NOT IN MY NEIGHBORHOOD: THE FIGHT AGAINST LARGE-SCALE ANIMAL FEEDING OPERATIONS IN RURAL IOWA, PREEMPTIVE TACTICS, AND THE DOCTRINE OF ANTICIPATORY NUISANCE

TABLE OF CONTENTS

I. INTRODUCTION

Imagine yourself as a farmer living in rural Iowa. Imagine being the second or third generation of farmers to care for a piece of land and make it your home, as your parents and your grandparents did before you. You take pride in your home and you cherish your way of life. You have always enjoyed the clean air, fresh water, and quality of life that your small community provides. Now imagine receiving news that a large-scale animal feeding operation, a facility that will hold approximately 6000 head of swine and will produce approximately 6,000,000 gallons of manure each year, plans to move in right next door.[1] You are aware of the potential impact such a facility could have on your home and your community as you have learned of the potential adverse health and environmental implications such facilities present. You are also aware that the property value of your land and home will be jeopardized by the establishment of this massive facility.[2] You begin to fear that the way of life you have grown to cherish, the only life you have ever known, is about to change in a major way. You begin to wonder if there is any means by which you can protect your way of life and preserve the current condition of your land for your children. Can you make this potential neighbor go away, or are you and your similarly situated neighbors helpless in the face of increasing large-scale agricultural production?

This dilemma is a growing trend in the rural communities across the United States which have traditionally been home to the livestock production industry.[3] Iowa has long been an attractive site for livestock production given its relatively small population, its need for fertilizer to support the large amount of crops produced each year in its agricultural sector (animal manure is often used to fertilize such crops), and its low cost for animal feed.[4] However, over the past twenty years, there has been a substantial change in the structure and composition of the livestock feeding industry in rural Iowa, making it increasingly difficult to establish animal

1. *See, e.g.*, Scott Niles, *Residents Raise Stink*, THE OTTUMWA COURIER, Aug. 10, 2005, at A1 (reporting the proposed establishment of a 5900 head hog facility near Batavia, Iowa).

2. *See* Joseph A. Herriges et al., *Living with Hogs in Iowa: The Impact of Livestock Facilities on Rural Residential Property Values* 16 (Ctr. for Agric. & Rural Dev., Iowa State Univ., Working Paper No. 03-WP 342, 2003) (noting that animal feeding operations have a statistically significant effect on the property values of residents living in close proximity to such operations).

3. *See id.* at 1 (detailing the problems associated with the introduction of large-scale animal feeding operations into rural Iowa communities).

4. *See id.* at 18.

feeding operations in rural communities where the interest in building an economically profitable industry clashes with the interest of rural residents in protecting their way of life.[5] The transformation in the composition and structure of livestock operations in the United States, and specifically in Iowa, is characterized by a significant reduction in smaller family-owned livestock operations on traditional family farms and a substantial increase in the number of heavily concentrated large-scale livestock production facilities.[6] While it was once common for many rural neighbors to own livestock (in substantially smaller concentrations) and to share in the benefits of the livestock production industry, there are now fewer farms for such production, yet the concentrations of livestock among farms and facilities that produce such livestock have reached epidemic proportions.[7] Adding to the increase in livestock concentration among existing production facilities is the fact that the number of such facilities producing livestock in heavy concentrations has also been on the rise.[8]

The increase in the size and number of large animal feeding operations in Iowa has given rural residents ample cause for alarm.[9] A major concern is the amount of animal waste produced by such facilities; waste which contains hazardous and volatile compounds capable of transmission through the air, surface water, and groundwater.[10] Hogs grown in concentrated animal feeding operations produce approximately fifteen pounds of waste per day, an amount three times greater than a human is capable of producing.[11] This waste of course must be disposed of,

5. *See id.* at 1.

6. *Id.*; KERR CTR. FOR SUSTAINABLE AGRIC., INC., RURAL COMMUNITIES AND CAFOS: NEW IDEAS FOR RESOLVING CONFLICT 1 (2000), http://www.kerrcenter.com/publications/CAFO.pdf.

7. *See* Herriges et al., *supra* note 2, at 1 ("In 1980, [in Iowa,] approximately 65,000 farmers in the state raised hogs, with an average of 200 hogs residing on each farm. In 2002, the number of farms with hogs had fallen to about 10,000; [however,] the average number of hogs per farm had risen to over 1,400."); KERR CTR. FOR SUSTAINABLE AGRIC., INC., *supra* note 6, at 1 (indicating that between 1987 and 1992, the number of hogs in farming operations in the United States increased by 134%).

8. KERR CTR. FOR SUSTAINABLE AGRIC., INC., *supra* note 6, at 1.

9. *See generally* Niles, *supra* note 1, at A1 (reporting citizens' concerns regarding the effects a large-scale animal feeding operation will have on their community).

10. *See* U.S. ENVTL. PROT. AGENCY, OFFICE OF WATER STANDARDS & APPLIED SCIS. DIV., ENVIRONMENTAL IMPACTS OF ANIMAL FEEDING OPERATIONS 11 (1998), http://www.epa.gov/waterscience/guide/feedlots/envimpct.pdf.

11. KERR CTR. FOR SUSTAINABLE AGRIC., INC., *supra* note 6, at 1.

and is often stored in large manure lagoons or applied to adjoining fields.[12] Such practices can produce odor which at times is unbearable,[13] and the fear of environmental contamination and adverse health effects is ever-present.[14]

Rural Iowans are not ignorant to the potential impact such operations may have on their communities, as findings and studies detailing the adverse environmental, health, economic, and social impacts of large-scale animal feeding operations coupled with "incidents of waste spills, excessive runoff [of manure], leaking storage lagoons, and odor problems, have heightened public awareness."[15] There is also concern that "increased concentration of the industry may be accompanied by an increased risk of environmental damage due to manure spills and further degradation of local air quality as the result of odor emanating from large-scale hog facilities."[16] While the smell of livestock manure may be the smell of money to some, to others it is the smell of a burden that must be tolerated and dealt with on a regular basis.[17] This phenomenon has created considerable tension between residents who wish to preserve the quality of life their rural communities provide and the owners of large-scale animal feeding operations who have somewhat differing interests—mainly to generate profits from the livestock operations that the rural area in question allows them to conduct.[18]

It is therefore easy to understand why many rural Iowans would be adamantly opposed to having large-scale animal feeding operations constructed in their neighborhood, especially right next door to their homes.[19] The real question and the subject of this Note is what, if anything, rural Iowans can do to prevent the establishment of such operations.

---

12. *See* U.S. ENVTL. PROT. AGENCY, OFFICE OF WATER STANDARDS & APPLIED SCIS. DIV., *supra* note 10, at 11.

13. *See* Valasek v. Baer, 401 N.W.2d 33, 34 (Iowa 1987) (noting that the spreading of manure on adjoining lands created extremely offensive odors which were often described as "'nauseating'" and "'worse than pig manure'").

14. *See generally* U.S. ENVTL. PROT. AGENCY, OFFICE OF WATER STANDARDS & APPLIED SCIS. DIV., *supra* note 10, at 1 (discussing the environmental impacts and health implications of large-scale animal feeding operations).

15. *Id.* at 1.

16. Herriges et al., *supra* note 2, at 1.

17. *See id.*

18. *See id.* (discussing the growing conflict between local residents and neighboring animal feeding operations).

19. *See* Niles, *supra* note 1, at A1; *see also* Associated Press, *Big Hog Lots Face New Protest*, DES MOINES REG., Sept. 29, 1999, at 8M; Jennifer Dukes Lee, *Hog Unit Frustrates Story County Residents*, DES MOINES REG., May 3, 2000, at A1.

The goal of this Note is not to denigrate the animal livestock industry in Iowa, nor to argue for the complete eradication of large-scale feeding operations. Rather, this Note merely addresses a common dilemma present in rural Iowa communities and addresses the means by which rural Iowans may attempt to prevent large-scale animal feeding operations from being constructed near their homes. Part II of this Note will explore in more detail the various impacts large-scale animal feeding operations may have on rural Iowa communities and set forth the reasons why rural Iowans claim to have a legitimate interest in preventing the establishment of such operations near their homes. Part III of this Note will discuss actions under traditional Iowa nuisance laws that are potential weapons in the fight against the practices of large-scale animal feeding operations. Part III will also discuss reasons why such actions are likely to obtain suboptimal results when the ultimate goal of some rural Iowans is to prevent large-scale animal feeding operations from existing in their communities altogether.[20] Finally, Part IV of this Note will propose an alternative solution to filing a nuisance claim against animal feeding operations after they have been established and will discuss the importance of preemptive action in contesting the establishment of such operations. Part IV focuses on the doctrine of anticipatory nuisance as a remedial measure which may allow for the imposition of an injunction before such operations come to fruition under the proper circumstances.

II. WHY ALL THE FUSS? THE POTENTIAL IMPACT OF LARGE-SCALE ANIMAL FEEDING OPERATIONS ON RURAL COMMUNITIES

In order to fully understand the opposition to large-scale animal feeding operations in rural communities, it is important to understand the reasons why many Iowans are apprehensive of having such facilities constructed in their neighborhoods. Numerous studies have been conducted and reports issued detailing the substantial environmental, social, and economic impact livestock facilities have on the communities in

20. *See, e.g.*, Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168, 180–81 (Iowa 2004) (finding sufficient evidence to rule the defendant's hog confinement was a nuisance); Weinhold v. Wolff, 555 N.W.2d 454, 463 (Iowa 1996) (refusing to grant an injunction on grounds that such an injunction would work as an inequitable and impractical solution given that it would result in the closing of an entire livestock production facility); *see also* Jeff L. Lewin, *Compensated Injunctions and the Evolution of Nuisance Law*, 71 IOWA L. REV. 775, 802 (1986) (explaining that "efficiency concerns predominate in the selection of an appropriate remedy [in nuisance suits], with a general presumption against unconditional injunctive relief for prevailing plaintiffs").

which they are imbedded.[21] The results of these studies have been available to the public for some time now, and rural Iowans are becoming increasingly well-informed of the potential adverse effects such facilities may have on their way of life.[22] Fear of environmental contamination and potential adverse health effects, coupled with reduced property values and a general reduction in the quality of life and enjoyment of rural landowners' property dominate the concerns pertaining to these facilities. This section will discuss, in some detail, the potential adverse consequences of animal feeding operations which have provided cause for alarm.

A. *Economic Impact and Reduced Property Values*

One of the major concerns associated with the establishment of large-scale animal feeding operations in rural communities is the effect on local economies and the reduction in property values generally associated with having such facilities located in close proximity to rural Iowans' homes and places of business. The main culprit responsible for the depreciation in property value is the unpleasant odors emanating from large-scale livestock facilities.[23] Odors from large-scale feeding operations generally originate from buildings housing livestock, waste storage and treatment processes, land application of manure, and disposal of dead animal carcasses.[24] As previously mentioned, large-scale animal feeding operations can produce millions of gallons of manure each year. Decomposition of such manure produces odor emissions consisting of a complex mixture of gases (most notably ammonia and hydrogen sulfide), vapors, dust, and volatile compounds which can travel quite some distance from their original point source and affect neighboring property.[25] Common attributes of such odor emissions are "[t]he characteristic smell of ammonia and the familiar 'rotten egg' odor of hydrogen sulfide."[26] Individuals living near such operations have described the smell as "nauseating," "like an open septic tank," "like a battery overcharged—kind of an acid smell," and other

21. *E.g.*, KERR CTR. FOR SUSTAINABLE AGRIC., INC., *supra* note 6, at 2.

22. *See* U.S. ENVTL. PROT. AGENCY, OFFICE OF WATER STANDARDS & APPLIED SCIS. DIV., *supra* note 10, at 1.

23. *See Weinhold*, 555 N.W.2d at 467 (remanding case to determine the amount of diminution in property value caused by offensive odors). *See generally* Herriges et al., *supra* note 2 (examining impact on property values).

