

A large indoor poultry farm with many white chickens in cages. The chickens are densely packed in rows of cages that stretch into the distance. The farm has a high ceiling with wooden beams and large windows on the right side. Red hanging feeders are visible above the cages.

# Environmental and Land Use Issues for Poultry Production

a/k/a

## How to Keep Your Poultry Operation in Local, State and Federal Compliance

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# Overview

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- Zoning and Land Use
  - Many legal aspects of animal agriculture relate to land use
  - Nuisance claims, waste runoff, and conditional or special uses are common causes of conflict
  - Approval or denial of conditional or special uses
    - What is in the county zoning board's discretion
    - What is mandated by state statute
    - Options for dealing with potential conflicts
- Livestock Waste Control under the Clean Water Act
  - Who needs an NPDES Permit
  - Recent legal challenges
  - What to do when you get an inspection
- Nuisance and Right to Farm

# CAFO's

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- Also called:
  - Animal Feeding Operations (AFOs), Concentrated Animal Feeding Operations (CAFO's), Livestock Feeding Operations (LFOs), Confined Animal Feeding, or Intensive Animal Feeding
- Operations which raise and feed animals in a confined space.
- Typically considered conditional or special uses in areas zoned for agriculture



# Conditional or Special Uses

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- Depending on the number of animal units, your poultry operation may need a Conditional Use Permit or a Special Use Permit
- “[T]hose uses specifically identified in the county zoning regulations as classifications of uses which may require special conditions or requirements to be met by the owners before a use permit or building permit is authorized.”
  - **Neb. Rev. Stat. § 23-114.01(4)**

# Conditional or Special Uses

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- “[T]he county board of commissioners or supervisors may choose to retain for itself the power to grant conditional uses or special exceptions for those classifications of uses specified in the county zoning regulations.”
- Alternatively:
  - The Planning Commission “may grant conditional uses or special exceptions to property owners for the use of their property if”
    - The county board of commissioners or supervisors has so authorized the commission AND
    - Has approved the standards and procedures the commission adopted for equitably and judiciously granting such conditional or special uses
      - **Neb. Rev. Stat. § 23-114.01(4).**
- Almost always done in concert



# **Application Requirements**

# Application for a Conditional or Special Use

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- Application requirements are governed by county regulations
  - Requirements vary widely by county
- At a minimum, generally:
  - Must be in writing
  - Must state location of property
  - Must describe proposed use of property

# Application Examples

## ■ Buffalo County

- “Livestock confinement facilities/operations defined by Article 3 or Class III or larger shall be allowed only by special permit in the AG Agricultural District.”
- “Such application shall be in writing, filed in the Office of the County Clerk, state the proposed location and use of the property, and such other relevant matters as may be requested by the County.”

	Class I	Class II	Class III	Class IV
Total Animal Units*	1 – 300	301 – 2500	2501 – 10,000	10,001 +
Chickens (x .01)	1 – 30,000	30,001 – 250,000	250,001 – 1,000,000	1,000,001 +
Turkeys (x .02)	1 – 15,000	15,001 – 125,000	125,001 – 500,000	500,001 +
Ducks (x .2)	1 – 1500	1501 – 12,500	12,501 – 50,000	50,001 +

\*1 animal unit is based on slaughter and feeder cattle (*See Buffalo County Zoning Regulations, Article 6, § 4*)

# Application Examples

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## ■ Cherry County

- “Agricultural Use” generally does not require a permit in the two agricultural districts
- “Agricultural Use” means “[t]he business and science of cultivating the soil, producing crops or breeding, feeding, pasturing of livestock . . . Buffalo, elk, and other animals, dairying, raising and management of poultry, fish, bees and other animals . . .”
- “Agricultural Use” does not mean: a confined or intensive animal feeding use
- Confined and intensive animal feeding uses: conditional uses
  - 300 or more animal units
    - 30,000 or more chickens
    - 15,000 or more turkeys

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# **Minimum Setback Requirements for Animal Feeding Operations**

# Minimum Setback Requirements:

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## ■ Buffalo County

■ Minimum distances from a residence, industrial or commercial facility, church, school, etc:

