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**Fighting Corporate Pigs: Citizen Action and
Feedlot Regulation in Minnesota**

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Note

Fighting Corporate Pigs: Citizen Action and Feedlot Regulation in Minnesota

Trevor Oliver*

Rural America, usually known for its bucolic scenery and fresh air, is becoming an environmental battlefield of sorts, as people struggle against a new threat to their air and water. What's threatening the country air and scenery is not some industrial newcomer, but farmers, the traditional inhabitants of the countryside. Increasing corporatization and consolidation in livestock production has created a new breed of giant animal feedlots, of sizes overwhelming previous conceptions of a "large" feedlot.¹ In the past decade, animal feeding operations have greatly increased in size, with hog feedlots leading the trend.² The waste from these giant feedlots causes various environmental problems, not the least of which is air pollution, because manure, especially pig manure, emits hydrogen sulfide, ammonia gas, and other compounds harmful to human

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1. See Nelson Antosh, *As Low Prices Hurt Operations, Big and Small, Many Hog Raisers Are Calling It Quits*, HOUS. CHRON., Jan. 17, 1999, at C1 (highlighting the difference between historical hog farming and the present situation by noting that a 100-sow farm, considered a "big" operation twenty years ago, is insignificant compared to farms with thousands of sows).

2. See Successful Farming Online, *Pork Powerhouses 1997* (visited Oct. 17, 1998) <<http://www.agriculture.com/sfonline/sf/1997/octoberpork97/pph97.html>> (naming the top 50 pork producers in the nation and describing some of the new, innovative large farms). Growth (measured in numbers of sows producing pigs at each farm) was 19% in 1997 for the top farms nationwide. See *id.*; see also Minnesota Pollution Control Agency, *Data on Feedlot Permits Issued in Minnesota*, (visited Sept. 1, 1998) <<http://www.pca.state.mn.us/hot/fl-permits.html>> (set of graphs showing more permits issued to larger feedlots in last seven years, and that a large proportion of the bigger feedlots are hog feedlots).

health.³ These new feedlots often outstrip the ecosystem's ability to handle the waste, as well as their neighbors' tolerance for the pollution they cause. As a result, the discussion in farming communities has grown more acrimonious as proponents of giant feedlots find themselves angrily opposed by smaller farmers and other longtime rural residents.⁴

Minnesota, like many states, is just now beginning to respond to the problem. In January 1999, the Minnesota Pollution Control Agency (MPCA or the Agency) assessed a penalty against a hog feedlot for air pollution, the first action of its kind in the state.⁵ The MPCA's action comes as a result of the increasing agitation among rural citizens about the constant odor problems from neighboring feedlots.⁶ Rural complaints eventually led the state legislature in 1997 to order the Agency to develop a compliance monitoring plan to enforce the ambient hydrogen sulfide standard at feedlots across the state.⁷ The Agency's regulatory program is a step forward in addressing the problem, but it took nearly a decade and a legislative mandate to make it happen. Additionally, the feedlot problem currently swamps the state regulation program, making citizens' ability to act necessary to fill in the gaps in enforcement.⁸ Un-

3. See LIVESTOCK ODOR TASK FORCE, MINNESOTA POLLUTION CONTROL AGENCY, A STRATEGY FOR ADDRESSING LIVESTOCK ODOR ISSUES 4 (1997) (noting in a preliminary characterization of the odor issue that manure contains over 168 odor-producing compounds).

4. The disputes over feedlots are usually heated, and in extreme cases, violent. See Paul Hammel, *Emotions Run Raw on Issue*, OMAHA WORLD-HERALD, Dec. 30, 1998, at 1. The article features the story of a Nebraska farmer serving out a prison sentence for destroying construction equipment at a feedlot site across the road from his farm. *Id.* It also tells of several Nebraska and Iowa livestock farmers attempting to organize their neighbors to protest the construction of new hog facilities, arguing that the new feedlots would degrade environmental quality.

5. See Tom Meersman, *State Fines Hog Feedlot for Odor-Related Violation*, STAR TRIB. (Minneapolis), Jan. 26, 1999, at B8 (reporting that the MPCA fined the ValAdCo feedlot in southwestern Minnesota \$32,500 for 46 documented violations, and required changes to its manure storage system in order to reduce hydrogen sulfide emissions).

6. See Chris Ison, *State Air Tests Find High Levels of Toxic Gas Near 5 Feedlots*, STAR TRIB. (Minneapolis), Apr. 26, 1998, at A1 (describing the plight of Julie Jansen, who closed down her daycare operation due to the fumes produced by the neighboring ValAdCo feedlot).

7. See MPCA, LEGISLATIVE REPORT OF THE FEEDLOT HYDROGEN SULFIDE PROGRAM 1 (1998) [hereinafter MPCA LEGISLATIVE REPORT] (noting the chronology of the livestock industry's transformation).

8. See Conrad deFiebre, *Audit: MPCA Lags Badly on Feedlots*, STAR TRIB. (Minneapolis), Jan. 29, 1999, at A1.

fortunately, any citizen action that could augment the process is hamstrung by agricultural protections that were written into environmental laws before the rise of mammoth feedlots.

This Note focuses on the environmental problems posed by feedlots, and proposes citizen enforcement actions as a tonic, using Minnesota's situation as a backdrop.⁹ Part I of this Note discusses the feedlot regulation problem and fleshes out the harms posed by feedlots, the Agency response, and potential areas in which citizen action against feedlots could be developed. Part II exposes the weaknesses of the options currently available to citizens, including the recently developed MPCA hydrogen sulfide compliance program and nuisance suits as a private cause of action against feedlot emissions. Part III proposes a strengthened citizens' suit through eliminating the agriculture exemption from the state's environmental citizen suit law. This simple change would complement the state's feedlot monitoring program, filling in the enforcement gaps left by the limited state resources and ensuring greater environmental protection for rural citizens.

I. BACKGROUND

A. THE GROWING FEEDLOT PROBLEM

Pork production over the past decade has seen a rush to gigantic hog operations run either by corporations or large farmers' cooperatives.¹⁰ The move from traditional pasture-

9. The overall solution is not, however, limited to Minnesota. Despite the wide variations in agricultural regulations among the states, all states could benefit from increasing citizen environmental rights to relieve pressure on their enforcement agencies. See James Walsh, *Big Pork: Agricultural Model or Menace?*, STAR TRIB. (Minneapolis), Nov. 26, 1995, at 1A (noting that Missouri, for instance, has exempted certain counties from laws barring corporate farming to encourage feedlot development); see also MPCA, *State-by-State Comparison of Animal Manure Regulations*, <<http://www.pca.state.mn.us/hot/fl-statecomp.html>> (visited May 21, 1998) (comparing regulations in the major feedlot states).

10. As an illustration, the MPCA issued 14 permits in 1990 to feedlots with a capacity of more than 1,250 hogs. By 1997 that number was 253. See Tom Meersman, *Legislature Braces for Hot Debate on Feedlots*, STAR TRIB. (Minneapolis), Jan. 20, 1998, at B1. Some states, such as Minnesota, still ban the outright corporate ownership of farms. See MINN. STAT. § 500.24 subd. 1, 3 (1998) (declaring the state's desire to maintain family farming and strictly limiting corporate ownership of farms). Most corporations get around this ban by contracting with individual farmers, providing the money to build facilities and supplying feeder hogs to that farmer to raise and sell back to the

based livestock practices to partially or totally enclosed high-volume operations began in the late 1960s and early 1970s following the success of the poultry industry's enclosure method.¹¹ The average volume of individual farms continues to increase as farms rush to keep up with the corporate giants.¹²

The concentration of livestock, and in particular swine, has the potential to cause severe environmental and health problems.¹³ Hog farms produce prodigious amounts of waste that somehow must be stored, treated, and disposed. The waste's final disposal involves spreading the manure out over fields as fertilizer at the end of a season. This can cause pollution problems, but the primary pollution concern stems from the storage of manure until it is spread.¹⁴ Many feedlots, particularly those built more than six years ago, store manure in open, earthen lagoons prior to spreading the manure on farmland.¹⁵ This method of storage presents the possibility of many environmental problems, including potentially health-endangering air pollution. Manure contains a multitude of odiferous compounds, the most prominent of which are hydrogen sulfide and ammonia.¹⁶ As the volume of hogs in the feedlot increases, so too does the amount of waste going into the lagoons or other

company. See William Claiborne, *Fighting the "New Feudal Rulers"*, WASH. POST, Jan. 3, 1999, at A3 (describing South Dakota farmers' attempts to stave off corporate feedlot development).

11. See MPCa LEGISLATIVE REPORT, *supra* note 7, at 2 (describing historical development of livestock operations in the state); see also Walsh, *supra* note 9 (noting the rapid growth of leading hog producers upon the adoption of the poultry model).

12. See Successful Farming Online, *supra* note 2. Three Minnesota farms in 1995 had at least 10,000 sows, allowing the farms to each produce approximately 200,000 hogs in one year. See Walsh, *supra* note 9. These operations pale in comparison to the Premium Standard plant in Missouri, the nation's fourth-largest hog producer, which in 1995 had 80,000 sows and slaughtered more than 5,600 hogs per day. See *id.*

13. See Ted Williams, *Assembly Line Swine*, AUDUBON, Mar.-Apr. 1998, at 27-28, 31 (cataloguing environmental hazards of feedlots, including manure spills into waterways, nitrate overloads, and hydrogen sulfide); Julie Anderson, *Hog-Farm Odors Studied for Risks*, OMAHA WORLD-HERALD, Dec. 28, 1998, at 7 (noting a University of Iowa study which found an "unusually high rate of respiratory problems" among people who lived near a large hog feedlot, similar to symptoms found in studies of livestock workers).

14. See Walsh, *supra* note 9; MPCa, *MPCa Orders Strict Improvements at Renville Farm* (visited Sept. 10, 1998) <<http://www.pca.state.mn.us/news/sep98/nrsep04c98.html>>.

