

- (3) Poultry operations with dry litter systems are deemed permitted if they maintain certain records, the waste is applied at less than agronomic rates and litter is stockpiled not closer than 100' from perennial waters ("blue line" streams).
- (4) Systems with an approved animal waste management plan by 12/31/97 are deemed permitted.
- (5) Land application plots owned by third parties, applying wastes at less than agronomic rates and maintaining at least a 25' vegetative buffer from perennial streams are deemed permitted.
- (6) New and expanded systems placed in operation between 2/1/93 and 12/31/93, and registered with DEM are deemed permitted.
- (7) Section .0217(H) spells out procedures for developing approved animal waste management plans, to be approved for new and expanded systems before animals are stocked. Its requirements include:
 - (a) Approved plans must include BMP's that meet SCS (NRCS) Field Office Guide minimum specs or NC Soil and Water Conservation Commission ("State Commission") specs or approved combinations.
 - (b) Plans must be certified by a technical specialist designated pursuant to State Commission rules. (See summary of State Commission guidelines, below--referred to interchangeably as "rules" or "guidelines.")
 - (c) An on-site inspection of waste storage features such as lagoons.
 - (d) A minimum 25' vegetative buffer between land application sites and perennial streams.
 - (e) A minimum 100' buffer between lagoons and perennial streams.
 - (f) Waste application at no greater than agronomic rates.

- (g) For existing systems the plan need only include operational and maintenance specs, and need not meet design and construction specs.
- (h) Third party applicators must maintain a 1-year current record of waste removals.

(8) Civil penalties for violations may be assessed by the EMC up to \$10,000 per day, so long as a violation continues. G.S. 143-215.6A.

A series of spills from lagoons during the summer of 1995 has focused attention on the design, installation, inspection and maintenance of lagoon systems. This has already stimulated a speedup of inspections, and seems likely to bring about more enforcement actions and a re-examination of the state rules on these subjects. (The possibility of rules changes must be considered in light of 1995 legislation that will both deter and delay changes in *any* state agency rules. 1995 N.C. Sess. L., ch. 507, § 27.8.) In early February 1996, proposed changes in rules and legislation were beginning to surface. A blue ribbon legislative study commission on livestock waste approved proposals for legislation to make ILO's subject to a permitting, testing, and inspection regime more nearly in-line with requirements that apply to industries and cities; to require forest buffers along streams; and to require enforceable odor control plans.² A DEHNR plan presented to the EMC for cleanup of the Neuse River basin would impose some similar requirements on ILO's.³ And a Law Engineering consultant study commissioned by the N.C. Pork Producers Association recommended stronger state controls on hog waste lagoons that are consistent in spirit with the State proposals, if more specific in some details.⁴

²Raleigh News and Observer, "State hog waste panel gets tough." February 9, 1996 (p. 1A).

³Raleigh News and Observer, "State drafts tough Neuse cleanup plan." February 8, 1996 (p. 1A).

⁴Raleigh News and Observer, "Hog study urges stronger rules for waste lagoons." February 8, 1996 (p. 3A).

N.C. Soil and Water Conservation Commission Guidelines for Animal Waste Management Systems (T 15A N.C.A.C. 06F .0001-.0005)

These Guidelines of the State Commission supplement the EMC .0200 animal waste management rules in the following respects:

- (1) The Guidelines implement the requirement of the .0200 rules that animal waste management plans must be certified by a technical specialist designated pursuant to State Commission rules, unless a system is operated under a DEM nondischarge permit. (The guidelines are referred to interchangeably as "guidelines" or "rules." They are "rules" in the sense that they are an exercise of the State Commission's rule-making powers under G.S. 143B-294(2), and are published like other state agency rules in the NCAC. They are referred to as "guidelines" in their NCAC title, and are guidance documents whose violation is not a regulatory offense.)
- (2) The State Commission has designated the following groups as Technical Specialists:
 - (a) Individuals assigned design or installation approval authority by USDA, NCDA, SCS (NRCS) or Extension.
 - (b) P.E.'s.
 - (c) Individuals with demonstrated skill and experience in designing or installing animal waste management BMP's.
 - (d) Additional individuals who meet minimum qualifications required by the Division of Soil and Water Conservation.

Lists of designated Technical Specialists are supplied to all districts.

