

An Ounce of Agribusiness Prevention is Worth a Pound of Drinking Water Cure

With lawmakers, lawyers, and the public focused on the relationship between agriculture and drinking

water, those in farming, fertilizer, and livestock businesses would be wise to heed Ben Franklin's caution that "an ounce of prevention is worth a pound of cure."



By Kevin P. Braig

Such intense public scrutiny increases risk to agribusiness each year. Under these circumstances, it is prudent for an agribusiness to undertake an attorney-supervised

environmental and nutrient management audit of their business and educate itself on new agriculture pollution liability insurance policies that are starting to appear in the



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marketplace. While there have been many recent episodes of new enforcement initiatives and adverse legislation, two recent developments are likely to have the biggest impact on the future of agribusiness.

First, there are governmental initiatives. In the aftermath of last summer's algae bloom in Lake Erie that prompted the City of Toledo to issue a three-day ban on drinking

the city's water, both state and federal legislators have introduced new legislation that will increase regulation of agribusiness' nutrient management practices.

To demonstrate how seriously the Ohio General Assembly is taking clean water and nutrient management, the very first bill that the Ohio Senate introduced in 2015 was the "Clean Lake Erie Act" (S.B. 1), which prohibits application of

fertilizer and manure in the western basin of Lake Erie under some weather conditions. The Ohio Senate quickly passed the measure on February 18, 2015.

At the federal level, Ohio Representative Bob Latta introduced the "Drinking Water Protection Act" (H.R. 212), which would require the U.S. EPA to develop a plan to assess and manage risks associated with algae blooms. In addition, fellow Ohio Representative Marcy Kaptur introduced the "Safe and Secure Drinking Water Act of 2015" (H.R. 243), which would require U.S. EPA to determine what level of microcystins in drinking water could be considered safe. Ohio Senators Sherrod Brown and Robert Portman also introduced drinking water legislation in the U.S. Senate.

The second, more serious concern, is the decision of a federal court in Washington, *Community Association for the Restoration of the Environment v. Cow Palace, LLC*. In this case, the court held that discharges from a dairy's liquid manure lagoons and application of manure to fields, which resulted in nitrate contamination of groundwater, constituted an imminent and substantial endangerment to local drinking water wells.

What is remarkable about the *Cow Palace* decision is that the court applied federal solid and hazardous waste law to an agricultural problem, which previously had been considered to be outside the coverage of these federal laws. Using the new application of these laws to agriculture, federal and state enforcement officials and environmental groups may attempt to force significant change to farming practices and subject farms to monetary penalties that until now have been limited to mostly the chemical industry.

In reaching its decision in *Cow*

Palace, the court found the dairy did an inadequate job of adhering to its nutrient management plan and that the over-application of manure constituted "discarding solid waste." The plaintiffs have petitioned the court to order the dairy to line its lagoons and to provide drinking water to residents on well water within a three-mile radius of the dairy.

Recommendations:

To protect itself from the future, an agribusiness should consider conducting an attorney-supervised environmental and nutrient management audit or acquiring agriculture pollution liability insurance, explained below:

1. Environmental and Nutrient Management Audit.

Twenty-eight states have enacted some form of environmental audit privilege law that protects from disclosure proactive self-investigation of operations to insure compliance with nutrient management plans and other applicable environmental laws, rules and regulations. Ohio's audit privilege law is contained in section 3745.71 of the Ohio Revised Code. By undertaking an attorney-supervised environmental and nutrient management audit, an agribusiness can verify that its operations are in compliance with its nutrient management plan and applicable environmental laws. In the event the agribusiness determines that operations depart from either, the agribusiness can implement remedial compliance measures to avoid or minimize enforcement costs or civil liability.

2. Agriculture Pollution Liability Insurance.

Because all comprehensive general liability insurance policies contain the absolute pollution exclusion, claims that are based on groundwater

contamination allegedly caused by agribusiness are highly unlikely to be covered. However, some insurance companies are now beginning to offer specialty agriculture pollution liability insurance. In general, this expanded coverage offers protection to an agribusiness that processes and distributes agricultural products for sudden and accidental as well as gradual environmental liabilities, including bodily injury, property damage, and remediation costs arising out of conditions migrating from a covered location. If you consider purchasing an agriculture pollution liability policy, make sure to carefully review the operations and materials and substances that are covered and the exclusions which preclude coverage.

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