24. AMY CHAPIN ET AL., CONTROLLING ODOR AND GASEOUS EMISSION PROBLEMS FROM INDUSTRIAL SWINE FACILITIES: A HANDBOOK FOR ALL INTERESTED PARTIES § 2.2.1 (1998), http://www.kerrcenter.com/publications/Controlling_Odor.pdf.

25. *Id.* § 2.1.

26. *Id.*

similarly descriptive phrases.[27]

It is understandable why many people, anticipating a reduction in property values due to the tainted air, would be hesitant to live or open a business near such a facility.[28] An important question is, therefore, to what extent and under what circumstances are rural property values reduced where an individual's property is located near a large-scale animal feeding operation. In 2003, Iowa State University conducted a comprehensive study and issued a report providing answers to this question in some detail.[29] The results of the report demonstrated that livestock operations in general "have a significant effect on rural residential property values," with the most notable negative effects observed on property located downwind and in close proximity to livestock operations.[30] Individuals living downwind and within a quarter of a mile of an animal feeding operation experienced or would experience an estimated 11% to 26% reduction in property values depending on the size of the facility.[31] Additionally, properties located downwind and approximately one-half of a mile from such an animal confinement facility experienced or would experience an 8% to 18% reduction in value depending on the size of the neighboring facility.[32] Even where properties are located a quarter of a mile upwind from an animal feeding operation, the Iowa State study demonstrated that such properties would experience a reduction in value of up to 22%.[33] The Iowa State study demonstrates that the establishment of an animal feeding operation in a given community will generally have adverse effects on the property values of neighbors' homes and businesses.[34] Thus, reduced property values have been considered an element of damages in many nuisance suits against animal feeding operations in Iowa.[35]

---

27. *Weinhold*, 555 N.W.2d at 460.

28. The plight of course would be more intense for those who have already established homes and businesses in such a community and have no choice as to whether their place of residence or business will be located near an animal feeding operation. *See, e.g.*, Niles, *supra* note 1, at A1 (reporting citizen resistance to the proposed establishment of a large-scale animal feeding operation).

29. *See* Staci Hupp, *Study Says Hog Lots Hurt Value of Property*, DES MOINES REG., Aug. 28, 2003, at A1 (reporting the results of the Iowa State University study by I.S.U.'s Center for Agricultural and Rural Development). *See generally* Herriges et al., *supra* note 2.

30. Herriges et al., *supra* note 2, at 16.

31. *Id.* at 19 tbl.6A.

32. *Id.* tbl.6B.

33. *Id.* tbl.6A.

34. *Id.* at 18.

35. *See, e.g.*, Weinhold v. Wolff, 555 N.W.2d 454, 467 (Iowa 1996).

In addition to the adverse effect on property values, several studies have also found that odors emitted from livestock feeding operations can have adverse effects on the economy.[36] For example, results from certain studies measuring the economic impact of swine facilities on local economies have found such facilities promote declines in the general population of the community where they are located, which in turn can produce "lower mean income, fewer community services, less retail trade, more unemployment, [and] less participation in democratic processes."[37] Furthermore, foul odor permeating the air can "sway consumers away from local businesses, such as grocery stores or other small establishments" located downwind from animal feeding operations.[38]

The aforementioned studies demonstrate that the establishment of a large-scale animal feeding operation in a rural Iowa community can have adverse effects on the economy and may reduce property values of local residents' homes and businesses. Whether this is the case in every circumstance is of little consequence when it comes to allaying the fears of residents who, having received news that a large animal confinement facility plans to set up operations in their area, naturally anticipate the worst.

B. *Impacts on the Environment and the Health of Individuals*

In addition to the economic impact on rural Iowan communities, another major concern is the environmental impacts posed by such facilities, including concerns about pollution and environmental contamination.[39] Such concerns are legitimated by recent studies detailing the varying impacts animal feeding operations can have on the environment, which can, in turn, affect the health of those who live near such facilities.[40]

The Environmental Protection Agency (EPA) has concluded that "animal feeding operations . . . are a significant source of water pollution in

36. *See, e.g.*, CHAPIN ET AL., *supra* note 24, § 2.2.6.

37. *Id.*

38. *Id.*; *see also Weinhold*, 555 N.W.2d at 460 (finding that certain individuals "were at [plaintiffs'] home for business reasons and described terminating their visits abruptly because of the strong odor").

39. *See generally* U.S. ENVTL. PROT. AGENCY, OFFICE OF WATER STANDARDS & APPLIED SCIS. DIV., *supra* note 10, at 1.

40. *See, e.g.*, *id.* (discussing the environmental impacts and health implications of large-scale animal feeding operations).

the U.S."[41] In 1996, studies revealed that agricultural operations contributed "to the impairment of at least 173,629 river miles, 3,183,159 lake acres, and 2,971 estuary square miles;" 20% of that contamination was attributed to animal feeding operations.[42] In addition, studies reveal that animal feeding operations have contributed to a considerable number of reported fish kills in the United States.[43] Such incidents are not foreign to Iowa, where animal feeding operations have been fined considerable amounts of money for discharging excessive amounts of manure into local waters.[44]

The main source of pollution associated with animal feeding operations is manure, which emits compounds such as ammonia, hydrogen sulfide, methane, and carbon dioxide, and also contains solids, pathogens, odorous compounds, trace metals, antibiotics, pesticides, and hormones.[45] These pollutants can reach surface and groundwater in a number of ways, including direct discharges of manure into waterways, leaching, surface runoff, erosion, and atmospheric deposition (where pollutants in gas form emitted from decomposing manure are redeposited back on earth and into bodies of water).[46] Problems of pollution associated with animal manure usually arise where manure is land-applied to fields in excess of crop nutrient requirements (meaning that manure is applied as fertilizer to land in amounts exceeding that which crops can absorb).[47] Where the practice of applying excessive amounts of manure to fields exists, the potential for nearby bodies of water to be contaminated by leaching, surface runoff, and drainage through field tile lines significantly increases.[48] There is also the fear that manure may escape from storage basins and lagoons due to excessive stockpiling, which can have adverse consequences on local bodies of water.[49]

---

41. *Id.*

42. *Id.*

43. *Id.*

44. *See* Perry Beeman, *Hog-Manure Spill Kills 33,000 Fish in North Iowa*, DES MOINES REG., July 25, 2001, at A1 (reporting a 5000-gallon manure spill from a 4200-head hog facility in Chickasaw County, Iowa, killing 33,000 fish in a nearby creek).

45. *See* U.S. ENVTL. PROT. AGENCY, OFFICE OF WATER STANDARDS & APPLIED SCIS. DIV., *supra* note 10, at 6.

46. *Id.*

47. *Id.* at 1.

48. Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 494 (2d Cir. 2005).

49. *Id.*; Perry Beeman, *Hog Ponds Endanger Iowa Water, Study Says*, DES MOINES REG., Jan. 31, 2002, at 1A (reporting the threats posed by Iowa hog manure lagoons to Iowa's drinking water supplies and rivers); *see* KERR CTR. FOR

The discharge of pollutants from animal waste into bodies of water can have severe impacts on the environment and can threaten the health of humans and animals.[50] For example, concentrations of nitrate can contaminate ground and surface water which, in turn, can reach drinking water supplies.[51] As nitrogen is a common component in animal manure, when discharged, it can easily be converted into nitrate form.[52] Where nitrate reaches drinking water through means such as leaching into underground aquifers, it can adversely affect human health and poses potentially fatal health risks to infants.[53] Nitrate exposure through drinking water contamination is not as uncommon as one may think; the EPA released a report in 1998 identifying nitrate as "the most widespread agricultural contaminant in drinking water wells, and estimat[ing] that 4.5 million people are exposed to elevated nitrate levels from drinking water wells."[54] This is an alarming statistic for individuals who obtain their drinking water from wells or underground aquifers in areas which are host to agricultural operations such as animal confinement facilities—a common source of nitrogen pollution. In addition to the nitrate threat, leaching salts discharged from animal waste can also cause groundwater to become unsuitable for human consumption.[55] Thus, there are significant concerns among environmentalists and citizens regarding the potential impact animal feeding operations have on water supplies.[56]

In addition to the potential effects animal feeding operations can have on water systems, studies have also revealed that air emissions from animal feeding operations can have serious adverse environmental and health implications.[57] Decomposing manure from livestock operations emits gaseous compounds such as ammonia, hydrogen sulfide, methane, and carbon dioxide which contain hazardous properties with the potential

SUSTAINABLE AGRIC., INC., *supra* note 6, at 37 (discussing an incident where 450,000 gallons of manure escaped from an earthen manure storage basin at a 3,200-head northern Iowa hog facility in 1998).

50. U.S. ENVTL. PROT. AGENCY, OFFICE OF WATER STANDARDS & APPLIED SCIS. DIV., *supra* note 10, at 1.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 2.

55. *Id.* at 1.

56. *See, e.g.*, Associated Press, *supra* note 19, at 8M (reporting citizens' concerns regarding negative health effects caused by local animal feeding operations).

57. U.S. ENVTL. PROT. AGENCY, OFFICE OF WATER STANDARDS & APPLIED SCIS. DIV., *supra* note 10, at 2.

to cause environmental damage and adversely affect human health.[58] Gases associated with decomposing animal manure have been cited as contributors to global warming,[59] and excessive exposure to such gases can produce undesirable mental and physical responses in humans, including severe illness and even death.[60] In Iowa, several deaths from manure gases are reported each year.[61] Although severe risks of excessive gas exposure are generally associated with individuals who are employed by animal feeding operations and are present during day-to-day operations,[62] studies also suggest that individuals living near animal feeding operations who are exposed to gaseous emissions from decomposing manure on a regular basis are also susceptible to the adverse health effects such gases pose.[63]

Studies examining the health effects of gaseous emissions from animal feeding operations on workers within these operations have identified a link between such emissions and acute and chronic respiratory disease and other illnesses.[64] Approximately 50% of workers in such studies were documented to have experienced one or more of the following: "bronchitis, toxic organic dust syndrome (TODS), hyper-reactive airway disease, chronic mucous membrane irritation, occupational

58. CHAPIN ET AL., *supra* note 24, § 2.3.1.

59. *Id.* § 2.3.3.

60. For example:

> According to the National Institute for Occupational Safety and Health, "hydrogen sulfide is a leading cause of death in the workplace." Moreover, it is accountable for most manure-related deaths in both humans and animals. The threshold limit value (TLV) or maximum allowable concentration for humans is 10 ppm. Concentrations from 20–150 ppm can "severely irritate the eyes after 6 to 8 minutes and the respiratory tract after one hour." In addition, levels between 500 ppm and 1,000 ppm induce acute intoxication associated with the following symptoms: sudden fatigue, headaches, anxiety, loss of olfactory senses, nausea, sudden loss of consciousness, optic nerve dysfunction, hypertension, pulmonary edema, coma, seizures and severe respiratory distress, often followed by cardiac arrest and death. Moreover, one to two breaths of 1,000 ppm of hydrogen sulfide causes instantaneous unconsciousness and death through complete respiratory paralysis, unless artificial means of respiration are performed.

Id. § 2.3.1 (citations omitted).

61. *Id.*

62. *See id.* § 2.2.5 (stating the hazardous health effects on workers have been well studied).