15. See MPCa LEGISLATIVE REPORT, *supra* note 7, at 15-18 (identifying the open earthen lagoon as an inexpensive way of stabilizing waste).

16. See *supra* note 3 and accompanying text.

storage facilities daily, causing the magnitude of the odor problem to grow from annoying to dangerous. Early studies link hydrogen sulfide to respiratory problems in people living near feedlots.¹⁷

The need to mitigate feedlot odors is pressing because the public is growing less tolerant of the odors and other environmental degradation that comes from the new breed of livestock operations.¹⁸ Community meetings in rural areas have become increasingly acrimonious as feedlots seem to be able to build and expand without regard for the input of neighbors.¹⁹ Frustration with the deleterious effects of many feedlot operations appears everywhere, and concerns of environmental stewardship even spring up in the statements of some livestock farmers.²⁰

B. DEVELOPING AGENCY ACTION ON FEEDLOT AIR POLLUTION

1. Permits

The MPCA first required permits for new or expanding feedlots in 1971, with an interest primarily in preventing water

17. See Anderson, *supra* note 13. A recent example is the ValAdCo feedlot in western Minnesota, which had 7,200 "finishing" hogs and an open lagoon. See Chris Ison, *MPCA Tests Find That Feedlot Violated State Standards for Toxic Emissions*, STAR TRIB. (Minneapolis), May 1, 1998, at B3. The gases from the lagoon caused a neighboring home daycare provider to close for fear of the children's health. See *id.*

18. Some options exist for feedlot owners to mitigate some of their odor problems. Several of these options come from methods developed to control odors at municipal waste treatment plants. See "Sludge" Machine Fights Feedlot Odor, STAR TRIB. (Minneapolis), Aug. 9, 1998 at B4; MPCA LEGISLATIVE REPORT, *supra* note 7, at 15-18 (outlining several options for manure odor mitigation, borrowing from industrial and municipal wastewater treatment methods).

19. See Hammel, *supra* note 4. After the MPCA granted permits for a 2,000-hog feedlot between two popular lakes in Stearns County, Minnesota, the county held a meeting to discuss the move. Chris Ison, *Counties Pick Up Slack in Oversight of State's Feedlots*, STAR TRIB. (Minneapolis), Apr. 27, 1998, at B1. A hundred angry residents went to the meeting, at which MPCA representatives agreed to appear only if provided with police protection. See *id.*

20. See Williams, *supra* note 13, at 28-30 (interviewing some of the Missouri livestock farmers who are opposed to the Premium Standard feedlot in that state, some of whom describe themselves as "prisoners" of the neighboring hog operation); Jim Muchlinski, *State of Feedlots Discussed at Forum*, MARSHALL INDEP., July 15, 1998, at 1A (summarizing citizen complaints and quoting a former Minnesota Pork Producers Association president who noted the importance of "tak[ing] care of our resources").

pollution.²¹ State law requires permits for all feedlots in shoreland areas, as well as those with more than fifty animal units, or 125 hogs.²² The permit process is fairly straightforward. Permit applicants submit their proposals to the MPCA Citizens' Board, which reviews the proposal's environmental consequences and either issues the permit or requires additional environmental study.²³ The Board will grant an "interim permit" to an already-operating facility applying for expansion if its current operation is found to potentially endanger the environment, upon which the owner has 10 months to remedy the problems.²⁴ The Agency in recent years has averaged 750 permits granted per year for feedlot construction or expansion.²⁵

As with all governmental decisions that have the potential permanently to affect the environment, the feedlot permit process provides for the consideration of environmental impacts through an environmental impact statement (EIS).²⁶ However, most state agencies seem to ignore the substantive requirement for environmental review, leaving the statute with only minimal impact.²⁷ In the feedlot context, the MPCA currently

21. Cf. MINN. R. 7020.0100-7020.1600 (1997) (establishing permit requirements for feedlot construction and maintenance under the Water Quality Division of the MPCA).

22. See MINN. STAT. §116.07 subd. 7(g) (1998) ("A feedlot permit is not required for livestock feedlots with more than ten but less than 50 animal units; provided they are not in shoreland areas"). "[O]ne swine over 55 pounds" equals 0.4 animal units. MINN. R. 7020.0300 subd. 5. Thus, to trigger the permit requirement, a feedlot must have 125 hogs.

23. See MPCA LEGISLATIVE REPORT, *supra* note 7, at 1-2. The Agency requires an Environmental Assessment Worksheet for total confinement operations (which includes the vast majority of hog feedlots) of 2,000 animal units or greater (5,000 hogs), and for partial confinement operations with over 1,000 animal units. See MPCA FEEDLOT PERMIT APPLICATION PROCESS (1997).

24. See MPCA LEGISLATIVE REPORT, *supra* note 7, at 1.

25. See *id.* The MPCA does not divulge the number of permits it denies per year, but indications are that the Agency denies only a small percentage of permits. See Conrad deFiebre, *Audit Will Examine MPCA's Policing of Feedlots*, STAR TRIB. (Minneapolis), Apr. 7, 1998, at B3.

26. See Minnesota Environmental Policy Act, MINN. STAT. § 116D.04 (requiring that state government agencies take environmental impact into account in decisionmaking). MEPA borrows the approach of the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d (1994), which requires federal agencies to investigate environmental impact before making final decisions that may affect the environment.

27. See John H. Herman & Charles K. Dayton, *Environmental Review: An Unfulfilled Promise*, BENCH & BAR MINN., July 1990, at 31, 33 (noting that Minnesota has only produced an average of 9 environmental impact state-

requires an environmental assessment worksheet (EAW), the preliminary study done to determine whether an EIS is necessary, for applicants proposing feedlots of 2,000 animal units or more.²⁸ The requirements may change, however, because a proposed new feedlot rule would lower the threshold requirement to 1,000 animal units.²⁹ The changes to the rule are partially the result of a recent state district court decision which invalidated a feedlot permit and required the MPCA to perform more substantial environmental study before proceeding.³⁰ The decision in *Pope County Mothers* blasted the MPCA for failing to require significant environmental review of a feedlot proposal involving sixteen new hog buildings in seven adjoining townships, accusing the MPCA Board of "careless disregard" of its protective mission.³¹

Historically, the Agency viewed odor as a local problem for control through zoning and other land use planning, and did not make it an issue in state permitting or oversight.³² While this view began to change in the early 1990s—as larger feedlots developed and complaints to the MPCA's permitting board about feedlot odor grew more adamant—much of the recent action regulating feedlots has come at the local level.³³ The power granted by the MPCA's deferral to local control is interpreted broadly, with zoning ordinances historically retaining exclusive control over odor problems. City councils and township boards have accordingly used zoning regulations in an at-

ments per year since the statute's inception, a meager amount compared to other states with EIS requirements).

28. Thus, only hog feedlots of 5,000 hogs and up get any kind of environmental scrutiny during the permit process. See *supra* note 23 and accompanying text (discussing EAW requirements for feedlots).

29. See Conrad deFiebre, *Senate Vote Reverses Feedlot Restrictions*, STAR TRIB. (Minneapolis), May 6, 1999, at 1B.

30. See *Pope County Mothers and Others Concerned for Health v. MPCA*, File No. C1-98-76 (Minn. Dist. Ct. Sept. 30, 1998). Hancock Pro-Pork, a cooperative of fourteen local hog farmers, proposed to build 16 separate buildings in the area which would process about 40,000 hogs per year. See *id.* Local residents sued the MPCA after the agency granted permits to the operation, including some granted before the EAW was complete. See *id.*

31. *Id.* at 60.

32. See MPCA LEGISLATIVE REPORT, *supra* note 7, at 2; see also MINN. R. 7020.0100 (1997) ("[T]he agency will look to local units of government to provide adequate land use planning for residential and agricultural areas.").

33. When the MPCA opened the public comment period on the permit for ValAdCo's feedlot in 1991, 37 local residents wrote the agency to complain of potential odor as well as groundwater problems. See *Board of Supervisors of Crooks Township v. ValAdCo*, 504 N.W.2d 267, 270 (Minn. Ct. App. 1993).

tempt to mitigate the odors and other land use problems that accompany feedlots.

Conditional use permits are the most powerful tool available to local governments; a local board may consider a conditional use permit much as it would consider a regular feedlot permit, but without the possibility of MPCA review and reversal.³⁴ This power is not absolute. A comprehensive scheme of land use regulation may be acceptable to the courts, but local governments must be careful about how far they go in making restrictions on feedlots. Crooks Township, for example, attempted to establish a local permit system, requiring feedlots to post bonds and set barns far back from other properties.³⁵ The courts struck the ordinance down as preempted by the state permit system.³⁶

To bolster a local role, under a recent statute, counties may "assume responsibility for processing permit applications" for feedlots with the approval of the MPCA.³⁷ This statutory

34. Conditional use permits are local land-use devices that allow localities to regulate a proposed land use, such as a feedlot, in exchange for giving the owner the ability to operate in an area not zoned for his use. See DANIEL L. MANDELKER ET AL., *LAND USE LAW* 276-77 (3d ed. 1993); *Canadian Connection v. New Prairie Township*, 581 N.W.2d 391, 393 (Minn. Ct. App. 1998). In *Canadian Connection*, the company sought to expand its New Prairie feedlot by 6,000 hogs, and the MPCA granted the permits, requiring only that the company implement an "odor management plan." 581 N.W.2d at 393. After its applications for the required conditional-use permits were denied by New Prairie's board, the feedlot challenged the township ordinance (passed in response to the company's plans to expand). See *id.* The court did not agree with *Canadian Connection's* argument that state law preempted the ordinance, finding it significant that no state regulation affected the day-to-day operation of the feedlot. See *id.* at 394-97.

