

# Welcome to the Manure Agreement Decision Making Tool

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## About this Tool

We developed this tool as a response to our research into Iowa's pork industry. It is designed as an educational tool to assist Iowa farmers and land owners.

In our research, we interviewed farmers, industry leaders, and conducted an online survey.

The research indicated that the changing value of manure was encouraging more manure agreements among hog producers and land owners and that the nature of these agreements was changing.

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## About this Tool (cont.)

This tool identifies questions that people should consider before entering into written manure agreements.

Our research project was funded by a Smithfield Innovative Swine Industry Enhancement Grant from the Iowa Attorney General's Office. Research was conducted in 2007 and 2008.

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## How to Use the Tool

This tool is to help farmers and land owners make decisions about what kinds of agreements work best for them.

This tool is not meant to provide legal advice. Individuals should seek legal advice from an attorney licensed to practice law in the State of Iowa. The Iowa State Bar Association Lawyer Referral Service can assist farmers and landowners in their search <http://www.iowabar.org/main.nsf>

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# Changes in the Value of Manure

Hog manure has gone from being treated as a cost to being seen as a significant component of many operations' cash flow. As the price of corn and the cost of production rises, such as the cost of commercial nutrients, the value of hog manure rises as well. As early as 2006, the desire to replace commercial fertilizer with hog manure generated new interest from grain farmers in either raising hogs or in entering into agreements with those who did to acquire the manure.

Today, hog farms are increasingly being treated as fertilizer production facilities. This change is affecting the need for and the type of manure agreements being used in the state.

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# Changes in the Value of Manure (cont.)

Generally speaking farmers and landowners need to consider their situation in relation to larger trends such as:

- What role do they want to play in the pork industry?
- Will the value of manure continue to rise?
- In the future, how will changing values for manure affect their satisfaction with agreements they make today?

Specifically, this tool focuses on what those entering into manure agreements need to consider regarding legally binding agreements?

This tool, while centered on hog manure agreements, can be used for considering other manure agreements.

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# What is a Manure Agreement?

A manure agreement is between at least two parties where one party has manure and the other party has land for manure application. The party with the manure may be an individual, a family corporation, or other legal entity that owns an Animal Feeding Operation (AFO).

Manure agreements have evolved as the value of manure has fluctuated. Ten years ago, the challenge was to find enough land to apply the manure. Manure easements were a common tool used to access land. Today, there is competition for the manure among farmers raising corn. This has resulted in the evolution of manure contracts where the manure is bought and sold.

Our goal is to help identify important questions that anyone entering into a manure agreement should consider.

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# Basics of Legally Binding Agreements

The terms of an agreement are always negotiable.

- Anyone can offer a “take it or leave it” agreement, but the unwillingness of one party to negotiate may be an indicator of future problems.

Oral modifications are hard to enforce.

- If the two parties agree to something verbally, it should be written into the agreement. Insisting on having it in writing saves at least a headache if something goes wrong and can potentially ward off disaster.

All foreseeable issues should be worked out before an agreement is signed.

- Parties should think about how their farm, their life, and the world might change in the coming years. They can’t predict the future, but anticipating as much as possible can be helpful. One thing is certain, all elements of the situation at the signing of the agreement will not be exactly the same by the time the agreement expires.

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# Basics of Legally Binding Agreements (cont.)

Each party has the option not to sign.

Know whether the agreement is assignable.

- If a hog operation is sold, will the buyer continue to maintain the contract to sell the manure?
- In the case of an easement, can the easement be assigned to a new owner?

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# Types of Manure Agreements

## Manure Easements

An easement is the right to use the land of another for a special and limited purpose. In the case of manure easements, that special and limited purpose is to apply manure to the land. An easement doesn't require that someone pay each time the land is used, however, easements often include payment for the right to make such use of the land.