63. *Id.*

64. *Id.*

asthma and hydrogen sulfide intoxication."[65] Such symptoms have also been identified among residents living within two miles of large animal feeding operations as opposed to rural residents living near minimal livestock production.[66] For example, neighbors living near animal feeding operations who were the subjects of studies measuring the health effects of gas emissions from livestock operations "reported higher rates of respiratory problems; nausea; headaches; plugged ears; and irritated eyes, nose and throat" than members of a control group not subjected to day-to-day emissions.[67] In addition, studies have revealed that gaseous animal feeding operation emissions can produce "elicited response[s] . . . altering a person's overall state of well[-]being, which is integral to good health."[68] A study conducted by the Department of Psychiatry at Duke University Medical Center found that people living near large animal feeding operations and experiencing odor emissions on a regular basis "reported significantly more tension, depression, anger, fatigue and confusion" compared to individuals in a control group who were not exposed to odor emissions.[69] Plaintiffs in nuisance suits against animal feeding operations in Iowa have reported strikingly similar symptoms when seeking relief from the practices of neighboring livestock operations.[70]

Various studies detailing the effects that air emissions from animal feeding operations can have on rural communities have led to the conclusion that air emissions may constitute a public health hazard.[71] This can be alarming news for rural Iowans who live near large-scale animal feeding operations or will live near a proposed facility, especially when field studies on levels of gaseous emissions emitted from numerous animal

65. *Id.*

66. *Id.*; *see* IOWA STATE UNIV. & THE UNIV. OF IOWA STUDY GROUP, IOWA CONCENTRATED ANIMAL FEEDING OPERATIONS AIR QUALITY STUDY, FINAL REPORT 7 (2002) ("[T]he findings of the limited community studies of concentrated livestock exposures are consistent with adverse health effects observed in other experimental and epidemiological studies of some specific chemicals (ammonia and hydrogen sulfide) known to be components of [animal feeding operation] air emissions.").

67. CHAPIN ET AL., *supra* note 24, § 2.2.5.

68. *Id.*

69. *Id.*

70. *See, e.g.*, Weinhold v. Wolff, 555 N.W.2d 454, 459 (Iowa 1996) (noting that plaintiffs experienced stomach sickness, continuous sneezing, headaches, tightness in the chest, sore throats, and burning eyes in addition to trouble sleeping); Patz v. Farmegg Prods., Inc., 196 N.W.2d 557, 562 (Iowa 1972) (noting that the plaintiffs suffered from headaches, nausea, loss of appetite, inability to sleep, and nervousness).

71. *See, e.g.*, IOWA STATE UNIV. & THE UNIV. OF IOWA STUDY GROUP, *supra* note 66, at 7.

feeding operations "ha[ve] consistently recorded high levels of ammonia, far-above the safe health standards of 150 parts per billion (ppb) recommended in the 2002 Iowa State University/University of Iowa air quality study."[72]

Based on the results of the aforementioned research pertaining to the environmental and health effects of animal feeding operations and the impact such facilities can have on local property values and local economies, it is understandable that rural Iowans are apprehensive toward having such a facility established in their community. It is also understandable why rural Iowans would be willing to mount resistance against the establishment of such a facility in order to protect their environment and quality of life.[73]

III. WAGING WAR AGAINST LARGE-SCALE ANIMAL FEEDING OPERATIONS: PRIVATE REMEDIES IN TORT, PRIVATE ENFORCEMENT OF ENVIRONMENTAL LEGISLATION, AND THE LIMITATIONS THEREOF

Having outlined the various impacts large-scale animal feeding operations can have on rural Iowan communities and those who must live near such facilities, this Note will now discuss what recourse individual landowners and concerned citizens may have for injuries sustained as a result of the practices of a large-scale animal feeding operation in their community. Traditionally, nuisance actions have been utilized by plaintiffs who are particularly concerned with the negative effects animal feeding operations have on their communities and their way of life. Generally, it is alleged that the feeding operation in question has injured the plaintiffs or their property in some respect or has led to a deterioration of their general quality of life or well-being.[74] In addition to nuisance actions, federal and state environmental legislation also provide citizen suit provisions, a vehicle through which individuals can compel animal feeding operations to bring their practices into compliance with legislative mandates regulating the discharge of pollution into the surrounding environment.[75] However,

72. Press Release, Iowa Citizens for Cmty. Improvement, DNR Study Shows Factory Farms Are Polluting Our Air (Aug. 31, 2006), http://www.iowacci.org/news/pressreleases/farming/farmingpress_39.htm.

73. *See* Associated Press, *supra* note 19, at 8M.

74. *See, e.g.*, Valasek v. Baer, 401 N.W.2d 33, 35 (Iowa 1987); *Patz*, 196 N.W.2d at 560.

75. *See, e.g.*, 33 U.S.C. § 1365(a) (2000) (providing for citizen suits under the Clean Water Act); 42 U.S.C. § 7604(a) (providing for citizen suits under the Clean Air Act); 42 U.S.C. § 9659(a) (providing for citizen suits under the Comprehensive

environmental legislation such as the Clean Air Act is complex and requires a great amount of understanding as to scientific and technical matters (generally beyond the competence of the average layman) in order to bring a claim under a citizen suit provision attempting to show that a defendant has violated some pollution control standard.[76] Such causes of action generally require compliance with complex procedures and a substantial and costly presentation of scientific evidence in order to proceed successfully.[77] Thus, when pursuing citizen suits, there is often a large imbalance of resources between an individual plaintiff, who usually has limited funds and resources for such litigation, and a typical corporate defendant.[78] Moreover, a plaintiff seeking to compel a polluter's compliance with environmental regulations will not receive compensation in the form of monetary damages.[79] Such a plaintiff will rarely succeed in obtaining an injunction banning the polluter's further operations because the typical remedy is to order the polluter's compliance with the environmental regulations at issue.

As a result, nuisance actions have proved more useful to plaintiffs seeking to oppose the practices of environmentally unfriendly operations than citizen suits provided for in environmental legislation.[80] With a nuisance cause of action, a plaintiff may sue for injuries that result from the practices of a defendant without regard to the legality of such activity.[81] A nuisance action "reduces the case to terms a layperson can understand," and "a plaintiff can simply allege that the pollution . . . 'looks bad, smells bad, and does bad things' to the plaintiff—without getting mired in the scientific underpinnings."[82] Therefore, a nuisance cause of action may be a more useful and economically feasible tool in the fight against large-scale animal feeding operations for rural Iowans than those provided for under environmental legislation. As such, this Note will discuss the law of nuisance as applied in Iowa in some detail to provide a further

Environmental Response, Compensation, and Liability Act).

76. *See* George P. Smith, II, *Re-Validating the Doctrine of Anticipatory Nuisance*, 29 VT. L. REV. 687, 729 (2005).

77. *Id.*

78. Ronald J. Rychlak, *Common-Law Remedies for Environmental Wrongs: The Role of Private Nuisance*, 59 MISS. L.J. 657, 661 (1989).

79. *See id.* at 663 (noting that nuisance suits may be more advantageous than statutory remedies because of the availability of monetary relief).

80. Smith, *supra* note 76, at 729.

81. *Id.*

82. *Id.* at 729–30 (internal quotation marks omitted) (quoting Peter F. Langrock, *Class Action Litigation*, TRIAL, Oct. 1998, at 46, 48).

understanding of how rural Iowans can oppose the actions of large-scale animal feeding operations and seek redress for harm inflicted as a result of the operations' practices.

A. *Nuisance Actions Under Iowa Law*

Under Iowa law, courts have long recognized a cause of action in tort against the practices of large-scale animal feeding operations where such practices are alleged to constitute a nuisance.[83] In Iowa, a nuisance is statutorily defined as: "Whatever is injurious to health, indecent, or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere unreasonably with the comfortable enjoyment of life or property."[84] Where a facility such as a large-scale animal feeding operation creates such interference, a nuisance will exist, and "a civil action by ordinary proceedings may be brought to enjoin and abate the nuisance and to recover damages sustained" by such interference.[85]

The determination of whether an individual's use of land or conduct actually satisfies the definition of a nuisance is generally one of fact and is contingent upon a consideration of factors relating to the specific circumstances attendant to the alleged nuisance.[86] When making such a determination, Iowa courts consider factors such as priority of location, the nature of the neighborhood in which a nuisance is alleged to take place, and the specific wrong complained of (meaning the actual nature of an alleged nuisance and the harm that it inflicts).[87]

Priority of location exists when a plaintiff has possessed a piece of property alleged to be affected by a nuisance before the nuisance was established on an adjoining piece of property or property in close proximity. Such priority will weigh in favor of the plaintiff with respect to

83. *See, e.g.*, Valasek v. Baer, 401 N.W.2d 33, 35 (Iowa 1987); Patz v. Farmegg Prods., Inc., 196 N.W.2d 557, 562 (Iowa 1972); State v. Chi. Great W. Ry. Co., 147 N.W. 874, 875 (Iowa 1914); Shivley v. Cedar Rapids, I.F. & N. Ry. Co., 37 N.W. 133, 134 (Iowa 1888).

84. IOWA CODE § 657.1(1) (2005).

85. *Id.*; *see also* Rutter v. Carroll's Foods of the Midwest, Inc., 50 F. Supp. 2d 876, 879 (N.D. Iowa 1999).

86. *See Patz*, 196 N.W.2d at 560–61 (noting that the main objective of courts in nuisance suits is to discern whether an activity alleged to constitute a nuisance is reasonable given where the activity has taken place and the circumstances in question).

87. *Id.* at 561.

the finding of a nuisance.[88] With regard to the nature of the neighborhood which encompasses a nuisance, courts have held that individual plaintiffs may be expected to tolerate more or less of an alleged interference with the use and enjoyment of their property depending on the characteristics of the neighborhood in which the nuisance is located.[89] For example, a waste disposal site would more likely be found a nuisance if it were located in a residential neighborhood than in a scarcely populated area.[90] With respect to rural areas where animal feeding operations are frequently located, courts have held that residents living within such areas should expect to be subjected to and tolerate normal rural conditions inherent in the nature of such neighborhoods.[91] However, courts have also made clear that such an expectation does not carry with it the requirement that rural Iowans tolerate "excessive abuse" having the propensity to "destroy the ability to live and enjoy the home, or such as to reduce the value of . . . residential property."[92] Therefore, the fact that an animal feeding operation is located in an area which is generally host to other agricultural operations does not preclude aggrieved residents from pursuing nuisance actions when the practices of such operations are alleged to create an unreasonable interference with the enjoyment of life or property of a particular plaintiff.[93]

In addition to the aforementioned factors for determining when a particular activity constitutes a nuisance, courts must determine whether an alleged interference with the use and enjoyment of another's property can be deemed "substantial" so as to warrant the finding of a nuisance.[94] Courts apply an objective standard when making such a determination by asking whether a normal person of average sensibilities would regard an alleged interference with the use and enjoyment of his property to be "definitely offensive" or "seriously annoying or intolerable."[95] Where such a showing is made by a particular plaintiff, the invasion in question is "significant" and the finding of a nuisance will be justified.[96] When, on the

88. *See* Weinhold v. Wolff, 555 N.W.2d 454, 460 (Iowa 1996).
89. *Id.*
90. *See, e.g.*, Vill. of Wilsonville v. SCA Servs., Inc., 426 N.E.2d 824, 835–36 (Ill. 1981).
91. *Weinhold*, 555 N.W.2d at 460.
92. *Id.* (quoting Flansburg v. Coffey, 370 N.W.2d 127, 131 (Neb. 1985)).
93. *Id.*
94. *See id.* at 459 (quoting RESTATEMENT (SECOND) OF TORTS § 821F cmt. d (1977)).
95. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 821F cmt. d (1977)).
96. *Id.*

other hand, "normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him."[97]

Through application of the aforementioned factors and considerations, Iowa courts have found animal feeding operations to constitute a nuisance on numerous occasions.[98] Factors such as unwholesome and unreasonably offensive smells emitted from such operations as well as concerns for plaintiffs' health and well-being have commonly played a significant role in persuading courts to rule in favor of particular plaintiffs.[99] Generally, much emphasis has been placed on the effect such operations have had on plaintiffs who lived near them and tolerated their practices on a regular basis when evaluating whether a substantial interference with a plaintiff's enjoyment of life or property was produced so as to warrant the finding of a nuisance.[100] Specifically, plaintiffs have been able to make a showing through their own testimony and that of other witnesses, by reference to ordinary sensibilities, that an animal feeding operation in question released noxious odors that were unreasonably offensive to the senses.[101] Such a finding weighed heavily in favor of the plaintiffs when the odors in question were demonstrated to have contributed to a general decline in their quality of life and well-being and to have created an unreasonable interference with the use and enjoyment of their property.[102] The plaintiffs complained of suffering from symptoms produced by excessive exposure to decomposing manure odor, including headaches, nausea, loss of appetite, sore throats, coughing, tightness in the chest, burning eyes, inability to sleep, and nervousness.[103] All of these symptoms have been identified by various studies as exposure

97. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 821F cmt. d (1977)).

