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## Oklahoma's Concentrated Animal Feeding Operations Act: Balancing the Interests of Landowners with the Exponential Growth of the Hog Industry

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# OKLAHOMA'S CONCENTRATED ANIMAL FEEDING OPERATIONS ACT: BALANCING THE INTERESTS OF LANDOWNERS WITH THE EXPONENTIAL GROWTH OF THE HOG INDUSTRY

## I. INTRODUCTION

In the past two years environmental effects from modern agricultural practices received unprecedented social and political attention. Public hostility toward certain agricultural practices intensified because of agricultural links to contamination of major sources of drinking water, fish kills, and nuisance odors.<sup>1</sup> Such practices encompass a broad range of activities. However, Concentrated Animal Feeding Operations (CAFOs), particularly those associated with hogs and poultry, are singled out as substantial contributors to environmental degradation and raise public health concerns.<sup>2</sup> The primary concern with CAFOs revolves around the massive volumes of waste they generate and the manner of waste disposal.<sup>3</sup> In Oklahoma, CAFOs are defined by statute.<sup>4</sup> A CAFO is an animal feeding operation where animals are primarily housed in a roof-covered structure and which uses a liquid waste management system.<sup>5</sup>

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1. See P.J. Lassek, *Lake Eucha Drowning in Algae: City's Water Source in Bad Shape, Some Say*, TULSA WORLD, August 17, 1997, at A1 (Alerting officials in Tulsa and northeastern Oklahoma to the threat of phosphorous overloading in the Lake Eucha Watershed. In response, Senate Bill 1170 was enacted and created the Oklahoma Registered Poultry Feeding Operations Act); see also OKLA. H.R., HIGHLIGHTS OF LEGISLATION, AGRICULTURE AND NATURAL RESOURCES: CONCENTRATED ANIMAL FEEDING OPERATIONS, H.R., 2d Legis. Sess. 4 (1998) (visited September 6, 1998) <<http://www.1sb.state.ok.us/senate/LegisBrief98.dir/pigops.html>>.

2. See OKLA. STATE S. BRIEF, CONCENTRATED ANIMAL FEEDING OPERATIONS, S., 2d Legis. Sess. 4 (1998) (Summarizing the background and provided a summary of actions regarding Concentrated Animal Feeding Operations in Oklahoma) (visited September 6, 1998) <<http://www.1sb.state.ok.us/senate/LegisBrief98.dir/pigops.html>>.

3. See Jean Anne Casey & Colleen Hobbs, *Look What the GATT Dragged In*, N.Y. TIMES, March 21, 1994, at A17 (Focusing on the rural town of Hennessey, Oklahoma and provides a unique perspective of the expanding CAFO markets. Hennessey is now home to the largest hog-breeding company in the world, the British owned Pig Improvement Company. The corporate hog farming giant plans to bring in 100,000 hogs to this operation. See *id.*)

4. OKLA. STAT. tit. 2 § 9-202(b)(11) (Supp. 1997).

5. There is both a statutory and common definition of what constitutes a CAFO. For the purposes of this comment, any reference to a CAFO in general or outside of Oklahoma corresponds to the common meaning. The common definition essentially includes any type of operation which confines a large number of animals. Furthermore, always refer to your state's statutes to determine the applicable definition. The statutory definition of a CAFO in Oklahoma is located at OKLA. STAT. tit. 2 § 9-202(b)(11): A CAFO means:

a. A licensed managed feeding operation (LMFO), or

b. An animal feeding operation which meets the following criteria:

(1) more than the number of animals specified in any of the following categories are confined:

(a) 1,000 slaughter and feeder cattle....(g)

(2) pollutants are discharged into waters of the state. Provided, no animal feeding operation pursuant to this subparagraph shall be construed to be a concentrated animal feeding operation if such animal feeding operation discharges only in the event of a 25 year, 24 hour storm event, or

Heightened attention toward CAFOs has short historical roots. In 1991 the Oklahoma Legislature relaxed state restrictions against corporate farming.<sup>6</sup> These restrictions facilitated Oklahoma's emergence as one of the nation's leading states containing CAFOs.<sup>7</sup> The pro-corporate farming atmosphere enticed Seaboard, an industry giant, to select Oklahoma for construction of one of the world's largest hog slaughterhouses.<sup>8</sup> According to the Oklahoma Department of Agriculture, Oklahoma's hog population is up from 200,000 animals in 1991 to 1.64 million in 1997.<sup>9</sup> The principal problem resulting from this exponential growth is odor.<sup>10</sup> Representative Frank Davis, R-Guthrie, a member of the House Agriculture Committee in describing the odors from a CAFO notes:

[I]t's the type of odor that makes it impossible for neighbors to stand to live on their own property. It's the type of odor that makes it impossible for them to stay in their houses with the windows open, and impossible for them to close the windows and turn on the air conditioner because it sucks in that odor. It permeates their clothes, their furniture, everything in the house, they can't get rid

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c. An animal feeding operation which meets the following criteria:

(1) more than the number of animals specified in any of the following categories are confined:

(a) 300 slaughter or feeder cattle...

(c) 750 swine each weighting over 25 kilogram or approximately 55 pounds,

(d) 3,000 weaned swine each weighing under 25 kilograms...(k)

(2) either of the following conditions are met:

(a) pollutants are discharged into waters of the state through an artificially constructed ditch, flushing system or other similar artificially constructed device, (b) pollutants are discharged directly into navigable waters which originate outside of and pass over, across or through the facility or otherwise come into direct contact with the animals confined in the operation. Provided, however, that no animal feeding operation pursuant to this subparagraph is a concentrated animal feeding operation if such animal feeding operation discharges only in the event of a 25 year, 24 hour storm event, or

d. The Board determines that the operation is a significant contributor of pollution to waters of the state pursuant to Section 9-204.1 of this title.

6. Compare OKLA. STAT. tit. 18, § 954 (West 1990) with OKLA. STAT. tit 18, § 954 (West 1991). In 1991 the Legislature added the following exemption to § 954:

The provisions of this act, Section 951 et seq. of this title, shall not apply where a corporation, either domestic or foreign: ... (3) Engages in poultry and/or swine operations, including only directly related operations, such as operating hatcheries, facilities for the production of breeding stock, feed mills, processing facilities, and providing supervisory, technical and other assistance to any other persons performing such services on behalf of the corporation."

7. See OKLA. STATE S. BRIEF, CONCENTRATED ANIMAL FEEDING OPERATIONS, S., 2d Legis. ss. 4 (1998) (In 1997 Oklahoma became the 8<sup>th</sup> leading hog producing state in our nation, up from 26<sup>th</sup> in 1992. Currently, the number of swine facilities in operation is 226 with 1,478,564 hogs) (visited September 6, 1998) <<http://www.isb.state.ok.us/senate/LegisBrief98.dir/pigops.html>>.

8. See Donald L. Bartlett & James B. Steele, *Special Report on Corporate Welfare: The Empire of the Pigs: A Little-Known Company is a Master at Milking governments for Welfare*, TIME, November 30, 1998 at 58. (In addition to Oklahoma's pro hog farming atmosphere, the authors indicate that Oklahoma's non union low-wage labor force and 21 million governmental subsidy played key roles in Seaboard's decision to select Oklahoma for its mega-slaughterhouse).

9. See Okla. H.R., *House Committee Reviews Proposed Limits On Concentrated Animal Feeding Operations*, MEDIA DIVISION, January 27, 1998 (visited November 10, 1998) <<http://www.isb.state.ok.us/house/news646.htm>> [hereinafter H.R. MEDIA DIVISION, *Committee Reviews CAFOs*]; see also Bartlett & Steele, *supra* note 7 (The Seaboard corporation accounts for approximately 80% of Oklahoma's pig population).

10. See Okla. H.R. *State House Divides Over Tougher Regulations of Hog Farms*, MEDIA DIVISION, June 3, 1998 (visited November 11, 1998) <<http://www.isb.state.ok.us/house/news646.htm>> [hereinafter H.R. MEDIA DIVISION, *House Divides on CAFO Regulations*].

of it. I've talked to numerous people in this situation who have told me this is what they endure on a daily basis.<sup>11</sup>

On the other hand, Representative Dale Turner, D-Holdenville, estimates that "20,000 jobs are directly associated with the swine industry, [which] invested \$650 million in Oklahoma and has generated \$500 million in personal income."<sup>12</sup> The end result is a regulatory dichotomy: should we regulate CAFOs or allow such operations to operate under a corporate structure and invoke statutory exemptions. The unrestricted growth of CAFOs must be balanced by mechanisms instituted to protect against the potential depletion of our natural resources and risks to public health.<sup>13</sup>

In response to these concerns, Oklahoma Governor Frank Keating and the Oklahoma State Legislature released a series of measures aimed at shifting the balance between environmental regulations and CAFOs.<sup>14</sup> As a first step, House Bill 1522, Oklahoma's original CAFO Act, was enacted in June of 1997.<sup>15</sup> Then on April 15, 1997, the Animal Waste and Water Quality Protection Task Force was created to further delineate the effect on Oklahoma's natural resources and to develop recommendations for additional regulations.<sup>16</sup> The Task Force issued its final report in December of 1997.<sup>17</sup> The report was instrumental in developing Senate Bill 1175.<sup>18</sup> In the interim period, House Joint Resolution 1093 was enacted and imposed a moratorium on the expansion of existing large hog farms or

11. *Id.*

12. *Id.*

13. See OKLA. STATE S. BRIEF, CONCENTRATED ANIMAL FEEDING OPERATIONS, S., 2D LEGIS. SESS 4, (1998) (visited September 6, 1998). <<http://www.lsb.state.ok.us/senate/LegisBrief98.dir/pigops.html>>

14. H.R. 1522, 46<sup>th</sup> Legis., 2d Sess. (Okla. 1997); Exec. Order No. 97-07 (Okla. 1997); H.R.J Res. 1093, 46<sup>th</sup> Legis. 2d Sess. (Okla. 1997); S. 1175, 46<sup>th</sup> Legis. 2d Sess. (Okla. 1998).

