

STATE ENVIRONMENTAL LAWS AFFECTING KENTUCKY AGRICULTURE

*(See NASDA's website for
Federal Environmental Laws Affecting U.S. Agriculture)*

A Project of the

**National Association of State Departments
of Agriculture Research Foundation**

through the

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Research and Information**



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The Project Participants

National Association of State Departments of Agriculture Research Foundation

The National Association of State Departments of Agriculture (NASDA) is a nonprofit, nonpartisan association of public officials comprised of the Commissioners, Secretaries, and Directors of the fifty State Departments of Agriculture in the fifty states and the territories of Puerto Rico, Guam, American Samoa, and the Virgin Islands. NASDA's mission is to represent the State Departments of Agriculture in the development, implementation, and communication of sound public policy and programs which support and promote the American agricultural industry while protecting consumers and the environment. The NASDA Research Foundation is a 501(c)(3) nonprofit, tax-exempt corporation for educational and scientific purposes.

National Center for Agricultural Law Research and Information

The National Center for Agricultural Law Research and Information (Center) was created in 1987 under Public Law 100-202, 101 Stat. 1329-30 to address the complex legal issues that affect American agriculture. The Center focuses its efforts on research, writing, publishing, development of library services, and the dissemination of information to the public. The Center is located at the University of Arkansas School of Law in Fayetteville, Arkansas.

Natural Resources Conservation Service

The Natural Resources Conservation Service (NRCS), formerly known as the Soil Conservation Service (SCS), is a federal agency within the U.S. Department of Agriculture (USDA). NRCS conservationists work with private landowners and operators to help them protect their natural resources.

U.S. Environmental Protection Agency

The U.S. Environmental Protection Agency (EPA) is a federal agency with primary responsibility for implementation of most federal laws designed to protect, enhance, and conserve the nation's natural resources.

Disclaimer

This guide is designed for use by farmers, ranchers, landowners, and their consultants in understanding the effect environmental laws have on agricultural operations. It is not a substitute for individual legal advice. Producers should always confer with their own attorneys, consultants, or advisors, as well as federal, state, and local authorities responsible for the applicable environmental laws.

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The contents and views expressed in this guide are those of the authors and do not necessarily reflect the policies or positions of the United States Department of Agriculture (USDA) NRCS or EPA.

Although every effort has been made to ensure the accuracy of the information contained in this book, environmental statutes, regulations, and ordinances are constantly changing. In addition, the overwhelming complexity and extent of environmental law make it impossible for a single book to describe in complete detail and depth all of the environmental laws and regulations impacting agricultural operations. The following material is simply a basic primer on environmental law for agricultural producers. For these reasons, the utilization of these materials by any person constitutes an agreement to hold harmless the authors, the National Center for Agricultural Law Research and Information, the University of Arkansas, the United States Department of Agriculture, the National Association of State Departments of Agriculture Research Foundation, the Natural Resources Conservation Service, and the United States Environmental Protection Agency for any liability, claims, damages, or expenses that may be incurred by any person or organization as a result of reference to, or reliance on, the information contained in this book.

The background research and final documents were completed in 2001. Updates of the information contained in the guide will occur on an as needed basis and be available on the internet.

Anyone with comments concerning the guide should contact the NASDA Research Foundation at 1156 15th Street, N.W., Suite 1020, Washington, D.C. 20005, or phone (202) 296-9680.

Quick Reference Guide

Producer Note: The following chart is intended as a quick reference guide to permits which may be necessary for a particular operation. If a permit is necessary, refer to the page numbers listed referencing this document for further information and contact the agencies listed in the final column for information on applications and procedures for securing a permit for an operation. A list of agencies and contact information is also provided in Appendix A.

Regulatory Area	Type of Activity	Permit Required	Agency
Water Quality <i>pp. 1-8</i>	Livestock and aquaculture operations, depending on size	NPDES/KPDES permit and state general permit or land disposal permit	Environmental Protection Agency (EPA) Regional Office and Natural Resources and Environmental Protection Cabinet (NREPC)
	Wetlands dredge and fill activity or dam, dike, or bridge building activities	Section 404 permit	U.S. Army Corps of Engineers with EPA and NREPC approval
	Water usage	Permit not required for agricultural use	NREPC
Groundwater <i>pp. 9-10</i>	Water well construction and use	No permit, but driller must be certified and submit report	NREPC
	Groundwater protection	No permit, but Best Management Practices (BMPs) must be followed	NREPC
Air Quality <i>pp. 11-12</i>	Grain terminals and grain elevators	Permit required	EPA Regional Office or NREPC
	General agricultural operations including odor, dust, or flies	No permit, but may be subject to nuisance suits	EPA Regional Office or NREPC
	Burning	No permit required for normal agricultural burning/land clearing	NREPC

Regulatory Area	Type of Activity	Permit Required	Agency
Solid Waste and Hazardous Waste <i>pp. 13</i>	Storage, treatment, or disposal of hazardous or solid waste	Permit required for disposal, treatment, or storage activities	EPA Regional Office and NREPC
	Public notice of hazardous waste	No permit	Local Emergency Planning Committee and NREPC
Pesticides and Chemigation <i>pp. 14-16</i>	Application and use of pesticides	No permit, but a license or certification may be required	EPA and Kentucky Department of Agriculture (DOA)
	Use of pesticides around farmworkers	No permit, but training and notification is required	NREPC and DOA
	Record keeping	No permit, but all requirements must be met	DOA
Wildlife Protection <i>pp. 16-17</i>	Taking of wildlife	Permit required if endangered or threatened species may be affected	U.S. Fish and Wildlife Service and Department of Fish and Wildlife Resources (DFWR)

STATE ENVIRONMENTAL LAWS AFFECTING KENTUCKY AGRICULTURE

Producer Note: Agricultural producers are faced with many challenges in today's rapidly changing world. Changes in industrialization, use of computer-based technology, governmental involvement in market dynamics, and environmental regulation are affecting producers in a number of ways. Environmental regulation is a complex area with both federal and state government involvement. Staying informed is the producer's most useful instrument for meeting the challenges of today's agriculture. This information on environmental regulation is provided to educate producers on the breadth and scope of environmental laws which may impact daily production activities.