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## Manure Contracts

A manure contract is the sale of manure through a legally binding document. This contrasts with an easement, which allows someone to use the land and may include provisions for paying for that use. A manure contract means the sale of good, in this case manure, and generally means the landowner is paying for the manure.

NOTE: A manure contract can be coupled with a manure easement so some flexibility is available concerning the renewal of the contract while enabling security of land access through a manure easement.

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## Questions to Consider

- Who is entering into the agreement?
- Will there be compensation? (easements)
- What amount will be charged? (contracts)
- Who has the responsibility to obtain, record, and keep a Manure Management Plan?
- Are there protections against liability for accidents or other claims of negligence or wrongdoing?
- How will disputes be resolved?
- Can the agreement be terminated?
- What period of time should the agreement cover?
- Does the agreement guarantee any manure will be applied on a given piece of land?
- What kind of manure is going to be applied?
- What type of application is going to be used?
- Who pays to find out the nutrient content of the manure?
- What type of property is included in the agreement?
- When will manure be applied?

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***People entering into manure agreements need to consider many variables including:***

How might changes in the industry affect one's desire to apply manure to their land? Or, how might changes in the industry affect one's need for land on which to apply their manure?

What legal agreement is best suited to meet one's own agricultural needs both now and in the future? How might using both an easement and a contract be beneficial?

What specific details need to be addressed in the agreement to protect one's interest and to support their agricultural goals.?

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Ethan D. Eppley, *General Practitioner's Guide to Livestock Production and Manure Management Plans in Iowa*, Drake University Agricultural Law Center, <http://law.drake.edu/aglaw>

Chris Boessen & Ray Massey, *Securing Manure Spreading Rights through Easements*, Univ. of Mo. Extension, <http://extension.missouri.edu/explore/agguides/agecon/g00361.htm>

Return to the Drake Agricultural Law Center [website](#) for additional food and agricultural resources.

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## Who is entering into the agreement?

Is the agreement going to run with the AFO if the current owner sells the AFO to another operator or corporation? If the AFO is sold the landowner may be concerned with who is going to apply manure. Will they use environmentally appropriate practices? Will they respect the issues of application timing, compaction, and weather?

If the AFO is sold the new owner may need somewhere to spread the manure, if an agreement has been established then it may remove some of the barriers to purchase and result in more buyers and a better price.

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## Who is entering in the agreement (cont.)

Also, if the AFO is sold the old owner won't likely have any need to have an agreement in place. Thus, the AFO owner would rather have the agreement run with the AFO. Assigning the agreement to the AFO rather than the person is one way around this issue. The AFO owner and the landowner can also solve this problem by making the agreement shorter so they are only bound to the terms for a few years instead of ten or twenty.

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## Will there be compensation (easements)?

Is the AFO compensating the landowner for the use of the land? Is the value of the manure enough to compensate for the use of the land? What happens if the AFO can sell the manure to someone else? If they are not applying manure on the land, the easement most likely will prevent the land owner from applying manure to that land since the AFO has the sole right under the easement to use that land for that purpose.

As the value of manure increases, easements can be less attractive for land owners than contracting for manure. This is because an easement may not guarantee manure will be applied to a particular piece of land. Also, even if the AFO has an easement with a land owner, the AFO is still free to sell the manure to someone else or to use this leverage to demand payment for the value of the manure from the owner of the land tied up in the lease.

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## What amount will be charged (contracts)?

This will need to be negotiated in the contract. Keep in mind that when buying anything on contract, the market price may move higher or lower, but the contract terms remain locked in for the length of the contract.

A determination of the cost for the manure depends on many factors. One option is to allow for annual negotiation or at least allow for the rate to change. Initially large AFO's were happy to have someone take their manure and didn't charge anything in some cases or they may have charged just enough to cover the cost of application. Recently, the price of commercial fertilizer has soared to new heights causing the price paid for manure to increase as well.

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## What amount will be charged (contracts cont.)

