

# Summary of laws lost or not used.

This is a summary of the laws that could be used but are not in relation to protecting the public from the sewer gasses and particulates that are produced by confinements and feedlots; and the laws that were on the books and that could have been used but they were changed or gotten rid of.

1. **Agency Discretionary Rule.** EPC/DNR doesn't use (except maybe once).
2. **Separation Distance Between Confinements and Sinkholes.** Lost when language was changed.
3. **“Permit to Operate” laws:** Iowa Administrative Code 567.64.3. Under 64.3(1)h.(2) those CAFO's cannot be excluded from regulation. Lost when moved to Chapter 65 and changed the language.
4. **2008 EPA CAFO Rules.** Lost in federal district court in Oklahoma. Cannot regulate CAFO's using the Clean Water Act.
5. **CERCLA provision of Superfund:** Community Right to Know. Changed to write a letter once a year to say their CAFO is polluting.
6. **OSHA “General Duty Clause”** prompts “Confined Spaces Regulations”. No one will use.
7. **Home Rule.** State laws only allow the DNR to regulate sewer gasses and particulates coming from CAFO's and they won't or say the Legislature won't let them.
8. **State denies anaerobic treatment taking place in confinements.** The State and the DNR say that confinements are for storage only. That way they don't have to regulate them as wastewater treatment technology. A DNR construction permit requires confinements which create sewer gasses and particulates that are vented to neighborhoods and the larger environment.

Below are more detailed explanations for each of the items listed above.

## 1. Agency Discretionary Rule:

Rich Leopold, the new Director of the DNR, has let it be known both inside and outside the DNR that he will rarely use what in the press and public has been known as the Director's Discretionary Rule, but is really the Agency Discretionary Rule. When I contacted Rich Leopold and told him I was going to write about this issue he emailed me the following language to use in explaining his position:

I will use it as appropriate. But I will not be quick to use it. The burden of evidence needs to be such that we (the DNR) could defend our decision in court if necessary. This sets the bar high, but does not mean that the rule will not be considered and used when necessary. (Leopold, Personal communication)

To me that is unfortunate because the public has the perception that the rule was put in place to be used more widely.

There is good news though. The rule still does exist and can still be used to protest those CAFO's that do not fall under regular DNR rules but pose risks to people and the environment. After an email conversation with a member of the Environmental Protection Commission, this member laid out why the rule can be used and how to get a protested CAFO permit in front of the EPC to ask them to use the rule. Here is the EPC member's language and direction:

Remember it's the Agency Discretion Rule which means the EPC can invoke the rule itself. That would occur when the commission hears a county appeal. The county would need to request the EPC to use its discretionary authority under the rule, as well as citing any other reasons to deny the permit and then it would be up to the commission. If the county believes that it should appeal the granting of a permit it should do so. The commission will hear the arguments and make its own decisions. It's not bound by any decision of the DNR director or staff. It takes those positions into account as well as other views including the county's. The final authority in the agency is with the EPC. (EPC member, Personal communication)

So, it is the County Supervisors' right, even when a confinement has enough matrix points and even when the DNR grants a permit, to protest that permit in front of the Environmental Protection Commission. They simply tell the Commission the reasons they feel a particular confinement, which may pass all the present legal requirements, isn't a good idea and ask the Commission to deny the permit using the Commissions' power under the Agency Discretionary Rules. Much of the Agency Discretionary Rules were written with karst in mind.

So, if your county wants to appeal a permit, they need only appeal it to the EPC, request the EPC use the rule and provide the county's reason(s) for denying the permit.

## **2. Separation Distance Between Confinements and Sinkholes.**

In Iowa law there is supposed to be a 1000 foot separation distance between sinkholes and confinements in NE Iowa's karst topography. That separation distance gives the public some assurance that their public water supply, aquifers, will not be subject to a pollution event from an industrial agricultural confinement. Not so anymore. Because there are so many places a proposed new confinement would be within 1000 feet of a

sinkhole, and therefore not allowed, the pork producers asked our local legislators, Chuck Gipp and Mark Zieman, to change the law. In 2002 they did. SF 2293 repealed the section in 455B which had, in part, to do with separation distance from sinkholes. A new provision for "secondary containment structures" allowed building confinements within the 1000 foot minimum and that new language is, I think, found in 459.