- 1 to 300 animal units: No Minimum
  - Up to 30,000 chickens; 15,000 turkeys; 1500 ducks
- 301 to 1,000 animal units: ¼ Mile
  - Up to 100,000 chickens; 50,000 turkeys; 5,000 ducks
- 1,001 to 5,000 animal units: ½ Mile
  - Up to 500,000 chickens; 250,000 turkeys; 25,000 ducks
- 5,001 to 10,000 animal units: ¾ Mile
  - Up to 1,000,000 chickens; 500,000 turkeys; 250,000 ducks
- 10,001 animal units and above: 1 Mile

# Minimum Setback Requirements:

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## ■ Cuming County

- New non-farm residences, as defined in the regulations, shall be located no less than 3,960 feet (3/4 mile) from a livestock operation or LFO under 5,000 animal units and 5,280 feet (one mile) from LFOs having more than 5,000 animal units.
  - 5,000 animal units = 500,000 chickens; 250,000 turkeys or ducks
- 1 animal unit = 100 Chickens;
- 1 animal unit = 50 Turkeys;
- 1 animal unit = 50 Ducks

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# **The Process of Obtaining a Conditional or Special Use Permit**

# Typical Example: Buffalo County

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- Upon receipt, the zoning administrator forwards application to the Planning Commission for recommendation
- Upon hearing, the Planning Commission forwards its recommendation to the County Board within 30 days
- Upon hearing, the County Board allows or denies the application in whole or in part or prescribes terms
  - Two hearings are required in total; Notice provisions must also be complied with for both hearings
    - Record – recorded and proper minutes
    - Typically like a trial with exhibits either for or against marked and offered

# Statutory Requirements for Conditional or Special Use Permits

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- Adopted in 2003 by LB 754
- (6) “[T]he planning commission or county board **shall**, with its decision to grant or deny a conditional use permit or special exception, **issue a statement of factual findings arising from the record of proceedings that support the granting or denial. . .**”
  - **Neb. Rev. Stat. § 23-114.01**
- Issuing authority **MUST** issue findings of fact.

# Livestock Waste Management Act

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- 54-2437(1): A county planning commission or county board **shall** grant a conditional use permit or special exception to an existing animal feeding operation seeking to construct or modify a livestock waste control facility if:
  - the purpose is to comply with federal or state regulations pertaining to livestock waste management,
  - the operation has complied with inspection requirements pursuant to section 54-2423, **and**
  - The construction or modification of the livestock waste control facility will not increase the animal capacity of such operation
- **Essentially any existing animal feeding operation can get a conditional use permit**

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# **Appealing the Denial of a Permit**

# Conditional Use Permits & Special Exceptions Under § 23-114.01

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(5) In any county other than a county in which is located a city of the primary class, an appeal of a decision by the county planning commission or county board of commissioners or supervisors regarding a conditional use or special exception **shall be made to the District Court.**

# *In re Olmer*, 275 Neb. 852 (2008)

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- A denial of Olmer's application for a conditional use permit by the board of commissioners was appealed to the District Court, and then the Nebraska Supreme Court.
- The issue in the case was whether Olmer was allowed a new trial when appealing to the District Court.
- The Supreme Court found that "appeals from a planning commission, county board, or board of supervisors are not to be made to the board of adjustment. Instead, these appeals are now taken directly to the district court," and that such appeals are to be considered "de novo".



# **Role of Board of Adjustment in Animal Agriculture**

# Neb. Rev. Stat. § 23-168.01 et seq.:

## Board of Adjustment

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- Consists of 5 members, one of which must be from the Planning Commission
  - **Neb. Rev. Stat. § 23-168.01**
- The Board is granted only limited powers:
  - To hear and decide appeals when an error is alleged in any order, requirement, decision, or refusal made by an administrative official or agency based on or made in the enforcement of any zoning regulation
  - To hear and decide requests for interpretation of any map
  - To grant variances, subject to statutory limitations
    - **Neb. Rev. Stat. § 23-168.03**