- (3) The basic function of Technical Specialists is to certify that the BMP's contained in animal waste management plans *for new systems* meet current standards established by the State Commission. (An existing system is not required to meet these standards, so long as the system is certified to be nondischarging.)
- (4) There is a review process for certifications, to-wit:
 - (a) Within 30 days of receiving a plan the district may notify interested parties of objections to the plan or to the certification.
 - (b) The owner or DEM may request the district to reconsider its objections.

Environmental and Conservation Law

- Within 45 days thereafter the district may affirm or disclaim its objections.
- (c) After these procedures are completed a dissatisfied owner may request the State Commission to mediate the dispute.
- (5) DEM--not the district or the technical specialist--remains responsible for monitoring of systems and enforcement of the .0200 Rules.
- (6) BMP's must either meet the minimum standards of the SCS (NRCS) Technical Guide or of the State Commission. (BMP's approved for use in the NPS agricultural cost share program may qualify.) The State Commission approves its BMP's annually by August 1. Land application BMP's are acceptable if they follow the SCS (NRCS) Technical Guide or recommendations of NCDA or Extension. Exemptions from minimum buffers may be obtained if there is no practicable alternative and if nondischarge requirements are met except for storm events more severe than the 25-year, 24-hour storm.

SCS (NRCS) Field Office Technical Guide

(Note: SCS has been renamed the Natural Resources Conservation Service—"NRCS")

The SCS Field Office Technical Guide referred to in the local ILO rules is a set of detailed technical guides for the design and installation of animal waste facilities and for application of animal wastes to vegetated soils at agronomic rates ("waste utilization"). The Guide contains white sheets for general use and more numerous green sheets containing recommendations that are specific to North Carolina. It is approximately 100 pages long.

More than half of the Technical Guide is a series of spreadsheets that calculate fertilizer nutrients, application rates and land areas needed for agronomic uses of an aerobic lagoon sludge or liquid, scraped surface manure, and an aerobic lagoon liquid for swine, dairy cattle, layers, broilers and turkeys. The remainder of the guide addresses the planning and design of waste treatment lagoons, temporary storage structures for animal wastes, and ponds for temporary storage of animal wastes.

The North Carolina guide recommends that new or expanded ponds, storage structures and lagoons be sited at least 750' from residences (other than the owner), churches and public use areas; existing

facilities, 300' from these places; and all facilities, 100' from wells. Amendments to the Guide that are scheduled to take effect in June 1996 would replace these setbacks with the higher numbers contained in S1080--1,500' from any occupied residence, 2,500' from any school, hospital, or church, and 100' from any property boundary. The amendments also revise other provisions concerning spillways, added storage, clay liners, odor control and waste utilization, among other things.

The SCS technical guide is only a guide, and not a regulation with the force of law, though it may have legal implications where, for example, it is incorporated by reference by EMC regulations. It expressly contemplates that stricter state or local ordinances will control.

Federal and State Air Pollution Control: Regulation of Odors

The regulatory scheme of the Federal Clean Air Act does not directly address odor and related problems, and the Act has not been applied so as to control odor emissions to the ambient air.

North Carolina's air pollution control regulations on odor consist of a provision codified in NCAC, Title 15A, Part 2D, .0522, providing that, "A person shall not cause, allow or permit any *plant* [emphasis added] to be operated without employing suitable measures for control of odorous emissions, including wet scrubbers, incinerators, or other devices approved by the [Environmental Management] Commission."

This rule is applied from time to time as a basis for persuading industrial operation to improve their housekeeping operations for better odor control. Examples of such industries are chemical companies, rendering plants, and fertilizer blending with ammonia. On the advice of legal staff, field offices have not applied the rule to animal or poultry growers because these activities do not readily fit the term "plant." (Conversations with Steve Proctor, DEHNR Air Quality Section, and Dick Copeland, Washington, NC field office, June 14, 1991.) A protocol has been developed that proceeds from a complaint to confirmation of the "objectionable" character of the emissions, involving the use of an odor panel.

In summary, the sum total of federal and state odor control regulation under the Clean Air Act is (i) no federal or state statutes, (ii) no federal regulations and (iii) a North Carolina regulation requiring any "plant" to control odorous emissions, which by its wording is unlikely to be applied to animal feedlots. Thus, under present law, neighbors who suffer from

ILO-caused odors will find no recourse from federal or state clean air agencies.