I. WATER QUALITY

A. Kentucky Water Quality Laws and Regulations

Most states have enacted clean water legislation. While these statutes usually contain provisions similar to those found in the parallel federal legislation, there may be significant differences. In fact, state statutes may impose requirements that are even more restrictive than the federal law. In all cases, federal Clean Water Act (CWA) requirements must be followed since they are enforced along with the state enacted statutes and regulations implemented by the state administrative agencies. Under the CWA, the Environmental Protection Agency (EPA) has delegated the NPDES permit program to many states including Kentucky.

Caution: Because environmental laws and regulations change frequently, all producers must stay in contact with both state and federal officials in order to remain in compliance and aware of changes in the law.

Producer Note: Often the specifics of environmental laws are found in federal and state agency regulations. In addition, regulations are likely to be amended frequently. As a result, a producer must stay in contact with offices administering specific programs in order to keep up with all changes which may occur.

1. *Kentucky Environmental Protection Act*

Producer Note: The Kentucky Environmental Protection Act (KEPA) is the primary water quality legislation in the Commonwealth of Kentucky. Air quality and solid wastes are also regulated under the Act. The Act is administered by the Natural Resources and Environmental Protection Cabinet (NREPC). Within the NREPC are three departments including the Department of Natural Resources (DNR), the Department for Environmental Protection (DEP), and the Department of Surface Mining Reclamation and Enforcement (DSMRE). Each department has several divisions. Primarily, the Department of Environmental Protection regulates water quality within the Division of Water.

The KEPA¹ gives the NREPC authority to regulate the quality of surface waters in the Commonwealth. Under the KEPA, the NREPC is authorized to prepare and develop a comprehensive plan for the environment of the Commonwealth including the management of water resources; the prevention, abatement, and control of water pollution; and the enforcement of rules and regulations adopted to carry out the environmental plan.

As a result, the NREPC has developed and established water quality standards and classifications for all surface water in the Commonwealth. The standards and classifications designate certain uses of the water and also provide the criteria necessary to protect the uses. Once a use is designated, the water quality must be maintained by using all available measures to prevent the creation of any new pollution and abate any existing pollution in surface water.² One such measure is the discharge permit.

2. *Kentucky NPDES Program*

Producer Note: The EPA has delegated the NPDES program in Kentucky to the NREPC. Consequently, the NREPC, not the EPA, has primary responsibility for issuing permits for point source discharges and for enforcing related sections of the CWA. However, the NREPC is required to administer the program in accordance with all federal statutes, rules, regulations, and standards.

One of the NREPC's most important functions under the KEPA is the issuance of permits for waste discharge into surface waters. However, by the same token, if a producer is not in compliance with the established standards, the NREPC may modify, suspend, deny, or revoke a permit.³ Permits issued under this program are called Kentucky Pollution Discharge Elimination

¹ KY. REV. STAT. ANN. § 224.01-010 *et seq.* (Michie 1995 & Supp. 1998).

² 401 KY. ADMIN. REGS. 5:026 to 5:031 (1992).

³ 401 KY. ADMIN. REGS. 5:050 TO 5:055 (1994).

System (KPDES) permits; however, the regulations for the KPDES permit are compatible with the federal regulations adopted pursuant to the CWA.⁴ Under the KPDES permitting scheme, the following are specifically included as point sources requiring permits for discharges:

- Concentrated animal feeding operations;
- Concentrated aquatic animal production facilities;
- Discharges into aquaculture projects;
- Discharges from separate storm sewers;
- Silviculture point sources; and
- Other activities on a case-by-case basis.

3. *Kentucky Agriculture Water Quality Act*

The Agriculture Water Quality Act (AWQA), Kentucky's water quality legislation,⁵ was created to develop and improve best management practices (BMPs) in conservation plans; to develop statewide and regional agricultural water quality plans; and to promote soil and water conservation activities to counter the adverse impacts of agricultural operations on the environment. Under the AWQA, statewide and regional plans are to be approved by the NREPC's Division of Water and, subsequently, used by each agriculture operation as a guide to develop individual water quality plans.

An agriculture operation is any farm operation on ten (10) or more contiguous acres of land used for the production of livestock, livestock products, poultry, poultry products, milk, milk products, and silviculture products⁶ or the growing of crops or any farm operation devoted to and meeting the requirements for payments to agriculture programs under an agreement with the state or federal government. Any operation that has implemented the provisions of an applicable agriculture water quality plan is in compliance with the legislation. However, compliance does not affect any obligation to obtain any permit, certification, or authorization under other state or federal law. If water pollution exists and continues while in compliance with a water quality plan, an operation will be given an opportunity to take corrective measures and modify any deficiencies in the plans or BMPs.

⁴ KY. REV. STAT. ANN. § 224.16-050 (Michie 1995).

⁵ KY. REV. STAT. ANN. § 224.71-100 *et seq.* (Michie 1995 & Supp. 1998).

⁶ Additionally, Kentucky's Forest Conservation Act requires loggers and operators to 1) have a master logger on site and in charge of commercial timber harvests, 2) use appropriate BMPs during timber harvests, and 3) correct damage to land and water.