Many landowners have begun to build their own AFOs or in some cases even selling small plots of land to AFO operators to put up an AFO simply to obtain a homegrown fertilizer source. The actual costs and benefits of manure will vary depending on the type of manure, the nutrient content, and distance traveled to apply. With the volatility seen over the past years within agriculture, the need to adjust the cost of manure application will encourage flexibility in manure agreements.

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## What period of time should the agreement cover?

The length of the agreement can be determined either by a set time period or by a significant event such as the death of a landowner or AFO owner. Once again there are several competing interests of both parties. By connecting the agreement length to the death of one of the parties it negates what may be considered a benefit of an easement. Also, if the landowner decides to sell the property a longer easement length may affect his ability to get a good price. An AFO operator may want an easement that runs the life of the feeding facility or the length of the financing.

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## What period of time should the agreement cover? (cont.)

In fact, some lenders require some kind of arrangement be made when an AFO owner doesn't own or lease enough land to legally apply the manure produced by the proposed AFO. An AFO operator may want to have some security down the road to know that they will have sufficient property on which to apply manure so they can expand their current operation

The length of the easement can be determined either by a set time period or by a significant event such as the death of a landowner or animal feeding operation owner.

The term of a contract is typically shorter than the term of an easement. The length of time can be from a one time acquisition to a series of acquisitions over a number of years.

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## What period of time should the agreement cover? (cont.)

If the value and subsequent price of manure are going to increase, then a land owner would probably want the term to be longer. If the value or price is going to decline over time, then the land owner would want the term to be shorter. The AFO is going to have the opposite desire.

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# Does the agreement guarantee any manure will be applied on a given piece of land?

A contract guarantees what is in the agreement. If a contract says that a certain type and quantity of manure will be applied to specific parcels of land, then that is the promise. However, the contract only commits to what is in the contract.

An easement on the other hand, would not generally guarantee that manure will be applied. An easement allows an AFO to use your land, it usually does not require it to use your land.

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# Does the agreement guarantee any manure will be applied on a given piece of land? (cont.)

## Manure Easements

If farmer Bob has an easement covering his entire farm allowing an AFO to apply manure, that does not guarantee the AFO will apply manure to his farm. The AFO may have downsized since acquiring an easement on Bob's farm or may be planning to expand but has not yet done so.

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# Does the agreement guarantee any manure will be applied on a given piece of land? (cont.)

## Manure Easements

If Bob's goal is to use manure in his farming operation, it is entirely possible he could have entered into an agreement that prevents him from being able to apply manure to his farm. Generally an easement allows but does not require manure to be applied.

Thus, it is important for a land owners to carefully choose the right agreements and to negotiate terms in those agreements consistent with the goals for their farms.

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# Does the agreement guarantee any manure will be applied on a given piece of land? (cont.)

## Manure Contracts

Even if farmer Bob has a contract, there are still issues of who is applying the manure, when and where they are applying it, and what application methods they are using.

As the value of manure increases, the type of manure applied becomes more important. Farmer Bob needs to be assured the value he is getting matches up with the price he is paying.

Nutrient analysis and manure management plan compliance are also an issue, including potentially greater liability for accidents or mistakes.

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## What kind of manure is going to be applied to my land?

The type of animal and type of manure storage can play a large part in the nutrient level of the manure. Usually liquid manure from a deep pit system has the highest level of nutrients, however, it also carries with it additional application requirements. Dry manure on the other hand may not have as high nutrient level but it also is not subject to as much regulation as liquid manure.

The landowner should have some assurance of the type of facility the manure is coming from in order to know how much commercial fertilizer will be needed, if any.

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## What kind of manure is going to be applied to my land (cont.)

The AFO owner on the other hand would rather have the flexibility of applying manure as needed to the ground ready to be fertilized. If the AFO operator has thousands of gallons of manure to apply and only a few months in the fall and a few weeks in the spring to apply it they want the flexibility to run from one field that is too wet to the field a few miles down the road that is ready without worrying about what building they are taking the manure from.