98. *See, e.g.*, *id.* at 461; Michael v. Michael, 461 N.W.2d 334, 335 (Iowa 1990); Valasek v. Baer, 401 N.W.2d 33, 35 (Iowa 1987); Patz v. Farmegg Prods., Inc., 196 N.W.2d 557, 562 (Iowa 1972).

99. *See, e.g.*, *Weinhold*, 555 N.W.2d at 459–60; *Patz*, 196 N.W.2d at 562.

100. *See, e.g.*, *Weinhold*, 555 N.W.2d at 459–60; *Michael*, 461 N.W.2d at 335; *Valasek*, 401 N.W.2d at 34; *Patz*, 196 N.W.2d at 562.

101. *See, e.g.*, *Weinhold*, 555 N.W.2d at 460.

102. *See, e.g.*, *id.* at 459–60 (detailing the various ways in which an animal feeding operation interfered with plaintiffs' use of property and caused them substantial inconvenience including forcing the plaintiffs to leave their home on numerous occasions to avoid the unbearable stench inflicted by the feeding operation in question).

103. *See id.* at 459; *Patz*, 196 N.W.2d at 562.

responses to gases emitted from decomposing animal manure.[104] Furthermore, plaintiffs in such cases were often successful in establishing damages in the form of reduced property values as a result of the practices of an animal feeding operation and the noxious odors emitted by the facility.[105] Such findings were deemed sufficient to warrant the finding that a particular animal feeding operation constituted a nuisance under Iowa law.[106]

Because Iowa courts are willing to recognize that animal feeding operations can constitute nuisances under Iowa law, plaintiffs opposing the practices of animal feeding operations may be able to seek judicial recourse for injuries sustained. Once a plaintiff establishes that a particular animal feeding operation is a nuisance, the question then shifts to a determination as to the form of relief that should be granted. When plaintiffs seek damages, the amount and type that may be awarded will be contingent upon whether the nuisance is classified as temporary or permanent.[107]

A permanent nuisance is one of such character and existing under such circumstances that it will be reasonably certain to continue in the future.[108] When injury flows from a nuisance that is permanent, all damages including past, present, and future are recoverable in one action.[109] The recovery of damages for a permanent nuisance is at once productive of all damages that can ever result from the nuisance, thus barring any subsequent recovery of future damages.[110] In essence, an award of damages for injuries sustained as a result of a permanent nuisance serves as a license to an individual producing the nuisance to continue interfering with the use and enjoyment of another's life and property, provided such individuals pays a monetary sum to the injured party for the continuance of the nuisance in question.[111]

When a permanent nuisance is found to exist, the proper measure of

104. CHAPIN ET AL., *supra* note 24, § 2.2.5.

105. *See, e.g.*, *Weinhold*, 555 N.W.2d at 465.

106. *See, e.g.*, *id.* at 461.

107. *See Patz*, 196 N.W.2d at 562.

108. *See Weinhold*, 555 N.W.2d at 463 (finding that defendants' animal feeding operation was a permanent nuisance when no evidence suggested that defendants could or would abate the nuisance unless such operation was shut down altogether).

109. *Id.* at 462 (citing 58 AM. JUR. 2D *Nuisances* §§ 273–275 (1989)).

110. *Id.* at 464.

111. *See id.* at 467 (awarding plaintiffs damages for all injuries that would be incurred in the future as a result of the nuisance in question, but refusing to abate the nuisance).

damages will generally be the diminution of the market value of property experienced by the plaintiffs as a result of a nuisance.[112] However, plaintiffs in such actions will also be able to recover other damages they can prove. Specifically, plaintiffs will be able to recover damages they suffer by being deprived of the enjoyment of their property and the inconvenience and discomfort suffered by them, their families, or other affected persons.[113] These types of damages are not subject to any precise rule for discerning the amount of a just award; rather, the amount is left to the discretion of a jury based on sound judgments brought by impartial considerations of the evidence presented at trial.[114] Therefore, the finding that a large-scale animal feeding operation constitutes a permanent nuisance may be an effective means by which an aggrieved individual can seek damages compensating them for both past and future injuries.

If, in a nuisance action, a court finds an activity to be temporary in nature, or of a recurring character, as opposed to one that is permanent, plaintiffs will be limited to the amount of damages they have sustained as of the date of trial.[115] However, one recovery against a judicially declared temporary nuisance will not serve as a bar to successive actions for damages accruing thereafter from the nuisance in question, as would be the case with a permanent nuisance.[116] Each repetition of a temporary nuisance will give rise to a new cause of action for damages.[117] For example, where a plaintiff receives an award of damages compensating him for the reduction in property value, the plaintiff is only entitled to recover damages for the amount of reduction that can be determined to have occurred as a result of the nuisance for the duration of its interference. A court will not speculate as to future damages that may occur from the nuisance if it were to continue.[118] Rather, the plaintiff is placed in a state of limbo where he must stand by and wait for further injury to occur if the nuisance resumes.[119]

---

112. *Id.* at 465.

113. *See, e.g.*, *id*. (citing 58 AM. JUR. 2D *Nuisances* § 293 (1989)).

114. *Id.*

115. *See id.* at 462–63 (citing 58 AM. JUR. 2D *Nuisances* §§ 273–275 (1989)).

116. *Id.* (citing 58 AM. JUR. 2D *Nuisances* §§ 273–275 (1989)).

117. *Id.* (citing 58 AM. JUR. 2D *Nuisances* §§ 273–275 (1989)).

118. *See id.* (when a nuisance is temporary, continuing, or reoccurring, "every day's continuance is a new nuisance") (quoting 58 AM. JUR. 2D *Nuisances* §§ 273–275 (1989)). For each separate action, "recovery may be had for damages sustained within the period of the statute of limitations applicable to the action." Thus, when a nuisance is temporary, a plaintiff may recover damages "from time to time until the nuisance is abated." 58 AM. JUR. 2D *Nuisances* 273–275 (1989).

119. *See id.* (explaining the nature of a damage award for a nuisance found to

Although an award of damages may compensate plaintiffs in nuisance actions for injuries they have sustained as a result of the nuisance, plaintiffs may also wish to have the nuisance abated altogether so as to preclude any future harm that may result from the nuisance if it were to continue.[120] Such a desire may be particularly strong when plaintiffs wish to preserve their quality of life and protect their community from interferences that a nuisance may pose,[121] reasoning that an award of damages is an inadequate remedy to ensure protection from problems such as pollution and potentially adverse health effects that a nuisance may inflict if allowed to continue.[122] Such a desire has become particularly strong among the increasing number of rural Iowans living in close proximity to large-scale animal feeding operations. This desire is mainly attributable to the expansion of the livestock production industry and heightened public awareness that has intensified concerns regarding the adverse effects such operations may have on communities.[123] In the past, some rural landowners have successfully enjoined the practices of animal feeding operations to a limited extent through nuisance suits.[124] However, the current trend among courts in such suits is to award injured plaintiffs damages as compensation for the unreasonable interference with their property as opposed to enjoining the animal feeding operations' practices altogether.[125] This trend can be understood to a large extent as an effort to

be temporary in nature) (citing 58 AM. JUR. 2D *Nuisances* §§ 273–275 (1989)).

120. *See, e.g.*, Valasek v. Baer, 401 N.W.2d 33, 37 (Iowa 1987).

121. *See supra* Part II (discussing the adverse health, environmental, and economic implications of large-scale animal feeding operations).

122. *See* Herriges et al., *supra* note 2, at 1 (detailing the problems associated with the introduction of large-scale animal feeding operations to rural Iowa communities).

123. *See, e.g.*, Niles, *supra* note 1, at A1 (reporting citizens' concerns regarding the effects that the establishment of a large-scale animal feeding operation will have on their community, including traffic conditions, health impairments, and decreased property values). *See generally* U.S. ENVTL. PROT. AGENCY, OFFICE OF WATER STANDARDS & APPLIED SCIS. DIV., *supra* note 10, at 1 (discussing the environmental impacts and health implications of large-scale animal feeding operations, such as reduced biodiversity and drinking water quality).

124. *See, e.g.*, *Valasek*, 401 N.W.2d at 37 (enjoining an animal feeding operation from spreading manure on fields in close proximity to plaintiffs' home when such practices created offensive odors that unreasonably interfered with the use and enjoyment of their property, but allowing the operation to continue spreading manure on fields farther from plaintiffs' home).

125. *See, e.g.*, Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168, 171 (Iowa 2004) (stating the district court refused injunctive relief because monetary damages were sufficient); Weinhold v. Wolff, 555 N.W.2d 454, 467 (Iowa 1996) (refusing to grant an

place considerations of economic efficiency above other considerations involved in the process of determining whether an animal feeding operation should be enjoined from continuing its practices altogether.[126]

B. *In the Name of Economic Efficiency: The Limited Availability of Injunctions in Nuisance Actions Against Animal Feeding Operations*

Iowa courts have proceeded with caution when making an appraisal as to whether an injunction should be granted to abate the practices of an animal feeding operation deemed to be a nuisance, as an injunction has been an extraordinary remedy imposed only where clearly required under Iowa law.[127] The determination of whether an injunction should be granted has traditionally involved a balancing test where the gravity of harm to a plaintiff as a consequence of the nuisance is weighed against the social utility the defendant's activity may provide.[128] However, when considering the social and economic utility of an animal feeding operation, courts have traditionally erred on the side of denying injunctive relief in nuisance actions, reasoning that such operations are vital industries in the state that deserve a certain amount of protection from complete abatement.[129] The

injunction on grounds that such an injunction would work an inequitable and impractical solution given that it would result in the closing of an entire livestock production facility); *see also* Lewin, *supra* note 20, at 802 ("[E]fficiency concerns predominate in the selection of an appropriate remedy [in nuisance suits], with a general presumption against unconditional injunctive relief for prevailing plaintiffs.").

126. *See Weinhold*, 555 N.W.2d at 467; Smith, *supra* note 76, at 714 (discussing courts' utilization of the "law in economics" approach to the decision of whether to grant injunctions in nuisance actions, embracing the theory that property disputes can be resolved through economic efficiency).

127. *Valasek*, 401 N.W.2d at 35.

128. *Id.*

129. *See Weinhold*, 555 N.W.2d at 467. The practice of affording greater protection to agricultural operations in Iowa, including animal feeding operations, was embraced by the Iowa General Assembly through the adoption of nuisance immunity statutes that were subsequently held unconstitutional. Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 321 (Iowa 1998); *see also Gacke*, 684 N.W.2d at 173 (holding Iowa Code Section 657.11(2) is not distinguishable from Iowa Code Section 352.11(1)(a)). Specifically, under former Iowa Code Section 352.11(1)(a), all "farm operations" located in designated agricultural areas were granted immunity from nuisance suits regardless of the date the operations were established or expanded unless such operations caused injury or damage to persons or property before the creation of the specially designated agricultural areas. IOWA CODE § 352.11(1) (1993). Furthermore, former Iowa Code Section 657.11(2) specifically provided immunity to animal feeding operations from nuisance actions and any other actions wherein the animal feeding operation was charged with interfering with another person's life or property, except under circumstances where the animal feeding operation was found to "unreasonably

social and economic utility (such as contribution to the maintenance of Iowa's strong agricultural sector and the creation of jobs) that can be derived from allowing animal feeding operations to continue their practices in many situations justifies the denial of an injunction when such utility is weighed against what is perceived to be a harm better compensated through more economically efficient means (such as compensatory damages).[130] This approach is commensurate with the traditional "law and economics" approach utilized by courts when determining a proper remedy to be granted for injuries sustained as the result of a nuisance.[131]

Generally, under a law and economics approach, all land disputes are resolved in favor of the most economically efficient solution to a given problem.[132] Under this approach, injunctive relief has been deemed economically inefficient when a defendant's cost to abate an activity constituting a nuisance exceeds the cost of damages that would flow from the nuisance, or when the economic utility and public interest derived from the alleged nuisance-causing activity outweighs the harm to the plaintiff.[133] This approach to land disputes becomes problematic for plaintiffs seeking to enjoin the practices of an animal feeding operation altogether when the owners have large amounts of capital invested, often in great excess of any award of damages that may flow to the particular plaintiff.[134] The large

and for substantial periods of time interfere[] with [a] person's comfortable use and enjoyment of . . . life or property" and where "[t]he animal feeding operation failed to use existing prudent generally accepted management practices reasonable for the operation." IOWA CODE § 657.11(2) (2005). The general policy behind such legislation was evident in the purpose statement of Iowa Code Chapter 352, wherein the legislature stated that "the general assembly recognizes the importance of preserving the state's finite supply of agricultural land. Conversion of farmland to urban development, and other nonfarm uses, reduces future food production capabilities *and may ultimately undermine agriculture as a major economic activity in Iowa*." IOWA CODE § 352.1 (1993) (emphasis added). Although Iowa Code Section 657.11(2) was ultimately held unconstitutional as creating an easement in property without just compensation, the spirit of these legislative enactments, recognizing the important role played by such operations in Iowa's economy, and the social utility flowing therefrom, arguably remains a justification for affording greater protection to such operations. *See Gacke*, 684 N.W.2d at 175.