4. *Kentucky Concentrated Animal/Aquatic Feeding Operations*

Producer Note: While concentrated animal feeding operations (CAFOs) and concentrated aquatic feeding operations (CAqFOs) discharging into Kentucky waters must be permitted, other animal feeding operations may also be required to receive a KPDES permit.

a. Concentrated Animal Feeding Operations

All concentrated animal feeding operations (CAFOs) require a KPDES permit if the operation meets the requisite number of animals or if the operation discharges pollutants into the waters of the Commonwealth. However, any animal feeding operation (AFO) may be designated a CAFO if it is determined by the NREPC to be a significant contributor to water pollution. In making the determination, the NREPC will consider the following:

- The size of the AFO and the amount of waste reaching the waters of the Commonwealth;
- The location of the AFO in relation to Commonwealth waters;
- The means of conveyance of animal waste or wastewater into the waters of the Commonwealth;
- The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal waste or wastewaters into Commonwealth waters; and
- Other relevant factors.⁷

b. Concentrated Aquatic Feeding Operations

As in the case of CAFOs, concentrated aquatic feeding operations (CAqFOs) are subject to the KPDES permit program. Under the requirements, a hatchery, fish farm, or other facility is a CAqFO, if it grows, contains or holds either of the following:

- Cold water fish species or aquatic animals in ponds, raceways, or similar structures which discharge at least thirty days per year and produces a minimum of approximately 20,000 pounds of fish per year or feeds a minimum of 5,000 pounds of food during a calendar month; or

⁷ 401 KY. ADMIN. REGS. 5:060 Sec. 10 (1994).

- Warm water fish species or aquatic animals in ponds, raceways, or similar structures which discharge at least thirty days per year and use closed ponds which discharge other than during periods of excess runoff or facilities which produce a minimum of 100,000 pounds of aquatic animals per year.

However, any warm or cold water aquatic animal production facility may be designated a CaqFO on a case by case basis, if the NREPC determines that the CAqfo is a significant contributor of water pollution. In reaching its determination, the NREPC will consider the following factors:

- The location and quality of the receiving waters;
- The holding, feeding, and production capacities of the facility;
- The quantity and nature of the pollutants reaching the waters of the Commonwealth; and
- Other relevant factors.⁸

5. *Kentucky Agricultural Operation Wastes Handling System*

Producer Note: An operation may be required to obtain other permits in addition to the NPDES/KPDES permit. In some cases, construction and operation permits may be required even when an NPDES/KPDES permit is not.

a. Construction Permit

Any animal feeding operation (AFO) other than a swine feeding operation (SWO) wishing to construct a waste handling system for its operation must obtain a construction permit. The following conditions apply to all permits:

- No deviations from the plans and specifications submitted with the application are allowed;
- Permittee must assure that the quality of the effluent is such that the standards will not be violated; and
- Upon completion, written certification must be provided that the facility has been constructed and tested in accordance with the approved plans and conditions.⁹

⁸ 401 KY. ADMIN. REGS. 5:060 Sec. 10 (1994).

⁹ 401 KY. ADMIN. REGS. 5:005 Sec. 24 (1997).

b. Operational Permit

An operational permit known as a Kentucky No Discharge Operational Permit (KNDOP) is required for AFOs other than SFOs that have agricultural waste handling systems which do not discharge to the waters of Kentucky. This includes AFOs which dispose of their effluent by spray irrigation. The conditions of the KNDOP include:

- No point source discharges of wastewater from the facility;
- No runoff of wastewater from land applications into a stream;
- Requirements for monitoring the facility including the frequency; and
- Requirements for disposing of waste materials removed from the settling basin.¹⁰

c. Swine Construction and Operation Permit

Kentucky's regulatory scheme also establishes separate permit requirements for construction and operation of swine feeding operations (SFOs). Swine feeding operations are operations that confine 1,000 or more swine units at any given time and are not CAFOs. Under the regulations, any new SFO or existing operation which increases its unit number to 1,000 or more or increases the number of swine units by more than ten percent must obtain a permit to construct, modify, or operate the SFO. Regulated areas include:

- The confinement area;
- The waste lagoon; and
- The land application areas.¹¹

Thus, the owner or operator of a SFO must obtain a swine waste management permit (SWMP) before beginning construction or operation of a swine confinement structure or a waste lagoon or beginning land application of swine waste. The application for a SWMP consists of the two copies of the following:

- A completed permit application form;
- A detailed set of plans and specifications for the proposed swine waste lagoon;
- Documentation of the required public notification;

¹⁰ 401 KY. ADMIN. REGS. 5:005 Sec. 25, 27 (1997).

¹¹ 401 KY. ADMIN. REGS. 5:009 (1998).

- A USGS¹² seven and one-half minute topographic quadrangle map with the SFO¹³ clearly marked;
- A site map clearly showing the swine waste lagoon location, roads, setback features, easements, locations of buildings on the site, field identification and numbers of acres in each for land application areas, filter strips, and existing and proposed monitoring wells and lysimeters;¹⁴
- A demonstration that the lagoon complies with the siting requirements;
- A monitoring plan to monitor the integrity of the lagoon;
- An operation-specific nutrient management plan;
- A certified copy of a legal deed, easement, or contract; and
- The results of the baseline soil analyses for each land application field.¹⁵

Producer Note: In the planning stages and before attempts to obtain a construction or operation permit for a swine feeding operation, a producer should thoroughly review the regulations or contact the NREPC for information and details due to the large number of further specific requirements -- lagoon specifications, setbacks, and acreage required for land disposal of manure and wastewater.