15. H.R. 1522, 46<sup>th</sup> Legis., 2d Sess. (Okla. 1997) (House Bill 1522 enacted June 24, 1997 and became effective September 1, 1997); See also Exec. Order No.97-07 (Okla. 1997) (Through this Executive Order, Governor Frank Keating created the Animal Waste & Water Quality Task Force. The Task Force's final report was dated December 1, 1997 noted that House Bill 1522 was a milestone in animal production regulation and was deemed an excellent "first step" in bringing needed regulation to Oklahoma's expanding hog industry).

16. See Exec. Order No. 9-07 (Okla. 1997) (The Animal Waste & Water Quality task Force was called to perform the following specific tasks:

- examine the current and past use, marketing, and disposal of poultry, swine and bovine waste and its effect on the quality of Oklahoma's water supply;
- assemble current laws and regulations in Oklahoma relating to the use, marketing and disposal of poultry, swine, and bovine waste for the purpose of determining areas of responsibility for the protection of the quality of Oklahoma's water supply;
- analyze and coordinate the activities of each state entity currently examining and regulating the use, marketing, and disposal of poultry, swine, and bovine wastes; and
- develop a statewide strategy and action plan to oversee the future use, marketing and disposal of poultry, swine, and bovine waste and its effect on the quality of Oklahoma's water supply; the plan shall include a mechanism for progressive monitoring of the state's water quality to determine changes as they are needed. The plan shall also include recommendations for legislation, regulatory change, structural and operational change, public-private partnerships, incentives, and other measures the Task Force deems appropriate to protect the quality of Oklahoma's water supply for future generations).

17. See Dan Mahoney, *Governor Signs Hog Bill*, OFFICE OF GOVERNOR FRANK KEATING NEWS RELEASE, June 10, 1998. (visited November 11, 1998) <[http://www.state.ok.us/~governor/nr\\_hogs\\_61098.htm](http://www.state.ok.us/~governor/nr_hogs_61098.htm)>

18. *Id.* (The Final Report from the Task Force contained 75 major recommendations and S.B. 1175 is comprised of most of these recommendations.)

construction of new hog farms pending adoption of new regulations.<sup>19</sup> Finally, the legislature passed and Governor Keating signed into law Senate Bill 1175 in June of 1998.<sup>20</sup> This law provides substantial amendments to Oklahoma's CAFO Act and is being "heralded around the nation as the new model of animal waste regulation which strikes that careful balance between air and water quality and economic development."<sup>21</sup>

As farming operations continue to modernize their operations, today's farming practices more closely resemble massive industrial operations or pig factories than traditional family farms.<sup>22</sup> The use of these new farming practices raises the issue of whether corporate operated CAFOs should receive any statutory protection from nuisance suits for environmental degradation of air, water, and land.

The purpose of this comment is to analyze Oklahoma's amended CAFO Act and its effect on Oklahoma's statutory exemptions for CAFOs. Section II discusses the foundation of Oklahoma's statutory definition and classification of nuisance causes of action. Section III reviews the exemptions Oklahoma provides for agricultural operations and the constitutional implications of the exemptions. Section IV introduces key aspects of Oklahoma's amended CAFO Act. Section V discusses the remedies available to landowners. Further, this section explores the newly revised provisions of Oklahoma's CAFO Act on causes of action grounded on a theory of nuisance. The final Section contends that Oklahoma's amended CAFO Act has the potential to balance the interests of CAFOs and affected landowners.

## II. FOUNDATION OF OKLAHOMA NUISANCE LAW

### A. Nuisance in General

"A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."<sup>23</sup> Professor Rodgers, an authority in environmental law and the Bloedel Professor of Law at the University of Washington, notes that nuisance theory and case law are the common law backbones of modern environmental and energy law.<sup>24</sup> Yet there is no common law doctrine that approaches nuisance in comprehensiveness or detail as a regulator of land use and of technological abuse.<sup>25</sup> Causes of actions grounded under a nuisance theory consistently challenge and substantially alter every major industrial and municipal

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19. H.R.J Res. 1093, 46th Legis. 2d Sess. (Okla. 1997).

20. S. 1175, 46th Legis. 2d Sess. (Okla. 1998) (This Bill was enacted June 10, 1998 and became effective August 1, 1998. The Bill amended various sections to Oklahoma's CAFO Act.

21. See Mahoney *supra* note 17 (Statement made by Governor Keating's Secretary of Environment, Brian Griffin.) Compare OKLA. STAT. tit. 2 § 9-00-9-212, 15, 17, 18, 20, and 22 (1991) with OKLA. STAT. tit. 2 § 9-00-9-212, 15, 17, 18, 20, and 22 (Supp. 1997).

22. See Bartlett & Steel, *supra* note 7, at 58.

23. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

24. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER §1.1 (1986).

25. *Id.*

activity that generates waste streams.<sup>26</sup> Such suits have challenged "the operation of land fills, incinerators, sewage treatment plants, chemical plants, metal smelters, oil refineries, pulp mills, rendering plants, and a host of other manufacturing activities."<sup>27</sup>

"There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word nuisance."<sup>28</sup> Generally, nuisance is defined in terms of the use of property in a manner that adversely effects another's use and enjoyment of property.<sup>29</sup> Such an invasion of rights constitutes a tort.<sup>30</sup> Nuisances can be described in terms of environmental harms such as odor or socially in terms of annoyance to other people.<sup>31</sup> However, the legal definition of a nuisance turns not on environmental or social concerns, but in terms of individual rights.<sup>32</sup> This is echoed in the RESTATEMENT (SECOND) OF TORTS (1977), which states three (3) categories of the legal sense of nuisance.<sup>33</sup>

In Oklahoma, nuisance is defined via statute as an unlawful act, or failing to perform a duty, which act or omission either:

First. Annoys, injures or endangers the comfort, repose, health, or safety of others; or Second. Offends decency; or Third. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or Fourth. In any way renders other persons insecure in life, or in the use of property, provided this section shall not apply to preexisting agricultural activities.<sup>34</sup>

26. *Id.*

27. *Id.*

28. *Id.*

29. W. PAGE KEETON ET AL, PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 616 (5<sup>th</sup> edition 1984).

30. See David A. Westbrook, *Liberal Environmental Jurisprudence*, 27 U.C. DAVIS L.REV. 819 (1994).

31. See BLACKS LAW DICTIONARY 1489 (6<sup>th</sup> edition 1990) which defines a tort as a legal wrong committed upon the person or property independent of contract. It may either be (1) a direct invasion of some legal right of the individual; (2) the infraction of some public duty by which special damage accrues to the individual; (3) the violation of some private obligation by which like damage accrues to the individual.

32. Westbrook, *supra* note 14, at 633.

33. RESTATEMENT (SECOND) OF TORTS § 821A (1977). In its legal significance, "nuisance" has been employed in three different senses: (1). It is often used to denote human activity or a physical condition that is harmful or annoying to others. Thus it is often said that indecent conduct or a rubbish heap or the smoking chimney of a factory is a nuisance.

(2). It is often used to denote the harm caused by the human conduct or physical condition described in the first meaning. Thus it may be said that the annoyance caused by loud noises or by objectionable odors is a nuisance to the person affected by them.

When the word is used in either of these two senses it does not necessarily connote tort liability. The courts that use the word in either sense will often proceed to discuss whether the particular "nuisance" is actionable and may conclude that it is not.

(3). Often, however, the term has been used to denote both the conduct or condition and the resulting harm with the addition of the legal liability that arises from the combination of the two. Thus the courts may say that a person is maintaining a nuisance, meaning that he is engaged in an activity or is creating a condition that is harmful or annoying to others and for which he is legally liable; or they may distinguish between a "nuisance per se," meaning harmful conduct of a kind that always results in liability and a "nuisance per accidens," meaning harmful conduct that results in liability only under particular circumstances. *Id.*

34. OKLA. STAT. tit. 50 § 1 (1991).

The statute proceeds to categorize nuisances as either private or public.<sup>35</sup> Additionally, Oklahoma courts distinguish nuisances based on conduct, classifying nuisances as either *per se* or *per accidens*.<sup>36</sup> However, the Oklahoma Supreme Court held that, “public, private, *per se*, and *per accidens* nuisances, in order to become nuisances at all, must annoy, injure or endanger the comfort, repose, health or safety of others, or possess some of the other alternative qualities described in the statute.”<sup>37</sup> Traditional case law in Oklahoma mirrors these prerequisites when analyzing whether a cause of action under a theory of nuisance exists:

[T]he term nuisance signifies in law such a use of property or such a course of conduct, irrespective of actual trespass against others, or of malicious or actual criminal intent, which transgresses the just restrictions upon use or actual conduct which the proximity of other persons or property in civilized communities imposes upon what would otherwise be rightful freedom. It is a class of wrongs which arises from an unreasonable, unwarranted, or unlawful use by a person of his own property, working an obstruction or injury to the right of another, or to the public, and producing such material annoyance, inconvenience, and discomfort that the law will presume a resulting damage.<sup>38</sup>

To help determine whether an act constitutes a nuisance, the courts utilize a two part analysis.<sup>39</sup> First, the court focuses on the type of act, occupation, or structure to classify the alleged nuisance as *per se* or *per accidens*.<sup>40</sup> Second, the court determines whether the nuisance affects either the entire community or the reasonable use and enjoyment of an individual’s private property.<sup>41</sup> Legal liability attaches when either type of nuisance or its affect is present and ultimately results in injury.<sup>42</sup>

### B. Nuisance Per Se and Per Accidens

As stated previously, one methodology courts use to evaluate whether a nuisance exists requires classification of the thing or instrumentality. To enhance efficiency and fairness, courts utilize the judicial refinements of nuisance *per se* or *per accidens*.<sup>43</sup> “A nuisance at law or a nuisance *per se* is an act, occupation, or structure which is a nuisance at all times, regardless of location or surroundings, and under any circumstance.”<sup>44</sup> A nuisance in fact or a nuisance *per accidens* is an

35. OKLA. STAT. tit. 50 § 2 & 3 (1991).

36. See *McPherson v. First Presbyterian Church of Woodward*, 248 P. 561, 564 (Okla. 1926).

37. *Id.* at 565-66.