35. See *ValAdCo*, 504 N.W.2d at 270.

36. See *id.* at 272. The court declared that the "comprehensive statutory scheme" contained in the statutes and rules governing the permit process preempted the Crook Township requirements. The absence of a bond requirement in the MPCA and statutory permit guidelines indicated to the court "the legislature's judgment that the MPCA application review process provides adequate protection" against operational problems with the feedlot. See *id.* at 270. The court drew a line between zoning and operational requirements and held that Crooks Township was attempting to affect the operation of the feedlot. See *id.*

37. MINN. STAT. § 116.07 subd. 7(a). "Processing" is defined in the statute as including the distribution of MPCA forms, receipt and review of forms, and rendering assistance to applicants. See *id.* Subsection (b) further states that, "at the option of the county board," processing may include "issuing, denying, modifying, imposing conditions upon, or revoking permits" along the lines of MPCA rules with the possibility of MPCA review within 15 days of the county board's action. See *id.*

language gives the counties far more authority in regulating feedlots than townships and city governments. For example, in 1994, Blue Earth County enacted a permit review ordinance containing several of the same provisions declared invalid in the Crooks Township ordinance.³⁸ Unlike the township law, however, the ordinance was incidental to the county's MPCA application to process feedlot permits, and was upheld by the courts.³⁹ Because the role of counties in feedlot regulation is specifically recognized, the counties have considerable leeway in setting requirements for feedlots within their boundaries, with MPCA approval.

The role of counties in feedlot regulation is thus fairly strong and getting stronger. In its 1998 session, the Minnesota legislature reinforced the county's role in feedlot regulation by including in the county permit program the guarantee that "[a] county may adopt by ordinance standards for animal feedlots that are more stringent than the standards in pollution control agency rules."⁴⁰ Townships also may affect feedlot placement through zoning regulation, though they must be careful to restrain their actions to pure land use regulation in order to pass judicial review.

2. State Air Quality Enforcement

Due to the intensified complaints and a very slow Agency response, the Minnesota Legislature in 1997 directed the MPCA to monitor and enforce the state's existing ambient air quality standard for hydrogen sulfide.⁴¹ The MPCA began

38. See *Blue Earth County Pork Producers v. County of Blue Earth*, 558 N.W.2d 25, 26 (Minn. Ct. App. 1997). The Pork Producers sued almost immediately after the county ordinance became effective on January 1, 1995, seeking a declaratory judgment invalidating the ordinance before Blue Earth County ever considered a feedlot permit.

39. See *id.* at 28. The court referred repeatedly to Minnesota Statutes section 116.07, subdivision 7 and Minnesota Rule 7020.0100 in making its argument that county feedlot regulation is intended to supplement and assist the MPCA in performing its mission of protecting the state's environment. The MPCA's approval of the Blue Earth ordinance also carried a lot of weight with the court, which noted that the legislature created "a state and county partnership . . . indicat[ing] feedlot regulation is not a matter of solely state concern." *Id.*

40. 1998 Minn. Laws ch. 401, §41. For an example of an attempt at tougher regulation, see Tom Meersman, *Rice County Board Relaxes Tough Feedlot Limits Passed Last Year*, STAR TRIB. (Minneapolis), July 13, 1997, at B1.

41. See MINN. STAT. § 116.0713 (1998) (requiring that the MPCA "monitor

testing ambient air quality around feedlots in late 1997 and spring 1998, developing a method for the monitoring of feedlot emissions.⁴² Six of the first ten lots sampled produced hydrogen sulfide in levels that would possibly exceed the state ambient air quality standard of 30 parts per billion (ppb).⁴³ Citizen complaints form the backbone of the MPCA's feedlot air quality monitoring program, initiating the process of air monitoring and compliance negotiation.⁴⁴ MPCA's response protocol follows several steps in responding to a citizen call, starting with the entry in an "odor log."⁴⁵ The agency staff will then try to meet with the complainant "where possible" to gain a closer understanding of the problem before notifying the feedlot owner of the existence of a complaint and beginning air moni-

and identify potential livestock facility violations of the state ambient air quality standards for hydrogen sulfide" and develop a system to respond to citizen complaints). The legislative action became necessary because it appeared that the Agency's Citizen Board, responsible for reviewing feedlot permits, was excessively slanted in favor of feedlots. In 1997, of the nine citizen members of the board, three had significant interests in feedlot operations, and none were affiliated with any environmental groups. In January 1998, one of the feedlot-affiliated members did not stand for reappointment, but her position is still vacant. See Chris Ison, *Agency Lags in Policing Feedlots; Regulatory Board Accused of Favoring Hog-Farm Owners*, STAR TRIB. (Minneapolis), Mar. 8, 1998, at A1.

42. See MPCA LEGISLATIVE REPORT, *supra* note 7, at 5-13 (discussing the methodology and equipment used in the fall 1997 sampling). For the fall tests, the Agency used a "Jerome" meter, a handheld electronic meter that gives instantaneous readings of H₂S levels in the air. The Jerome was found to be extremely useful for spot sampling, but was not recommended by the Agency for actual compliance monitoring.

43. See Ison, *supra* note 17. The Minnesota ambient hydrogen sulfide standards are violated if an operation exceeds more than 30 ppb, averaged over a half-hour period, twice in one year. MINN. R. 7009.0080 (1997). For the spring 1998 tests, the agency also used the Jerome meter while testing another method, the "chemcassette," a 24-hour remote device which the agency did recommend for continuous compliance monitoring. See MPCA LEGISLATIVE REPORT, *supra* note 7, at 5-6. The spring 1998 tests alone would not establish a violation of the standard in any case, because a second reading would be necessary, using a 24-hour continuous air monitor for each test.

44. See MPCA LEGISLATIVE REPORT, *supra* note 7, at app. I (feedlot enforcement program flowchart). The MPCA notes this, stating that "[t]he MPCA investigation into hydrogen sulfide emissions is primarily complaint driven." *Id.* at 9. It can be said that citizen complaints created the MPCA's hydrogen sulfide initiative, as the MPCA Legislative Report included copious records of air quality monitoring done by individual citizens without MPCA assistance. See *id.* at app. H.

45. *Id.* at 10. The log has 24 different categories of information to be filled in, including location, humidity, suspected facility, and whether the citizen has any monitoring results of his or her own.

toring.⁴⁶ The MPCA's protocols aim to ensure responsiveness on an issue where the agency was previously very unresponsive. Possibly because of that record, the legislature has built more citizen participation into the feedlot permit process, requiring feedlot permit applicants to notify all residents living within 5,000 feet of the proposed feedlot within ten days of filing the application with the MPCA or county board.⁴⁷

The Agency's first enforcement step upon receiving a complaint is to dispatch an inspector with a portable meter for an air measurement at the site. This inspection is preliminary, because a violation of the law can only be established through two 24-hour long readings, but if the portable meter shows a potential violation of the hydrogen sulfide standard, the Agency will contact the feedlot owner, and three things may happen.⁴⁸ If the feedlot has a permit, the permit is checked for the existence of an "odor contingency plan," and the Agency will require that those procedures be followed.⁴⁹ If no permit or contingency plan exists, the feedlot has the option to enter into a compliance agreement on the basis of the portable meter readings to remediate the pollution problem.⁵⁰ In the absence of voluntary or permit compliance, the Agency will deploy a continuous air monitor at the feedlot's boundary, and will enter into enforcement actions if the monitor indicates a violation of the standard.⁵¹

Some problems remain to be resolved, however. There are far more feedlots in Minnesota than there are MPCA inspectors to monitor them. The Agency estimates that there are approximately 35,000 to 45,000 feedlot facilities that fall under the MPCA's regulatory scope, and only a small team of investi-

46. *Id.* at 10-11. Complaints to the MPCA are confidential and are not divulged to the feedlot owner.

47. *See* MINN. STAT. § 116.07 subd. 7(a) (1998) (mandating public notice by feedlot applicants). The requirement only applies to all people seeking to build or expand a feedlot with a capacity of 500 or more animal units (1,250 hogs), so only major feedlots seem to be affected. The statute does not apply to all permits; state law requires permits for feedlots with more than 50 animal units. *See id.* § 116.07 subd. 7(g).

48. *See* MINN. R. 7009.0080 (1997).

49. *See* MPCA LEGISLATIVE REPORT, *supra* note 7, at 9 (describing the operation of the compliance monitoring system, from original complaint to enforcement procedures).

50. *See id.*

51. *See id.*

gators exists to respond to complaints.⁵² The worker hours involved in air quality monitoring have the potential to become very large, especially considering the requirement of at least two 24-hour measurements for establishing a violation. The estimates for the development of the monitoring program show an increase from 0.7 worker years in 1995 to 4.0 worker years in 1998, with 2.5 of the 1998 worker years devoted exclusively to hydrogen sulfide monitoring.⁵³

3. The Citizens' Enforcement Options

Citizens' complaints have driven the feedlot issue in Minnesota, and their rights and options are a critical part of any feedlot regulation system. The complaints of feedlot neighbors are an integral part of the MPCA's hydrogen sulfide emissions monitoring program. In the case of an agency backlog or if enforcement is lax, citizens may need to turn to private causes of action to combat air problems from feedlots. Nuisance suits and environmental citizen suits under the Minnesota Environmental Rights Act (MERA) are usually available to citizens faced with environmental problems.⁵⁴ With environmental problems stemming from agriculture, though, the situation is different because the legislature historically has exempted certain agricultural operations from the reach of environmental causes of action.⁵⁵

Nuisance doctrine, and indeed all environmental law, has its genesis in agricultural waste odors, so the idea of citizens suing over feedlot waste emissions is not tremendously foreign.⁵⁶ Minnesota has codified its doctrine of nuisance, stating that anything that may "interfere with the comfortable enjoyment of life or property, is a nuisance."⁵⁷ The cause of action is available to anyone "whose property is injuriously affected or

52. See Ison, *supra* note 41 (noting the then-current number of 22 field inspectors at the MPCA); see also MPCA LEGISLATIVE REPORT, *supra* note 7, at 1 (estimating the number of feedlots covered by the feedlot program).