When confinements started being put in next to sinkholes, we asked the DNR how that could be when there was supposed to be a 1000 foot separation. The DNR held an upper level management meeting where this was discussed. At that meeting the DNR lawyers said that because of the way the new law, a variance granted for the 1000 foot minimum if a "secondary containment structure" was put in place, was written, there was "effectively no longer any separation distance between sinkholes and confinements". A confinement could now be built right next to a sinkhole. Oddly, no one at that DNR meeting seemed to think they might want to look into how or why this change to the safety of the public's water supply happened.

The concept of "secondary containment" comes from the EPA's regulation of the petroleum industry. It originally meant an earthen berm 360 degrees around a set of above ground tanks capable of holding 150% of the largest tank. In karst, for confinements with underground tanks, "secondary containment" means a pit dug on one side of the building big enough to hold 50% of the manure. How this ground level pit is supposed to contain a leak from an underground tank is unknown. How any spill is supposed to happen on only that one side of the building is unknown. And, how something illegal in karst for manure storage because of sinkholes, namely an earthen structure (the pit), allows you to build right next to a sinkhole in karst is also unknown.

We are in real danger when our legislators are unable to understand the effects of laws they pass. And when they, and our regulatory officials, are apprised of those effects and are unwilling to reinsert the provisions which protect the public, we are courting disaster.

### **3. "Permit to Operate" laws**

Even though Iowa DNR says they can't regulate confinements and open feed lots like they do other entities with fecal waste and poison gasses, that statement is not true. Because of a snafu by the State of Iowa when originally applying for EPA's NPDES Permit program in the 1970's, Iowa wasn't enrolled in the program and had to create their own "Permit to Operate" laws, which the EPA accepted as a mirror program. Those rules, Iowa Administrative Code 567.64.3, included not only point source wastewater treatment plants, but also included CAFO's. Under 64.3(1)h.(2) those CAFO's cannot be excluded from regulation. Those rules are still on the books and could be used immediately to regulate CAFO's (by a request to do so of the County to the DNR Director) as wastewater facilities thusly (but not limited to):

- a. require monitoring wells around storage lagoons, concrete storage tanks, and fields being used for application.

- b. testing requirements of waste for, but not limited to, nitrogen, phosphorus, E. coli, antibiotics, hormones, and other pollutants.
- c. set rules for manure storage capacity.
- d. set minimums for the depth to groundwater under storage facilities.
- e. require tests of tile lines and adjacent streams where manure is applied.
- f. impose requirements to prevent waste from running off fields.

(Iowa Code 2003: Section 455E.5 Groundwater protection policies. #3 All persons in the state have the right to have their lawful use of groundwater unimpaired by the activities of any person which render the water unsafe or unpotable. #4 All persons in the state have the duty to conduct their activities so as to prevent the release of contaminants into groundwater.)

Counties have the authority to enforce existing state and federal laws which address the interface between industrial poisons and the public, if the counties choose to do so. Any enforcement action would be up to the county attorney, with the direction or concurrence of the board of supervisors.

#### **4. 2008 EPA CAFO Rules**

In November of 2008, EPA finalized its new CAFO rule. Under that rule, any CAFO that discharges or proposes to discharge pollutants into waters of the United States must have an NPDES permit. This applies to all CAFOs, confinement operations and open feedlots. Counties can enforce this rule. This rule applies to all confinements regardless of size.

The Oklahoma Attorney General was using this law in an action against Tyson. The County could use this section to protect neighbors and the watershed from pollution from manure. See (64.3) to see how testing could be done to see whether pollution goes from a confinement property to adjacent properties and/or the larger watershed.

The EPA lost this suit and lost the ability to use the Clean Water Act in relation to agriculture.