Producer Note: Most poultry operations fall outside the above permitting process because the operations do not dispose of the chicken litter using a liquid process. However, local authorities can and have imposed permitting or other requirements on operations that fall outside the regulations adopted by the NREPC. Consequently, poultry producers should check local ordinances, rules, and regulations which might impact their operation. Also poultry operations with greater than 10 acres will be required to implement new BMPs incorporated into the Kentucky Agriculture Water Quality Plan by October 2001. These BMPs detail specific requirements associated with nutrient management, poultry facility siting, and land application of on-farm generated waste by-products.

¹² United States Geologic Survey (USGS).

¹³ Site for operation (SFO).

¹⁴ A device for collecting water from the pore spaces of soils and for determining the soluble constituents removed in the drainage.

¹⁵ 401 KY. ADMIN. REGS. 5:009 (1998).

6. *Kentucky Nonpoint Source Pollution Control*

Kentucky has created within the Department of Natural Resources of the NREPC a Division of Conservation (DOC). The DOC carries out its duties through the Soil and Water Conservation Commission. Under the statutory provisions,¹⁶ the Commission is responsible for the conservation, utilization, and control of soil and water resources. The Commission also administers the Kentucky Soil Erosion and Water Quality Cost-Share Fund which provides financial assistance for programs to reduce topsoil loss due to wind and water erosion and to reduce sediment loading of Kentucky's streams, rivers, and lakes. The financial assistance, thus, aids in the prevention of surface and groundwater pollution.

To receive financial assistance, farmers must implement BMPs to control the nonpoint source pollution runoff. BMPs for agricultural operations are established practices that are the most effective, practical, and economic means of reducing and preventing water pollution. BMPs constitute the minimum level of acceptable control of nonpoint source pollution runoff for agricultural practices.

7. *Kentucky Water Resources*

Kentucky's water resource policy recognizes the need to develop, conserve, and properly use its water resources. Legislation¹⁷ prevents the obstruction of streams and floodways by disposal and dumping activities, regulates the amount of water withdrawn from public waters, and requires local communities to develop long range water supply plans. To this end, a permit is required for any person, business, industry, city, county, or water district desiring to withdraw, divert, or transfer public water.

However, at this time, no permit is required for water used for agricultural purposes including irrigation. In fact, owners of land contiguous to public waters have a right to use the water for domestic purposes which includes household use and drinking water for poultry, livestock, and domestic animals.

8. *Kentucky Enforcement of the Environmental Protection Act*

Discharging wastes into surface waters, unless authorized by a KPDES or other permit, is a violation of the KEPA.¹⁸ Violators are subject to both civil and criminal penalties. Civil penalties include fines up to \$25,000 for each day a violation continues. In addition, liability also exists for the costs of restocking fish or replacing wildlife killed as a result of the violation.

¹⁶ KY. REV. STAT. ANN. § 146.080 *et seq.* (Michie 1996).

¹⁷ KY. REV. STAT. ANN. § 151.100 *et seq.* (Michie 1996).

¹⁸ KY. REV. STAT. ANN. §§ 224.01-070, 224.99-010, 224.99-020 (Michie 1995 & Supp. 1998).

Any person who knowingly violates the KEPA, a permit, or a regulation or who knowingly provides false information in any required or filed document is guilty of a felony and can be fined up to \$25,000 and imprisoned up to five years or both.

Additionally, the NREPC can bring an action for an injunction to prevent any person from violating or threatening to violate any KEPA provision.

II. GROUNDWATER

A. Kentucky Groundwater Laws and Regulations

1. Kentucky Groundwater Protection Plans

Groundwater in Kentucky provides 95% of the Commonwealth's water resources and is the source of over 30% of the public and domestic water supplies in the Commonwealth. In rural areas, groundwater contributes up to 90% of the domestic water supply. Consequently, Kentucky has adopted legislation which provides for characterizing and monitoring of groundwater.¹⁹ The statute provides for a monitoring network to be established to provide information to:

- Identify, characterize, and model groundwater systems;
- Develop community and private water supplies;
- Address resource allocation concerns;
- Set boundaries on wellhead protection areas; and
- Recognize groundwater potential degradation.

As direct by the legislation, the NREPC has developed agency regulations to protect groundwater. One such regulation establishes the requirement for groundwater protection plans for certain activities. These activities include:

- Storing or handling bulk quantities of pesticides or fertilizers for commercial purposes;
- Storing or handling bulk quantities of pesticides or fertilizers for the purpose of distribution to a retail sales outlet;
- Applying pesticides or fertilizers for commercial purposes;

¹⁹ KY. REV. STAT. ANN. § 151.620 *et seq.* (Michie Supp. 1998).

- Land treatment or land disposal of a pollutant;
- Installation, construction, operation, or abandonment of wells, bore holes, or core holes; or
- Impoundment or containment of pollutants in surface impoundments, lagoons, pits, or ditches.

At this time, exclusions for required groundwater protection plans exist for some activities involving agricultural operations but the exclusions are under review. Producers should contact the NREPC to determine whether a groundwater protection plan is required their specific situation.

2. *Kentucky Water Wells*

In order to assist in the protection of groundwater, Kentucky has enacted legislation for the construction, alteration, or repair of water wells.²⁰ Under the statute, it is unlawful for any person to construct, alter or repair a water well without a valid certificate. Additionally, all certified well drillers must submit a report to the NREPC within thirty days of completion of the construction or alteration. Each report must contain the following information:

- The name and address of the owner of the well and the person constructing or altering the well;
- A sketch showing the distance from any road, intersection, septic tank drain field, and permanent structure;
- The dates of commencement and completion of the construction or alteration of the well;
- The depth, diameter, and type of casing;
- Information on screens and type of completion;
- The discharge in gallons per minute and the shut-in pressure in pounds per square inch of a flowing well;
- The static water level in relation to land surface and an estimation of the well yield and drawdown;

²⁰ KY. REV. STAT. ANN. § 223.400 *et seq.* (Michie 1995).