53. See MPCA LEGISLATIVE REPORT, *supra* note 7, at 8 (discussing staffing and training procedures, and responding to criticism about slow hiring).

54. See MINN. STAT. § 561.01-.03 (1998) (providing for a nuisance cause of action); *id.* § 116B.01-.13 (MERA).

55. See *id.* § 561.19 (creating exemption from nuisance suits for certain agricultural operations); *id.* § 116B.02 subd. 2 (exempting certain agricultural operations from the definition of "person" in MERA).

56. For a summary of the foundations of nuisance law, see ROBERT PERCIVAL ET AL., ENVIRONMENTAL REGULATION 73-87 (2d ed.1996).

57. MINN. STAT. § 561.01.

whose personal enjoyment is lessened" by the offending operation, and they may seek the termination of the nuisance and ask for damages.⁵⁸ The leading Minnesota case of rural nuisance is *Hall v. Stokely-Van Camp, Inc.*,⁵⁹ in which the Minnesota Supreme Court found that odors resulting from canning waste clearly were "offensive to the senses" and interfered with Hall's property enjoyment, causing Stokely to incur nuisance liability.⁶⁰ Concerning livestock, a later case found that a poultry feeding operation could constitute a private nuisance, based on the offensive odors and its effect on nearby residents.⁶¹

The potential bar to bringing nuisance suits against feedlots is that Minnesota, like most farm states, has enacted a "right to farm" statute, restricting the instances in which an agricultural operation may be considered a nuisance under the law. Most of these laws, enacted in the late 1970s and early 1980s, aim to prevent the loss of farmland to suburban sprawl by immunizing existing farms from nuisance suits brought by newly arrived residential neighbors.⁶² Minnesota's "right to farm" statute reads as follows:

An agricultural operation is not and shall not become a private or public nuisance after two years from its established date of operation if the operation was not a nuisance at its established date of operation.⁶³

58. *Id.*

59. 106 N.W.2d 8 (Minn. 1960).

60. *See id.* at 10. The canning plant put its solid waste in a massive compost pile, and liquid waste was piped to an earthen lagoon, much like feedlot waste, and then spread over a neighboring farm's fields. *See id.* Hill claimed that waste from Stokely's canning operation so polluted the air and water in the farms surrounding the plant that the Hill family could not comfortably inhabit its own home. *See id.*

61. *See* *Schrupp v. Hanson*, 235 N.W.2d 822, 824 (Minn. 1975). The case primarily concerned the neighbor's request for an investigation of jury misconduct; several jury members admitted that they had considered economic consequences not in the trial record in making their decision. In granting a new trial, the Supreme Court stated that if the poultry farm was a nuisance, the plaintiff was entitled to relief regardless of economic effect.

62. *See* Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right To Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 97, 100.

63. MINN. STAT. § 561.19 subd. 2. The language of the statute envisions the need to protect existing operations from new arrivals, as it couches its protection in terms of an operation's longevity. For a timely discussion of the many states' rush to pass "right to farm" laws, see Grossman & Fischer, *supra* note 62. For a more recent assessment of the laws and some of the problems they have caused, see Neil D. Hamilton, *Right-To-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts To Resolve Agricultural Nuisances May*

Even against new arrivals, though, the statute does not universally block nuisance suits. It allows actions for damage or injuries resulting from "operations contrary to . . . applicable state or local laws, ordinances, rules, or permits."⁶⁴ The statute also specifically does not protect "animal feedlot facilit[ies] with a swine capacity of 1,000 or more animal units," or more than 2,500 mature hogs.⁶⁵ The extent of the statute's bar to agricultural nuisance suits is hard to gauge, though, because few nuisance cases involving an agricultural operation appear in Minnesota appellate court records since the statute's enactment in 1982.⁶⁶

The other legal option for citizens faced with environmental threats is to file suit under MERA. MERA affords "[a]ny person residing within the state" the right to maintain an action in court against "any person" in the state, including governmental entities, "for the protection of the air, water, land, or other natural resources."⁶⁷ The burden of proof in a MERA case requires the plaintiff to show that the defendant is in violation of any environmental quality standard.⁶⁸ Defendants may defend against these suits on grounds that they

Be Ineffective, 3 DRAKE J. AGRIC. L. 103 (1998).

64. MINN. STAT. § 561.19 subd. 2. The language quoted is from subsection 2(c)(1) of the statute, which is the part that will probably prove most interesting with the promulgation of the new hydrogen sulfide rules. Subsection 2(c) lists five instances in which the protection against nuisance suit does not apply. Part 3, interestingly, specifically allows suit for the "pollution of . . . the waters of the state."

65. *Id.* § 561.19 subd. 2. Part 4 of subdivision 2(c) specifically excludes the large feedlots from protection, but setting the limit at 1,000 animal units probably still leaves a large majority of the state's 45,000 feedlots within the protections of the statute.

66. The statute has received passing mention in two cases, but has never had a role in determining the outcome of an appellate case. Another reason nuisance suits are hard to gauge, according to Neil Hamilton, is that it is impossible to know how many suits were never filed because of the "right to farm" protection. See Hamilton, *supra* note 63, at 104.

67. MINN. STAT. § 116B.03 subd. 1. The statute does require that a MERA plaintiff deliver a copy of the complaint to the Attorney General and the MPCA within seven days of filing, and publish notice of the suit in a newspaper in the county in which the suit is brought within 21 days. See *id.* § 116B subd 3(2).

68. See *id.* § 116B.04 (setting forth the burden of proof to be met by MERA plaintiffs); State *ex rel.* Schaller v. County of Blue Earth, 563 N.W.2d 260, 264 (Minn. 1997) (stating that the two prongs of a MERA prima facie case are a "protectible natural resource" under MERA and defendant's conduct must "cause or be likely to cause 'pollution, impairment or destruction . . . of that resource'").

have no feasible alternative, or that the activity is reasonably required for public health or safety, but economic defenses are specifically forbidden.⁶⁹ If a violation exists, a court may grant declaratory or equitable relief, or impose "such conditions upon a party as are necessary or appropriate" to remedy the pollution problem.⁷⁰

In the feedlot arena the potential for a MERA suit could arise in two instances, either at the permit level to force a comprehensive environmental review, or against an operating feedlot to enforce air quality standards. The legislature specifically included the state government and its agencies in the definition of those who can be sued under MERA, with the implication that any breach of an environmental rule by the state is just as actionable as a private party's breach.⁷¹ MERA suits extend to an agency's breach of its responsibility to substantially consider environmental impacts as the law requires, as the Hancock Pro-Pork case exemplifies.⁷²

For operating feedlots, MERA would seem to provide a citizen remedy to supplement the MPCA's feedlot compliance enforcement program. This is not the case, however, because MERA's definition of "person" under the act specifically excludes any form of farming operation, from "family farm" to "bona fide farmer corporation."⁷³ The courts have limited the exemption to include only farming operations, but that would still include livestock feeding within the scope of the exemption.⁷⁴ This exclusion currently precludes any MERA suits against feedlots for pollution.

Outside of agricultural issues, the statute's wide open language has not spawned widespread legal activism, as some

69. See MINN STAT. § 116B subd. 4 (listing affirmative defenses available to MERA defendants and noting that "[e]conomic considerations alone shall not constitute a defense hereunder").

70. *Id.* § 116B subd. 7 (listing types of relief that courts may grant to successful plaintiffs).

71. See *id.* § 116B.02 subd. 2.

72. See *supra* notes 30-31 and accompanying text.

73. *Id.* § 116B.02 subd. 2, 6-8. Agricultural operations are the only things in the state exempted from MERA's reach—the language in subdivision 2 refers to "any natural person . . . and any other entity, except a family farm, a family farm corporation or a bona fide farmer corporation."

74. The leading case for limiting the agricultural exemption to farming operations is *County of Freeborn ex rel. Tuveson v. Bryson*, 243 N.W.2d 316, 320 (Minn. 1976), which held that a wildlife marsh created by a farmer on his land was outside the protection of the farming exemption.

might fear. A study of the first five years of MERA's operation found that the state district courts heard and resolved 26 cases under the statute, including three dealing with air pollution.⁷⁵ A more recent assessment of Minnesota citizen suits also finds that such suits are not flooding the courts.⁷⁶

Due to the protections of agriculture contained in the statutes, private citizens have very little recourse available to them when faced with pollution from a feedlot. Citizens may successfully challenge the procedure a feedlot follows to gain its permit for construction or expansion, and forestall the problem in that manner. Once the lot is operating, however, their options disappear. Citizens may complain to the MPCA's feedlot unit about the problem with their neighboring feedlot, and rely upon the strained resources of the state to remedy the problem. Should that not work, however, the road to the courts is unavailable, barred by legislative protections of agriculture written into citizen causes of action.

Citizen action against feedlot odor through private action is a viable option for supplementing the state's regulatory program. Minnesota's environmental laws originally shielded agriculture from liability, fearing intrusion from city interests.⁷⁷ Now, the complaints about agricultural pollution come from longstanding rural residents, complaining about giant neo-corporate feedlots not envisioned by the writers of the original legislation.⁷⁸ The primary challenge in restructuring environmental laws to address the feedlot air pollution problem is striking a balance between neighbors' interest in clean air and the traditional protection of smaller farming operations, be-

75. See David P. Bryden, *Environmental Rights in Theory and Practice*, 62 MINN. L. REV. 163, 183-210 (1978). One of the air pollution cases was an action against a hog feedlot. See *id.* at 191. Unfortunately for legal scholars, the defendant withdrew his plan to open the lot in order to avoid bad relations with his neighbors. See *id.* at 191-92.

76. See Herman & Dayton, *supra* note 27, at 36 (noting that MERA and MEPA have had a role in only "a handful" of cases).