130. *See supra* text accompanying note 129.

131. *See* Smith, *supra* note 76, at 714 (discussing the law in economics approach embraced by courts when determining an appropriate remedy for injuries sustained as the result of a nuisance).

132. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 21 (4th ed. 1992).

133. Smith, *supra* note 76, at 718.

134. *See Weinhold*, 555 N.W.2d at 467 (deeming the closure of an entire feeding operation to be an inequitable and impractical solution); Smith, *supra* note 76,

capital investments and expenditures necessary to construct and maintain large-scale animal feeding operations give the owner a vested interest in ensuring the facility's continued operation. This in turn provides an incentive for courts to grant greater protection to these operations because closing the doors altogether would completely deprive the owner of the fruits of his investment and cause him to sustain a substantial loss.

Consequently, once an animal feeding operation is established, a complete injunction restraining an animal feeding operation from continuing its business will most likely be deemed an inefficient and impractical remedy for a particular plaintiff in a nuisance suit, and an award of compensatory damages will be granted as the most economically efficient solution to the conflict.[135] The award of compensatory damages in lieu of an injunction of course does little for those who wish to protect their communities from the practices and potential health and environmental hazards of large-scale animal feeding operations. A continued interference is thus licensed by the courts provided the nuisance tortfeasor pays injured individuals an amount deemed reasonable as just compensation.[136] As a result, rural Iowans who wish to prevent large-scale animal feeding operations from conducting business in their neighborhoods are left with little hope of expelling the neighbor that is deemed a threat to their health and way of life.

IV. A POTENTIAL SOLUTION: PUBLIC PRESSURE AND THE UTILIZATION OF ANTICIPATORY NUISANCE AS A MEANS OF PREEMPTING THE PERCEIVED THREAT

The apparent problem for rural Iowans in opposition to the establishment and practices of large-scale animal feeding operations, as discussed in the course of this Note, has become the inability to expel the operation or to prevent its practices once established. This is true regardless of whether the operation creates a substantial interference with the use and enjoyment of individuals' property or poses risks to their

at 711 (discussing the problem of "economic waste" that may occur when an industry with large amounts of money invested in its business operations is forced to close its doors as a result of a judicially imposed injunction).

135. *See Weinhold*, 555 N.W.2d at 467; Smith, *supra* note 76, at 714 (noting the developing trend among courts to favor compensatory damages without injunctive relief as the most economically efficient remedy).

136. *See Weinhold*, 555 N.W.2d at 467 (awarding plaintiffs $45,000 for past, present, and future special damages as a result of the interference with the use and enjoyment of their property); Lewin, *supra* note 20, at 802.

health and well-being.[137] Returning to the scenario outlined in the beginning of this Note, assume the role of a farmer living in rural Iowa who has just learned that a pork producing company has received approval from the Iowa Department of Natural Resources to begin construction of a large-scale swine feeding operation (which will hold approximately 6000 head of swine and will produce approximately 6,000,000 gallons of manure each year) on land adjacent to your property, within a half-mile of your home.[138] You begin to wonder what course of action may be taken to preserve your way of life and to protect your community and the environment from the adverse impacts such a facility threatens to impose on you and those similarly situated.[139] One option may be to commence a nuisance suit against the animal feeding operation after it has been constructed and is in operation (assuming the operation interferes with the use and enjoyment of your property).[140] However, as pointed out in Part III of this Note, this will likely serve only to secure an award of damages compensating for injuries sustained as a result of the operation's practices.[141] An attempt to abate the practices of the large-scale animal feeding operation altogether will likely be frustrated by predominant economic considerations.[142] Therefore, it appears that one may be powerless to protect his or her family and community from the adverse effects such an operation may have on the overall well-being, health, and way of life, unless an alternative solution can be developed that will stop construction or provide an incentive which will compel those proposing construction to use greater discretion in selecting appropriate locations and to employ management practices that will ensure adequate protection of the property interests, health, and safety of others residing in the surrounding community.

137. *See supra* Part III.B (discussing the predominating considerations of economic efficiency in land use dispute resolutions as driving courts toward the denial of injunctive relief in many situations).

138. *See, e.g.*, Niles, *supra* note 1, at A1 (reporting the proposed establishment of a 5900 head hog facility near Batavia, Iowa).

139. *See supra* Part II (discussing the potential adverse impacts of large-scale animal feeding operations).

140. *See, e.g.*, Valasek v. Baer, 401 N.W.2d 33, 34 (Iowa 1987).

141. *See, e.g.*, *Weinhold*, 555 N.W.2d at 467; Lewin, *supra* note 20, at 802 (explaining that "efficiency concerns predominate in the selection of an appropriate remedy [in nuisance suits], with a general presumption against unconditional injunctive relief for prevailing plaintiffs").

142. *See supra* Part III.

A. *The Efficacy of Public Pressure in the Fight Against Large-Scale Animal Feeding Operations*

One option that has had some recent success in attempting to preempt the establishment of large-scale animal feeding operations has been the utilization of intense public pressure in challenging proposed operations.[143] Through public pressure (in the form of protests and otherwise), concerned citizens have sought to influence the decision of those responsible for the implementation of an animal feeding operation to move their operation elsewhere.[144] Concerned citizens have also sought to influence local officials responsible for approving construction or passing legislation regulating the practices of such facilities.[145]

Under Iowa law, all large-scale animal feeding operations must apply for construction permits before beginning the construction of any facilities in a chosen area.[146] Along with the application and subsequent approval process, all applicants desiring to construct concentrated animal feeding operations must deliver an application to the county board of supervisors where the proposed operation is sought to be constructed in addition to the Iowa Department of Natural Resources (IDNR) (the administrative body with jurisdiction over the regulation of animal feeding operations in Iowa and with which rests the final decision of whether to approve or deny permits for construction).[147] The county board of supervisors publishes notice in the local newspaper notifying residents of the proposed facility, thus providing an opportunity for public comment and debate.[148] This allows local residents to lodge complaints they may have against the proposed operation with the board in an effort to persuade county officials to recommend disapproval of an application to the IDNR.[149] The board must then evaluate the application for the proposed facility and make recommendations as to whether the construction plan should be approved

143. Iowa Citizens for Cmty. Improvement, Local Opposition Forces Developer to Withdraw Plans for 5,000-Head Factory Farm, http://www.iowacci.org/Issues/farming/factory%20/20campaign/ffcampaign_campaigns_local.htm (last visited Feb. 13, 2007).

144. *Id.* (reporting the successful opposition by residents of Sac County, Iowa, to the construction of a 5000 head factory farm).

145. *See id.* (reporting citizens' successful attempt at persuading local officials to recommend denial of a factory farm permit application).

146. IOWA ADMIN. CODE r. 567-65.7(1), 65.105, 65.107 (2005).

147. *Id.* r. 567-65.10(1).

148. *Id.* r. 567-65.10(2).

149. *Id.* r. 567-65.10(2)(a)(5)–(a)(6).

or denied.[150]

Upon receiving the board's recommendations, the IDNR must take this evaluation into consideration when determining whether to approve a construction permit application and is required to preliminarily deny the application if the board so recommends, with conclusive denial pending a subsequent independent investigation as to whether the application meets certain technical and statutory requirements mandated under Iowa law.[151] Although a county board's recommendation to deny approval will not ultimately prevent the issuance of a construction permit if the IDNR finds all of the technical and statutory requirements for the issuance of such permits satisfied,[152] a preliminary denial of a permit can have a powerful effect in influencing an individual or entity seeking the permit to consider alternative locations for the placement of its operation.[153] Thus, the application process for construction permits itself provides a vehicle through which Iowans may attempt to preempt the construction of such operations in their communities.[154] In making a decision whether to recommend approval or denial of a particular application, the board may consider factors such as the nature of the neighborhood that may be affected by the proposed facility and potential conflicts that may result if the operation is located too close to a particular structure that benefits from statutorily imposed separation distance requirements.[155] As previously mentioned, local Iowa residents have successfully utilized this process to preempt the establishment of animal feeding operations in their communities where county board members have been persuaded to deem the proposed area for construction unsuitable for such use. This in turn has provided enough incentive for those proposing construction of an animal feeding operation in a given area to consider alternative locations. Therefore, the use of public pressure and persuasion appears to be a viable option in the fight against the establishment of large-scale animal feeding operations in Iowa communities, though one that does not always succeed, as the approval of more than 1800 documented large-scale animal feeding

150. *Id.* r. 567-65.10(3).

151. *Id.* r. 567-65.10(5)(c).

152. IOWA CODE § 459.304(5)(b) (2005).

153. *See* Iowa Citizens for Cmty. Improvement, *supra* note 143.

154. *See* IOWA ADMIN. CODE r. 567-65.10(2)(a)(5)–(a)(6); Iowa Citizens for Cmty. Improvement, *supra* note 143 (reporting the successful effort of Iowa residents in persuading county officials to recommend the denial of a large-scale animal feeding operation in Sac County, Iowa).

155. *See* IOWA CODE § 459.304(2)(b).

operations in Iowa indicates.[156]

Given that one is not always guaranteed success by employing preemptive tactics such as public protest and pressure in the fight against animal feeding operations, one may also wish to pursue legal courses of action in conjunction with or in lieu of public pressure. The importance of halting an animal feeding operation before construction cannot be overstated if one wishes to keep his or her community free from the practices of such operations. It will be extremely difficult to have the operation enjoined from conducting business once it has been established, and, because of this, one must search for a judicial doctrine that provides an opportunity to preempt the potential injuries that may result from this proposed use of the land.[157] This proposition may seem bizarre in light of the fact that most tort doctrines focus on granting relief to injured individuals *after* injury has been inflicted.[158] However, one can glean from tort doctrine the desire of courts to take precautions against foreseeable injury—as apparent, for example, from the nature of negligence actions.[159] Courts have also expressed the desire to create strong incentives for the prevention of injury before the fact through the creation of doctrines such as strict liability and products liability.[160] Thus, it is not entirely inconceivable that courts may wish to provide aggrieved residents, fearful of a perceived threat that may befall them if a certain business is allowed to erect its operation in close proximity to their homes, the ability to seek judicial relief from such a threat before actual injury occurs. Courts have provided such a cause of action through the creation of the judicial doctrine of anticipatory nuisance.[161]

---

156. *See* ENVTL. INTEGRITY PROJECT, THREATENING IOWA'S FUTURE: IOWA'S FAILURE TO IMPLEMENT AND ENFORCE THE CLEAN WATER ACT FOR LIVESTOCK OPERATIONS 15 (2004), http://www.environmentalintegrity.org/pubs/EIP_CAFO_fnl_rpt.pdf (noting the existence of over 1800 documented concentrated animal feeding operations in Iowa).

157. *See supra* Part III (discussing courts' tendency to deny issuing an injunction against the practices of animal feeding operations found to be a nuisance to a particular individual or community).