# Appeals *to* the Board of Adjustment

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- May be taken by “any person or persons aggrieved, or by any officer, department, board, or bureau of the county affected by any decision of an administrative officer or planning commission.”
  - **Neb. Rev. Stat. § 23-168.02(1)**
- Does not include appeal of the denial of a conditional use permit
  - Remember *In Re Olmer*
- Statutory Requirements:
  - Taken within a reasonable time (as determined by the rules of Board)
  - Filing a notice of appeal with the Board specifying the grounds

# *Hanchera v. Board of Adjustment, Red Willow County, 269 Neb. 623 (2005)*

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- Red Willow County Board passed county zoning regulations which limited placement of CAFO's
- Furnas County Farms, with knowledge of the zoning regulations, started construction on a CAFO after the regulations were passed, but before they went into effect
- The Zoning Administrator, affirmed by the Board of Adjustment, found that because substantial construction had begun, it was outside the newly passed zoning regulations
- However, the Nebraska Supreme Court reversed and remanded to the District Court with instructions to remand back to the Board of Adjustment
- Because Furnas County Farms did not act in “good faith” (meaning that they had knowledge of the impending regulations), they were to be governed by the new regulations

# *Hanchera v. Board of Adjustment:* Standards

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- The Standard of Review at the District Court:
  - “A district court may disturb the decision of a board of adjustment if the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong.”
- The Standard of Review at the Appellate Court:
  - “In appeals involving a decision of a board of adjustment, an appellate court reviews the decision of the district court, and . . . The appellate court is to decide if . . . The district court abused its discretion or made an error of law”
- These are fairly deferential standards



# **Livestock Waste under the Clean Water Act**

# Applicable Laws

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- Clean Water Act
- Nebraska Environmental Protection Act
- Nebraska Livestock Waste Management Act
- Title 130 of the Nebraska Administrative Code
  - Under the Clean Water Act, primary jurisdiction and enforcement has been delegated by the federal Environmental Protection Agency (EPA) to the Nebraska Department of Environmental Quality (NDEQ)
  - However, EPA has retained concurrent enforcement jurisdiction, which means that EPA can inspect facilities on its own

# Animal Feeding Operations

130 Nebraska Administrative Code §§ 1-024, 1-029

<b>Species</b>	<b>Large AFO (No. of head)</b>	<b>Medium AFO (No. of head)</b>	<b>Small AFO</b>
Cattle/Veal Calves	1,000	300 - 999	Small AFOs are those operations with less than the number of animals at a Medium AFO
Dairy Cows (mature)	700	200 - 699	
Swine ≥55 lbs.	2,500	750 - 2,499	
Swine < 55 lbs.	10,000	3,000 - 9,999	
Sheep/Lambs	10,000	3,000 - 9,999	
Chickens – Laying Hens, Broilers With liquid manure system	30,000	9,000 - 29,999	
Chickens – Laying Hens No liquid manure system	82,000	25,000 - 81,999	
Chickens – Other than layers No liquid manure system	125,000	37,500 - 124,999	
Turkeys	55,000	16,500 - 54,999	
Horses	500	150 - 499	



# **Types of Permits**



# NPDES Permit

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- National Pollutant Discharge Elimination System Permit
- Required for owners and operators of CAFO's who discharge
- If you confine animals for at least 45 days within a 12-month period, and no grass or other vegetation (including post-harvest plant residue) exists in the confinement area, you may need to submit an application for a NPDES Permit
- Not required for “small animal feeding operations” (130 Neb. Admin. Code § 2-001
  - Unless the AFO has discharged pollutants or the NDEQ has determined that discharge is more likely than not to occur

# NPDES Permit

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- Individual Permit
- General Permit
- The permit does not supersede or remove liability from compliance with county and other local ordinances, other state and federal laws.
- Effluent Limitations
  - 25-year, 24-hour rainfall event
  - May request alternative, site-specific limitations under 130 Neb. Admin. Code § 7-004

# Construction and Operating Permit

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- The state permit to construct and operate a livestock waste control facility, including conditions imposed on the livestock waste control facility and the associated animal feeding operation.
- “Livestock waste control facility” means any structure or combination of structures utilized to control livestock waste until it can be used, recycled, or disposed of in an environmentally acceptable manner.
  - Such structures include diversion terraces, holding ponds, settling basins, liquid manure storage pits, lagoons, and other such devices utilized to control livestock wastes. 130 Neb. Admin Code § 1-026