- The kind, nature, approximate thickness, and water-bearing capacity of the material in each stratum penetrated;
- The type and amount of disinfectant used and the date of disinfection.

III. AIR QUALITY

A. Kentucky Air Quality Laws and Regulations

1. *Kentucky Air Quality Standards and Control*

Air quality in Kentucky is regulated by the KEPA²¹ and the Air Pollution Control Act (APCA).²² Under the KEPA, the NREPC is given the authority to develop and conduct comprehensive programs for the management of air resources, control of air pollution, and issuance of permits for any machine, equipment or other article/device that may cause or contribute to air pollution. Pursuant to this authority, the NREPC has developed primary and secondary air quality standards.²³

Under the APCA, each county within the Commonwealth is empowered to create an air pollution control district within its boundaries. The affairs of the district are carried out by the air pollution control board although a public meeting must be held before any regulation may be adopted. The board is authorized to establish:

- Applicable emission standards including the fixing of reasonable limits for particular air contaminants which, in the opinion of the board, could or may cause injury, detriment, nuisance, or annoyance to a considerable number of persons or the public; and
- Permits for the operation or use of any machine or equipment which may cause the issuance of air contaminants.

The following equipment does not require a permit:

- Any mobile equipment; or
- Equipment used for agriculture operations in the growing of crops or raising of fowl or animals.

²¹ KY. REV. STAT. ANN. § 224.01-010 *et seq.*

²² KY. REV. STAT. ANN. § 77.010 *et seq.* (Michie 1995).

²³ 401 KY. ADMIN. REGS. 53:010 *et seq.* (1988).

Once established, any person who discharges an air contaminant in excess of the set standards, fails to obtain a required permit, or fails to comply with the permit requirements is presumed to be in violation of the regulations and can be liable for both civil and criminal penalties.

Producer Note: Although the air pollution laws do not appear to include agriculture operations under the issuance of permits or other air pollution control requirements, the statute specifically allows local authority -- counties and municipalities -- to enact and enforce stricter ordinances, rules, and regulations. Consequently, producers should always check with local governing bodies to see if there are ordinances, rules, or regulations that might impact their operations.

2. *Kentucky Odor*

The APCA has designated odor as an air contaminant. Under the primary and secondary ambient air quality standards formulated by the NREPC, odor is considered to be a secondary source contaminant. Consequently, odor does not become applicable for action by the NREPC until a specific complaint regarding odor is received.

3. *Kentucky Noise*

Although Kentucky has adopted extensive legislation²⁴ on noise pollution which includes local government authority to adopt and enforce ordinances for noise control plans, farm tractors and other farm equipment, machinery, or vehicles used primarily for off-highway use are exempt from the legislation.

4. *Kentucky Open Burning*

Generally, open burning -- the burning of any matter without an approved burn chamber and stack or chimney with an approved control device -- is prohibited in Kentucky. However, unless local ordinances prohibit it, open burning is allowed for the following purposes:

- Cooking of food for human consumption;
- Weed abatement, disease prevention, and pest prevention;
- Agricultural, silvicultural, range, and wildlife management practices; and
- Land clearing and removal of trees or tree limbs felled by storms.²⁵

²⁴ KY. REV. STAT. ANN. § 224.30-050 *et seq.*

²⁵ 401 KY. ADMIN REGS. 63:005 (1998).

IV. SOLID WASTE AND HAZARDOUS WASTE

Producer Note: There are several laws which control the use and disposal as well as the cleanup of hazardous wastes. Producers who use hazardous chemicals, petroleum, or other products stored in storage tanks must be aware of requirements governing their actions.

A. Kentucky Solid Waste and Hazardous Waste Laws and Regulations

Producer Note: While most farmers and ranchers are not generators, transporters, or disposers of solid waste, it is important to check with state officials concerning the definitions of solid waste to determine whether an operation's activities could be regulated under state solid and hazardous waste statutes.

Solid and hazardous wastes in Kentucky are regulated under the KEPA, the same act that regulates air and water pollution.²⁶ Under the KEPA, disposal of solid waste at any site other than a permitted site is illegal. Solid waste is any garbage, refuse, sludge, and other discarded material including solid, liquid, semi-solid, or contained gaseous material.

Open dumping is prohibited. An open dump is a site without a permit where solid waste is deposited. However, the owner or occupant of any land containing an open dump will not be guilty of violating the KEPA, if the person is:

- Not the generator of the solid waste; or
- Not knowingly allowing the solid waste to be deposited on the land and has made reasonable efforts to prevent disposal by others.

Under the KEPA, the NREPC is also responsible for the management of hazardous wastes. Hazardous waste is any discarded material which, because of its quantity, concentration, physical, chemical, or infectious nature, may cause or contribute to serious illness, a public health hazard, or an increase in mortality. However, hazardous waste provisions exempt certain agricultural wastes. These include:

- Agricultural wastes -- manure²⁷ and crop residues -- provided they are returned to the soil as fertilizers or soil conditioners; and

²⁶ KY. REV. STAT. ANN. § 224.40-100 *et seq.* (Michie 1995 & Supp. 1998).

²⁷ Off-site manure utilization (manure removed from the site where the manure was produced) requires a permit as does commercial or contract manure applications even though the application may be on-site (applied at the site where the manure was produced). Producers should check with the NREPC for their specific situation to determine whether a permit is required.