Related North Carolina Legislation: The "Bona Fide Farms" Exemption from County Zoning and the "Right-to-Farm" Law

County Zoning. In theory one option for mediating or resolving land use conflicts between ILOs and their neighbors would be to apply zoning concepts in order to separate incompatible uses from one another. This option is precluded at the county level in North Carolina, however, by the county zoning enabling act which has long exempted "bona fide farms" from county zoning (in GS 153A-340). The definition of bona fide farms in GS 153A-340 clearly covers ILOs. There is no similar exemption in the city zoning enabling act, and cities can and do use zoning to regulate farms. Many also have general police power ordinances limiting the number of animals that may be kept. The zoning power extends to extraterritorial jurisdiction. A number of small towns use this jurisdiction to prevent location of ILO's within a mile of town limits. Most ILOs are likely, though, to be located within the county's zoning jurisdiction but not the city's zoning jurisdiction. The North Carolina Court of Appeals has interpreted the bona fide farms exemption as applying to a plant nursery but as not applying to a dog breeding and boarding facility. *Baucom's Nursery v. Mecklenburg County*, 62 N.C. App. 396, 303 SE 2d 236 (1983); *Development Assocs, Inc., v. Wake County Board of Adjustment*, 48 N.C. App. 541, 269 SE 2d 700 (1980), cert. den. 30/N.C. 719, 274 S.E 2d 227 (1981).

The bona fide farms exemption does not appear to prevent counties from applying their zoning ordinances to processing plants, such as slaughterhouses. The Edgecombe County Board of Commissioners amended their county zoning ordinance on January 10, 1996 to clear the way for a large slaughterhouse by rezoning a potential site for industrial use. (*Raleigh News and Observer*, January 11, 1996.)

The "Right-to-Farm" Law. In the mid-1970s several civil suits were brought in North Carolina against hog farmers, based on odor and other nuisance problems of neighbors. When one suit in Pamlico County resulted in a \$2,000 damage award against the farmer, agricultural interests persuaded the General Assembly to enact the Agricultural Nuisance or Right-to-Farm law to allay their concerns that the proliferation of such litigation would disrupt important

farming activities. GS 106-701. The statute essentially codified the old common law defense of "coming to the nuisance" in this fashion:

- It provided that "changed conditions" in an area cannot make an agricultural operation a nuisance if it wasn't a nuisance initially, and it has operated more than one year. (An obvious example of a "changed condition" might be a neighbor moving in more than a year after the agricultural operation began.)
- The statute barred nuisance suits that contradict the "changed conditions" rule. It also voided local ordinances making such activities a nuisance or providing for their abatement as a nuisance. This part of the statute may be relevant for some of the local rules and ordinances discussed later.
- The statute was later amended to add forestry operations to the protected class.

There have been two Court of Appeals decisions interpreting the Right-to-Farm Law. The first decision reached the straightforward conclusion that the statute did not provide a defense for a hog farmer against the owner of a boys' camp that was in place sixty years before the hog farm was established. *Mayer v. Tabor*, 77 N.C. App. 197 (1985).

The second decision held that the Right-to-Farm Law did not bar a nuisance suit brought by a neighbor of a farm converted from three turkey houses to a large hog production facility that plaintiff feared would adversely affect his planned subdivision of lots. *Durham v. Britt*, 117 N.C. App. 250, 451 S.E. 2d 1 (1994). The court stated, in reversing a trial court's grant of summary judgment against plaintiff:

We do not believe the legislature intended North Carolina General Statutes § 106-701 to cover situations in which a party fundamentally changes the nature of the agricultural activity which had heretofore been covered by the statute. For example, a fundamental change could consist of a significant change in the type of agricultural operation, or a significant change in the hours of the agricultural operation. 117 N.C. App. 250, 254-5, 451 S.E. 2d 1, 3.

1995 Legislation Concerning Animal Feedlots and Nuisance Abatement

A series of bills were introduced to address the environmental and neighborhood issues that have been generated by the surge of development in the animal feedlot business, especially hogs. Several of them did not pass—including S 394, to eliminate the exemption

Environmental and Conservation Law

of bona fide farms from the county zoning enabling act; H 524, to establish comprehensive regulation of hog farming; H 874 (S 804), to require an environmental impact statement for meat and poultry packing or processing plants located within one mile of an intrastate river; and H 845, to declare that agricultural operations that continually violate environmental laws are nuisances. However, a blue ribbon study commission on animal waste management was created, various existing regulatory and technical assistance programs were given increased funding, and a few measures were enacted.