# Record Keeping Guidance

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- 130 Neb. Admin. Code, Chapter 12
- All permittees and all recipients of construction approvals are required to have routine inspections conducted of the production area, irrigation distribution system, and land application
- Must keep records for five years

# Inspection

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- Inspectors
  - NDEQ Inspectors
  - EPA Inspectors
  
- Routine Inspections
  - Routine Inspection Checklist
    - Records and Record Keeping;
    - Ground Water Monitoring (if applicable);
    - Nutrient Management Plan Requirements;
    - Operational Maintenance Plan; and
    - Animal Feeding Operation (general) and site-specific requirements

# Inspection

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- Complaint-driven Inspections
  - Calls, letters, or e-mails from neighbors or others
  - Generally confidential under Nebraska State Law
  - Focus on certain problems (e.g., potential discharge)
  - Complaint Investigation Report
- Keys under either inspection
  - Cooperation
  - Produce and permit inspection of applicable records

# Inspection

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## When the Inspector Leaves

- Routine Inspection
  - NDEQ will send a letter with the Routine Inspection Checklist form
  
- Complaint-driven Inspection
  - Letter of Warning (LOW)
    - Provides guidance that deficiencies were noted and need to be corrected
  - Notice of Violation (NOV)
    - NOV is more serious and usually provides a specific deadline for deficiencies to be corrected
    - Usually indicates that NDEQ reserves the right to proceed further including seeking the imposition of civil penalties

# Inspection

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- NDEQ Enforcement Options
  - Under NEPA, NDEQ does not have the power to levy civil penalties
  - May refer the case to the Nebraska Attorney General's Office
  - Administrative complaints seeking compliance
    - Requires response within 30 days
  
- EPA Enforcement Options
  - Court action
  - Internal Administrative Complaints



# **Nuisance and Right to Farm**

# *Stephens v. Pillen*, 12 Neb. App. 600 (2004)

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- Eighteen neighboring landowners brought private nuisance action against property owner who operated four hog confinement facility. The lawsuit primarily focused on odors from the facility. The district court ultimately found that the plaintiffs had proven that the four hog confinement facilities constituted an intentional nuisance.
- The court ordered the defendants to explore the utility of processes to mitigate the odors from the facilities and to implement such processes.
- “[W]ithin [a] twelve (12) month period, the Defendants are ordered to abate the nuisance or cease operating their facilities which are subject to this lawsuit.”
- The district court did not award monetary damages, and the Plaintiffs appealed.
- “We find that the district court was correct in finding a private nuisance and granting injunctive relief. We further find that the district court was correct in denying monetary damages to some of the plaintiffs. However, we also find that the district court was incorrect in denying monetary damages to some of the plaintiffs.”

# *Stephens v. Pillen*, 12 Neb. App. 600 (2004)

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- “A private nuisance is a nontrespasory invasion of another's interest in the private use and enjoyment of his or her land.”
- “[O]ne is subject to liability for a private nuisance if, but only if, his or her conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land and the invasion is intentional and unreasonable.”
- “An intentional invasion of another's interest in the private use and enjoyment of land exists when an actor purposefully causes the invasion, knows that the invasion is resulting from the actor's conduct, or knows that the invasion is substantially certain to result from the actor's conduct.”
- The court focused on the change in the quality of life in the plaintiffs

# *Stephens v. Pillen*, 12 Neb. App. 600 (2004)

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- On remand, the district court reconsidered the evidence and heard additional arguments of counsel on the issue of damages. The court awarded damages as follows: \$10,000 each to two plaintiffs, \$5,000 each to two plaintiffs, \$2,500 each to two plaintiffs, and \$1,500 each to the remaining plaintiffs.
  - The two plaintiffs who received \$10,000 each presented “compelling testimony as to the effect that the permeating odor had on their lifestyles.”
- Award of damages was affirmed by the Court of Appeals
  - *Stephens v. Pillen*, 2006 WL 2805667 (Neb. Ct. App. Oct. 3, 2006)