158. *See* Charles J. Doane, Comment, *Beyond Fear: Articulating a Modern Doctrine in Anticipatory Nuisance for Enjoining Improbable Threats of Catastrophic Harm*, 17 B.C. ENVTL. AFF. L. REV. 441, 448 (1990) (discussing the traditional application of various tort doctrines where compensation is mandated only after a person fails to take precautions against foreseeable injury).

159. *Id.*

160. *Id.*

161. *See, e.g.*, Rutter v. Carroll's Foods of the Midwest, Inc., 50 F. Supp. 2d 876, 883 (N.D. Iowa 1999) (holding that "it is clear that Iowa has recognized

B. *An Introduction to the Doctrine of Anticipatory Nuisance*

As opposed to other tort doctrines which seek to grant relief to individuals for injuries sustained after a certain event, the anticipatory nuisance doctrine "focuses directly on the issue of whether or not injury should be prevented before it occurs."[162] By its very name, anticipatory nuisance is a cause of action to be utilized by an aggrieved plaintiff when seeking to prevent what is perceived to be a nuisance that will come to fruition in the future.[163] Iowa courts have long recognized the doctrine of anticipatory nuisance as a viable claim, although it has been given little consideration until recently.[164] Therefore, rural Iowans wishing to oppose the establishment of a large-scale animal feeding operation in their community on grounds that it will create an unreasonable interference with the use and enjoyment of their property or will adversely affect their health may attempt to preempt the establishment through the judicial process as opposed to the other preemptive means of opposition previously discussed.[165]

Given that nuisance is defined as "[w]hatever is injurious to health, indecent, or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere unreasonably with the comfortable enjoyment of life or property,"[166] an anticipated nuisance under Iowa law will be whatever threatens to fulfill this statutory definition.[167] The beauty of an anticipatory nuisance cause of action for plaintiffs who wish to completely prevent the use of land in their community or in close proximity to their homes is that when brought before a court, the doctrine prevents courts from considering alternative remedies in lieu of granting an injunction.[168] The only permissible

'anticipated nuisance' claims that fit [the plaintiffs'] allegations").

162. Doane, *supra* note 158, at 449.

163. Smith, *supra* note 76, at 688.

164. *See Rutter*, 50 F. Supp. 2d at 883 (finding anticipatory nuisance to be a valid claim under Iowa law); Livingston v. Davis, 50 N.W.2d 592, 599 (Iowa 1951) (discussing application of the doctrine of anticipatory nuisance); Amdor v. Cooney, 43 N.W.2d 136, 141 (Iowa 1950) (same); Funnel v. City of Clear Lake, 30 N.W.2d 722, 725 (Iowa 1948) (same).

165. *See Rutter*, 50 F. Supp. 2d at 884 (refusing to dismiss plaintiffs' anticipatory nuisance claim against an animal feeding operation, finding that such a claim is clearly cognizable under Iowa law).

166. IOWA CODE § 657.1(1) (2005).

167. *Rutter*, 50 F. Supp. 2d at 884.

168. *See id.* at 886 (noting that no authority exists under Iowa law for awarding damages in anticipatory nuisance cases, thus limiting the only available remedy to

consideration will be whether the anticipated nuisance should be prevented in the first place, or in the case of the hypothetical animal feeding operation previously discussed, by not allowing construction of its facilities.[169] Where, under the proper circumstances, a proposed use of land is deemed to be an anticipated nuisance, courts will be allowed to enjoin the operation before it can be established in order to prevent the harm that is reasonably certain to flow from its operations.[170] However, the determination of whether a proposed activity constitutes an anticipatory nuisance involves a somewhat different analysis than that which would be performed under a traditional nuisance action.[171]

C. *Identifying the Applicable Standard for the Finding of an Anticipatory Nuisance*

The ultimate determination of whether a proposed use of land should be deemed an anticipated nuisance warranting an injunction is dependent on the standard applied by the court making the determination.[172] A survey of the various approaches taken by courts in differing jurisdictions throughout the United States on both the federal and state level reveals three separate standards applied when determining whether to enjoin a proposed use of land from commencing on grounds that it will result in a nuisance.[173] The most stringent standard applied is to deny the finding of an anticipated nuisance, and therefore an injunction, unless the proposed use of land will, by its very nature, constitute a nuisance per se that is imminent and certain to occur.[174] A nuisance per se is an activity or use of property that is at all times and under all circumstances a nuisance regardless of its location or surroundings.[175] Common examples of nuisances per se are extra hazardous activities that create an extreme risk

injunctive relief).

169. *Id.*

170. *Id.*

171. *Compare id.* (discussing circumstances under which the finding of an anticipatory nuisance is appropriate), *with* Patz v. Farmegg Prods., Inc., 196 N.W.2d 557, 561 (Iowa 1972) (discussing circumstances under which the finding of a nuisance is proper).

172. *See* Smith, *supra* note 76, at 700–03 (discussing three separate standards applied by different jurisdictions in the application of the anticipatory nuisance doctrine).

173. *See id.*

174. *See, e.g.*, Wallace v. Andersonville Docks, Inc., 489 S.W.2d 532, 535 (Tenn. Ct. App. 1972).

175. 58 AM. JUR. 2D *Nuisances* § 16 (2002).

of danger regardless of the setting in which the activity is conducted, or immoral and extremely offensive activity forced upon a non-consenting public.[176] Although the practices of animal feeding operations carry with them potential adverse health risks and other implications to a given community,[177] they have never been declared nuisances per se under Iowa law because the determination of whether such an operation constitutes a nuisance is generally dependent on a factual analysis of all the relevant surrounding circumstances pertaining to the operation's use and practices.[178] Therefore, the finding of an anticipated nuisance that may stem from the practices of a large-scale animal feeding operation would be precluded under this extremely stringent standard.

A far less stringent standard (and arguably the most favorable to plaintiffs bringing an anticipatory nuisance claim) applied by courts involves a balancing of the equities of a given case much like the traditional nuisance analysis previously discussed.[179] The main thrust under this approach is to consider the gravity of harm that could result from a proposed use of land alleged to constitute a nuisance if it were allowed to commence and to weigh the gravity of the potential harm against the utility that would result from the proposed use.[180] If the gravity of the potential harm is great or severe enough to outweigh any utility that may be derived from the proposed use, the grant of an injunction will be proper.[181] Under such an approach, even when the injury from the proposed use is not absolutely certain or extremely likely to occur (as required under the more stringent nuisance per se analysis previously discussed), a court may still enjoin the proposed use if it deems the potential gravity of such harm to be sufficiently significant. This is because the reasonable probability of the apprehended injury is deemed to justify the prevention of the proposed use, discounting any consideration as to the likelihood of actual injury.[182] This will be a favorable standard for plaintiffs to allege that a proposed use

176. Smith, *supra* note 76, at 699.

177. *See supra* Part II.

178. *See, e.g.*, Patz v. Farmegg Prods., Inc., 196 N.W.2d 557, 561 (Iowa 1972) (noting that whether the animal feeding operation in question constituted a nuisance involved a consideration of "all the attending or surrounding circumstances").

179. *See* Smith, *supra* note 76, at 702.

180. *See* Sharp v. 251st St. Landfill Inc., 810 P.2d 1270, 1281 (Okla. 1991).

181. *See id.* (finding the potential harm that could result from the establishment of a landfill outweighed its utility).

182. *See id.* (granting an injunction against the establishment of a landfill where it was found that the reasonable probability of local groundwater contamination outweighed the utility of the proposed landfill).

of land will constitute a nuisance if it can be shown that great harm might result from such use if allowed to commence, as a showing of the immediacy or likelihood of potential harm is not necessary where the gravity of harm is of sufficient magnitude.[183] With respect to bringing a cause of action against the establishment of a large-scale animal feeding operation on grounds that it will result in a nuisance under the balancing of harms standard, a showing of harm of sufficient magnitude to warrant an injunction may be made where, for example, plaintiffs can demonstrate that the establishment of an animal feeding operation on alluvial soil[184] may result in the contamination of local groundwater.[185] Such a finding would be significant given the danger posed to the health of local residents,[186] and such showing would indicate a serious threat which, by its very possibility, could warrant an injunction.

Under the final anticipatory nuisance standard applied by courts, a court will enjoin a proposed use of land from commencing if either the proposed use, if established, would constitute a nuisance per se (as previously discussed) or if it can be proved that the proposed use of land will necessarily become a nuisance.[187] Iowa courts have selected this as the appropriate standard to apply when determining whether an anticipated nuisance should be enjoined.[188]

Under Iowa law, "[a]n anticipated nuisance will not be enjoined unless it clearly appears a nuisance will necessarily result from the act . . . it is sought to enjoin."[189] Furthermore, no injunction will be granted against a proposed use of land under Iowa law if the use "sought to be enjoined may or may not become [a nuisance], depending on its use or other circumstances."[190] Although this standard appears to be as stringent as the

183. *See id.*

184. In many alluvial soil profiles, groundwater fluctuates throughout the year. Alluvial soil is that which has been deposited by a river or other running bodies of water.

185. *See generally Sharp*, 810 P.2d at 1281 (finding potential harm of sufficient magnitude to justify the grant of an injunction where it was alleged that a proposed use of land would contaminate local groundwater and endanger the health of the public).

186. *See id.*

187. *See, e.g.*, Vill. of Wilsonville v. SCA Servs., Inc., 426 N.E.2d 824, 836 (Ill. 1981) (quoting Fink v. Bd. of Trs., 218 N.E.2d 240, 244–45 (1966)) (holding that an anticipated nuisance may be enjoined only where it clearly appears that a nuisance will necessarily result from the act or thing sought to be enjoined).

188. Livingston v. Davis, 50 N.W.2d 592, 599 (Iowa 1951).

189. *See id.*

190. *Id.*

nuisance per se standard (requiring that a use of land be of such a nature that it would necessarily result in a nuisance regardless of its location or surroundings),[191] the "necessarily result" aspect of this analysis involves considerations that go beyond merely assessing whether a nuisance per se is present in a given case and may actually be less stringent for plaintiffs depending on the attendant circumstances surrounding the proposed use of land alleged to be an anticipated nuisance.[192] Where the determination as to whether a proposed use of land will constitute a nuisance per se is made without regard to location or surroundings attendant to the alleged nuisance, the necessarily result analysis contemplates that a proposed use of land, which would not meet the classification of a nuisance per se (such as an extra hazardous activity), may still be classified as a nuisance warranting an injunction if the nature of the neighborhood or setting where the proposed use of land would be located is incompatible with such use.[193] Such a determination will of course involve considerations of the relevant circumstances pertaining to the proposed use so as to make a determination regarding compatibility.[194]

Allowing the consideration of circumstances pertaining to the surrounding location and actual use of an alleged nuisance may seem inconsistent with the previous statement that a proposed use of land or activity will not be enjoined under Iowa law where such activity or use "may or may not become a [nuisance], depending on its use and other circumstances."[195] However, it is important to differentiate between considerations pertaining to the particular compatibility of a use in a neighborhood and considerations as to the manner in which the land will actually be used. The former consideration involves a determination of whether a particular use would unreasonably interfere with the property rights of others or would bring harm to those located near such use

191. *See* Wallace v. Andersonville Docks, Inc., 489 S.W.2d 532, 535 (Tenn. Ct. App. 1972).

192. *See* Rutter v. Carroll's Foods of the Midwest, Inc., 50 F. Supp. 2d 876, 886 (N.D. Iowa 1999) (holding that "the determination of whether a nuisance will 'clearly' and 'necessarily' result is determined by 'look[ing] at the surrounding property, and consider[ing] its actual use'" (quoting Funnell v. City of Clear Lake, 30 N.W.2d 722, 725 (Iowa 1948))).

193. *See id.*

194. *See* Amdor v. Cooney, 43 N.W.2d 136, 138 (Iowa 1950) (noting that "neither the game of baseball nor a baseball park is a nuisance per se but either may be so conducted as to be a nuisance in fact"); *see also Funnell*, 30 N.W.2d at 725 (noting the court may be justified in enjoining a proposed use of land for a stockyard if the stockyard was to be located in a residential district).