Chapter 420 (S 1080) establishes three statutory setbacks for swine-growing facilities that raise 250 or more swine. Under this act, swine farms or lagoons must be sited at least 1,500 feet from any occupied residence; 2,500 feet from any school, hospital, or church; and 100 feet from any property boundary. Also, the outer perimeter of land onto which lagoon waste is applied must be at least fifty feet from any residential property boundary and any perennial stream. Lesser setbacks are permissible with recorded written permission of the owner. The legal effect of Chapter 420 is not clear, because the act contains no enforcement sanctions for violations. On the other hand, the new setbacks might be incorporated in the existing state .0200 rules or in local rules or ordinances that do have enforcement sanctions. (As this publication went to press, these setbacks were being used by DEM as conditions for plan approval.)

Chapter 544 (S 974) establishes a program within DEHNR to require certification and training of operators in charge of animal waste systems who apply animal wastes to land from swine production systems serving more than 250 swine. As introduced, S 974 was a very general authorization for training and certification under the Water Pollution Control Systems Operator Certification Commission. The bill was rewritten a number of times, each rewrite progressively strengthening previous versions, as public pressures grew for stronger swine farming regulation. Key features of Chapter 544, effective January 1, 1997, include these:

- DEHNR, in cooperation with the Cooperative Extension Service, is responsible for developing the programs. Operators must complete six hours of instruction and pass an examination every five years, pay an annual \$10 fee, and renew their certificates annually.
- Swine wastes must be managed so as not to cause a discharge of pollutants to surface waters, except as a result of a storm event more severe than a twenty-five-year, twenty-four-hour storm.

- Enforcement options include civil penalties up to \$1,000 and suspension or revocation of certificates.

Chapter 500 (S 528) requires that parties to civil actions in superior court attend pretrial mediated settlement conferences, if ordered by the senior resident superior court judge. The act specifically requires that the plaintiff in a farm nuisance civil action must initiate pre-litigation mediation before filing suit. This requirement does not apply if the suit is a class action, or the court finds good cause, or a mediator's certificate shows that the requirements of the act have been met—for example, by waiver of mediation or an unsuccessful attempt to mediate. The mediator can be selected by agreement of the parties from a list of mediators certified by the Dispute Resolution Commission or, failing such agreement, by the senior resident superior court judge.

Recent Litigation

In addition to the Court of Appeals cases interpreting the Right-To-Farm Law, there have been other recent nuisance actions tried in Superior Court. A Johnston County jury found that defendant's hog farm was not a nuisance in *Hockaday et al. v. Lee Brothers Farm* (Earl and Dennis Lee) (May 1995). Trial judge Marsh McLellan had previously granted a directed verdict for defendants on the issue of damages, ruling that plaintiffs had not proven monetary losses or health effects sufficient to go to the jury. A second Johnston County nuisance action against a hog farmer is still pending. (*Raleigh News and Observer*, May 23, 1995 p. 1B, and May 24, 1995, p. 1A.)

Recent County Rules and Ordinances

In recent years a number of counties, mainly eastern, have considered adopting either county commissioner ordinances or local health board rules regulating ILOs. In the early 1990s several counties adopted temporary moratoria on installation of new ILOs pending further study; all of these moratoria have expired. Three county boards of health, in Halifax, Scotland, and Robeson counties, exercised their rulemaking authority by adopting local ILO rules. The Halifax and Scotland rules contain such provisions as setback requirements (minimum setbacks for ILO facilities from residences, etc.); requirements for health department permits covering ILOs; requirements to submit closure plans before closing a permitted ILO; and requirements for lagoon liners and ground water monitoring. The

Robeson County rule uses the concept of a *public health nuisance* to test whether existing ILOs should be abated under GS 130A-19 as "public health nuisances" and whether proposed ILOs should be approved and given health department permits.

Appendix B contains a letter that reviews some of the issues that may arise in the application of this rule.