38. *Humel v. State*, 99 P.2d 913, 917 (Okla. Crim. App. 1940).

39. See *McPherson*, 248 P.2d at 565.

40. RESTATEMENT (SECOND) OF TORTS § 821A (1977).

41. *McPherson v. First Presbyterian Church of Woodward*, 248 P.2d 561, 565-66 (Okla. 1926).

42. *Id.*

43. *Id.*

44. *Id.* at 562; See also 58 AM. JUR. 2D NUISANCES § 18 (1989) (noting a further definition of nuisance *per se* as any “act or omission or use of property or thing which of itself hurtful to the health, tranquillity, or morals, or which outrages the decency of the community...or an act or use of property of a continuing nature...”).

act, occupation or structure which may become a nuisance depending upon its location, surroundings, and circumstances.<sup>45</sup> The RESTATEMENT (SECOND) OF TORTS (1977) denotes a nuisance *per se*, as harmful conduct of a kind that always results in liability and a nuisance *per accidens* as harmful conduct that results in liability only under particular circumstances.<sup>46</sup> In the instance of a nuisance *per se*, some form of injury must be substantially probable, whereas an injury in a nuisance *per accidens* is uncertain or contingent.<sup>47</sup> The key distinction between nuisance *per se* and *per accidens* boils down to a matter of proof.<sup>48</sup> Generally, nuisances *per accidens* are more common than nuisances *per se*.<sup>49</sup> For example, some activities which are always nuisances *per se* include violations of public morals and laws.<sup>50</sup> In contrast, a nuisance *per accidens* turns on an evaluation of the circumstances and location of the surroundings.<sup>51</sup>

### C. Public Nuisance

In general, a public nuisance is a nuisance which affects an interest "common to the general public, rather than to one peculiar individual, or several."<sup>52</sup> Expanding on this definition, the RESTATEMENT (SECOND) OF TORTS states that the "nuisance is an unreasonable interference with a right common to the general public."<sup>53</sup> The underlying assumption is not the number of people affected that is outcome-determinative, but rather the infringement upon a public right.<sup>54</sup> For example, if pollution of a stream merely deprives fifty or one hundred downstream riparian<sup>55</sup> owners of the use of water for purposes connected with their land, this does not, by itself, constitute a public nuisance.<sup>56</sup>

However, Oklahoma is one of three states that does not follow the general rule requiring that for a public nuisance to exist there must be interference with a public right.<sup>57</sup> In Oklahoma, a public nuisance is statutorily defined as a nuisance "[w]hich affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal."<sup>58</sup> This implies that in Oklahoma a public nuisance may exist without any interference of a public right. Therefore, in contrast to the

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45. See *McPherson*, 248 P.2d at 565.

46. *Id.*

47. See 58 AM. JUR. 2D NUISANCES § 16 (1989).

48. See *id.*

49. *McPherson v. First Presbyterian Church of Woodward*, 248 P.2d 561, 565 (Okla. 1926).

50. See 58 AM. JUR. 2D NUISANCES § 16 (1989).

51. See *McPherson*, 248 P.2d at 565 (Examples of activities that are nuisances *per accidens* include: a bowling alley, factory, public filling station, or oil and gas production wells. However, each activity is contingent on its operation in a safe and reasonable manner, which does not injuriously affect the community or private parties.)

52. KEETON ET AL., *supra* note 29, § 90, at 645 (5<sup>th</sup> edition 1984).

53. *Id.*

54. *Id.*

55. See BLACKSLAW DICTIONARY 1489 (6<sup>th</sup> edition 1990) which defines a riparian owner as one who owns land on the bank of a river, or one who is owner of land along, bordering upon, bonded by, fronting upon, abutting or adjacent and contiguous to and in contact with a river.

56. See RESTATEMENT (SECOND) OF TORTS § 821B (1977).

57. See *id.*

58. OKLA. STAT. tit. 50 § 2 (1991). †

foregoing example, under Oklahoma law, “if enough downstream riparian owners which form a community, neighborhood or considerable number of persons are adversely affected by a polluted stream, a claim for public nuisance exists, even though no public right as such is involved.”<sup>59</sup>

#### D. Private Nuisance

In the majority of jurisdictions, a private nuisance is a non-trespassory invasion of another's interest in the private use and enjoyment of land, and does not require interference with possession.<sup>60</sup> It is important to distinguish between trespasses and private nuisances. Trespass and private nuisances are alike in that they both impose tort liability for either the intentional or unintentional interference with the interest of use and enjoyment in land.<sup>61</sup> To quantify the distinction, Professor Prosser states that a “trespass is an invasion of the plaintiff's interest in the exclusive possession of his land, while nuisance is an interference with his use and enjoyment of it.”<sup>62</sup> Interest in use and enjoyment of land includes the pleasure, comfort and enjoyment that a person normally derives from the occupancy of the land.<sup>63</sup> As applicable to CAFOs, a landowner's freedom from discomfort and annoyance, such as noxious odors, flies, and rodents, while using the land is often as important as freedom from detrimental change in the physical interruption of the land.<sup>64</sup>

In Oklahoma, private nuisances are defined broadly by statute as “every nuisance not included in the definition of the last section [public nuisance].”<sup>65</sup> Thus, this catch-all category for private nuisances is aimed at affording adequate protection to interests in the use and protection of land.<sup>66</sup> Oklahoma courts adopted the national common law norms found in the RESTATEMENT (SECOND) OF TORTS § 821D (1977) as harmonious with existing jurisprudence.<sup>67</sup> Such jurisprudence includes two historic holdings which set clear precedents allowing a claimant to

59. See L. Mark Walker & Dale E. Cottingham, *An Abridged Primer on the Law of Public Nuisance*, 30 TULSA L. J. 355 (1994) (The authors note that in *City of McAlester v. Grant Union Tea Co.*, 98 P.2d 924 (Okla. 1940), the court placed an additional requirement on the Oklahoma statute defining public nuisance. Namely, the act or failure to act constituting the nuisance must affect a community of people “at the same time.”); see also RESTATEMENT (SECOND) OF TORTS § 821B (1977). Cf. *Smicklas v. Spitz*, 846 P.2d 362,366 (Okla. 1992). (Alternatively, a private person can seek the abatement of a public nuisance if it is demonstrated that the injury is specifically injurious to that individual's rights.)

60. RESTATEMENT (SECOND) OF TORTS § 821B (1977). See also *Bormann v. Board of Supervisors*, 584 N.W.2d 309, 315 (Iowa 1998)

(A private nuisance...is a civil wrong based on a disturbance of rights in land. . . The essence of a private nuisance is an interference with the use and enjoyment of land. Examples include vibrations, blasting, destruction of crops, flooding, pollution, and disturbance of the comfort of the plaintiff, as by unpleasant odors, smoke, or dust.)

61. RESTATEMENT (SECOND) OF TORTS §821 D (1977).

62. KEETON ET AL., *supra* note 29, § 87, at 622 (5<sup>th</sup> edition 1984).

63. *Id.*

64. *Id.*

65. OKLA. STAT. tit. 50 § 3 (1991), which states that every nuisance not included in the definition of a public nuisance is private

66. RESTATEMENT (SECOND) OF TORTS §821 D Comment a. (1977).

67. See *Nichols v. Mid-Continent Pipe Line Co.*, 933 P.2d 272, 277 (Okla. 1996).

recover for personal harm, inconvenience and annoyance incidental to another's interference with the possessory interest in land.<sup>68</sup>

### III. REVIEW OF STATUTORY EXEMPTIONS FOR AGRICULTURAL PRACTICES

It is important to briefly note some tangential events which have facilitated Oklahoma's genesis to a national leader in CAFOs. Corporate farming operations in Europe, impeded by tough pollution laws, are taking advantage of the United States of America's less stringent standards by expanding their operations among the states.<sup>69</sup> Under the General Agreement on Tariffs and Trade (GATT), pork exports to Europe increased from less than 90,000 metric tons in 1991 to 624,000 metric tons by 1999.<sup>70</sup> In anticipation of these new markets, the 1991 Oklahoma Legislature relaxed state restrictions against corporate farming.<sup>71</sup> Additionally, the Oklahoma Department of Agriculture repealed regulations pertaining to CAFOs. Furthermore, replacement rules were not adopted until 1993.<sup>72</sup> Subsequently, in 1994, 1995, and 1996 the Oklahoma Legislature effectively blocked regulation of the hog industry.<sup>73</sup> These factors, coupled with Oklahoma's prime natural resources,<sup>74</sup> established the foundation for the proliferation of CAFOs in Oklahoma.<sup>75</sup> The following section briefly reviews Oklahoma's legislative history regarding agricultural activities.