- Waste pesticides, herbicides, and fertilizers provided the farmer triple-rinses each emptied container and disposes of the waste residues on his own farm in a manner consistent with the labeling instructions on the container.

V. PESTICIDES AND CHEMIGATION

Producer Note: Use of pesticides and other farm chemicals is regulated by federal and state statutes. Most states also have some form of licensing or certification requirements controlling pesticide users. Additionally, if a producer employs agricultural workers, there are regulations which address safety concerns about pesticide use around those workers or by those workers.

A. Kentucky Pesticide and Chemigation Laws and Regulations

Producer Note: Kentucky, like most states, has laws designed to control the use of pesticides. The laws are designed to closely monitor the distribution and ultimate use of these substances within the state.

Kentucky regulates the storage, use, and application of insecticides, fungicides, herbicides, defoliant, rodenticides, and other pesticides as well as the storage of fertilizers under the Kentucky Fertilizer and Pesticide Storage and Pesticide Use and Application Act of 1996 (Pesticide Act).²⁸ The Pesticide Act is administered by Kentucky's Department of Agriculture (DOA). Pursuant to this authority, the DOA is authorized to promulgate administrative regulations. Such regulations can:

- Relate to the time, place, manner, and method of storage and application of pesticides and storage of fertilizers;
- Prohibit or restrict use of pesticides in designated areas during specified periods of time; and
- Encompass all reasonable factors which the DOA deems necessary to prevent damage or injury by drift or misapplication to plants on adjacent or nearby lands, wildlife in adjoining or nearby areas, fish in waters in reasonable proximity to treated areas, and animals, persons, or pollinating insects.

1. *Kentucky Private Farmer Applicator Certification*

Restricted-use pesticides are certain pesticides which may cause injury on lands other than on the land where it is applied or to persons, animals, crops, pests, or vegetation other than

²⁸ KY. REV. STAT. ANN. § 217B.010 *et seq.* (1995 & Supp. 1998).

the pests or vegetation which are intended. In order to comply with the Federal Environmental Pesticide Control Act of 1972, restricted-use pesticides must be applied by certified applicators. Consequently, the Kentucky DOA has established a certification process administered by county extension agents. After certification, farmers and other individuals may purchase, use, and apply restricted-use pesticides as private applicators.

To become a private applicator, a person must demonstrate a practical knowledge of the pest problems and pest control practices associated with agricultural operations. As part of the practical knowledge requirement, the person must demonstrate the ability to:

- Recognize common pests to be controlled and evidence of damage caused by them;
- Read and understand labels and labeling information including common names of the pesticides, targeted pests, timing and methods of application, safety precautions, preharvest or reentry restrictions, and disposal procedures;
- Apply pesticides in accordance with label warnings and instructions -- prepare the proper concentration of pesticide to be used under existing circumstances adjusting for certain factors such as area to be covered, speed of application equipment, and quantity to be dispersed;
- Recognize local environmental situations that must be considered during the specific application to prevent contamination or damage;
- Recognize poisoning symptoms and know the procedures to follow in case of a pesticide accident; and
- Demonstrate knowledge of the standards for the supervision of non-certified persons.²⁹

2. *Kentucky Storage of Restricted-Use Pesticides*

The following standards must be observed for the storage of restricted-use pesticides:

- Sites must be of sufficient size to adequately and neatly store all stocks in designated and segregated areas;
- Sites must be cool, dry, airy, or have an exhaust installed to reduce concentrations of toxic fumes and keep temperatures down;

²⁹ 302 KY. ADMIN. REGS. 31:005 (1980).

- Sites must be adequately lighted;
- Sites must be equipped with fire fighting equipment -- fire extinguishers, sprinkler systems, or alarm systems;
- Sites must be securely locked except when authorized personnel are in the area; and
- Floor sweep compound must be available to absorb leaks or spills.³⁰

3. *Kentucky Local Regulation*

No city, town, county, or other political subdivision of Kentucky may regulate the sale or use of pesticides by an agricultural or silvicultural operation. As a result, local authorities cannot by ordinance, regulation, or rule regulate the registration, notification of use, advertising, marketing distribution, applicator training and certification, storage, transportation, disposal, disclosure of confidential information, or product composition of pesticides for agricultural or silvicultural operations.

VI. PROTECTION OF WILDLIFE

Producer Note: Agricultural producers also have responsibilities concerning wildlife and migratory birds which may have habitat on the producer's property. Federal and state laws contain measures designed to protect or enhance wildlife or wildlife habi

A. *Kentucky Wildlife Protection Laws and Regulations*

Producer Note: Many states have additional measures which either enhance protections under federal laws or address issues peculiar to wildlife found within the state. These states also may address common problems caused by wildlife. Kentucky has laws protecting wildlife.

1. *Kentucky Endangered Wildlife*

All species of wildlife threatened with worldwide extinction or with extinction in Kentucky are protected by Kentucky's endangered species of wildlife legislation.³¹ The Department of Fish and Wildlife Resources (DFWR) is responsible for carrying out provisions of the legislation. The statute expressly prohibits the importation, possession for sell, or resale of

³⁰ 302 KY. ADMIN. REGS.31:005 (1980).

³¹ KY. REV. STAT. ANN. § 150.183 (Michie 1996).

any endangered species of wildlife or the hides, skins, or other parts of the wildlife. However, the DFWR can permit the importation, transportation, possession, or sale of endangered species for zoological, educational, scientific, or preservation purposes.