# Nebraska Right to Farm Act

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- **Neb. Rev. Stat. §§ 2-4401 to 2-4404**
- **Neb. Rev. Stat. § 2-4402:**
  - (1) Farm or farm operation means any tract of land over ten acres in area used for or devoted to the commercial production of farm products;
  - (2) Farm product means those plants and animals useful to man and includes, but is not limited to, forages and sod crops, grains and feed crops, dairy and dairy products, poultry and poultry products, livestock, including breeding and grazing, fruits, vegetables, flowers, seeds, grasses, trees, fish, apiaries, equine and other similar products, or any other product which incorporates the use of food, feed, fiber, or fur; and
  - (3) Public grain warehouse or public grain warehouse operation means any grain elevator building or receptacle in which grain is held for longer than ten days and includes, but is not limited to, all buildings, elevators, and warehouses consisting of one or more warehouse sections within the confines of a city, township, county, or state that are considered a single delivery point with the capability to receive, load out, weigh, and store grain.

# Nebraska Right to Farm Act

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**Neb. Rev. Stat. § 2-4403:**

- **A farm or farm operation** or a public grain warehouse or public grain warehouse operation **shall not be found to be a public or private nuisance if the farm** or farm operation or public grain warehouse or public grain warehouse operation **existed before a change in the land use or occupancy of land** in and about the locality of such farm or farm operation or public grain warehouse or public grain warehouse operation and before such change in land use or occupancy of land the farm or farm operation or public grain warehouse operation would not have been a nuisance.

# Nebraska Right to Farm Act

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- Was the agricultural operation a nuisance before the change in the surrounding area?
- If the operation was not a nuisance before, then the “operation shall not be found to be a public or private nuisance.”
- But, note that the Right to Farm Act does not apply to when “there was not a change in the land use or occupancy of land in and about the locality” of a farm operation after the commencement or a change in the operation of the facility.
  - *Cline v. Franklin Pork, Inc.*, 219 Neb. 234, 240 (1985)

# Nebraska Right to Farm Act

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- In a case styled *Bolton v. M Farm, Inc.* in the District Court of York County, the issue of the applicability of the Right to Farm Act was addressed in a 2003 case. In that case, the District Court framed whether the Nebraska Right to Farm Act applies as follows:

- If:
1. The residential home site underwent a change in land use or occupancy;
  2. The commercial feedlot operation existed before such change in the land use or occupancy of the residential home site; and
  3. Before such change in land use or occupancy of the residential home site, the operation would not have been a nuisance, then, the operation shall not be found to be a public or private nuisance.

- Following a four day trial, the District Court concluded that the Nebraska Right to Farm Act applied and therefore the commercial feedlot operation cannot be found to be a public or private nuisance, cannot be enjoined and cannot be assessed damages for the creation or maintenance of a nuisance.

# *Oklahoma v. Tyson Foods, Inc.*

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2010 WL 653032 (N.D. Okla. Feb. 17, 2010)

- The Oklahoma Attorney General filed a complaint against several Arkansas-based poultry producers in June 2005
  
- Alleged that poultry litter is a hazardous substance and should not be used as fertilizer
  - Alleged that the litter was polluting the Illinois River Watershed (IRW) and increasing the presence of bacteria in the water
  - Sought to force the producers to remove the litter from the IRW
  
- Basis for lawsuit:
  - CERCLA (Comprehensive, Environmental Response, Compensation and Liability Act)
  - RCRA (Resource Conservation and Recovery Act)
  - State law
  - Common law nuisance and trespass

# *Oklahoma v. Tyson Foods, Inc.*

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- The court found that the application of poultry litter as fertilizer did not constitute a nuisance *per se* under Oklahoma law.
  - “In other words, poultry litter does not always cause a nuisance at all times and under any circumstances, regardless of where or how much is applied.”
- The State failed to show that land application of poultry litter in the IRW caused the presence of pathogenic bacteria in the waters of the IRW, or created a risk to health or the environment.
- Poultry litter is not “solid waste” under RCRA, but rather was a commodity for which a market exists, as well as a beneficial use
- The remainder of claims were settled out-of-court
  - Defendants paid \$7.5 million to the state and implemented improved waste management techniques

# Questions?

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