#### **5. CERCLA provision of Superfund**

To protect the public from the poison gasses being constantly discharged into the neighborhoods of confinements, the County could enforce the CERCLA provision of Superfund: Community Right to Know. Under this law, monitoring equipment, per EPA regulations, would need to be installed by the owner at each confinement site's exhaust vents and the owner would need to contact the EPA each day that the facility discharges more than 100 lbs of ammonia and/or 100 lbs of hydrogen-sulfide into the atmosphere. This would apply to most CAFO's. (This section was changed in the waning days of the

Bush administration. It now says a confinement need only send a letter once a year to the EPA stating the confinement is discharging the poison gasses hydrogen-sulfide and ammonia into the neighboring atmosphere. The National Sierra Club has a lawsuit pending to return this section to its original requirements.)

## **6. OSHA “General Duty Clause” prompts “Confined Spaces Regulations”**

To protect the public from the poison gasses inside and outside confinements, Counties could enforce the federal “Confined Spaces Regulations”. These laws can be enforced by OSHA through their “General Duty Clause”. This clause comes into effect if a serious hazard is identified. We know that over 20 Iowans have been killed from poison gasses in confinements, and that many studies show serious health effects to people from the emission of those poison gasses. A recent study from the U. of Iowa shows 55.8% of children on farms with confinements have asthma. These “recognized hazards” trigger OSHA’s “general duty clause” and allow OSHA to regulate these confinements. We are asking the Counties to enforce OSHA’s Confined Spaces Regulations and General Duty Clause. It seems reasonable when all of the wastewater facilities and sewer systems in Iowa are already regulated under these laws.

## **7. Home Rule.**

From Ken Sharp, Iowa Department of Public Health, to Bob Watson

I am attaching a few items for your consideration. In essence, the regulation of animal feeding operations by local jurisdictions is preempted by state regulations. While this is an oversimplification of an otherwise complicated issue, the attached documents provide some context through Iowa Code citations, Attorney General Opinions, and Court findings.

- a. The attached AG Opinion speaks specifically to city authority over animal feeding operations, however in the document there are several references to county authority being preempted by state authority. In most citations, the document references the court decision impacting Humboldt County (also attached).
- b. The attached Iowa Code citation is the language that appears to most directly impact local authority.

I’ve highlighted the sections of the AG Opinion and Iowa Code documents that appear to be most relevant to the issues and concerns you raised in your original email.

Furthermore, it has been a long standing practice that State Agencies can act only within the authorities granted to them under Iowa Code. The Code of Iowa that establishes the authorities and duties of the **Iowa Department of Public Health** can be found in Iowa Code Chapter 135. In this chapter there is an absence of any explicit authority for IDPH to regulate animal feeding operations within the state of Iowa.

Regarding **local board of health authorities**, those authorities are spelled out in Iowa Code 137 (Local Boards of Health) and again there is an absence of any explicit authority to regulate animal feeding operations. Chapter 137 also specifically requires when local boards of health adopt rules and regulations that those regulations must not be inconsistent with state law. This would seem to relate to the preemption discussion found in the AG Opinion; in that any attempt by local boards of health to regulate animal feeding operations would be "inconsistent" with state law and preempted by that state law.

The authorities to regulate animal feeding operations clearly lie with the Iowa Department of Natural Resources.

I hope this helps to clarify the authorities around the issues and concerns over animal feeding operations.

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Bob Watson's Reply to Ken Sharp

The attachments you sent stating why the County or the State doesn't have jurisdiction in this, or like, cases, do not address the issue that we contacted you about. The ongoing air quality issue on North Winn's property is not addressed, nor does our request have anything to do with wanting to regulate cafo's on their own property.

As I mentioned originally, we are only interested in the interface between industrial poisons and the public. We are not interested in regulating anyone. We simply don't think people, children in this case who are mandated to be in school by the State, should be exposed to industrial poisons - in concentration's which are known to put their health at risk - when they are on public property regardless of origin of those poisons. The question is, does the State have an obligation to protect our most vulnerable citizens from air pollutants that can shorten their life span and leave them suffering from chronic and acute health conditions?