Additionally, in the event protected wildlife are causing damage to persons, property, or other wildlife or spreading disease, the commissioner of DRWR can, with commission approval, authorize the destruction or control of the wild animal, fish, or bird.³²

2. *Kentucky Endangered Plants*

As with endangered wildlife, Kentucky recognizes endangered or threatened species of plants.³³ The endangered plants program is administered by the Kentucky State Nature Preserves Commission. Under the statute, the commission is authorized to conduct investigations and compile a list of plant species in danger of extinction or threatened with becoming endangered within the Commonwealth. The subsequent list will not, however, prevent the development or use of public or private lands containing an endangered plant for the normal and accepted operations of agriculture, forestry, mining, utilities, equine, or construction activities.

VII. ENFORCEMENT OF STATE ENVIRONMENTAL LAWS

As with federal environmental laws, persons who violate the regulatory requirements of state environmental laws face substantial penalties. The specific penalties vary to some degree with each statute. However, they generally include both civil and criminal fines. Additional fines can be assessed for each day that an operation remains in violation. For severe or repeated violations, jail sentences can be imposed. State agencies can also bring proceedings, either in court or before an administrative tribunal, to enjoin a producer's activities and force compliance with the statute. In some cases, citizens may also file suits to enforce the requirements of the environmental laws. As with the federal statutes, state laws afford producers the right to administrative and/or judicial review of agency decisions.

³² KY. REV. STAT. ANN. § 150.105 (Michie 1996).

³³ KY. REV. STAT. ANN. § 146.600 *et seq.* (Michie 1996).

VIII. OTHER KENTUCKY STATUTES AFFECTING AGRICULTURE

A. Kentucky Farmland Preservation

1. *Kentucky Zoning and Planning*

Producer Note: Agricultural operations frequently are controlled by local planning and zoning activities. Since it is not possible here to outline the requirements of all local areas, a producer should always check with the local authorities to determine local planning and zoning regulations which may affect an operation.

Zoning legislation³⁴ authorizes the legislative bodies or fiscal courts of cities or counties in Kentucky to divide their jurisdictions into zones and restrict the uses of land within the zones. Land use or zoning regulations may be used to:

- Facilitate fire and police protection;
- Prevent overcrowding of land including the size and usage of any structures;
- Protect airports, highways, public facilities, prime agricultural lands, and other natural resources; and
- Regulate the use of sludge from water and wastewater facilities.

In addition to zoning powers, any city or county of a planning unit may by ordinance provide for:

- The voluntary transfer of the development rights of one parcel of land to another parcel of land;
- The restriction or prohibition of further development of the parcel where development rights have been transferred; and
- An increase in the density or intensity of development of the parcel where such rights have been transferred.

³⁴ KY. REV. STAT. ANN. § 100.111 *et seq.* (Michie 1993 & Supp. 1998).

2. *Kentucky Conservation Easements*

Producer Note: Many states have passed laws allowing preservation or conservation of agricultural lands through the use of easements. When easements are used for these purposes, the law frequently has certain requirements relating to the creation, compensation, and enforcement of the easement.

Kentucky has adopted provisions which allow the Commonwealth to purchase or otherwise acquire agricultural conservation easements.³⁵ Agricultural conservation easements are interests in land which restrict or prevent development of the land other than for agricultural purposes. Under Kentucky's program, the Purchase of Agricultural Conservation Easement (PACE) Corporation is responsible for overseeing purchases of easements. During the term of the easement, the use of the land is restricted to the production of crops, livestock, livestock products, nursery products, and greenhouse products. Additionally, the owner must:

- Implement a conservation plan approved by the soil and water conservation district;
- Not construct any new buildings or structures unless approved by the easement holder -- PACE;
- Not subdivide the restricted land; however, right-of-ways may be granted for utilities;
- Not construct any road or pave any part of the restricted area without approval by PACE;
- Continue to pay all taxes and assessments levied against the land; and
- Continue to be responsible for the upkeep and maintenance of the land.

An easement may be terminated by the owner upon demonstrating that conditions on or around such land subject to the easement have changed to such a degree that agricultural activity is no longer viable. If relief is granted by the court, then the owner must pay PACE the fair market value of the easement.

3. *Kentucky Agricultural Districts*

The Agricultural District Law was passed in 1982, permitting a landowner or a group of landowners, owning at least 250 contiguous acres in active agricultural production, to petition

³⁵ KY. REV. STAT. ANN. § 262.900 *et. seq.* (Michie 1994).

the local conservation district to form an agricultural district. The purpose of the program is to provide a means by which agricultural land may be protected and enhanced as a viable segment of the state's economy and to minimize the conversion of Kentucky's best agricultural land to non-farm use. The benefits to landowners participating in the Agricultural District Program are listed below:

- Land enrolled cannot be annexed. If land in an agricultural district is condemned by a state agency, the agency must mitigate the impact of the conversion of that land to non-farm uses.
- Land enrolled is eligible for differential assessment by the local Property Evaluation Administrator.
- Deferment of paying the assessed cost against their land for the extension of water lines across their property, as long as the land remains enrolled in the program.
- Higher ranking when applying for state cost-share assistance.
- Higher ranking in the application review process for the Purchase of Agricultural Conservation Easements Program.

B. Kentucky Nuisance and Right-to-Farm

Producer Note: Producers may be confronted with complaints of local residents originating from dust, odor, or flies from an agricultural operation. While not specifically an area where state or federal authorities have become involved, court action is oftentimes brought against the operation. These actions are usually based on a nuisance theory, and in some cases, a right-to-farm defense may apply.