#### A. *An Abridged History of Oklahoma Corporate Farming Statutes*

Oklahoma has constitutional and statutory provisions restricting corporations from owning land. The 1907 Oklahoma constitutional provision maintains: "[N]o corporation shall be created or licensed in this state for the purpose of buying, acquiring, trading, or dealing in real estate other than real estate located in

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68. See *Oklahoma City v. Tytenicz*, 43 P.2d 747 syl.2, 748 (Okla. 1935) (This case concerns Oklahoma City's sewage treatment plant polluting a navigable stream and thus causing Tytenicz to suffer a nuisance from odors and damages from inability to use water on his farm to sustain livestock); see also *City of Weatherford v. Rainey*, 3 P.2d 153, 154 (Okla. 1931) (this case ironically concerns a chicken and dairy farmer suing a sewage treatment plant for nuisance caused from odors.)

69. See *Casey & Hobbs*, *supra* note 3, at A17.

70. See *id.*

71. See OKLA. STATE S. BRIEF, CONCENTRATED ANIMAL FEEDING OPERATIONS, S., 2D LEGIS. SESS 4, (1998) (visited September 6, 1998). <<http://www.lsb.state.ok.us/senate/LegisBrief98.dir/pigops.html>>; see also *Casey & Hobbs*, *supra* note 3 at A17 (In an aggressive marketing campaign aimed at attracting CAFOs, Oklahoma spent \$8 million to advertise that the state is livestock-friendly); see also Stephen Buttry, *Corporate Farms Start to Hog Pork Production, Producers Say, Retail Sales, Technology Spurs Change*, OMAHA WORLD-HERALD, May 22, 1994 (Oklahoma's marketing campaign and pro-corporate farming legislation were successful. Kansas, an anti-corporate farming status state, lost a \$50 million dollar pork packing plant with 1,400 jobs, by Shawnee-based Seaboard Corp., to Guymon, Oklahoma).

72. See OKLA. STATE S. BRIEF, CONCENTRATED ANIMAL FEEDING OPERATIONS, S., 2D LEGIS. SESS 4, (1998) (visited September 6, 1998). <<http://www.lsb.state.ok.us/senate/LegisBrief98.dir/pigops.html>>

73. See H.R. MEDIA DIVISION, *House Divides on CAFO Regulations*, *supra* note 10.

74. See Editorial, *People v. Hogs*, DAILY OKLAHOMAN, April 5, 1998 (The Oklahoman Panhandle is ideally suited for CAFOs because of terrain, low rainfall, and other factors).

75. See Kathleen Roth, *A Landowners' Remedy Laid To Waste: State Preemption of Private Nuisance Claims Against Regulated Pollution Sources*, 20 WM. & MARY ENVTL. L. & POL'Y REV. 401 (1996).

incorporated cities and towns.<sup>76</sup> In 1969, the Oklahoma Supreme Court held that such restrictions on corporations did not apply to farming operations.<sup>77</sup> In response, the Oklahoma Legislature placed several limitations on agricultural production.<sup>78</sup> The Oklahoma statute does not purport to prohibit corporations from farming; instead it only prohibits some corporations from owning rural real estate for the purpose of farming.<sup>79</sup> In 1991, the Oklahoma Legislature broadened exemptions for CAFOs with the addition of the following provision:

The provisions of this act, Section 951..., shall not apply where a corporation, either domestic or foreign: ... (3) Engages in poultry and/or swine operations, including only directly related operations, such as operating hatcheries, facilities for the production of breeding stock, feed mill, processing facilities, and providing supervisory, technical and other assistance to any other persons performing such services on behalf of the corporation...<sup>80</sup>

This provision created for the first time in Oklahoma a pro-corporate farming environment.<sup>81</sup> House Bills 3215 and 3140 were filed earlier this year and reviewed by the Oklahoma House Committee on Energy, Environment and Natural Resources. Both bills contained provisions to restore the pre-1991 prohibition against corporate hog farming.<sup>82</sup> Additionally, House Bill 3140 imposed a moratorium of up to one year on licensure of new or enlarged hog CAFOs.<sup>83</sup> However, neither of these measures were passed before the legislative session adjourned on May 29, 1998 and neither were carried over to the next session.<sup>84</sup>

### *B. CAFOs are not Agricultural Activities*

As the size of individual CAFOs expands and continue to seek protection under statutory exemptions from nuisance suits, the issue arises as to whether the size of a CAFO should limit its ability for the exemption.<sup>85</sup> At the threshold of the debate is whether CAFOs are included in the classical definition of an agricultural

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76. OKLA. CONST. art. XXII, § 2.

77. *Le Force v. Bullard*, 454 P.2d 297 (Okla. 1969).

78. OKLA. STAT. tit. 18, § 951 (1991). § 951A prohibits the formation or licensing of foreign corporations for the purpose of engaging in farming or owning agricultural land, but allows a domestic corporation to engage in such activity if they meet certain requirements. The exceptions include but are not limited the following limiting requirements: thirty-five percent of the annual gross receipts must come from farming, ranching, or mineral extraction; and there can be no more than ten shareholders unless they are related.

79. *Id.*

80. OKLA. STAT. tit. 18, § 954(3) (1991).

81. See H.R. MEDIA DIVISION, *Committee Reviews CAFOs*, *supra* note 10.

82. *Id.*

83. *Id.*

84. *Id.*

85. Compare OKLA. STAT. tit. 2 § 9-210.2 (Supp. 1997), with MINN. STAT. ANN. § 561.19(2)(c)(2)-(4)(Supp. 1997). (Minnesota's statutory nuisance protection for CAFOs does not apply to those operations with more than 1000 animal units of *sine* or more than 2500 animal units of cattle, to operations that pollute the waters of the state, or to operations that cause injury or direct threat of injury to the health or safety of any person).

activity.<sup>86</sup> The answer is outcome-determinative as to whether CAFOs may utilize the statutory shield as protection against nuisance suits.<sup>87</sup>

In some regions, the traditional family farm still remains touted as the most socially and environmentally sound method of agricultural production.<sup>88</sup> Thomas Jefferson, considered by most historians as the founding father of the American agrarian system stated: “[T]hose who labour in the earth are the chosen people of God, if ever he had a chosen people, whose breasts he has made his peculiar deposit for substantial and genuine virtue.”<sup>89</sup> This is commonly referred to as the Jeffersonian ideal and is premised on three assumptions: “1) [T]he farmer was basically a subsistence operator, buying and selling as little as possible; 2) he did his own work and made his own managerial decisions; and 3) he owned his land in fee simple.”<sup>90</sup> Based on Jefferson’s ideal, the family farmer retained a special status in American culture. In theory, such farming operations are self-contained, non-commercial, uninfluenced by politics, and not subject to the demands of the marketplace.<sup>91</sup>

In contrast, industrial-scale CAFOs vitiate every element of the Jeffersonian ideal and are transforming traditional farms.<sup>92</sup> First, while the family farm is a self-contained entity, CAFOs are functionally dependent on various people owning, managing, and working the land.<sup>93</sup> This type of organization is referred to as vertical integration.<sup>94</sup> Second, key developments in technology, economics, and

86. 97 Ky. Op. Att’y Gen. 31 (1997) (In Kentucky, the word “farm” has historically been synonymous with “small farm” or “family farm.” Furthermore, Kentucky’s right-to-farm legislation affords protection to agricultural operations, which includes those “producing crops or livestock by any generally accepted, reasonable, and prudent method that is performed in a reasonable and prudent manner customary among farm operators”).

87. See Neil D. Hamilton, *Right-To-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts To Resolve Agricultural Nuisances May be Ineffective*, 3 DRAKE J. AGRIC. L. 103 (1998) (The author notes that it is important to determine the original intent of the right-to-farm statutes, which in some states, may have been passed 20 years ago when agriculture was of a different nature).

88. See Jan Stout, *The Missouri Anti-Corporate Farming Act: Reconciling the Interests of the Independent Farmer and the Corporate Farm*, 64 UKMCL REV. 835 (1996).

89. WRITINGS OF THOMAS JEFFERSON, (P.L. Ford ed., vol III 1986).

90. See Bryan F. Stayton, *A Legislative Experiment in Rural Culture: The Anti-Corporate Farming Statutes*, 59 UMKC L. REV. 679 (1991).

91. See *id.* (In fact, the author notes that state anti-corporate farming Acts were enacted to save family farms from corporate domination); see also MO. REV. STAT. § 350.015 (1994) (The Act’s intended purpose is to prohibit large farm corporations from owning farm land or engaging in farm related activities within the state in order to protect the family farmer from unfair competition and market foreclosure).

92. See Ky. Op. Att’y Gen. *supra* note 86 (In 1984, there were 2.2 million hogs and 20,000 farms in North Carolina. By 1992, the hog population doubled but the number of farms dropped to 8,000); see also, John D. Burns, *The Eight Million Pigs-A Cautionary Tale: Statutory and Regulatory Responses to Concentrated Hog Farming*, 31 WAKE FOREST L. REV. 851 (1996)

(The author reports that while corporate operated hog farms report astronomical revenues the number of North Carolina small hog farmers continues to plummet. To illustrate, since 1991 the number of farms with hogs has dropped by an additional 2,200); see also, Stout, *supra* note 88 (“Fifteen percent of the 95 million swine slaughtered in the U.S. are produced by large hog corporations, representing a 300 percent increase from 1983 to 1993. Conversely, the number of small hog producers dropped by fifty percent with the same time period”).