Appendix A contains detailed summaries of these health board rules/proposals and a proposal similar to the amended Halifax rule that was drafted by the Land Loss Prevention Project and is being considered in Edgecombe County.

Is There Legal Authority for County Rules and Ordinances?

To this question, the answer is probably "yes." Two statutes potentially might authorize county ordinances or rules concerning animal waste management: the rule-making authority of local boards of health, and the county police power ordinance-making statute. (A third statute, the county zoning enabling act, expressly excludes this subject.)

For counties that have adopted county zoning, an obvious vehicle for ILO rules might seem to be zoning. As noted earlier, however, the bona fide farms exemption will stand in the way of zoning until the General Assembly sees fit to eliminate or modify that exemption. So, zoning is not the answer for counties, though it may be in rural areas within the extraterritorial zones of cities.

G.S. 130-39(a) authorizes the county or district board of health to adopt rules necessary to "protect and promote the public health." The immediately following subsection allows the local board to adopt "a more stringent rule [to protect the public health] in an area regulated by the Commission for Health Services or the rules of the Environmental Management Commission," such as water pollution control. G.S. 130A-39(b). This language can be used to counter the argument that local health rules are pre-empted by state law. A health board rule has other inherent advantages. For example, the public health law (G.S. Chapter 130A) contains a statutory right of entry for inspections to enforce health rules in G.S. 130A-17. Also, if a health rule requires a permit, the permit can be suspended or revoked for violations under G.S. 130A-23.

The initial conclusion is that GS 130A-39 taken as a whole provides adequate authority for a local board of health to adopt a properly drafted ILO rule. A major limitation on this rule-making power is that its exercise must be necessary to protect and promote the public

health. Public health experts may differ among themselves whether some impacts of feedlot activity--for example, odor problems in the neighborhood--present legitimate public health problems. Also, circumstances alter cases--for example, the scale of a feedlot operation, the closeness of neighbors, and prevailing air currents may significantly affect the odor problems caused by a feedlot.

These sorts of considerations suggest, at a minimum, that the local health director's opinion should be obtained before a local health board adopts rules regulating feedlots, since the health director may be called upon to justify the rules in court. The board must also be of the opinion that a more stringent local rule is required to protect the public health. (See Appendix B.)

If the local health officials believe that odor can be a public health problem, there is no reason why a local health rule could not address odor, directly or indirectly. The logic of the rule would resemble closely the logic of US-EPA's regulation of air quality pollutants, in which the standards are set to protect vulnerable populations (such as asthmatics or the very old or very young).

GS 153A-121(a) authorizes the board of county commissioners by ordinance to define and regulate conditions "detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county; and [to] define and abate nuisances." This "police power" authority is the broadest regulatory authority available to the county, and it can be enforced under GS 153A-123 by criminal sanctions, civil penalties, and injunctive relief. Like the rule-making power of health boards, it may address public health issues, but it also may address issues of public welfare, safety, peace and dignity.

There are some possible questions about the permissible scope of police power ordinances concerning animal feedlots, for example:

- (i) ***Can a police power ordinance address matters that could be dealt with by county zoning?*** A recent Court of Appeals decision indicates that the existence of the zoning power does not mean that the county may not also regulate the same subject under the general police powers under GS 153A-21 *Summey Outdoor Advertising v. County of Henderson*, 96 N.C. App. 533, 538 (1989). In reaching this conclusion, the court relied on the mandate in GS 153A-4 that Chapter 153A be broadly construed. The reasoning of the *Summey* case, which involved sign ordinances, would seem equally applicable to a feedlot ordinance. In addition, animal

Environmental and Conservation Law

feedlot regulations are specifically excluded from the scope of county zoning by the bona fide farms exemption, as previously noted.

- (ii) ***Should the county's general ordinance-making power be narrowly or broadly construed?*** If one takes the language of GS 153A-4 seriously, the statute mandates that county authority "shall be broadly construed," thereby challenging the narrow construction precept of "Dillon's Rule." In recent years the North Carolina courts sometimes have taken the mandate of GS 153A04 to heart (as in the *Summey* case, above) and sometimes has chosen instead to follow Dillon's Rule. See A. Fleming Bell, II, "Dillon's Rule is Dead; Long Live Dillon's Rule." Institute of Government, Local Government Law Bulletin No. 66 (1995).