77. See Hamilton, *supra* note 63, at 105 (describing the original justification for right to farm acts as protection for farmers against the encroachment of non-farm operations).

78. See Ison, *supra* note 19 (describing angry citizen reaction to hog feedlot permit in Stearns County, Minnesota); Hammel, *supra* note 4 (chronicling the heavy rural opposition to feedlot construction in Nebraska and Iowa); Williams, *supra* note 13 (reporting on opposition of Missouri livestock farmers to corporate hog feedlot); Claiborne, *supra* note 10 (noting a plan by South Dakota farmers to pass a constitutional amendment banning corporate farming in the state).

cause some of the same concerns that justified blanket agricultural exclusions still exist today.⁷⁹ However, citizens living near the new breed of giant feedlot must have increased recourse to deal with this new affront to their health and safety. Hydrogen sulfide and ammonia gas from feedlots are serious health threats that the state's environmental laws should properly regulate, and this expansion should include the introduction of citizen rights to act against feedlots in the courts.

II. WEAKNESSES OF THE CURRENT STATE OF FEEDLOT REGULATION

A. AGENCY REGULATION

The MPCA feedlot program sets out a fairly detailed plan of attack for policing feedlot odor problems that attempts to balance the complaints of the public with the concerns of the feedlot owners.⁸⁰ The permitting program, conducted with county board participation, also helps set limits and control some of the problems feedlots cause before they begin. Counties that use this permit review power aggressively have made requirements for construction and impact investigation considerably more stringent than those mandated by the MPCA.⁸¹ The permit process is also a potential forum for expanded citizen involvement, given the notice and hearing requirements that are built into the process.⁸² Requiring the installation of

79. See Hamilton, *supra* note 63, at 105 (discussing rationale for agricultural exemption to nuisance suits).

80. See *supra* notes 44-51 and accompanying text (describing the hydrogen sulfide monitoring scheme set out by the MPCA in spring 1998). In the program, cooperative efforts to avoid any compliance action begin with the initial showing of a possibility of violation, well before even the first continuous air test begins. The Agency also makes an attempt to work with the complaint makers, before beginning monitoring, though it seems once monitoring begins the dialogue is strictly between the Agency and the feedlot.

81. MINN. STAT. § 116.07 subd. 7(k) (1998). The MPCA's own permit-review body, the MPCA Citizens' Board, has developed a reputation in recent years for being extremely lenient with feedlot applications, often requiring no environmental impact statement or investigation whatsoever for even very large feedlots near substantial residential areas. The Board's members, as mentioned earlier, include several feedlot owners, some of whom rather vehemently believe that feedlots pose little to no environmental threat. See *supra* note 41.

82. See MINN. STAT. § 116.07 subd. 7(a). All residents within 5,000 feet of a feedlot to be constructed or expanded with a capacity of 500 or more animal units must be notified. See *id.*

remedial technology upon the building of the feedlot naturally reduces the number of future complaints stemming from that feedlot's odor.⁸³

However, the permit system is not without deficiencies. More stringent EIS requirements in conjunction with the permit process would further the cause of breathable air around feedlots.⁸⁴ Unfortunately, the current threshold number a feedlot has to exceed before incurring the obligation to perform any environmental assessment is 2,000 animal units, and at that point the Agency only requires an EAW.⁸⁵ Two thousand animal units equates to 5,000 mature hogs, and this requirement means that anything smaller does not have to submit any form of environmental study whatsoever.⁸⁶ Fewer than two percent of the permits granted by the MPCA for each of the past seven years have been for feedlots larger than 2,000 animal units.⁸⁷ The permit process, if used properly, looks promising as a prospective tool for air quality control, but the current environmental survey requirements of the system are far too lax for the permit system to reach its full potential.

The county permit system exists to alleviate some of these problems, but it is no panacea. To begin with, not all counties with feedlot problems are in the state's feedlot program, leaving several potential hotspots up to the state alone.⁸⁸ Another problem is that many counties where feedlots are located have small county boards, and the state of regulation is volatile. An example is Rice County, where a shift in the five-member

83. Most of the setbacks, bond requirements, and other measures have sought to minimize the burden on local governments of dealing with manure containment problems. See *supra* notes 34-40 and accompanying text.

84. Currently, environmental assessment worksheets are only required for enclosed feedlots of 2,000 animal units or more. See *supra* note 23.

85. See *supra* note 23. An operation that exceeds the 2,000 animal unit threshold only incurs the obligation to complete an environmental assessment worksheet (EAW), which was designed as an initial survey to determine whether further environmental review was necessary, and not to stand in as the final statement of environmental impact. See Herman & Dayton, *supra* note 27, at 33 (noting that state agencies increasingly substitute EAWs for full impact statements and thus circumvent the purpose of the environmental review system).

86. See MINN. R. 7020.0300 subd. 5(d) (equating one hog to 0.4 animal units).

87. See Minnesota Pollution Control Agency, *supra* note 2 (showing data charts on MPCA permit statistics from 1990 to 1997).

88. See Ison, *supra* note 19, at A12. Renville County, home to the ValAdCo feedlot and source of much of the feedlot controversy, is one of 40 out of 87 Minnesota counties not in the state's feedlot program.

county board led to the relaxation of one of the tougher feedlot standards in the state.⁸⁹ The operation of democracy is a good thing, but the inconsistency inherent in such shifts is not good for environmental law, and does not alleviate the problems in the state feedlot permit program.

Even with a fix of the permit system, the prospective controls must be backed up by present monitoring. The Agency's enforcement plan, which acts upon citizen complaints, is structured to give feedlots several opportunities to resolve the problem short of a legal enforcement action or penalties.⁹⁰ For example, the lot's permit, should one exist, is checked for an air quality plan, and other similar outs are offered.⁹¹ It is only after sustained intransigence that the Agency will move to direct enforcement of the standards through orders and penalties available under state law.⁹² This arguable tilt in favor of feedlot concerns is somewhat odd considering the massive public pressure that led the state legislature to force the MPCA into developing feedlot air quality controls.⁹³ Both the perception of governmental indifference and the subsequent public reaction to the MPCA bolster the argument in favor of other solutions;

89. See Meersman, *supra* note 40 (noting that a 3-to-2 vote of the county board relaxed feedlot limits passed by the county a year earlier).

90. See MPCA LEGISLATIVE REPORT, *supra* note 7, at 14, 22, app. I (describing the structure of the feedlot enforcement system, and the progressive steps taken in cooperation with the feedlot operator to control air pollution problems).

91. See *id.* (describing compliance steps the MPCA may opt for short of enforcement penalties and orders).

92. See *supra* notes 44-51 and accompanying text (discussing cooperative steps taken in the monitoring and compliance process). To conclusively establish an ambient air quality violation, two infringements must occur within either a 5-day period (30 ppb) or a one-year period (50 ppb). See *supra* note 43. The current structure of the feedlot enforcement program requires that an inspector visit a given feedlot at least three times merely to establish a violation, giving the feedlot plenty of time to escape any harsh or deterrent-oriented forms of enforcement. See *supra* notes 48-51 and accompanying text.

93. The MPCA can certainly argue that cooperative steps toward compliance may work better than a semi-adversarial regulatory posture. This is probably true when it comes to maintaining a good relationship with the feedlot owners, but not particularly useful in winning and keeping the confidence of rural citizens. The delay in developing the enforcement program left many with the impression that the Agency is on the side of the feedlots. See *supra* note 33 and accompanying text (noting that slow reaction to feedlot complaints leaves an impression that the MPCA is biased in favor of feedlots); see also note 19 and accompanying text (reporting extremely bitter public reaction to an MPCA permit decision made on the basis of grossly inadequate information).

merely being able to register complaints with the regulatory agency is not enough.⁹⁴

Two factors feed citizen frustration and support the assertion that the Agency should not be the sole enforcer of feedlot regulations. The first and most obvious of these is the massive disparity between the magnitude of the feedlot problem and the resources available to the MPCA. Minnesota, by the Agency's estimation, has somewhere between 35,000 and 45,000 animal feedlots.⁹⁵ The Agency has fewer than 100 people working in some way with feedlots, and only a third to a half of those are assigned to spend more than fifty percent of their time on feedlot issues. Within the group, staff time is further split between permit issuance or compliance and enforcement activities.⁹⁶

The relatively low number of enforcement staff indicates a low probability, even given enforcement workers' high level of dedication to their jobs, that compliance with even a majority of feedlots could be covered by the Agency working alone.⁹⁷ The shortage affects both the permit and monitoring programs. The lack of staff leads to Board decisions like the one that produced the public outcry in Stearns County, where no MPCA staff ever visited the site or conducted any investigation.⁹⁸ With only monitoring, a backlog of complaints from frustrated rural citizens is likely, even with a significant expansion in en-

94. See Ison, *supra* note 41. The state Attorney General's office alerted the Board to the potential that the feedlot owners' presence on the Board could "raise a perception problem," but the Board dismissed that concern as unimportant. See *id.* at A14. The caustic comments of one of the Board members quoted in the article merely added to that impression, as he belittled Agency feedlot staff ("I . . . think that they could all work harder") and dismissed the idea that the feedlot owners on the Board should recuse themselves during consideration of feedlot permits as "almost pure stupidity." See *id.* at A15. Further driving the bias point home, one of the feedlot-vested Board members became the target of an MPCA investigation into her feedlot's emissions. See *id.* at A14. Upon finding out about the investigation and while still on the Board, she called several "high-level MPCA officials" to complain about the Agency's investigation. See *id.*

95. See MPCA LEGISLATIVE REPORT, *supra* note 7, at 1 (noting the number of feedlots already covered under the MPCA feedlot permit program).

96. See Memorandum from Gary A. Pulford, Feedlot Lateral Manager, MPCA (Sept. 15, 1998) (on file with author).

97. See deFiebre, *supra* note 8 (reporting findings of legislative audit that despite the quality of inspection design and operation, the number of feedlots in the state overwhelms the MPCA's current resources).