I am wondering if you would address this more specific issue again with the Assistant Attorney General?

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And the final word from the DNR on this request and issue:

What follows is the letter that I received from Wayne Gieselman, Administrator IDNR.

March, 28, 2011

RE: Odor, hydrogen-sulfide and ammonia concerns at North  
Winneshiek School

Dear Bob,

I am responding to your March 2, 2011 e mail to Catharine Fitzsimmons at the Air Quality Bureau. The subject of your e mail is hydrogen sulfide, ammonia, and odors “emanating from multiple hog confinements and one cattle feedlot in proximity to the North Winneshiek School”. In your March 2, 2011 e mail you indicated that you are “not interested in regulating anything or anyone. We are only interested in getting the ongoing air quality issue at North Winn resolved”. That’s good because at this time this department has no regulatory control over odors, hydrogen-sulfide and ammonia from the sources you listed.

In 2002 the Iowa Legislature directed the DNR to perform a field study to determine airborne levels of ammonia, hydrogen-sulfide and odor near animal feeding operations. The outcome of that study was not a new set of rules. It was a report titled “Animal Feeding Operation Technical Workgroup Report On: Air Emissions Characterization, Dispersion Modeling, and Best Management Practices” (12/15/04)/. The full report is available through the Iowa DNR website at <http://www.iowadnr.gov/air/afo/afo.html> . Scroll down to “Animal Feeding Operation Technical Workgroup Report” and click on “complete report”. There are also a number of Iowa State University publications available to guide facilities in the reduction of hydrogen-sulfide, ammonia and odor. They are included in the report and individually at the same website. If the confinement and feedlot owners are interested in being good neighbors to the school they can voluntarily implement the practices described in the ISU publications. I would encourage you to work with all the parties to discuss these options. {no reduction methods have been successful – Watson}

I would also like to offer the assistance of the field office at Manchester. {the Manchester office won’t even log odor reports called in from the school – Watson} They could not assist from a regulatory standpoint but they could meet with the school’s neighbors to provide technical assistance. Another option {this organization that Wayne is suggesting to contact is a corporate ag apologist group fully funded by corporate ag – Watson} might be to contact the Coalition to Support Iowa Farmer. Brian Waddingham is the contact person. He can be reached at 800-225-5531. {the irony is too much – Watson} I believe that they might be able to help out with this too in terms of trying to come to some resolution about this.

I hope this is helpful to you. We will do what we can to assist you in this.

Sincerely,

Wayne Gieselman  
Administrator

So, through this email chain you can see that no one in the state of Iowa is responsible for children's health when they are required by law to be on school property. And, no one at the EPA is very much concerned either.

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This odyssey was somewhat summarized by an op-ed that Bob Watson wrote in 2011 which appeared in the *Cedar Rapids Gazette*:

**Rural school kids are being poisoned – and the bureaucrats refuse to do anything.**

With most of Iowa's livestock now being raised in factory-like, industrial settings, rural residents and rural schools are being subjected to the poison sewer gasses hydrogen-sulfide and ammonia, to the explosive and greenhouse gas methane, and to particulates.

Concentrated animal feeding operations (CAFOs), which include both confinements and open feedlots, act like sewers and poorly operating wastewater digesters. They create sewer environments. But unlike carefully monitored industrial or municipal sewers, CAFOs are unregulated. They can and do constantly produce poison gasses, which are blown into the rural neighborhoods 24/7, 365 days a year. This is legal because the state and federal governments have exempted confinements and feedlots from all regulation concerning these poisons and particulates. Rules that normally would protect the public from the harmful health effects of these industrial technologies do not apply to agriculture. Rural schools – and school children – receive no protection from industrial poisons produced by agriculture.

The essential question we are asking is: "Who is responsible for school children's health when they are required by law to be on school property?"

In our effort to find a solution to this problem in our county, we have gone to the Iowa DNR, our local County Board of Health, and the

Iowa Department of Public Health – which checked twice with the Attorney General’s office. In each instance, when we asked who might be responsible for these children’s health, we have been told essentially that no one is. Apparently these poisons are not considered poisons when they are coming from industrial agriculture.