- (iii) ***Would a police power ordinance be barred by the Right-to-Farm Law (GS 106-701)?***

One might argue that an ILO ordinance in effect would make agricultural operations a "nuisance;" if so, it could not restrict the activities of an ILO that had been in operation for more than a year (GS 106-171). One could also argue that an ILO ordinance does not make agricultural operations a "nuisance," especially if the ordinance avoided the use of the language of nuisance abatement and emphasized such matters as plan review, setbacks and other site controls.

As yet, these possible questions concerning ILO ordinances have not been litigated and there are no definitive answers.

APPENDIX A

Summaries of Intensive Livestock Ordinances and Rules

Scotland County Health Board Rules (12/94)

Standards

- (1) *US-SCS Field Office* Technical Guide applies.
- (2) Appendix A (Adopted by rules)
 - (a) 1,500' *minimum setback* of buildings and lagoons from residences, offices, commercial buildings and places of public assembly, without owner's written consent.
 - (b) 2,500' setback from churches and schools.
 - (c) Lagoons are to be located, designed, constructed and operated in accord with SCS guides and current state rules (e.g., .0200 rules).
- (3) Closure Requirements. Owner is to submit closure plan prepared by PE or SCS at least 60 days before last day of operation. This is to include specified engineering elements and a \$2000 per acre security requirement, running to the county (bond, cash, irrevocable letter of credit as certified quarterly). Ownership changes: new owner must certify awareness of closure requirements to DEM.

- (4) Most stringent requirements prevail.
- (5) Standards apply to "intensive livestock operations," (defined thresholds for cattle, horses, sheep or goats, birds with liquid waste systems and swine. The minimum number of swine is 250).

Compliance Provisions

- (1) *This is a "more stringent" local health rule* (G.S. 130A-39) that adds the more stringent local standards of Appendix A to state and federal standards. Violations of the rule can be remedied by injunctions and other available Chapter 130A civil and criminal remedies.
- (2) *Basic enforcement provision* (§ 6): construction, operation or expansion of ILO's is prohibited except in compliance with local and state rules.
- (3) *Specifics*:
 - (a) New or expanded animal waste treatment and disposal facilities can begin construction only in compliance with the

- local and state rules (or begin operation by placing animals in ILO's).
- (b) Local SWCD must notify owner of compliance with SCS design specs.
- (c) Owner must forward a document affirming compliance with Appendix A to SWCD; which must forward it with comments to DEM.
- (d) The rule provides for annual inspection fees and incorporates Chapter 130A right of entry provisions.
- (4) There is *no health department permit* in Scotland.

**Halifax County Board of Health Rules
(adopted 4/27/92 with 11/23/93 and 7/25/94
amendments, including Appendix)**

Standards

- (1) US-SCS Field Office Technical Guide applies (formerly, also NC Soil and Water Conservation Commission BMP's--repealed in 1993).
- (2) Setbacks include:
 - (a) 750' *minimum setback* to residences from lagoons, and 500' from waste application areas (100' for owner)
 - (b) 100' *minimum setback* to rivers from lagoons, and waste application areas (15' if dry waste)
 - (c) 200' *minimum setback* to wells from lagoons, and 100' from waste application areas
 - (d) 150' to property line from lagoons, and 100' to waste application areas (0' if dry waste)
- (3) Halifax rule uses "job classification" provisions of Land Loss Prevention Model (below) to scale its requirements for storage, flood protection, freeboard, groundwater monitoring, and lagoon inside permeability.
- (4) Plan applies to ILO's where the dietary needs of confined livestock are met primarily by means other than grazing.

Compliance Provisions

- (1) Halifax requires *health department permits* (separately, for construction and for operation) for ILO's

- (a) Plans must be approved by HD (a certification that setback and job classification provisions are met).
- (b) Also, US-SCS must certify that its design requirements are met.
- (c) *New and expanded units* can be constructed only after the HD gets the SCS certification and HD certifies compliance with requirements of rule.
- (d) Operation permits can be issued only after HD is notified by SCS that system was designed and constructed to meet SCS specs.
- (e) *Existing units* in operation on 4/27/92 must obtain operations permit after 12/31/97. All facilities must be designed, constructed, operated and maintained per SCS specs after 12/31/97.
- (2) There is a right of appeal to the Board of Health within 15 days of notification of a permit decision.
- (3) The rule incorporates G.S. Ch. 130A permit suspension/revocation authority for failure to maintain a system per permit or for violations of permit conditions. See specifics on revocation.
- (4) Permits can be suspended if owners don't allow annual inspection without notice.
- (5) There are separate inspection and operation fees, and annual inspection fees.
- (6) Most stringent requirements prevail.