98. See Ison, *supra* note 19.

forcement staff.⁹⁹ Clearly, the magnitude of this mismatch will depend on the volume of feedlot complaints to the Agency. It, however, already receives more than 2,000 feedlot complaints per year, a number that is not likely to drop without a significant change in the manner in which the state regulates feedlots.¹⁰⁰ Given that substantial pressure from rural citizens forced the legislature to mandate air quality controls, and that six out of the first ten feedlots tested by the Agency exceeded the hydrogen sulfide standard, the odds are better than even that the complaint volume will be consistently high.¹⁰¹

The second problem militating against leaving feedlot regulation up to the Agency alone is the inherent nonaccountability of all state and federal agencies. The Agency, by setting ambient air standards and developing a permit and enforcement regime, wields legislative power over feedlots in its role as the sole enforcer of the regulations it devises.¹⁰² A considerable amount of power thus rests in the hands of an unelected body, with no direct avenues for citizen action. The deleterious effects of this structure are evident in the MPCA Citizens' Board's history of approving feedlot permits in recent years. Despite the increasing clamor for tighter oversight of feedlots, the Board rarely gave any permit request a hard look.¹⁰³ Applicants were often not even required to complete an environmental assessment worksheet, much less prepare an environmental impact statement, regardless of their situation.¹⁰⁴ In all of the court challenges to more stringent county feedlot regulations discussed earlier, the MPCA Board granted all

99. See Ison, *supra* note 41. One staff member is quoted as saying that it would take the Agency 20 years to inspect every feedlot in the state. See *id.* at A14.

100. See *id.* The feedlot staff has acknowledged that they cannot handle all of the complaints that come in, due to limited resources and the distances inspectors occasionally have to travel to get to the feedlots. See *id.*

101. See Ison, *supra* note 41 and accompanying text.

102. See MINN. R. 7009.0010-.0080 (1997) (setting out air quality standards).

103. See deFiebre, *supra* note 25 (noting that the Legislative Audit Commission has ordered an investigation of feedlot regulation in the state, spurred by comments that the MPCA Board is too lax in approving feedlot permits).

104. See *supra* note 28 and accompanying text (discussing seemingly high numerical threshold requirement for demanding an environmental assessment worksheet).

feedlot requests for building or expansion permits with seemingly little inquiry.¹⁰⁵

In recent years, several feedlot owners have sat among the Board's members, leaving the impression that the Board has been "captured" by feedlot interests.¹⁰⁶ A captured Board's potential for bias against environmental consequences in permitting spills over into decisions affecting feedlot environmental enforcement. A particular issue of note is the Agency's response to the need to increase staffing levels for the compliance and enforcement program. If the Board decides not to staff the program adequately, enforcement suffers, as do thousands of rural residents affected by unmonitored polluting feedlots.¹⁰⁷ The decision, made by unelected Board members, would have significant impact upon the citizens of this state, who in turn have no more impact upon the Agency's decisionmaking than it cares to give them.

In sum, if an Agency Board is captured by feedlot developers, the balance of power between citizens and feedlots is slanted greatly in the feedlots' favor. If a Board does not offer any resistance to new feedlots, the Agency's enforcement staff will not be capable of handling the volume of citizen complaints. Feedlot air quality enforcement may become something akin to the lottery for many rural residents, whose only option would be to call the Agency and then hope their number comes up in the compliance division.¹⁰⁸ It makes sense in this scenario to give individuals or groups of citizens legal rights to act against polluting feedlots in order to ensure the recognized right of citizens to clean air. Recognizing these legal rights would also alleviate the burdens on the Agency, allowing it to perform its job efficiently.

105. See *supra* note 34 (describing the *Canadian Connection* case).

106. See Ison, *supra* note 41, at A1 (stating that three of the nine members of the 1997 Board either owned feedlots of some kind or had interests in feedlots). The feedlot owners on the Board are aggressively opposed to feedlot regulation and fail to see any conflict of interest in their consideration of feedlot topics. See *id.*

107. This is a foreseeable outcome, as one Citizens' Board member has already remarked that he is not in favor of increasing staff for the feedlot program. See *id.* at A15.

108. As a feedlot staffer noted, waiting may cause additional problems. Due to heat, humidity, wind, and other factors, what may be a dire problem the day the person calls in will not measure out as a violation even a couple of days later. See *id.*

B. CITIZENS' CAUSES OF ACTION

A form of that citizen right exists in the use of nuisance suits against feedlots. Encouraging private tort claims for nuisance damage would appear to fill the gaps left by state enforcement while controlling any problem of unfettered access to the courts. The basic tort requirement of actual harm limits the set of people who may sue feedlots under nuisance to the immediate neighbors who have the worst problems with hydrogen sulfide emissions.¹⁰⁹ Nuisance also allows the individual citizen to gain reparations for the damage done by the feedlot, which seems more equitable than the typical regulatory remedy, which is simply to bring the lot into compliance.

Minnesota's state right to farm law does not preclude nuisance suits against the huge feedlots that cause a fair share of the controversy.¹¹⁰ Feedlots over 1,000 animal units are not covered by the agricultural exemption, leaving every lot with more than 2,500 hogs at a time open to suit under nuisance.¹¹¹ The application of ambient air quality standards to feedlots also could open up nuisance liability against agricultural polluters, since the right to farm law requires that farms not operate in violation of "state or local laws, ordinances, rules, or permits."¹¹² The violation of state air quality laws can steer a case around the bar created by the right to farm law, and allow a citizen's nuisance suit against a feedlot to proceed.¹¹³ Using

109. This typical tort standing threshold typically ensures that the plaintiff has suffered an actual injury, and is also somewhat representative of the community offended by the pollution. See *supra* notes 57-58 and accompanying text.

110. See *supra* note 55 and accompanying text (stating that Minnesota Statutes section 561.19 shields agricultural operations from nuisance, but exempts livestock operations over 1,000 animal units from its protection).

111. See *supra* note 65 and accompanying text. A numerical threshold is a convenient bar for suits, and one easy for a legislature to create, because it creates a bright line that provides some comforting certainty to politically powerful livestock owners. Such a number does not really encompass the whole problem, however, since a lot with 900 hogs and an uncovered earthen lagoon probably poses greater environmental danger than a 5,000-hog lot with covered concrete lagoons and manure pretreatment. See MPCA LEGISLATIVE REPORT, *supra* note 7, at 15-18 (discussing manure containment technology).

112. MINN. STAT. § 519.19 subd. 2(c)(1) (1998). This standing "loophole" may alleviate the concerns outlined in the last footnote, in that a lot shown to violate the ambient air quality standard or any other environmental regulation may not use the protections of section 561.19.

113. Depending upon how section 561.19 is viewed, the use of environmental standards could be problematic. If the statute is viewed as setting standing requirements (farms may not be sued under nuisance), then using an

these provisions, citizens could bring nuisance suits against any feedlot, regardless of size.

This unfettered route to the courts in nuisance, however, points to a problem that should forestall reliance on it as the sole supplement to state regulation. The "right to farm" law has never been a factor in a case at Minnesota's appellate level, nor has a plain agricultural nuisance suit made it to an appellate court for about three decades.¹¹⁴ The lack of appellate activity would seem to indicate a general lack of interest in using the remedy. It would seem that nuisance actions should have increased as the feedlot controversy grew, and some should have made it to the appellate level.¹¹⁵ One commentator points out that the effect of "right to farm" laws is difficult to judge because it is impossible to know how many suits were never filed because of the provision.¹¹⁶ Since the cause of action seems to find few takers despite its availability to afflicted parties, it is hard to imagine what steps the legislature could take to make nuisance a useful supplement to state regulation.

Even if such steps did exist, however, there are strong arguments that the legislature should not take action. First and foremost is the disparate situation in which similar feedlots may find themselves if agency action and nuisance are the two options available to aggrieved citizens. Depending upon the load at the agency or the wealth and dedication of their neighbors, one feedlot may resolve the problem through remedial construction, while another may face those remedial measures as well as damage payments to various individuals.¹¹⁷ This in-

alleged violation to get around these requirements means that the courts must decide the merits of the case to determine standing. Courts may be reluctant to operate in this manner.

114. The statute came up briefly as a defense in *Canadian Connection*, but the court in that case quickly dismissed it, particularly since the case concerned an attempt to prevent a public nuisance, not address an existing nuisance. 581 N.W.2d 391, 393 (Minn. Ct. App. 1998).

115. One would think that given the increasing stakes, a situation such as that of Julie Jansen, who gave up her business due to feedlot emissions problems, would recur, and that the losing party would feel compelled to challenge the ruling at the appellate level. See Ison, *supra* note 6 (describing Jansen's efforts to fight the feedlot). Apparently, that has not happened since 1975, before the "right to farm" act existed. See Schrupp v. Hanson, 235 N.W.2d 822, 824 (Minn. 1975) (deciding that poultry farm odors could be a nuisance, and that jurors' reliance on economic concerns was improper).

116. See Hamilton, *supra* note 63, at 104 (noting that the effect of the "right to farm" provision is hard to analyze "because it is hard to estimate how many legal actions are not filed due to the existence of the laws").

117. There is a possible deterrent value in exposing feedlots to potentially

equity weighs against favoring nuisance as the citizens' sole alternative to agency enforcement, since the overriding purpose of the scheme is to ensure breathable air, and not necessarily to punish feedlots.