93. See Stout, *supra* note 88.

94. See Keith D. Haroldson, *Two Issues in Corporate Agriculture: Anticorporate Farming Statutes and Production Contracts*, 41 DRAKE J. AGRIC. L. 393 (1992). Owning and controlling livestock is a form of vertical integration. Vertical integration is advantageous because it gives a business the ability:

1) [T]o closely ally with a particular market outlet to assure future market access;

expanding domestic and international markets have fostered the growth of corporate farms.<sup>95</sup> Third, CAFOs have been at the political forefront in Oklahoma since 1991, when our Legislature relaxed restrictions against corporate farming.<sup>96</sup> In short, “[P]ork is political, and pigs are an environmental hazard.”<sup>97</sup> Technological advances and consumer demand for a higher quality, less expensive product are instrumental in the expansion of CAFOs.<sup>98</sup> Based on Jefferson’s ideals, CAFOs bear no resemblance to a traditional family farm. A more fitting description is that CAFOs are “industrial operation[s] producing industrial waste[s].”<sup>99</sup> In response, some states have enacted moratoriums on the expansion of existing CAFOs or construction of new CAFOs pending adoption of more stringent regulations.<sup>100</sup>

### C. Constitutional Implications of Statutory Exemptions

The original equitable premise of right-to-farm legislation served a legitimate goal. The legislation serves to preserve farms and farmland from the expansion of non-farm operations and residential areas moving close to and then challenging the very existence of an existing agricultural operation.<sup>101</sup> Yet, modern agricultural practices converted right-to farm legislation to a wide and strong shield from nuisance suits.<sup>102</sup> This conversion resulted in increased political opposition and legal challenges.<sup>103</sup> At center stage is the industrialization of CAFOs and the protections afforded to them under the expanded application of Oklahoma’s right-to-farm exemptions.<sup>104</sup>

To set the stage for the analysis of Oklahoma’s right-to-farm exemptions, it is essential to first discuss the constitutional implications. Oklahoma Attorney General Drew Edmonson discussed the constitutionality of such exemptions in a

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- 2) to become tied more closely with a particular source of raw product...that is not available on the open market, and that might improve profitability;
  - 3) to acquire marketing and supervisory skills in order to better coordinate production to market specifications; [and,]
  - 4) to obtain better financing through vertical coordination.”

95. See Stout, *supra* note 88; see also Burns, *supra* note 92 (In North Carolina, the nation’s second largest hog producer behind Iowa, cash receipts from hog farming have skyrocketed, rising from \$665 million in 1991 to over \$1 billion in 1995).

96. See OKLA. STATE S. BRIEF, CONCENTRATED ANIMAL FEEDING OPERATIONS, S., 2d Legis. Sess 4, (1998) (This legislation has profoundly impacted hog production in Oklahoma and has focused attention to the potential for serious resource degradation and public health risks.) (visited September 6, 1998) <<http://www.1sb.state.ok.us/senate/LeisBrief98.dir/pigops.html>>

97. Casey & Hobbs, *supra* note 3.

98. See Stout, *supra* note 88.

99. See Ky. Op. Att’y, *supra* note 86 (Hogs produce two to four times as much waste as humans); see also Casey & Hobbs, *supra* note 3 (Mr. Leon Chesnin, a retired University of Nebraska waste-management specialist, estimates that the waste generated by 10,000 pigs equals that produced by a city of 17,000 people).

100. H.R.J Res. 1093, 46th Legis. 2d Sess. (Okla. 1997) (However, Senate Bill 1175, enacted June 10, 1998, repealed the moratorium). The North Carolina Legislature passed the Clean Water Responsibility and Environmentally Sound Policy Act, § 1.1(A) (1997 N.C. Sess. Laws 458) (This Act prohibits new construction and expansion until March 1, 1999).

101. See Hamilton, *supra* note 87.

102. See *id.*

103. See *id.*

104. See H.R. MEDIA DIVISION, *Committee Reviews CAFOs*, *supra* note 9.

1997 opinion.<sup>105</sup> The Attorney General's Opinion emphasized a provision in the Oklahoma Constitution, which guarantees a landowner's right to compensation for the taking or damaging of private property for private use.<sup>106</sup> In light of this constitutional right the question remained whether Oklahoma's CAFO Act can provide immunity from nuisance actions.<sup>107</sup>

Both the United States Constitution and the Oklahoma Constitution prohibit the uncompensated taking of private property by a government entity.<sup>108</sup> In addition, Article II, § 23 of the Oklahoma Constitution protects against the taking or damaging of property for private use, stating "private property shall not be taken or damaged for public use without compensation."<sup>109</sup> This creates a private cause of action in favor of adjoining landowners who are injured by the operation of a lawful business on neighboring property."<sup>110</sup> The Oklahoma Supreme Court held that damage to private property under Article II, § 23 includes physical injury to real property as well as interference with the owner's peaceful occupancy and enjoyment of his premises.<sup>111</sup>

Oklahoma courts have yet to delineate types of damages to private property produced from a CAFO which fall under the protection of Article II, § 23. However, Oklahoma courts have recognized a landowner's right to compensation for the "noxious fumes and other traits associated with an open sewage lagoon."<sup>112</sup> Similarly, landowners adjacent to a 40,000 hog CAFO complain of noxious odors emitted from exhaust fans located in the confinement buildings and massive open-air sewage ponds.<sup>113</sup>

Under Oklahoma law a landowner can sue for damage to private property under a theory of common law nuisance, as codified by statute,<sup>114</sup> or a constitutional claim under Article II, § 23.<sup>115</sup> Unlike a claim of common law nuisance, in a constitutional claim for damages to private property it is no defense that the challenged activity is reasonable or even that it has been licensed by the government.<sup>116</sup> However, a landowner has a right to seek only compensation, not an injunction.<sup>117</sup> The Attorney General's Opinion concluded that the nuisance protection contained in Oklahoma's CAFO Act only prevents a landowner from abating the alleged nuisance through the use of an injunction.<sup>118</sup> The landowner's constitutional cause of action for taking and damaging property remains available

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105. 97 Ok. Op. Att'y Gen. 30 (1997).

106. *See id.*

107. *See id.*

108. U.S. CONST AMEND; OKLA CONST art II, § 24 ("Private property shall not be taken or damaged for public use without just compensation").

109. OKLA CONST art II, § 23.

110. *See Stewart v. Road*, 796 P.2d 321, 336 (Okla. 1990), *reversed on other grounds by Dulaney v. Oklahoma State Department of Health*, 868 P.2d 676, 678 (Okla. 1993).

111. *Schaeffer v. Schaeffer*, 743 P.2d 1038, 1039 (Okla. 1987).

112. *Id.*

113. *See Bartlett & Steel*, *supra* note 7.

114. OKLA STAT. tit. 50 § 2 (1991).

115. OKLA CONST art II, § 23.

116. *See Ok. Op. Att'y Gen.*, *supra* note 105.

117. *See id.*

118. *See id.*

even though the source is a legalized nuisance.<sup>119</sup> Accordingly, the statute does not violate Article II, §23.<sup>120</sup>

In contrast, a petitioner before the Iowa Supreme Court maintained that the common law right to bring a nuisance suit is a constitutionally protected “inalienable right” under both the federal and Iowa Constitutions,<sup>121</sup> which cannot be limited by right-to-farm laws.<sup>122</sup> The Iowa Supreme Court held that such statutory immunity from nuisance suits resulted in an unconstitutional taking of private property for public use without just compensation in violation of federal and Iowa constitutional provisions.<sup>123</sup>

However, this case is distinguishable from Oklahoma because it is based on Iowa state law. Unlike the Iowa Constitution, Article II, § 23 of the Oklahoma Constitution provides an avenue for private landowners to seek compensation for the taking or damaging of their land for private use.<sup>124</sup> The Iowa Supreme Court implied that for Iowa’s right-to-farm exemptions to be enforceable, there must be provisions for the payment of just compensation.<sup>125</sup>

#### *D. Oklahoma’s Right-to-Farm & Livestock Statutory Exemptions*

Statutory protection for officially sanctioned activities is well established in Oklahoma.<sup>126</sup> In 1910, Oklahoma law provided blanket protection under the provision that “[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance.”<sup>127</sup> Since the instatement of the provision, no court has ever questioned the constitutionality of this provision.<sup>128</sup> Oklahoma courts extend this shield to protect statutory nuisance claims and not the

119. *See id.*

120. *See id.* The official Opinion of the Attorney General included that:

- Article II, §23 of the Oklahoma Constitution creates a cause of action for the taking or damaging of private property for private use.
- The cause of action under Article II, §23 is distinct from and independent of the statutory cause of action for nuisance.
- By its own terms the restriction which the Oklahoma Feed Yards Act at 2 O.S Supp. 1996, §9-210(C), places on the right of near by landowners to sue feed yard operators only applies to nuisance actions and does not apply to taking or damaging of property.
- Because it does not apply to actions for the taking or damaging of property, the nuisance protection provision of the Oklahoma Feed Yards Act at 2 O.S Supp. 996 , §9-210(C), does not contravene Article II, §23 of the Oklahoma Constitution.

121. IOWA CONST. art. 1, § 9 provides “no person shall be deprived of life, liberty, or property, without due process of law.” IOWA CONST. art. 1, § 18 provides “Eminent domain—drainage ditches and levees. Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury.”

122. *See* Hamilton, *supra* note 87.

123. *See* Bormann, 584 N.W.2d 309 (“When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few. In short, it appropriates valuable private property interests and awards them to strangers”).

124. OKLA CONST art II, § 23.

125. *See* Bormann, 584 N.W.2d 309, 322.

126. *See* Ok. Op. Att’y Gen., *supra* note 105.