Land Loss Prevention Model

Standards

- (1) The model ordinance (rule) contains a set of setback standards for new and expanded ILO's that combine some features of both the Halifax and Scotland rules, with some additional details. It was drafted by the Land Loss Prevention Project and is being considered in Edgecombe County.
 - (a) 1500' from lagoon to residence and 1250' from waste application area to residence (can be 100' to owner's residence)
 - (b) 200' from lagoon or application area to well
 - (c) 100' to surface water (25' if dry waste)
 - (d) 200' to property line (0' if dry waste)
 - (e) 50' from lagoon to groundwater lowering device

Environmental and Conservation Law

- (2) The model contains a series of additional requirements for new ILO's scaled by size according to seven different "job classifications", spelled out in the Appendix. The seven classifications for swine range from ceilings of 740 feeder-to-finish service, to 1850, 3700, 7400, and 14,800. (There are two other swine classifications with smaller ceilings: farrow-to-feeder, and farrow-to-finish.) Every classification from II - VII must have 6 months' waste storage and 15 years' minimum sludge storage. All class III - VII groups also must have 50-year flood protection, 2-stage lagoons and 2' freeboard in lagoon. Classes IV - VII must have groundwater monitoring systems, and classes V - VII must meet a specified lagoon inside permeability standard.

Compliance Provisions

The compliance provisions and definitions of the model closely track the Halifax rule, with a few minor modifications in detail that will not be summarized here.

Robeson County Board of Health Rules on ILO's as Public Health Nuisances

Unlike the existing local rules in Halifax and Scotland counties, this rule does not lay down a series of standards (such as setbacks and monitoring requirements), and compliance procedures to implement these standards. Instead, it uses the concept of a "public health nuisance" to test whether existing ILO's should be abated under G.S. 130A-19 as public health nuisances, and whether proposed ILO's should be allowed to proceed under health department permits.

Definitions

- (1) Rules apply to ILO's with 100 or more animal units.
- (2) "Animal unit" equivalents are listed for mature dairy cows, slaughter steers or heifers, horses, sheep, ducks, turkeys, chickens and hogs (over 55 pounds--0.4 units, under 55 pounds--0.05 units). Definition is identical to Halifax County's.
- (3) References to "owner" of ILO include operator (below).

Existing ILO's

- (1) Health Director is to investigate an existing ILO to determine if it is a "public health nuisance." Investigation can be triggered by neighbor complaints, request by other health or environmental officials, or director's belief that it may be a public health nuisance.
- (2) Director may: request information required for proposed ILO's (see below), owner's responses to complaints, and investigation reports, and shall make a site visit to verify the information. Property owners within ½ mile radius are to be given written notice of investigation, opportunity to provide evidence, and access to files.
- (3) Health Director is to make a report of the investigation, and make findings whether:
 - (a) the ILO is a public health nuisance;
 - (b) the ILO is incompatible with the surrounding area;
 - (c) the property can be used for other bona fide farm uses or economically developed for commercial or residential uses;
 - (d) the ILO has been in operation for less than one year; and
 - (e) the nuisance was caused by changed conditions beyond the control of the ILO's owner.
- (4) Owner of ILO is to notify Health Director of major changes in the scope of operations, and Health Director may require resubmittal of applications for significant changes.
- (5) Health Director
 - (a) is to notify ILO owner if Health Director makes a preliminary determination that the ILO is or will become a nuisance; or
 - (b) may determine that there is no nuisance if owner takes abatement actions.
- (6) Owner of ILO may request that Health Director reconsider preliminary nuisance determination, triggering hearing on notice to property owners within ½ mile radius.
- (7) If request for reconsideration is denied, Health Director shall issue order directing owner to abate the nuisance, pursuant to G.S. 130A-19.

Proposed ILO's

- (1) Requires Health Department permit for new ILO to begin operation. Spells out information requirements for application form; failure to act within 60 days is a

decision that the ILO will not be a nuisance. Permits are presumably subject to suspension or revocation under G.S. 130A-23.