The exercise of tort law has the potential to fail to provide many citizens with a fair remedy, as well. Besides the time, money, and effort involved in bringing a nuisance suit compared to filing an odor complaint, judicial balancing inherent in the tort analysis could occasionally work against the citizen and deny relief. While the *Stokely* decision seems to argue strongly against the inclusion of economic factors in the consideration of nuisance claims,¹¹⁸ the fact is that such balancing of concerns is a natural part of equitable causes of action such as nuisance.¹¹⁹ As such, the huge feedlots that would serve as defendants in these cases would also likely be the largest employers and taxpayers in their respective areas. Their economic importance might make courts somewhat more reluctant to sanction them for odor problems, especially if the plaintiff had no particular monitoring data to substantiate the odor claim. Thus, with the swamped state of the MPCA, having only a tort law alternative for citizens leaves a substantial possibility that some citizens might never gain timely relief for their dirty air concerns under any form of the law.

One last problem with using nuisance law as a supplement to agency enforcement is that the tort law standards used in a nuisance case do not match up with the objectives of the regulatory scheme. Nuisance is judged upon a set of subjective standards, such as "offensive[ness] to the senses," or "inter-

large damages awards, but as a regulatory supplement such damage claims do not offer much promise for helping to create a balanced enforcement program. The inequity also works the other way, as citizens could get frustrated that those with the time and resources to go to court over their odor problems may receive monetary compensation, while others who go through the MPCA's process get only prospective injunctive relief.

118. See *Hall v. Stokely-Van Camp, Inc.*, 106 N.W.2d 8 (Minn. 1960).

119. While the court in *Stokely* did not permit economic considerations to factor into the nuisance analysis, such considerations are nevertheless usually present since the basic premise of private nuisance law requires the balancing of one party's property interests against another's. Consequently, the relative worth of each person's property may unconsciously but reasonably wind its way into the case. See, e.g., *PERCIVAL ET AL.*, *supra* note 56 (summarizing the roots of environmental nuisance law and citing the infamous case *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 83 S.W. 658, 667 (Tenn. 1904), which allowed for the total destruction of neighboring properties due to the immense value of a copper-smelting plant).

fer[ence] with the comfortable enjoyment of life or property."¹²⁰ Regulatory standards, on the other hand, are objective, and in the case of air quality, require two measurements above a specified standard to establish an actionable violation.¹²¹ As such, nuisance law would work to a different purpose than the MPCA regulations, serving not so much to establish a health standard to protect citizens but instead merely to make feedlots tolerable most of the time.¹²² Such potential consequences greatly reduce the desirability of nuisance as an avenue of citizen action against feedlots and suggest that a more appropriate cause of action is needed to aid environmental enforcement.

III. A SOLUTION: EXPANDING THE ENVIRONMENTAL CITIZEN SUIT

The Minnesota Environmental Rights Act (MERA) provides exactly the type of solution sought here—an environmental citizens' suit.¹²³ The feedlot situation seems almost custom-designed for the application of MERA, particularly with an arguably indifferent MPCA licensing board and nascent ambient air quality standards monitoring.¹²⁴ The statute can and has been used to require a harder look at environmental impacts in the consideration of feedlot permits, through an enforcement of the state's EIS requirements.¹²⁵ Despite this

120. MINN. STAT. § 561.01 (1998).

121. The hydrogen sulfide standard applicable to feedlots is two readings above .03 ppm within five days, or two readings above .05 ppm in one year. See MINN. R. 7009.0080 (1997).

122. The different purposes beget different motivations in moving forward with action that could affect environmental quality. Agency regulation seeks to achieve a certain "safe" level of pollutants in the air from the feedlot at any given time, and compliance actions only end when that level is reached. Nuisance, on the other hand, involves redress for injury, and plaintiffs could foreseeably settle for their damage amounts without demanding any changes in the feedlot operation, leaving the environmental problem to come up another time. This disparity does not make for much of a comprehensive environmental protection scheme.

123. See *supra* note 67 and accompanying text (discussing MERA).

124. The situation seems all the more ripe for environmental citizen suits considering that part of the push for an MPCA feedlot air quality monitoring program came from citizens doing their own measurements of hydrogen sulfide in their homes, having bought or otherwise obtained airborne sulfide monitors. See MPCA LEGISLATIVE REPORT, *supra* note 7, at app. H (collecting citizen data taken before the MPCA monitoring program began).

125. See *supra* note 30 and accompanying text (discussing a successful citizen suit requiring the MPCA to prepare an EIS for the Hancock Pro-Pork feedlot in the western part of the state).

good fit, MERA is not a factor in controlling existing feedlot emissions because of the statute's blanket exemption of agricultural operations from its coverage.¹²⁶ The exemption creates an inequitable situation in which many businesses and private polluters, including many who violate the same hydrogen sulfide standard violated by feedlots, are exposed to suit, but feedlots of all sizes may fall into an exemption. As the blanket agricultural exemption now protects larger and more corporate feedlot operations largely capable of defending themselves in court, this inequity has grown, making the time ripe to modify the exemption.

A. USING MERA TO CONTROL EXISTING FEEDLOTS

Removing the exemption would take the form of including farming operations within the definition of "person,"¹²⁷ thereby exposing them to suits for violation of promulgated environmental standards in the state.¹²⁸ Citizens could then prevail in MERA suits against feedlots after providing evidence that a lot violated the ambient air quality standard for hydrogen sulfide.¹²⁹ The change in MERA's definitions would bring several benefits, not the least of which is the lightening of the MPCA's regulatory burden. Citizen suits of all kinds intend to have individuals act as "private attorneys general" when bringing suits against polluters, preventing polluters from ducking environmental regulations merely because of limited state resources.¹³⁰ MERA-based feedlot suits would benefit at least two state agencies, as citizens would augment the work of the

126. See MINN. STAT. § 116B.02 (1998) (exempting a "family farm," "family farm corporation," and "bona fide farmer corporation" from suit under MERA).

127. See *id.* § 116B.03 subd. 1 (providing that "[a]ny person . . . may maintain a civil action against any person for the protection of . . . natural resources").

128. See *id.* § 116B.03 subd. 2. As the law currently exists, agricultural operations are the only entities exempted from suit under MERA. The protection even extends to include farm corporations, thus protecting even the largest feedlots from suit.

129. See *id.* § 116B.04 (plaintiffs' burden of proof is to show a violation of a standard, permit requirement, or agreement by the defendant).

130. The "private attorneys general" language is often quoted in connection with private citizen suits. See, e.g., *Portsmouth Redev. & Housing Auth. v. BMI Apts.*, 847 F. Supp. 380, 385 (E.D. Va. 1994). The description is apt, as citizen suit plaintiffs do not receive damage awards, but seek court enforcement of the environmental standard at issue, much as the Attorney General would.

MPCA's inspectors and cover more cases than the State Attorney General's office could litigate on its own. Additionally, allowing citizen suits frees the state from expending the huge sums necessary to add staff sufficient to police feedlot pollution.

MERA also provides an efficient and equitable means of resolving feedlot pollution problems. The only issue in a MERA case is the alleged violation of environmental laws; the only remedy available is injunctive-type relief.¹³¹ For plaintiffs, this provides a more level playing field than they would face in either a tort suit or hearings before a governmental body, where the feedlot's economic value could factor into the final decision, or otherwise influence the decision makers.¹³² From a defendant's perspective, the plaintiffs must show an objective violation of a statutory environmental standard to prevail, rather than a subjective showing of inconvenience.¹³³ Further, MERA defendants do not face the possibility of punitive damages, only equitable relief and "such conditions . . . as are necessary or appropriate to protect the air, water, land or other natural resources."¹³⁴ Allowing citizen actions against feedlot polluters would ensure that the disputes are resolved efficiently, focusing only on the environmental issues at hand, and, where appropriate, awarding relief geared toward clearing up the environmental violation.

Perhaps most importantly, expanding MERA to encompass agricultural operations would improve the responsiveness of law to the concerns of the citizens. One of the more aggravating aspects of the feedlot problem is that environmental laws which exist to protect citizens' interests for a variety of reasons fail to do so with feedlots. Citizen action under MERA would empower neighbors of polluting feedlots to assert their interests in court and gain assistance in controlling the problem. Aside from legal benefits, opening the process of enforcement could reduce citizens' alienation from law and government, in-

131. See *State ex rel. Schaller v. County of Blue Earth*, 563 N.W.2d 260, 264 (Minn. 1997) (stating that a prima facie case consists of a protectable resource and a showing that defendant's conduct will harm that resource).

132. See MINN. STAT. § 116B.04 (stating that "[e]conomic considerations alone shall not constitute a defense" to a MERA suit).

133. See *id.* (stating that prima facie showing requires "that the conduct of the defendant violates or is likely to violate" an environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit")

134. *Id.* §116B.07.

creasing the feeling that the law can respond to the concerns of the citizens it governs.

Citizens may face an initial problem in figuring out how to gather the data required to show a violation, but options exist for citizens to do this. Several monitoring technologies exist to measure hydrogen sulfide, since the gas is a contaminant of concern at oil refineries as well as hog farms.¹³⁵ Options may range from the continuous air monitors used by the MPCA to relatively inexpensive air quality badges that change colors depending on the amount of hydrogen sulfide in the air.¹³⁶ The technology is certainly not exclusively available to government and industry; the MPCA has a considerable amount of monitoring data taken by citizens investigating the odor problems caused by local feedlots.¹³⁷ Concerned citizens can easily acquire the tools needed to perform monitoring sufficient to show a potential violation of the state's ambient air quality standards in a MERA suit.¹³⁸ With citizens so equipped to assist in enforcing the state's environmental laws, the law should not stand in their way when it comes to enforcing air quality laws against feedlots.¹³⁹

In the interest of efficient and effective environmental enforcement, the legislature should remove the provision that exempts feedlots from suits under MERA. There should be, however, some restrictions on the action. First, while giant feedlots certainly appear to be likely defendants under MERA, small family farmers or non-livestock operators who previously received protection under the statute are still deserving of that protection. The main concern is that small farmers, already facing various troubles, including low prices and growing corporate competition, will fold at the first brush with environ-

135. See MPCA LEGISLATIVE REPORT, *supra* note 7, at 7 (describing existing equipment available for compliance testing).

136. See *id.* (recommending the badges for feedlot self-monitoring because of simplicity and relative inexpense). Using the simple badges, which typically turn one of four colors depending on the amount of hydrogen sulfide in the air, may not necessarily substantiate a claim of an air quality violation in court, but it provides a starting point.