Studies have shown that negative health effects normally associated with exposure to hydrogen-sulfide, ammonia, and particulates are higher in rural Iowa than most anywhere else in the US, as a percentage of population. We used to raise most animals outside on pasture. Up until a few years ago in Iowa, we raised more animals per year outside versus what we raise now in confinements and feedlots. We didn’t have these health problems in rural areas until we started using CAFOs – confinements and feedlots – with their inherent poisons and particulates.

So, who is responsible for children’s health when their playgrounds and classrooms are inundated with poison sewer gasses and particulates? Do we accept the Orwellian decree from the State that these really aren’t poisons when they come from industrial agriculture, and those children’s health problems don’t really exist?

We have been amazed and disappointed at this response – or really the non-response – from government officials to our inquiry. The harmful effects to human health and the environment from this modern petro-chemical industrial model of agriculture is probably Iowa’s most urgent peace and justice issue. It is despicable that children can be sacrificed for a model of agriculture that enriches a few corporations and leaves the rest of us living with the shattered remains of a once vibrant farming culture.

#### **8. State denies anaerobic treatment taking place in confinements.**

It’s not just one bad egg. There are fundamental problems across industrial confinement agriculture. In the last year, both Iowa and Minnesota have seen an ominous increase in foaming in pits beneath hog confinements – like a potentially toxic bubble bath, it rises right through floor slats – exacerbating the already serious problem of dead pigs and flash fires caused by hydrogen-sulfide and methane.

Angela Rieck-Hinz of ISU, writing in August on the Iowa Manure Management Action Group website, stated:

I wish we had the answer, but at this point in time we still have no answers as to what is causing the foaming or how best to control or manage the foam. If you have information regarding foaming pits you

would like to share please contact me. In the meantime, I urge caution when pumping from manure pits. Be aware of safety concerns regarding manure gases, pit fires and explosions. Not all pit fires and explosions have happened in barns with foaming pits.

The crux of the problem is that confinement advocates have inappropriately transferred wastewater technology from the highly regulated sector of municipal and industrial wastewater to the unregulated – in terms of wastewater – sector of industrial agriculture. *The concern about poison and explosive gasses is not new*, and not only in those confinements with the foaming problem. *It is simply a consequence of using wastewater technology to raise animals.*

In the wastewater industry, we learned long ago - after workers became ill or died - that we could not put normal workspaces in proximity to areas where fecal waste is decomposing. The constant production of the poison and explosive gasses - hydrogen sulfide, ammonia, and methane - was finally taken into account in designing wastewater facilities and technology that would protect both the workers and the surrounding public. Those protections have been codified in the regulations that control municipal/industrial wastewater technology and design. But industrial agriculture remains exempt.

There may be many causes for the upswing in foaming problems in confinements. Some potential causes might include: damage to buildings and equipment through the corrosive nature of hydrogen-sulfide, genetically modified crops being fed to animals, different insecticides and herbicides applied to fields as pests and weeds become resistant to chemicals used in the past. Perhaps we will find solutions to somewhat mitigate this new foaming problem. But the bottom line is that as long as you use wastewater technology to store waste in pits below where animals are being raised, you will always have disease and death affecting both people and animals caused by these poisonous and explosive gasses.

The state Legislature, the Iowa Department of Natural Resources, and corporate industrial agricultural officials steadfastly deny that confinements are a form of wastewater technology. Although seeming illogical, in fact a DNR construction permit requires this type of building, resulting in these problems.

As a society, we should question what this industrial model of agriculture is doing to us, the animals, and the environment. We have turned most of our hog producers into virtual serfs, with corporations financing and owning the buildings, the pigs, and the feed, and even controlling when the producers market the pigs. Corporations externalize their environmental costs onto the producers and the public by having the producers own the polluting waste and the dead animals. We also expect producers to deal with the unsolvable problems confinement buildings create.

Confinement technology used to raise animals is a failed model on many levels. It is time to put animals back on the land.