127. OKLA STAT. tit. 50 § 4 (1991).

128. *See* Ok. Op. Att’y Gen., *supra* note 105.

constitutional claim created under Article II, § 23.<sup>129</sup> Oklahoma's right-to-farm and livestock statutory exemptions bars relief under a statutory nuisance claim, but to a lesser degree than the 1910 exemption.<sup>130</sup> Unlike the broad protection against nuisance suits under the 1910 exemption, any operation claiming protection under either the right-to-farm or livestock exemptions receives limited protection and must meet certain conditions.<sup>131</sup>

The most protection is afforded to agricultural activities as defined under Oklahoma's right-to-farm statute.<sup>132</sup> These activities include, but are not limited to, "the growing or raising of horticultural and viticultural crops, berries, poultry, livestock, grain, mint, hay, and dairy products."<sup>133</sup> Such activities are presumed reasonable and do not constitute a nuisance contingent on whether they have a substantial adverse affect on the public health and safety.<sup>134</sup>

The statutory shield from nuisance suits for CAFOs provides less protection.<sup>135</sup> This livestock exemption is set forth in the CAFO Act and provides a tiered approach based on a CAFOs distance to a source.<sup>136</sup> In Oklahoma, a licensed CAFO which is operating in accordance with all applicable rules and regulations of the Oklahoma Board of Agriculture is prima facie evidence<sup>137</sup> that a nuisance does not exist, if the operation is following all zoning regulations.<sup>138</sup> CAFOs which are operated in more rural areas are deemed to not constitute a nuisance unless a

129. E.I. Du Pont de Nemours Powder Co. v. Dodson, 150 P. 1085 (Okla. 1915).

130. The Right-to Farm exemptions are located under: (1) OKLA. STAT. tit. 50 § 1, ¶4 (1991): In any way renders other persons insecure life, or in the use of property, provided, this section shall not apply to preexisting agricultural activities; (2) OKLA. STAT. tit. 50 § 1.1(B) (1991):

Agricultural activities conducted on farm or ranch land, if consistent with good agricultural practices and established prior to nearby nonagricultural activities, are presumed to be reasonable and do not constitute a nuisance unless the activity has a substantial adverse affect on the public health and safety. If that agricultural activity is undertaken in conformity with federal, state and local laws and regulations, it is presumed to be good agricultural practice and not adversely affecting the public health and safety;

The general exemption for all permitted or licensed activities is located at:

OKLA. STAT. tit. 50 § 4 (1991): Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance;

The Livestock exemption is located in Oklahoma's CAFO ACT:

OKLA. STAT. tit. 2 § 9-210B(1)-(2) (1991): Any animal feeding operation licensed pursuant to the Oklahoma Concentrated Animal Feeding Operations(CAFO) Act, operated in compliance with such standards, and in compliance with such standards, and in compliance with the rules promulgated by the Board of Agriculture, shall be deemed to be prima facie evidence that a nuisance does not exist; provided, no animal shall be located or operated in violation of any zoning regulations. (2) Any animal feeding operation licensed pursuant to the Oklahoma CAFO Act, operated in compliance with such standards, and in compliance with such standards, and in compliance with the rules promulgated by the Board of Agriculture, that is located on land more than three (3) miles outside the incorporated limits of any municipality and which is not located within one (1) mile of ten or more occupied residences shall not be deemed a nuisance unless it is shown by a preponderance of the evidence that the operation endangers the health or safety of others.

131. See generally *id.*

132. OKLA. STAT. tit. 50 § 1.1(A) & (B) (1991).

133. OKLA. STAT. tit. 50 § 1.1(A) (1) (1991).

134. OKLA. STAT. tit. 50 § 1.1(A) (1991).

135. OKLA. STAT. tit. 2 § 9-210(A)-(C) ( SUPP. 1997).

136. *Id.*

137. See BLACKS LAW DICTIONARY 1090 (6<sup>th</sup> edition 1990). Prima facie evidence is that quantum of evidence that suffices for proof of a particular fact until the fact is contradicted by other evidence; once a trier of fact is faced with conflicting evidence, it must weigh the prima facie evidence with all of the other probative evidence presented.

138. OKLA. STAT. tit. 2 § 9-210B(1) & (2) (West 1998).

claimant shows otherwise by a preponderance of the evidence.<sup>139</sup> The nuisance protection for a CAFO is only available if the CAFO complies with rules and regulations of the CAFO Act and the Board of Agriculture.<sup>140</sup> The amendments to the CAFO Act weakens this nuisance protection even further by imposing additional rules and regulations on CAFOs.<sup>141</sup>

#### IV. OKLAHOMA'S NATIONALLY TOUTED CAFO ACT

##### A. Description of a Typical CAFO

The industrialization of agriculture as applied to hog farming has resulted in operations commonly referred to as either mega-farms, industrial-scale farms, super-concentrated farms or CAFOs.<sup>142</sup> In such operations the once inherent symbiosis between farmer and land is absent.<sup>143</sup> The condition of the land is immaterial because hogs "spend their lives in narrow steel crates that allow the companies to flush away waste, that falls through grates and to move the pigs [hogs] assembly-line style."<sup>144</sup> The hog waste is collected in huge open ponds where it is piped to surrounding pastures and hayfields.<sup>145</sup>

These factory-like operations utilize a complex layout of metal buildings to separate hogs by size, sex, and function.<sup>146</sup> In the central control room, remote sensors monitor the temperature, humidity, water consumption, and oxygen levels.<sup>147</sup> Feed is supplied to the hogs in the form of high-potency pellets, which are delivered through plastic tubes.<sup>148</sup> There are stringent procedures to protect the hogs from germs. Employees and visitors are required to shower and cloak in sterile uniforms before entering any of the buildings.<sup>149</sup> Ear tags are placed on each sow allowing for computerized surveillance and medical updating.<sup>150</sup> The sows are

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139. OKLA. STAT. tit. 2 § 9-210B(1) & (2) (West 1998). BLACKS LAW DICTIONARY 1183 (6<sup>th</sup> edition). Preponderance of the evidence as used as a standard of proof in a civil case, is evidence which is of greater weight or more convicting than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.

140. OKLA. STAT. tit. 2 § 9-210B(1) (West 1998).

141. See generally OKLA. STAT. tit. 2 § 9-200-212 (West 1998).

142. See Stout, *supra* note 88.

143. See Ky. Op. Att'y Gen., *supra* note 86.

144. See Stout, *supra* note 88 (Industrial hog waste is collected in lagoons—a euphemism for a cesspool—where it is pumped by underground pipes to surrounding pastures and hayfields).

145. See Scott Kilman, *Power Pork: Corporations Begin to Turn Hog Business into Assembly Line*, WALL ST. J., March 28, 1994, at A1; see also Casey & Hobbs, *supra* note 3 (Bob Bergland, the Secretary of Agriculture under Jimmy Carter stated that super-concentrated pig industry in North Carolina was in danger of collapse because in some counties the "ground is saturated with hog manure").

146. See Kilman, *supra* note 145 (These buildings serve three types of functions: a sow unit, nursery, and finishing floor).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

artificially inseminated and placed on a rigid production schedule.<sup>151</sup> Each sow is expected to generate 23 pigs a year for three years, after which she is slaughtered.<sup>152</sup> The entire production process, from insemination to a slaughter weight of 245 pounds, takes about five and one-half months.<sup>153</sup>

### B. *Quantifying Odors Associated with CAFOs*

Odors produced from thousands of confined hogs can be composed of over 200 different compounds.<sup>154</sup> The primary sources include the confinement buildings, carcass disposal areas, open air sewage lagoons and land application from the spraying of hog wastes.<sup>155</sup> This lagoon-and-spray system is a major source of the odors that engulf adjacent neighbors.<sup>156</sup> These odors consist of ammonia, the most potent form of nitrogen, which is released into the atmosphere from the hog waste.<sup>157</sup> Some other compounds include hydrogen sulfide,<sup>158</sup> grain dust, and fecal matter.<sup>159</sup> Ammonia and sulfur represent half of the principal biological classes of odor compounds.<sup>160</sup>

For decades, scientists, state regulators, and industry leaders have known that CAFOs discharge massive amounts of ammonia into the atmosphere from the production buildings, lagoons, and spray fields.<sup>161</sup> A CAFO with 1,400 mature hogs releases approximately a ton of ammonia into the atmosphere per year.<sup>162</sup> The North Carolina Division of Air Quality estimates that the hog farms there collectively discharge at least 186 tons of ammonia into the air each day.<sup>163</sup> In Minnesota, the odor issue was addressed by setting ambient air quality standards

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151. *Id.*

152. See Scott Kilman, *Power Pork: Corporations Begin to Turn Hob Business into Assembly Line*, WALL ST. J., March 28, 1994, at A1.

153. *Id.*

154. See Matt M. Dummermuth, *A Summary and Analysis of Laws Regulating the Production of Pork in Iowa and Other Major Pork Producing States*, 2 DRAKE J. AGRIC. L 447 (1997).

155. See Stuart Leavenworth & James Eli Shiffer, *Airborne Menace-Hog Farms Pose Risks of Waste Spill and Runoff, but That's Not All. The Ammonia Rising From Lagoons Could Be Even More Hazardous*, THE NEWS & OBSERVER, July 5, 1998, visited on October 25, 1998. <<http://www.news-observer.com/daily/1998/07/05/nc00.html>>

156. *See id.*

157. *See id.* (However, the article also notes that the amount of nitrogen being released into the atmosphere has not been accurately measured. Efforts to limit ammonia gases from CAFOs has been met with a high-priced campaign by the large hog operators to convince the public that they are not harming the environment).

158. Bartlett & Steel, *supra* note 7, at 58 (Hydrogen sulfide is a poisonous gas produced by decaying manure that smells like rotten egg).

159. *Id.*

160. See Macki et al, *Biochemical Identification and Biological Origin of Key Odor Compounds in Livestock Waste*, JOURNAL OF ANIMAL SCIENCE, Vol. 76, No. 5, p.1331-1342 (1998) (The other biological origins of odor compounds include: branched and straight-chain Volatile Fatty Acids; indoles and phenols; and volatile sulfur-containing compounds.)

161. See Leavenworth & Shiffer, *supra* note 155.

162. See Ky. Op. Att'y Gen, *supra* note 86 (To illustrate, once the wastes are delivered to the lagoon, microbes in the manure and soil convert the waste into ammonia which escapes into the air).