195. *See Rutter*, 50 F. Supp. 2d at 886 (quoting *Livingston*, 50 N.W.2d at 599.

depending on whether it was located in an area that was unsuitable for, or intolerant to, such use.[196] The latter consideration involves a determination of how a particular individual plans to go about conducting the alleged use.[197] For example, when determining whether an alleged nuisance should be enjoined under the necessarily result analysis, it would be permissible for a court to take notice of the fact that a landfill is proposed to be located in an area where seepage from the landfill could contaminate local groundwater or that the landfill was to be located across the street from homes.[198] Such a use of land would very likely be deemed incompatible with the location given the inherent danger of pollution, interference, and inconvenience that would be inflicted upon those situated across the street. The analysis of incompatibility would also involve permissible considerations as to the nature of the use. For example, the analysis would look at the fact that the landfill stores trash and other hazardous or unwholesome substances that would likely be offensive to or pose a threat to those living nearby. The analysis would also consider that it is highly likely, based on prior experience, that pollution from such a site would intrude upon those located near the land use in one way or another.[199] The nature of the actual land use (the storing of offensive and dangerous substances likely to intrude on others) and the surrounding property would therefore likely warrant the granting of an injunction against the anticipated nuisance.[200] However, it would be impermissible, for example, to consider that if certain pollution control practices were not employed,

196. *See, e.g.*, *Funnell*, 30 N.W.2d at 725 (noting that a stockyard may necessarily result in a nuisance if located in a residential neighborhood void of similar industrial uses).

197. *See Livingston*, 50 N.W.2d at 599 (noting that the operation of a school could not be enjoined where the existence of a nuisance would be dependent on how the school was operated in the future).

198. *See, e.g.*, Vill. of Wilsonville v. SCA Servs., Inc., 426 N.E.2d 824, 836–37 (Ill. 1981) (applying the "necessarily result" standard and holding that the proposed establishment of a hazardous waste landfill was inappropriate at a location adjacent to a town given that such waste could escape from the site through multiple means of migration, could infect local groundwater, and could pose other serious health risks to the town).

199. *See also* Nickels v. Burnett, 798 N.E.2d 817, 826 (Ill. App. Ct. 2003) (finding that plaintiffs presented sufficient evidence demonstrating that a hog facility was substantially certain to cause harmful health effects and to significantly reduce property values).

200. *See, e.g.*, *Vill. of Wilsonville*, 426 N.E.2d at 837 (granting an injunction where the establishment of a toxic landfill would be incompatible with and dangerous to residents of a given location).

the landfill would likely result in a nuisance.[201] Such a consideration goes to the heart of considering the actual nature of use, such as if negligent practices were employed in the operation of the use that would result in a nuisance, which is prohibited under the necessarily result analysis.[202] This type of consideration would not warrant the finding that a proposed use of land would likely result in a nuisance, as the plaintiff alleging the anticipated nuisance would have to wait and see if such negligent practices were actually employed to transform mere apprehension into an identifiable interference and source of injury.[203] Therefore, under the necessarily result standard used by Iowa courts, plaintiffs seeking to prevent the establishment of a large-scale animal feeding operation in their community may be able to abate the construction of such an operation if they can demonstrate that the proposed use of land would be incompatible with the neighborhood. This may be accomplished by demonstrating, for example, that the feeding operation will necessarily result in pollution of local waterways, which would in turn pose a significant health risk to the plaintiffs and those similarly situated or create a substantial interference with the use and enjoyment of their property and way of life, and would result in a reduction in property values given its size at its present location.[204] Although the previously mentioned showing would likely be sufficient to demonstrate that a large-scale animal feeding operation would necessarily result in a nuisance were it allowed to begin its operations in a given area under the necessarily result analysis, it is difficult to say with exact specificity what type of evidence would be required in order to make a successful showing given that there has been little litigation on the subject.[205] Therefore, an analysis of case law from other jurisdictions employing the same anticipatory nuisance standard is important in order to

201. *See* Rutter v. Carroll's Foods of the Midwest, Inc., 50 F. Supp. 2d 876, 886 (N.D. Iowa 1999) (holding that an anticipated nuisance may not be enjoined if it may or may not become an actual nuisance, depending on its use).

202. *See id.*

203. *See id.* (noting that in such a situation relief would be available only if the anticipated nuisance ripened into an actual nuisance).

204. *See, e.g.*, *id.* (refusing to grant defendant's motion to dismiss on grounds that the plaintiffs failed to state a claim where it was alleged that "invasion by intangible substances, such as noises or odors, will 'necessarily' result from construction of a swine facility of the anticipated size in its present location"); *Nickels*, 798 N.E.2d at 826 (granting an injunction restraining the construction of an animal feeding operation where evidence demonstrated that if the hog facility were to begin operation, it was highly probable that the plaintiffs would experience substantially harmful health effects and a significant loss of their property value).

205. *Rutter*, 50 F. Supp. 2d at 884 ("'Anticipated nuisance' is clearly a cognizable claim . . . albeit one that has not had much consideration . . . .").

understand how a plaintiff may be successful in bringing such a cause of action against a large-scale animal feeding operation.

D. *Utilizing the Doctrine of Anticipatory Nuisance as a Preemptive Tactic in the Fight Against the Establishment of Large-Scale Animal Feeding Operations in Rural Communities*

To gain a better understanding of the type of showing that would be sufficient to warrant the finding of an anticipated nuisance worthy of an injunction in Iowa courts, one may look to other jurisdictions applying the same anticipatory nuisance standard. Illinois, another state with a large agricultural base and numerous animal feeding operations, has rendered several court decisions that can be used as a template for discerning how a suit in an anticipatory nuisance action would be resolved under the necessarily result standard employed by Iowa courts.[206] Under Illinois law, as with Iowa law, a court may enjoin a threatened or anticipated nuisance only where it clearly appears that a nuisance will necessarily result from the act sought to be enjoined.[207] Under this standard, plaintiffs have been successful in enjoining the establishment of a large-scale animal feeding operation in a particular community on grounds that it would necessarily result in a nuisance.[208]

In *Nickels v. Burnett*, plaintiffs brought suit against individuals proposing to construct an 8000 head swine facility in De Kalb County, Illinois, alleging that the facility would necessarily result in a nuisance if established.[209] In the course of litigation, the "plaintiffs submitted extensive evidence in the form of expert affidavits and scholarly articles."[210] This evidence demonstrated that if the facility were constructed at its present size and in its present location, the plaintiffs would necessarily experience a significant loss in the value of their land, and that extreme and offensive odors would be inevitable given the size of the proposed facility, which would be detrimental to the health and well-being of those situated in close proximity to it.[211] The court deemed such evidence sufficient to

206. *See, e.g.*, *Nickels*, 798 N.E.2d 817; Vill. of Wilsonville v. SCA Servs., Inc., 426 N.E.2d 824 (Ill. 1981).

207. Fink v. Bd. of Trs., 218 N.E.2d 240, 244 (Ill. App. Ct. 1966).

208. *See Nickels*, 798 N.E.2d at 820, 826 (enjoining the construction of an 8000 head swine facility on grounds that it would necessarily result in a nuisance and would be harmful to residents located near the facility).

209. *Nickels*, 798 N.E.2d at 820.

210. *Id.* at 825.

211. *Id.* at 826.

warrant the grant of an injunction restraining the establishment of the facility in question, as the evidence demonstrated that the apprehended harms were substantially certain to occur if the operation was allowed to commence at the given location.[212] Thus, the proposed use of land in this situation, the establishment of an 8000 head swine facility, was deemed incompatible with the surrounding environment due to the reduction in property values and the imminent threat to the residents' health and well-being.[213]

In addition to demonstrating the harmful impacts previously cited in *Nickels*, other factors such as the nature of the soil on which the proposed operation will be built and the existence of groundwater or waterways running through the construction site may have some bearing on a court's decision to enjoin.[214] For example, in *Village of Wilsonville v. SCA Services, Inc.*, plaintiffs challenging the establishment of a landfill site for toxic chemicals presented evidence on the soil's permeability and the existence of groundwater beneath the soil.[215] Based on this evidence, experts could conclusively say that infiltration of pollutants into such water from seepage, other forms of subsidence, and migration were certain to occur in that location.[216] This fact, coupled with other showings as to the inherent danger posed to local residents, was sufficient to warrant the imposition of an injunction restraining the practices of the landfill.[217]

Applying the aforementioned case law to an anticipatory nuisance cause of action against an animal feeding operation under Iowa law, it appears that individuals challenging the establishment of such an operation may be successful if evidentiary findings similar to those discussed in *Nickels* and *Wilsonville* can be demonstrated. Returning to the hypothetical animal feeding operation discussed throughout this Note, individuals challenging its establishment may be able to demonstrate through the use of expert testimony and other scholarly articles, such as the previously mentioned Iowa State University/University of Iowa study detailing the adverse effects such operations have on local property values, that an operation holding 6000 head of swine and producing approximately 6,000,000 gallons of manure each year will necessarily result in a reduction

212. *Id.*
213. *Id.*
214. *See* Vill. of Wilsonville v. SCA Servs. Inc., 426 N.E.2d 824, 831 (Ill. 1981).
215. *Id.*
216. *Id.*
217. *Id.* at 841.

of property values to neighboring residents.[218] Furthermore, one may be able to demonstrate, through the use of expert testimony, that the amount of manure produced by such an operation would inevitably create extreme and offensive odors that would jeopardize neighboring residents' health and well-being based on prior experience and scientific evidence relating to air emissions from feeding operation facilities.[219] Finally, depending on the type of soil and the presence of local waterways or groundwater in a given area, plaintiffs may be able to demonstrate, through expert opinions and testimony, that the feeding operation, at its present size and location, would be substantially certain to pollute groundwater or other waterways in the given area, thus posing an additional risk to those living in the neighborhood in question.[220] Many animal feeding operations dispose of manure by applying it directly to fields as fertilizer.[221] This practice can result in the contamination of groundwater through leaching and surface runoff if located near sources of water or on permeable soil.[222] Therefore, if the hypothetical animal feeding operation were to be located on permeable soil near local waterways or above vulnerable groundwater, expert testimony could demonstrate that contamination of local water would necessarily result from the operation. Under the *Nickels* and *Wilsonville* approach to the doctrine of anticipatory nuisance (the same approach applied by Iowa courts), such evidentiary findings would be sufficient to warrant the imposition of an injunction against the establishment of a large-scale animal feeding operation in a given area, as the use of land for this purpose would be deemed incompatible with the given area.[223]

It should be noted, however, that not all factual situations surrounding the proposed establishment of an animal feeding operation will prove as favorable for plaintiffs as those in *Nickels* and *Wilsonville*. To

218. *See* Herriges et al., *supra* note 2, at 16 (noting that animal feeding operations have a statistically significant effect on the property values of residents living in close proximity to such operations).

219. *See* CHAPIN et al., *supra* note 24, § 2.2.5 (discussing problems associated with odors emitted from large-scale animal feeding operations).

220. *See, e.g.*, *Vill. of Wilsonville*, 426 N.E.2d at 831.

221. *See* U.S. ENVTL. PROT. AGENCY, OFFICE OF WATER STANDARDS & APPLIED SCIS., DIV., *supra* note 10, at 2.

222. *Id.* at 13.

223. *See Vill. of Wilsonville*, 426 N.E.2d at 831 (enjoining a landfill from conducting operations in the future on grounds that it would necessarily result in a nuisance); Nickels v. Burnett, 798 N.E.2d 817, 826 (Ill. App. Ct. 2003) (granting an injunction against the establishment of an animal feeding operation in an area deemed incompatible for such use).

state that all anticipatory nuisance causes of action brought against proposed large-scale animal feeding operations in rural communities, where there is potential for odor and environmental contamination, will be successful would be a major misstatement. As previously mentioned, courts are somewhat hesitant to grant an injunction restraining a certain activity before it actually commences where the activity in question may or may not become a nuisance depending on the facts and other surrounding circumstances.[224] This is because courts are generally reluctant to speculate on whether a proposed use of land will result in a nuisance in the future where the facts do not clearly demonstrate that the proposed land use will be clearly incompatible with the surrounding environment and result in injury to others.[225] Consequently, proceeding with an anticipatory nuisance cause of action can involve a difficult battle for plaintiffs where the factual circumstances surrounding an alleged anticipated nuisance fall short of those present in *Nickels* and *Wilsonville*. This can be particularly true where the individuals responsible for establishing an animal feeding operation plan to institute measures that can potentially mitigate the interferences that may bear upon neighboring residents.