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## What type of application will be used?

For the most part application of manure depends on the type of manure being applied. Liquid manure is almost always knifed into the soil using a large tanker. This method of application helps eliminate nitrogen loss and complaints of odor. Also, according to the state code, manure that is knifed into the ground can be applied closer to public use property. Liquid manure can also be surface applied. Dry manure can't be knifed in and thus must be applied onto the surface of the ground.

The type of application will affect the availability of nitrogen, the amount of compaction, the cost of application and the benefit of the manure and should be made known to all parties involved.

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# Who pays to find out the nutrient content of the manure?

As discussed earlier, nutrient content of manure can vary depending on several factors including: type of storage, type of animal, feed variability, length of time stored, and type of application. To determine what rate of manure needs to be applied a sample of the manure should be analyzed to determine what the nutrient load is.

Typically the AFO operator will pay for the testing and provide the landowner with this information, but this should be included in the manure contract. The parties may also want to include how often sampling will be done, where the sample will be analyzed, as well as how the sample will be taken. Results will be most accurate if sampling is done close to the time of application.

With the increase in regulations and cost of manure, a precise rate of application will increasingly depend on an accurate nutrient analysis.

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## What type of property is included in the agreement?

Agreements can include a certain field or an entire farm. The AFO would prefer to tie up an entire farm to assure adequate acres and flexibility. Since crop rotation, soil type, and weather will play a huge role in when and where manure can be applied more acres allows more flexibility.

The landowner wants to make sure that any acres not tied up in one easement are still available for another easement; therefore they may want to only include part of their farm in an easement rather than the entire farm.

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## What type of property is included in the agreement (cont.)

If the manure applicators need to access land, will they have to travel through the land owner's farmyard or someone else's to get to the property? This is a concern because of the nature of manure application. Manure applicators are often required to run all night long which may be a nuisance to nearby homeowners.

The AFO operator would prefer to use land that is close to the facility to cut down on transportation costs. Many times commercial manure applicators charge extra depending on the distance between the application site and the facility.

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# Who has the responsibility of recording, keeping and obtaining a Manure Management Plan?

The responsibility of developing an MMP is generally within the purview of the AFO operator. However, some information will need to be shared for the AFO to comply with the original MMP and annual MMP reports.

The landowner and AFO operator should discuss the sharing of information in regards to manure application rates as well as any commercial fertilizer applications to ensure all regulations are met.

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# Who has the responsibility of recording, keeping and obtaining a Manure Management Plan? (cont.)

Some information that will need to be disseminated among the parties includes soil type, nutrient load and application rate of manure, commercial fertilizer application, optimum crop yields, and application methods.

Addressing this issue in advance will avoid the problem of surprise to the landowner when the AFO operator begins asking questions that most landowners don't otherwise discuss.

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## When will manure be applied?

Many AFOs have adequate storage of manure to only require manure application once or twice per year. The AFO operator and the landowner may have different opinions on when manure should be applied. It is important the parties discuss this and include language addressing the timing of application in the manure agreement. The availability of nitrogen depends on several factors including: weather, temperature, and time.

The landowner will want manure applied in the spring prior to planting crops. The AFO on the other hand may not have adequate storage for the entire year and may need to apply some or all of the manure in the fall.

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## When will manure be applied? (cont.)

Weather in the spring is unpredictable and can cause serious problems; especially if the AFO operator has multiple facilities that need to be pumped. Both parties need to discuss these issues and if possible make some arrangement within the manure agreement to address the timing of application.

Another issue of timing that should be addressed is the condition of the soil at time of application. A landowner will want to avoid any activity when the ground is too wet to avoid compaction problems. Resolving this problem requires defining what “too wet” means and determining who makes the determination and how. Environmental and soil conditions are hard to include in an agreement so the parties should address how these decisions are made and who is involved in the process.

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## Can the agreement be terminated?