163. See Leavenworth & Shiffer, *supra* note 155.

for hydrogen sulfide emissions.<sup>164</sup> Yet, the standard was not enforceable because there was not an approved method for accurately measuring the odor levels.<sup>165</sup>

There are at least two obstacles to resolution of the issue of reducing odors associated with CAFOs. First, there is no accepted objective scientific method to accurately measure odor.<sup>166</sup> Currently, the subjective perception of odor by hog farm neighbors becomes the driving force for nuisance suits against CAFOs.<sup>167</sup> Second, there is no uniform standard for measuring odors at what constitutes a nuisance level. There must be a uniform standard or definition of what constitutes acceptable odors emanating from a CAFO.<sup>168</sup> With no reference point, panels of experts and juries are left to determine what are acceptable levels of odors.<sup>169</sup> This will inevitably result in inconsistent standards and remedies.

### C. Oklahoma's Amended CAFO Act

On August 1, 1998, Senate Bill 1175 went into effect and strengthened the existing CAFO Act.<sup>170</sup> As a result of these amendments, Oklahoma's CAFO Act represents "one of the strongest regulatory bills anywhere in the United States."<sup>171</sup> The amended CAFO Act represents Oklahoma's response to curtail the unrestricted and virtually unregulated expansion of LMFOs or large-scale CAFOs.<sup>172</sup> Based on initial assessments, it appears that they are having just that effect.<sup>173</sup> There are two key provisions that both enhance a landowner's standing to bring a nuisance suit and protect landowners from nuisances. These provisions increase and standardize setbacks for LMFOs from occupied residences<sup>174</sup> and impose stringent operating

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164. See Dommermuth, *supra* note 154.

165. *Id.*

166. See NATIONAL PIG PRODUCERS COUNCIL, *Pork Issues Handbook-Air Quality and Odor*, August 1997, visited October 12, 1998 <<http://www.nppc.org/Issue%20Handbook/AirQuality.html>>.

167. *Id.*

168. See Dommermuth, *supra* note 154.

169. *See id.*

170. S.1175, 46th Legis. 2d Sess. (Okla. 1998) (Amended various sections to Oklahoma's Concentrated Animal Feeding Operations Act); compare OKLA. STAT. tit. 2 § 9-200-9-212, 15, 17, 18, 20, and 22 (1991) with OKLA. STAT. tit. 2 § 9-§9-200-9-212, 15, 17, 18, 20, and 22 (West 1998).

171. H.R. MEDIA DIVISION, *House Divides on CAFO Regulations*, *supra* note 10 (Comment by Representative M.C. Leist, Chairman of the House Agriculture Committee).

172. See OKLA. STATE S. BRIEF, CONCENTRATED ANIMAL FEEDING OPERATIONS, S., 2D LEGIS. SESS 4, (1998) (visited September 6, 1998). <<http://www.lsb.state.ok.us/senate/LegisBrief98.dir/pigops.html>>.

173. See J.B. Blosser Bittner, *Hog Farmers In Quandary Over Rules*, THE DAILY OKLAHOMAN August 29, 1998 (Attorney Bob Kellogg, longtime legal counsel for the state Department of Environmental Quality and now with the law firm of Shipley, Jennings and Champlin summarized the modifications to the CAFO Act postulated that Oklahoma's changing look at the hog industry may have an effect more far-reaching than on existing farms. To illustrate, Kellogg said no new permit requests had been filed with the state since March); see also H.R. MEDIA DIVISION, *Committee Reviews CAFOs*, *supra* note 9 (The Oklahoma Agriculture Department already has authorized 317 CAFOs, including 208 licensed hog operations. The Agriculture Department has 78 other pending CAFO applications, of which 74 are for swine CAFOs).

174. OKLA. STAT. tit. 2 § 9-210.1(A)-(J) & 210.3(A) (West 1998).

requirements on LMFOs.<sup>175</sup>

To minimize the potency of odors, the amended CAFO Act contains provisions which increase the distance between the CAFO and occupied residences.<sup>176</sup> The new setback distances are not applicable to any animal feeding operation with a capacity of 2,000 animal units or less which was established prior to June 1, 1998 or if the operation has a license or submits an application for a license prior to March 9, 1998.<sup>177</sup> Setback distances require the following distances from an occupied residence: two miles for farms with more than 4,000 animal units (10,000+ hogs); ¼ mile for farms with 2,001 to 4,000 animal units; ¾ mile for farms with 1,001 to 2,000 animal units; ½ mile for farms with 601 to 1,000 animal units; ¼ mile for farms with 300 to 600 animal units; and no setback for farms with less than 300 animal units (750 hogs).<sup>178</sup> Additionally, LMFOs are precluded from expanding and/or establishing an operation after March 9, 1998 within three miles of certain protected areas.<sup>179</sup> These areas include: scenic rivers, historic property, public drinking wells, national parks, or parks or recreational areas operated by nonprofit organizations.<sup>180</sup> The new setbacks are substantially greater than the two highest hog producing states of North Carolina and Iowa. Under North Carolina regulations the setback between residences and a CAFO ranges from 500 to 2,500 feet<sup>181</sup> Under Iowa regulations the setbacks range from 750 to 2,500 feet.<sup>182</sup>

The amended CAFO Act imposes substantial requirements on large-scale operations.<sup>183</sup> According to the statutory definition, the largest class of CAFOs constitutes (LMFOs).<sup>184</sup> The amended CAFO Act redefines LMFOs to include any animal feeding operation which uses primarily a liquid waste management system, where animals are housed primarily in roof-covered structures, and reduces the

175. See generally OKLA. STAT. tit. 2 § 902 (Such additional regulations, which are applicable only to CAFOs classified as a LMFO include but is not limited to the following: any increase in capacity over 5% of the original licensed capacity; development of a Pollution Prevention Plan; Best Management Practices; Odor Abatement Plan; Leak Detection System; and additional licensing fees in an amount equal to (\$0.80) per licensed animal unit capacity); see also OKLA. DEPT. OF AGRIC. tit. 35, ch.17, subch. 3, § 1 (Newly enacted provisions are only applicable to LMFOs, unless specifically stated in Senate Bill 1175).

176. OKLA. STAT. tit. 2 § 9-210.3(A)-(F) (West 1998).

177. OKLA. STAT. tit. 2 § 9-210.1(A) & 9-210.3(F) (West 1998).

178. OKLA. STAT. tit. 2 § 9-210.3(A)(1) (West 1998).

179. OKLA. STAT. tit. 2 § 9-210.3(B) & (D) (1)-(3) & (5) (West 1998).

180. *Id.*

181. See Steve Marbery, *Hog Industry Insider*, FEEDSTUFFS, Aug. 18, 1997, at 14, 15.

182. See IOWA CODE ANN. § 657.11 (West Supp. 1997).

183. See Mahoney, *supra* note 17.

184. OKLA. STAT. tit. 2 § 9-202(b)(11) (West 1998) (A licensed managed feeding operation is statutorily classified as one form of a CAFO.). Okla. Stat. tit. 2 § 9-202(B)(18): A LMFO is defined as: an animal feeding operation primarily using a liquid animal waste management system, where animal are primarily housed in a roof-covered structure and which has more than the number of animals specified in any of the following categories confined:

a. 2,500 swine each weighing over 25 kilograms, approximately 55 pounds,

b. 10,000 weaned swine each weighing under 25 kilograms,...

e. Any combination of swine weighing over twenty-five (25) kilograms or under twenty-five (25) kilograms which would equal one thousand (1,000) animal units.

number of confined animals from: 5,000 to 2,500 swine each weighing over 55 pounds; 20,000 to 10,000 weaned swine each weighing under 55; or any combination of animal units equaling 2,000 to 1,000.<sup>185</sup> This expanded definition encompasses the largest CAFOs and exposes them to more stringent regulations.<sup>186</sup> Such regulations include, but are not limited to: increased guidelines in the development of an odor abatement plan,<sup>187</sup> addressing odor problems in the carcass removal plan approved by the Department of Agriculture,<sup>188</sup> and education and training in waste management and odor control.<sup>189</sup>

The amended CAFO Act provides increased odor abatement guidelines that each LMFO must include in their Odor Abatement Plan (OAP).<sup>190</sup> In addition to the OAP, LMFOs must not “otherwise create unnecessary and unreasonable odors.”<sup>191</sup> Odors are unnecessary and unreasonable if such odors may be reduced by more efficient management practices at a reasonable expense.<sup>192</sup> The requirements for developing an OAP are set forth both in the amended CAFO Act and by rules promulgated by the Oklahoma Board of Agriculture.<sup>193</sup> The OAP places a substantial burden on each LMFO.<sup>194</sup> To illustrate, each LMFOs must annually evaluate and modify the effectiveness of the OAP and determine whether any “economically feasible technological advances” are viable for implementation at the facility.<sup>195</sup> On their face, the OAP and the requirement that LMFOs not create unnecessary and unreasonable odors, may play a central role in a successful nuisance action. However, it remains unclear how these requirements will be quantified and enforced. In fact, the amended CAFO Act requires the Oklahoma Department of Agriculture to consider “all relevant factors” when reviewing an OAP.<sup>196</sup>

As previously identified, another source of nuisance odors produced by CAFOs emanates from the disposition of carcasses. People who live near CAFOs report situations where dead hogs are not buried, but are placed in open trenches.<sup>197</sup>

185. *Id.*

186. OKLA. STAT. tit. 2 § 9-210.3(B)(11) (West 1998).

187. OKLA. STAT. tit. 2 § 9-205.3(B)(4)(d) (West 1998) This section requires that animal waste handling, treatment and removal shall: comply with the Odor Abatement Plan for licensed managed feeding operations; *see* Okla. Stat. tit. 2, § 9-205.3(a)(A) - (D) (West 1998) for specific requirements of an Odor Abatement Plan

188. OKLA. STAT. tit. 2 § 9-205.3 (H) (West 1998).

189. OKLA. STAT. tit. 2 § 9-205 (H) (1)-(6) (West 1998).

190. OKLA. STAT. tit. 2 § 9-205.3A (B)(8) (West 1998).

191. OKLA. STAT. tit. 2 § 9-205.3A (B)(4) (D) (West 1998).

192. *Id.*

193. *See generally* OKLA. STAT. tit. 2 § 9-205.3(a) (West 1998); *see also* OKLA. DEPT. OF AGRIC. tit. 35, ch. 17, subch 3, § 1 (The goal of the Odor Abatement Plan(OAP) is to minimize the adverse impact on neighboring citizens. Each OAP is site specific and addresses methods for reducing odors from the following sources: animal maintenance, waste storage, land application, and carcass disposal).