Although there are currently no measures capable of completely eliminating the presence of odor generated by animal feeding operations,[226] there are certain management practices and technologies, at least with respect to odor problems, that can be utilized to reduce the likelihood that it will substantially interfere with the use and enjoyment of others' property so as to justify the finding of a nuisance.[227] For example, studies have demonstrated that the utilization of vegetative barriers (typically large rows of trees) surrounding a livestock facility can reduce odor impact on neighboring residents by promoting dispersion and dilution of odors in surrounding areas.[228] Furthermore, there are several steps that can be taken with regard to the treatment, storage, and disposal of animal waste that can reduce the amount of odor generated. These practices may include the use of aerobic manure storage lagoons, which generate fewer odors than other manure storage structures;[229] the use of additives, which

224. Livingston v. Davis, 50 N.W.2d 592, 599 (Iowa 1951).

225. *See id.*

226. *See* CHAPIN et al., *supra* note 24, § 3.0.

227. *See id.*

228. U.S. ENVTL. PROT. AGENCY, SWINE CAFO ODORS: GUIDANCE FOR ENVTL. IMPACT ASSESSMENT 5-2 (1996), http://www.epa.gov/earth1r6/6en /xp/odor.pdf.

229. *Id.* at 8-1.

can be applied to manure or waste water to mitigate odor;[230] and the disposal of animal waste by forced injection and incorporation into the surrounding soil.[231] Such practices are used in place of basic land application in areas located in close proximity to plaintiffs' homes (a practice which would arguably create a stronger case for injunction under the anticipatory nuisance standard previously discussed). An operator of an animal feeding operation may also transport and land-apply manure to sparsely populated areas where there are no neighboring residences, and where there is no potential for groundwater contamination.[232] These practices can be utilized by those responsible for managing livestock operations to reduce the likelihood that such operations will substantially interfere with the use and enjoyment of others' property in the areas surrounding the operation. Therefore, where the operators of livestock feeding facilities have taken the proper steps to ensure that these practices will be in place when operation begins, a court will be less willing to enjoin the continued construction because the chances of interference with neighboring properties would be reduced.[233]

Although the implementation of management practices previously discussed would likely create a stronger presumption against the issuance of an injunction, by no means is this detrimental to individuals who may be located in close proximity to such operations. Such practices can be somewhat expensive to utilize, thus, reducing an animal feeding operation's profit margin and the incentive to take proper precautionary measures to minimize the impact on its neighbors.[234] However, the threat of an anticipatory nuisance action can provide powerful incentive to take such measures given the threat of injunction and that a court could potentially consider such practices in assessing the feeding operation's compatibility

230. *Id.* at 6-1.

231. *Id.* at 5-9.

232. *See id.* at 5-1.

233. It would be difficult to argue, for example, that an animal feeding operation would necessarily result in extreme and offensive odors which would interfere with neighboring residents' properties when those responsible for constructing a proposed operation can demonstrate that all of their animal waste will be transported to a remote area and applied to lands that are not even remotely close to neighboring residences or businesses. *See* Rutter v. Carroll's Foods of the Midwest, 50 F. Supp. 2d 876, 886 (N.D. Iowa 1999) (requiring that a nuisance must "'clearly' and 'necessarily' result" in order to enjoin an act (quoting Funnell v. City of Clear Lake, 30 N.W.2d 722, 725 (Iowa 1948))).

234. *See, e.g.*, CHAPIN et al., *supra* note 24, §§ 3.0–3.10 (describing various practices).

with the area at issue.[235] Therefore, neighboring residences may actually benefit from the imposition of such practices because their property interests and well-being will be taken into account during construction and implementation with an eye toward protecting those interests into the future from the adverse impacts such operations may pose. Where management practices are employed to minimize the effects on neighboring residents, there is no longer a need to enjoin the operation's practices where these mitigation measures are effective, as there is no longer an interference giving cause for residents to take action in the first place. However, such management practices will not always provide adequate assurance that individuals residing near large-scale animal feeding operations will be protected from the potential health and safety hazards. For example, even where an animal feeding operation engages in the practice of disposing of manure by injecting it directly into the soil surrounding such facility (a process which can greatly reduce the amount of odor and ammonia emitted into the atmosphere),[236] such injection may still jeopardize the health and safety of residents of the community in which the operation is located if, for example, the operation injects manure into permeable soil above vulnerable groundwater or in areas with high water tables.[237] In this instance, a preemptive injunction would be proper, and a plaintiff maintaining an anticipatory nuisance action on such grounds would likely be successful, as water pollution in the given area would be certain to result from such practices.[238]

Thus, it appears that in addition to intense public pressure and protest against the establishment of animal feeding operations, the filing of an anticipatory nuisance action may be an additional preemptive tactic capable of giving individuals the extra bite needed to persuade a feeding operation to relocate to an area less likely to be incompatible with the proposed use, or to engage in management practices that will adequately protect individuals' interests and well-being. The filing of such an action may provide a powerful incentive for the owners of the proposed operation to settle a case before trial and concede to plaintiffs' demands, reasoning that the ensuing litigation would be costly and time consuming. Through the anticipatory nuisance doctrine, plaintiffs, fearful of the effects such an operation may have on their community, have the ability to seek judicial

235. *See Rutter*, 50 F. Supp. 2d at 886 (noting that the determination of whether a nuisance will clearly and necessarily result is determined by looking at the surrounding property and considering its actual use).

236. U.S. ENVTL. PROT. AGENCY, *supra* note 228, at 5-9.

237. *Id.*

238. Vill. of Wilsonville v. SCA Servs., Inc., 426 N.E.2d 824, 831 (Ill. 1981).

recourse before injury from such an operation can be identified. Knowledge of this fact may influence prospective owners and operators of large-scale animal feeding operations to use greater care in the selection of an area suitable for such use, considering both the compatibility of the neighborhood in question and those who might be adversely affected. In various jurisdictions, many land disputes where nuisances are alleged result from the phenomenon of unconsidered environmental externalities.[239] This phenomenon is a result of individuals and corporations acting in their own self-interest, by using their land to conduct activities that are the most economically profitable without regard to the consequences that may flow to others from such activities.[240] The use of land in such a fashion often creates environmental externalities (such as industrial waste) that may enable the land owner to generate profits (as pollution may be the byproduct of a profitable industry), but serve as an overall detriment to the surrounding environment.[241] Those using the land gain the benefits in the form of profits, while society bears the costs in the form of increased medical expenses flowing from greater incidence of disease as a result of pollution, reduction of property values due to the presence of polluting industries, and an overall degradation of the environment—costs which the land-user is not obligated to absorb.[242] "[T]he doctrine of anticipatory nuisance could be applied to compel users of land to internalize environmental [externalities], and thereby prevent unreasonable uses of land, before these uses actually occur."[243] The individual proposing to use the land for a given purpose would be forced to consider the impact on the surrounding environment in addition to the profits that could be generated if an anticipatory nuisance action were threatened against such operation.

Knowledge that aggrieved plaintiffs have the option to file a lawsuit against a proposed operation before its establishment may compel those proposing to establish such a facility to consider alternative locations, rather than investing substantial amounts of money into a project that may be shut down before completion, on the grounds that it will result in harm

239. Smith, *supra* note 76, at 728–29.

240. *Id.*; *see also* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 48–52 (5th ed. 2002) (discussing environmental externalities). *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (describing environmental externalities).

241. Smith, *supra* note 76, at 728–29.

242. *See, e.g.*, Joseph J. Romm & Christine A. Ervin, *How Energy Policies Affect Public Health*, 111 PUB. HEALTH REP. 390, 394 (1996) (discussing the adverse impact of polluting industries on the economy and health of individuals).

243. Karin P. Sheldon, *Introduction*, 29 VT. L. REV 679, 683 (2005).

to others located in the area.[244] Furthermore, such knowledge may serve as a powerful incentive for those proposing to establish a large-scale feeding operation in a given area to ensure that measures, that will protect neighboring residents from the adverse effects such a facility may pose, are in place. When knowledge and the filing of an anticipatory nuisance action fail to persuade the owners of the proposed animal feeding operation to consider alternative locations and the implementation of mitigation measures, the case will proceed to trial where the court will consider the ultimate fate of the operation in question. If the court deems the proposed use of land to be incompatible with the area in question under the considerations and presentation of evidence previously discussed, the establishment will be enjoined, the apprehended injury prevented, and the community seeking to protect its way of life will be victorious in the fight against what it perceives to be an unwelcome neighbor.

V. CONCLUSION

The establishment of large-scale animal feeding operations in rural Iowa communities is being met with increased opposition as findings and studies detailing the adverse effects such operations may have on local residents and their way of life, coupled with incidents of waste spills, excessive runoff of manure, leaking manure storage lagoons, and odor problems, have heightened public awareness. As a result, many Iowans are turning to courts for the resolution of the numerous land disputes that arise when such operations are perceived to cause injury to the property interests and well-being of others in some identifiable way. Plaintiffs bringing nuisance claims against animal feeding operations, however, have often obtained suboptimal results when their ultimate goal was to restrain the practices of such operations altogether, as considerations of economic efficiency have persuaded courts to gravitate toward alternative forms of relief in the form of compensatory damages.

The current trend among courts to award compensatory damages in lieu of granting an injunction has made preemptive tactics that can prevent the establishment of large-scale animal feeding operations before they are actually constructed more important. Intense public pressure and protests in the fight against establishment of large-scale animal feeding operations in Iowa are solutions that have had some success. However, a potentially more effective solution may be seeking an injunction preventing the

244. *See, e.g.*, Whalen v. Union Bag & Paper Co., 101 N.E. 805, 806 (N.Y. 1913) (granting an injunction requiring a pulp mill to close despite the fact that the mill had cost millions of dollars to build and employed between 400 to 500 individuals).

injuries that may result from the operation before it comes to fruition. In this respect, the doctrine of anticipatory nuisance, a significantly underutilized doctrine in Iowa, has the potential to fulfill this role and become an effective tool in the fight against the establishment of large-scale animal feeding operations in rural Iowa communities.

By filing an anticipatory nuisance claim, courts are given the opportunity to declare that a proposed use of land will necessarily result in a nuisance and enjoin it before it actually commences operation, thus precluding any injury that can originate from the use in question. This doctrine may serve as an alternative solution for rural Iowans who wish to protect their way of life and community from the potential adverse effects a large-scale animal feeding operation presents if placed in an area incompatible with such use. By demonstrating incompatibility, plaintiffs can preclude any harm that is likely to flow to them before it has an opportunity to manifest. In addition, the anticipatory nuisance doctrine can serve to further the courts' broader policy goal of avoiding economic waste while eliminating the need for unnecessary land disputes. Such disputes may be prevented through the selection of sites better suited for the establishment of large-scale animal feeding operations. By empowering courts with the opportunity to utilize the anticipatory nuisance doctrine, those interested in establishing large-scale livestock facilities will be compelled to use greater care and insight in the selection of areas suitable for such use. At the very least, operators will need to implement management practices that will ensure there is little interference with neighboring residents' properties. Where such an incentive is lacking, the courts will be called upon to decide the fate of the operation, and will have the power to prevent such individuals from commencing with their plans if they have failed to exercise care in the selection of an appropriate area. Herein lies the power of the anticipatory nuisance doctrine in the fight against the establishment of large-scale animal feeding operations in Iowa.

*Ryan Teel**

* B.A., University of Iowa, 2004; J.D. Candidate, Drake University Law School, 2007.