137. See *id.* at app. H (collecting data from citizen monitoring of feedlots).

138. See Ison, *supra* note 6, at A7 (describing the acquisition by a group of feedlot neighbors of a handheld sulfide meter, similar to the Jerome meters used by the MPCA, for approximately \$2,000).

139. There is also an equitable angle to this, in that a group of citizens facing the same air pollution from any other polluter could establish a violation in a MERA suit, but with feedlots that action is barred by the agricultural exemption.

mental lawsuits.¹⁴⁰ While the huge farm cooperatives and quasi-corporations running the controversial feedlots are likely to be able to defend against a lawsuit, the small family farmer can not be expected to mount the same defense against environmental citizen suits.¹⁴¹ Along with the sentimentality attached to family farms, the state's declared official policy is to maintain the family farm.¹⁴² Furthermore, the worst case scenario of a large number of small farm failures due to MERA lawsuits should stir reformers to create a limited exception for small livestock farmers.¹⁴³ MERA is a powerful environmental tool, and it is probably one that should only operate in certain circumstances, leaving the delicate cases to the more flexible state regulatory system. Thus, a limit on who is exposed to suit, similar to the size restrictions placed on nuisance suits,¹⁴⁴ may be necessary.

The trouble with retaining protection for smaller farmers is figuring out where "small" ends and "big" begins. A thousand animal unit line drawn from nuisance suits may well work as a MERA limitation, but the legislature may want to consider reducing the threshold number, based upon at what

140. Increasing vertical integration in agriculture, particularly the livestock industry, is rapidly killing off the small livestock producer. See Meersman, *supra* note 10 (noting that Minnesota lost 28% of its hog farms between 1990 and 1997, while neighboring states have lost 45 to 65% of theirs); Antosh, *supra* note 1 (describing situations of Texas hog farmers forced out of business by recent price crash).

141. Additionally, the small family farmer may also be less likely to cause objectionable air pollution. The possibility of small farmer pollution certainly exists. Just based upon volume, however, a reasonable assumption can be made that large feedlots will be the primary environmental culprits. The legislature in considering the statute change can perhaps define "large" based upon existing data from citizen complaints.

142. See MINN. STAT. § 500.24 subd. 1 (1998) ("The legislature finds that it is in the interests of the state to encourage and protect the family farm as a basic economic unit, to insure it as the most socially desirable mode of agricultural production, and to enhance and promote the stability and well-being of rural society.").

143. See MPCA LEGISLATIVE REPORT, *supra* note 7, at 1 (noting that somewhere between 35,000 and 45,000 feedlots currently operate in the state). While a number of feedlots recently permitted are large operations, the majority of feedlots in the state are "small," and the potential economic dislocation of several thousand farm failures is very serious. As previously mentioned, this is an extreme "worst-case" analysis. The legislature, however, will have to consider the possibility of such a dislocation, and may want to limit its possibility.

144. See MINN. STAT. § 561.19 (barring nuisance suits against animal feeding operations of 1,000 animal units or fewer).

size a feedlot typically starts generating complaints.¹⁴⁵ Another possible threshold comes from the EPA's Clean Water Act regulations, setting 700 animal units as its threshold requirement for requiring a NPDES permit for a feedlot facility.¹⁴⁶ The 700 animal unit number is close to what at least some in local agriculture feel is the difference between small and large farms, as evidenced by a moratorium called for by the Minnesota Farmers' Union, seeking to prevent any growth above 750 animal units.¹⁴⁷

The MERA suit is a simple and powerful tool available to citizens to achieve a higher level of environmental enforcement than is available with the state working alone. Individual citizens may act to protect their own air quality from encroachment by improperly operating feedlots in cases where the state's mechanism is either bogged down or otherwise incapable of handling the problem. Economic concerns with smaller farmers may justify retaining some of the existing protection for farm operations. Otherwise, equity requires that the legislature remove the agricultural exemption from MERA and give the citizens of the state the same right to act against large polluting feedlots as they do against any other polluter in the state.

B. USING MERA TO ENHANCE THE PERMIT PROCESS

Even without the change proposed by this Note, MERA suits allow citizen challenges to the consideration of permits.¹⁴⁸ Increased use of these suits could greatly enhance the protection of citizen rights against indifferent or biased permitting

145. The line drawn by MERA has different justifications than the line drawn in nuisance. The "right to farm" law sought to protect farms against intrusion from suburban development, since the legal standard there is based merely upon the tolerability of odor. Under MERA, under which air quality standards are more strictly defined, the specter of encroachment is not an issue, because the environmental laws are meant to be complied with regardless of neighboring population.

146. See 40 C.F.R. § 122.23(b) (1996) (setting 700 animal units as the standard numerical threshold to subject a "concentrated animal feeding operation" to NPDES permit program requirements).

147. See Meersman, *supra* note 10 (reporting that the Minnesota Farmers' Union wants a two year moratorium on all feedlot expansion above 750 animal units). The Farmers' Union is an organization that represents family farmers.

148. See MINN. STAT. § 116B.02 (permitting citizens to maintain a suit against a state governmental entity, because state subdivisions are included within the definition of "person").

bodies, particularly unelected ones like the MPCA Citizens' Board. Bodies of government, unlike the feedlots themselves, are already amenable to citizen suit under MERA for violations of the state's environmental laws. As the Hancock Pro-Pork case illustrates, an important environmental law often ignored by the MPCA and counties is the duty to examine the environmental impact of any potentially harmful decision.¹⁴⁹ This oversight is potentially fertile ground for change in the way the MPCA handles feedlots in the state. Currently, the Agency will not require any form of environmental assessment unless the applicant presents a proposal involving 2,000 animal units or more, by new construction or expansion.¹⁵⁰ And even at that point, the Agency only requires an environmental assessment worksheet, which is supposed to help determine whether an EIS is necessary.¹⁵¹ Invariably, the permit boards decide they have all they need in the EAW, circumventing the substantive review requirement of the state's environmental policy.¹⁵²

Citizen suits like the Hancock Pro-Pork case provide a potential counter to this shoddy environmental decisionmaking.¹⁵³ If the trend of ignoring environmental impacts when granting feedlot permits persists, citizens may take each granted permit before a district court judge and challenge its validity on grounds of inadequate environmental review. Another similar approach is to attack the permit requirements directly, claiming the high threshold for an EAW effectively violates the state's EIS requirements.¹⁵⁴ With the level currently

149. See *Pope County Mothers and Others Concerned for Health v. MPCA*, File No. C1-98-76 (Minn. Dist. Ct. Sept. 30, 1998); see also MINN. STAT. § 116D.03 subd. 2(3) (requiring state government to examine environmental impact when making a decision that potentially may have harmful environmental effects).

150. Once again, at 0.4 animal units per pig, 2,000 animal units translates into 5,000. See *supra* note 22. This unbelievably high threshold for impact review means that a mere 1.7% of recent feedlot applicants have had to submit an environmental assessment worksheet with their building proposal. See *supra* note 2 (citing a website showing MPCA data on feedlot permits issued in the last seven years).

151. See *supra* note 23 (describing the permit requirements currently set out by the MPCA, including the stipulation that only feedlots of 2,000 animal units or more need to complete an environmental assessment worksheet).

152. See Herman & Dayton, *supra* note 27, at 36.

153. See *supra* notes 30-31 and accompanying text (describing a decision awarding judgment in favor of citizens suing to force MPCA to require an EIS on a new hog feedlot facility).

154. Because MEPA merely states that an EIS is required when there is "potential for significant environmental effects," the numerical threshold for

set at 2,000 animal units for total confinement sites (most hog lots), the threshold does not square with any conception of where deleterious environmental impacts begin.¹⁵⁵ Thus, the requirement itself would not withstand challenge, because it works against consideration of environmental impact for the vast majority of feedlots.¹⁵⁶

CONCLUSION

In order to more fully address the environmental problems posed by feedlot expansion, Minnesota and other livestock-intensive states must create citizen actions to enforce environmental laws against feedlots. Waste from hog feedlots threatens the quality of our air and water and endangers the health of neighbors if the feedlots are not monitored adequately. Hog feedlots have grown rapidly and have wrought enough environmental damage in the last decade that even some in the agricultural community are calling for tighter oversight of the industry's pollution problems.

Minnesota has taken a big step toward controlling the problem by beginning the process of monitoring feedlot air pollution. Even so, the Minnesota enforcement system is not complete. Since governmental agencies have only limited resources, and the number of feedlots in the state greatly overwhelms those resources, many feedlots will slip through the cracks of the enforcement scheme and operate unmonitored. This slippage could be countered by the actions of neighboring citizens through private suits in nuisance or an action under MERA. However, statutory restrictions stand in the way of both options. A suit against some of the larger feedlots may get around the "right to farm" bar to agricultural nuisance actions, but the plaintiffs would then find themselves open to the

an EAW requirement would seem to be the Agency's guess at where "significant environmental effects" start. See Herman & Dayton, *supra* note 27, at 32 (discussing statutory requirements).

155. See FEEDLOT PERMIT APPLICATION PROCESS, *supra* note 23 (informing applicants when an EAW is required with permit application).

156. A further possibility is that the threat of continuous litigation over EIS omissions may force the Board to change its policy regarding environmental review. The broad change brought about by the statute's indirect effects may prove more helpful to the environment than the pastiche of individual actions over single permits. Certainly, the statute's indirect effect could, and hopefully will, influence feedlot operators as well, as rational actors would want to make the requisite changes to their farms while the costs are known rather than wait for the unknown outcome of the lawsuit.