194. Telephone conversation with Tina Gunter, Staff Attorney for the Okla. Bd. Of Agric. (Sept. 28, 1998).

195. OKLA. DEPT. OF AGRIC. tit. 35, ch. 17, subch 3, § 15.

196. *See id.* § 15(e).

197. *See* Bartlett & Steele, *supra* note 7; *see also* H.R MEDIA DIVISION, *House Divides on CAFO Regulations*, *supra* note 10.

This attracts such pests as flies and rats, which eventually invade their homes.<sup>198</sup> Furthermore, coyotes drag the dead pig carcasses into their yards.<sup>199</sup> In response to these problems, the Oklahoma Department of Agriculture requires that the carcass removal plan be assimilated into the Pest Management Plan (PMP)<sup>200</sup> to reduce health hazards.<sup>201</sup> The Department of Agriculture requires each facility to develop an approved carcass removal plan with a goal aimed at reducing odor.<sup>202</sup> The amended CAFO Act also imposes strict liability on CAFOs for the proper handling of animal wastes, even if not performed by employees of the CAFO producing these wastes.<sup>203</sup> With increased emphasis on odor reduction, LMFOs will be forced to review their operations with an eye towards increased liability and exposure to nuisance actions.

Finally, the amended CAFO Act institutes formal education and training requirements for employees of existing and proposed LMFOs after August 1, 1998 in the areas of waste management and odor control.<sup>204</sup> The education and training focuses on the primary sources of odors produced at a LMFO.<sup>205</sup> These include the proper operation and management of waste retention structures,<sup>206</sup> animal waste nutrient management including land application of wastes,<sup>207</sup> and air quality and odor control.<sup>208</sup>

## V. REMEDIES AVAILABLE

Given the constitutionally grounded right to compensation for damage to private property created under Article II, § 23, the amended CAFO Act substantially strengthens a landowners ability to challenge CAFOs.<sup>209</sup> Some of the key provisions in the amended CAFO Act include: 1) Legal standing for landowners at the licensing stage;<sup>210</sup> 2) A system where cumulative violations of the CAFO Act will result in revocation, suspension, or nonrenewal of a CAFO license,<sup>211</sup> and 3) Additional options of relief for landowners to redress or restrain violations of the CAFO Act.<sup>212</sup>

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198. *See id.*

199. *See id.*

200. OKLA. DEPT. OF AGRIC. tit. 35, ch. 17, subch 3, § 16 (1998) (A Pest Management Plan (PMP) provides specific methods for preventing flies, rats, and coyotes. In addition, each PMP must include a physical, structural, and chemical controls to minimize such pests and bacterial buildup).

201. *Id.* §16(3) (The PMP assimilates into the carcass disposal plan to reduce health hazards).

202. OKLA. DEPT. OF AGRIC. tit. 35, ch. 17, subch 3, § 17 (1998).

203. OKLA. STAT. tit. 2 § 9-205.3(F)(3) (West 1998).

204. OKLA. STAT. tit. 2 § 9-205.3(H)(1) & (2) (West 1998).

205. *Id.*

206. OKLA. DEPT. OF AGRIC. tit. 35, ch. 17, subch 3, § 18 (1998).

207. *Id.*

208. *Id.*

209. *See Ok. Op. Att'y Gen., supra* note 105.

210. OKLA. STAT. tit. 2 § 9-205.1(C)(4)(b) (West 1998).

211. OKLA. STAT. tit. 2 § 9-211(A) (West 1998).

212. *Id.*

The amended CAFO Act grants landowners legal standing to challenge a proposed CAFO application.<sup>213</sup> As of August 1, 1998, the Department of Agriculture will be compelled to deny a license to a LMFO applicant if a nearby landowner "proves that the granting of the license will cause significant harm to the property value of the interested party."<sup>214</sup> In Guymon, Oklahoma, a landowner adjacent to a massive LMFO noted that their property was "devaluated to nothing as far as the market's concerned."<sup>215</sup> This provision should help balance the conflicting interests between LMFOs and landowners. Furthermore, landowners are empowered to act rather than react to foreseeable damages or nuisance odors caused by these large scale CAFOs.

The amended CAFO Act directs the Oklahoma Board of Agriculture to promulgate a violation points system to enforce the provisions of the CAFO Act.<sup>216</sup> This violation point system provides greater punishment for violations which are intentional and for violations which pose a greater threat to the environment.<sup>217</sup> The system allows the Board to assess points prior to revocation, suspension, or nonrenewal of a CAFO license.<sup>218</sup> When a CAFO accrues fifteen or more points in a two year time frame, the Board is compelled to revoke, suspend, or not renew their license.<sup>219</sup> Such a system functions as a quasi-injunctive tool for a landowner and as a warning system for a CAFO. Of particular interest to a landowner utilizing this system to abate nuisance odors, three points accrue for the following violations of the CAFO Act: 1) Failure to obtain or renew educational requirements for odor and waste management;<sup>220</sup> 2) Failure to implement a carcass removal plan;<sup>221</sup> or 3) Failure to utilize and comply with an Odor Abatement Plan.<sup>222</sup> The assessment of points by the Board is final, unless the CAFO has accrued fifteen points or the violation has been deemed significant.<sup>223</sup>

However, regardless of the number of points a CAFO has accrued, the Board maintains discretionary power to immediately revoke or suspend a CAFO for significant violations.<sup>224</sup> According to the Board, a significant violation accrues either four or five points from a failure to comply with or utilize certain operating requirements and results in potential or actual harm to public health or the

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213. OKLA. STAT. tit. 2 § 9-205(C)(4)(b) (West 1998); see H.R. MEDIA DIVISION, *House Divides on CAFO Regulations*, *supra* note 10 ("One thing that has not been in the law in Oklahoma is protection for a landowner whose property values are going to be damaged because of a hog operation." This new law provides such protection).

214. OKLA. STAT. tit. 2 § 9-205(C)(4)(b) (West 1998).

215. Bartlett & Steele, *supra* note 7, at 58.

216. OKLA. STAT. tit. 2 § 9-211(A)(1) (West 1998).

217. *Id.*

218. OKLA. DEPT. OF AGRIC. tit. 35, ch. 17, subch 3, § 22(a) (1998).

219. *Id.* § 22(a)(1).

220. *Id.* § 22(a)(2)(D).

221. *Id.* § 22(a)(2)(N).

222. *Id.* § 22(a)(2)(P).

223. *Id.* § 22(a)(3).

224. OKLA. DEPT. OF AGRIC. tit. 35, ch. 17, subch 3, § 22(a)(4) (1998).

environment.<sup>225</sup>

While the amended CAFO Act does not expressly eliminate a CAFO's protection from nuisance suits, it does substantially weaken their immunity status. It accomplishes this through conditioning immunity on compliance with more stringent rules and regulations<sup>226</sup> and providing more avenues of relief.<sup>227</sup> The amended CAFO Act provides a full array of remedies, which were not previously available to an affected landowner, including but not limited to mandatory or prohibitive injunctive relief, interim equitable relief, and punitive damages.<sup>228</sup> As a result, a landowner's remedies are no longer limited to compensation, but also include for nuisances: compensation, abatement, and injunctive relief.

## VI. CONCLUSION

Oklahoma's highly acclaimed CAFO Act confers measurable benefits to all concerned parties. CAFO owners are provided with unambiguous guidance as to their expected standard of care and predictable exposure to liability. This may increase their operating costs, but any increase will more than likely be shifted to the consumer. Landowners rights to sue were enhanced as a substantial blow was dealt to the statutory immunity from nuisance suits enjoyed by CAFOs. Additionally, a landowner now has a full array of remedies, from legal standing at the licensing stage to injunctive relief. Even the traditional farmer wins as the CAFO Act focuses on the large-scale hog factories, i.e. LMFOs.

To realize these benefits, there must be an enforcement structure. The Oklahoma Board of Agriculture constitutes that structure and it remains unknown as to how and to what extent the amended CAFO Act will be enforced.<sup>229</sup> Regardless of these potential drawbacks, a sensible CAFO will implement these new standards. In the final analysis, Oklahoma's amended CAFO Act signals a shift in social policy away from CAFOs and balances the interests of this lucrative industry with the concerns of affected landowners. The amended CAFO Act affects any new CAFO license filed after March 9, 1998. However, as of May 11, 2000, the Oklahoma Board of Agriculture had received no applications for any new CAFOs.

*David R. Gillay*

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225. *Id.* § 22(a)(2)(A)-(C) (E) & (F).

226. *See supra* text at Part IV.C.

227. *See supra* text Part V.

228. OKLA. STAT. tit. 2 § 9-212(F)(2) (West 1998).

229. Telephone Conversation with Tina Gunter, Staff Attorney for the Oklahoma Board of Agriculture (May 11, 2000).

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