One benefit of written agreements is assurance the terms are binding for a certain period of time. However, the parties may wish to include a clause to allow them to get out of the agreement in certain situations. Situations could include bankruptcy, death of a party, sale of property or AFO, or other reasons.

It is important for the parties to be specific about what circumstances result in the ability to terminate. For instance, if the agreement can terminate upon the sale of the AFO, what happens if the AFO is gifted to an heir as part of an estate? Does this terminate the agreement? The more specific the agreement is the better.

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# Are there protections against liability for accidents or other claims of negligence or wrongdoing?

Manure application can be a very controversial subject because manure can have adverse affects on land, property values, and the local environment. A landowner will likely want some language included in the agreement to protect the landowner from liability for accidents in transportation, improper application, and accidental discharge. An indemnity clause would require the owner of the AFO to defend and hold harmless the property owner from any liability caused by spreading manure. Unfortunately this clause might not carry as much strength as the landowner would like.

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# Are there protections against liability for accidents or other claims of negligence or wrongdoing? (cont.)

If the AFO is bankrupt there won't be any money to defend litigation that may be brought against the landowner. Also, an AFO's insurance carrier may exclude claims for environmental damages or for claims occurring off property owned or leased by the AFO therefore leaving the AFO and landowner holding the bag. Unfortunately, all the issues that could arise during the life of an easement are too numerous to address or even realize. It is important all parties involved consider carefully their position and try to think through the specific issues they are concerned with and address those throughout the drafting process.

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## How will disputes be resolved?

Both parties should determine how disputes are going to be settled. Many aspects of the manure contract may be open to interpretation or may need to be adjusted according to the changing circumstances. Both parties to the agreement should determine how the disputes are going to be settled.

The parties should consider various options for dispute resolution. Some matters could be solved by adhering to an industry standard as developed by a certain entity, such as Iowa State recommendations regarding manure application rates.

The parties can also agree to work out their differences by using mediation or arbitration. Arbitration and mediation each have benefits and disadvantages that a landowner and an AFO operator should consider prior to agreeing to one of these dispute resolution tools.

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# How will disputes be resolved? (cont.)

## Arbitration

Arbitration is a process where the parties agree to allow a third party to act as judge and jury in resolving a dispute. The parties will have to agree on who to use as an arbitrator then both sides will be allowed to present evidence and make arguments. The arbitrator will then make a decision based on the evidence. There are two types of arbitration; binding and non-binding. Just like the names indicate a binding arbitration binds the parties by the decision and can be enforced in a court of law if one of the parties fails to follow the arbitrator's decision. Arbitration is a simple process compared to resolving issues in court; it proceeds quicker and costs less than a trial would. An arbitrator is not bound by rules of procedure and evidence; they can choose to weigh facts that wouldn't be presented in an actual trial.

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# How will disputes be resolved? (cont.)

## Arbitration

Along with benefits come drawbacks as well. One drawback to arbitration is there is no guarantee the process will be fair. Also, there is no ability to appeal the decision of the arbitrator and the parties will be bound by the decision of the arbitrator. The arbitrator's decision may not be enforceable if the arbitration is none binding. When including an arbitration clause into a contract the parties need to weigh the benefits and drawbacks of arbitration and determine what will be covered by the arbitration clause.

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# How will disputes be resolved? (cont.)

## Mediation

Another option for resolving conflicts is mediation. Mediation is an intervention of a third party to help resolve a conflict by assisting in the negotiations of the parties. Unlike arbitration the parties retain the decision making power while the mediator simply facilitates the discussion, helps maintain order, and prevents the escalation of conflict. Mediation offers benefits such as being faster and less expensive than formal court proceedings. Also, if the mediation process doesn't result in a solution the parties are free to go to court. Like arbitration the parties need to consider what will be encompassed within a mediation clause. Every situation is different and requires careful consideration of all parties.

[Iowa Mediation Service](#)

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