1. Kentucky Nuisance

A nuisance is any activity or use of property that causes annoyance, harm, inconvenience, or damage to another. A nuisance is called a public nuisance when it violates public rights or causes an injury to the public at large. A nuisance is called a private nuisance when the damage is limited to nearby residents and landowners.³⁶

Besides the common law surrounding nuisance, Kentucky has by statute enacted provisions that address private nuisances.³⁷ The provisions of the statute categorize a private

³⁶ Fletcher v. Tenneco, Inc., 816 F. Supp. 1186 (E.D. Ky. 1993); W.G. Duncan Coal Co. v. Jones, 254 S.W.2d 720 (Ky. 1953).

³⁷ KY. REV. STAT. ANN. § 411.500 *et seq.* (Michie 1992).

nuisance as either permanent or temporary. The provisions further establish factors to be considered in determining the existence of a nuisance. Those factors include:

- The manner in which the defendant has used the property;
- The lawful nature of the defendant's property use;
- The importance of the defendant's property use to the community;
- The influence of the defendant's property use to the growth and prosperity of the community;
- The kind, volume, and duration of the annoyance or interference with claimant's use and enjoyment of claimant's property caused by the defendant's property use;
- The respective situations of the defendant and claimant; and
- The character of the area in which the defendant's property is located.

2. *Kentucky Right-to-Farm*

Although, the statute does not afford absolute protection to the farmer, Kentucky's Right-to-Farm Act³⁸ restricts neighboring landowners from bringing a nuisance action against agricultural or silvicultural operations for noise, dust, odor, and pesticide use. An agricultural or silvicultural operation is deemed not to be a private or public nuisance, a trespass, or a zoning violation if:

- The operation utilizes normal and accepted methods of operation;
- The operation has been in existence for over one year and was not a nuisance when it began; and
- The operation has not substantially changed.

On the other hand, the operation is not protected if it functions in a neglectful manner or if it pollutes any water of streams or groundwaters.

³⁸ KY. REV. STAT. ANN. § 413.072 (Michie Supp. 1998).

C. Kentucky Dead Animal Disposal

All dead livestock, poultry, or fish must be disposed within 48 hours of discovery. Proper methods of disposal include:

- Incineration of the entire carcass;
- Boiling of the carcass in water or with steam for a minimum of two hours;
- Burying the carcass at least four feet deep in an area that does not flood and that is at least 100 feet from any water source, residence, or highway;
- Removal of the carcass by a licensed rendering facility;
- Depositing the carcass in an approved landfill; or
- Composting the carcass in a facility approved by the Board of Agriculture.³⁹

³⁹ KY. REV. STAT. ANN. § 257.160 (Michie Supp. 1998).

Appendix A - Agencies

Producer Note: State and federal agencies are available to answer questions regarding environmental matters and a producer's compliance with environmental laws and regulations. The following is a list of agencies which should be able to answer questions or provide materials for a producer.

State Agencies:

Department of Agriculture

Capitol Annex, Room 188
Frankfort, KY 40601
(502) 564-5126
(502) 564-5016 fax
<http://www.kyagr.com>

Department of Fish & Wildlife Resources

#1 Game Farm Road
Frankfort, KY 40601
(502) 564-3400 or
(800) 858-1549 toll free
(502) 564-6508 fax
<http://www.kdrwr.state.ky.us>

Natural Resources and Environmental Protection Cabinet

Capital Plaza Tower, 5th Floor, 500 Mero Street
Frankfort, KY 40601
(502) 564-5525
(502) 564-5105 fax
<http://www.nr.state.ky.us>

Three Departments:

Department for Environmental Protection

Fort Boone Plaza, 14 Reilly Road
Frankfort, KY 40601
(502) 564-2150
(502) 564-4245 fax
<http://www.nr.state.ky.us/nrerpc/dep>

Four Divisions:

Division of Air Quality
803 Schenkel Lane
Frankfort, KY 40601
(502) 573-3382
(502) 573-3787 fax
<http://www.nr.state.ky.us/nrepc/dep/daq>

Division of Environmental Services

100 Sower Boulevard, Suite 104
Frankfort, KY 40601
(502) 564-6120
(502) 564-8930 fax
<http://www.nr.state.ky.us/nrepc/dep/lab>

Division of Waste Management

14 Reilly Road
Frankfort, KY 40601

(502) 564-6716
(502) 564-4049 fax
<http://www.nr.state.ky.us/nrepc/dep/waste>

Division of Water

14 Reilly Road
Frankfort, KY 40601
(502) 564-3410
(502) 564-5105 fax
(800) 928-2380 Environmental Emergencies
<http://www.nr.state.ky.us/nrepc/dep/dow>

Department of Natural Resources

663 Teton Trail
Frankfort, KY 40601
(502) 564-2184
(502) 564-6193 fax
<http://www.nr.state.ky.us/nrepc/dnr>

Three Divisions:

Division of Conservation
663 Teton Trail
Frankfort, Ky 40601
(502) 564-3080
(502) 564-9195 fax
<http://www.nr.state.ky.us/nrepc/dnr/Conserve>

Division of Energy

663 Teton Trail
Frankfort, KY 40601
(502) 564-7192 or
(800) 282-0868 toll free
(502) 564-7484 fax
<http://www.nr.state.ky.us/nrepc/dnr/energy>

Division of Forestry

627 Comanche Trail
Frankfort, KY 40601
(502) 564-4496
(502) 564-6553 fax
<http://www.nr.state.ky.us/nrepc/dnr/forestry>

Department of Surface Mining Reclamation & Enforcement

#2 Hudson Hollow Road
Frankfort, Ky 40601
(502) 564-6949
(502) 564-5698 fax
<http://www.nr.state.ky.us/nrepc/dsmre>