- (2) Health Director shall make a site visit to verify information. Property owners within 1/2 mile radius are to be given the same notice, opportunity to be heard and files access as with existing ILO (see item 2 above).
- (3) Health Director is to make a report of the investigation and make findings whether:

- (a) the proposed ILO will be a public health nuisance;
- (b) the proposed ILO is incompatible with the surrounding area; and
- (c) the property can be used for other bona fide farm uses or economically developed for commercial or residential uses.
- (4) Final denial of permit application may be appealed to the General Court of Justice.

APPENDIX B

Public Health Nuisances

January 22, 1995

Mr. William Smith, Health Director
Robeson County
Route 4, Box 388
Lumberton, North Carolina 28358

Dear Bill:

Paige Sawyer passed along to me your question about defining a "public health nuisance." I am enclosing the current materials on this subject from my "school book" for the environmental health law course. It addresses this rather nebulous subject fairly thoroughly and covers North Carolina case law as well as cases from other states. As you know, there is no definition in the statutes or rules.

Summarizing what you will find in these materials, let me put it this way. You must answer three questions:

- Is there a "nuisance"?
 - Is it "public"?
 - And, is it a "*public health* nuisance"?
- 1) The easiest question to answer is whether the nuisance is "public" rather than private. There is some case law on this subject, usually arising in the context of a civil nuisance suit in which the defendant claims that if several plaintiffs are involved, or a neighborhood or community, the suit will not lie because it was for a "public nuisance." For your purposes under G.S. 130A-19, I think that it is enough to say that more than one individual's health should be involved. Chris Hoke once suggested to me that it only requires a minimum of two persons, but I think that at

- least two families or dwelling units would be a safer test. The District Courts in Chapel Hill have used that test in enforcing the Chapel Hill noise nuisance ordinance. One of the cases cited in my material treated a nuisance affecting six houses as a "public" nuisance.
- 2) The underlying question of what is a "nuisance" is one of the more elusive issues in the law of torts, but I think that the essence of it is captured in the phrase used in my material: a substantial, recurring or continuing, unreasonable interference with the use and enjoyment of property (that is, real property). In the case law, nuisances are sometimes defined as "continuing trespasses," sometimes they involve negligence, and sometimes they are equated with modern strict liability concepts. Unless negligence or reckless or abnormally dangerous conduct is involved, the activity must be intentional. Among the phenomena that have been treated by the courts as giving rise to nuisance liability are water pollution, air pollution, odor, noise, accumulation of garbage, and activities breeding flies, mosquitoes or other vectors. Always, in the enforcement of G.S. 130A-19, it must be kept in mind that these activities must give rise to or be capable of giving rise to physical ailments or other public health problems.
 - 3) In the end, your informed judgment (or the state health director's) as to whether there is a *public health* problem should weigh heavily in determining whether an abatement proceeding under G.S. 130A-19 will be sustained by the courts. There are some issues associated with intensive livestock operations

Environmental and Conservation Law

on which public health officials differ, and odor is one of these issues. One of the difficulties with the issue of odor, of course, is the difficulty of objectively measuring odor and tying the measured results to identifiable public health problems. If you are going to link your public health nuisance abatement proceeding to odor, your case obviously would be strengthened if you were trying to protect the health of vulnerable populations, such as asthmatics or the very young or the very old. I am trying to interest some faculty colleagues in the School of Public Health in examining the public health aspect of your questions and will pass along to you any results that I get. In part I am thinking of your need for expert witnesses in case you get into court enforcing your rule.

The North Carolina case law is not encouraging on finding future nuisances—i.e., that a proposed

project or plan will be a nuisance in the future. If I were in your place, I would prefer not to see the Robeson County ILO rule first be tested in the context of your finding that a proposed ILO will be a public health nuisance. If you get taken to court you will have enough of a challenge in your first case to sustain an action to abate an existing ILO as a nuisance.

I know that you will stay in close touch with your county attorney on this matter, since the county attorney will have to defend you in any litigation that may arise.

Sincerely,

Milton Heath
Assistant Director

©1996

Institute of Government. The University of North Carolina at Chapel Hill
Printed in the United States of America

This publication is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes