

OPINION NO. 87-097**Syllabus:**

1. If an egg farm operation creates conditions injurious to the public health, comfort, or property by maintaining a place for the keeping of animals which produces offensive smells, or creates conditions which damage others due to the collection of filth, offal, or noisome substances, it may qualify as a nuisance under R.C. 3767.13 unless the conditions are the result of agriculture conducted outside a municipality in accordance with generally accepted agricultural practices, and in such a manner so as not to have a substantial, adverse effect on the public health, safety, or welfare.
2. Pursuant to R.C. 3707.01, a board of health of a general health district has authority to undertake the abatement of a nuisance. In counties which have created a county health department under R.C. 301.24, the county health department has authority to undertake abatement of a nuisance.
3. Under R.C. 3707.01, a board of health of a general health district created pursuant to R.C. 3709.01, or a county health department created pursuant to R.C. 301.24, may issue an order for the abatement of a nuisance. If the order is not obeyed, the board or department may then prosecute pursuant to R.C. 3707.02 or seek an injunction pursuant to R.C. 3707.021.

4. Under R.C. 3709.22, a board of health of a general health district created pursuant to R.C. 3709.01 or a county health department created pursuant to R.C. 301.24 may provide for the inspection and abatement of nuisances and may take such steps as are necessary to protect the public health and prevent disease.
5. Under R.C. 3767.03, the Attorney General or a county prosecuting attorney may file a civil action for abatement and other injunctive relief in connection with a violation of R.C. 3767.13.
6. Under R.C. 309.08, the county prosecuting attorney is to prosecute any criminal charge filed in the court of common pleas charging a violation of R.C. 3767.13.
7. Except as provided in R.C. 1901.34(B), when criminal charges are filed in a municipal court for violation of R.C. 3767.13, the village solicitor, city law director, or other similar chief legal officer of the municipality in which the municipal court is located shall prosecute the case if the offense occurs in an unincorporated area within the territory of the municipal court.

To: R. Larry Schneider, Union County Prosecuting Attorney, Marysville, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 24, 1987

I have before me your request for my opinion as to which county, state, or local agency is responsible for the control of flies, birds, rodents or other varmints within a county or township. You indicate that this problem concerns an egregious health hazard created by flies, birds, and other varmints associated with a huge egg farm operation in Union County.

I begin my analysis by addressing the issue of whether the problem you describe may constitute a statutory nuisance. R.C. 3767.01 states that a nuisance is "that which is defined and declared by statutes to be such...." R.C. 3767.13 provides:

(A) No person shall erect, continue, use, or maintain a building, structure, or place for the exercise of a trade, employment, or business, or for the keeping or feeding of an animal which, by occasioning noxious exhalations or noisome or offensive smells, becomes injurious to the health, comfort, or property of individuals or of the public.

(B) No person shall cause or allow offal, filth, or noisome substances to be collected or remain in any place to the damage or prejudice of others or of the public.

While these prohibitions do not explicitly "define and declare" a nuisance, the General Assembly clearly intended that the activities listed in R.C. 3767.13(A) and (B) are to be considered nuisances.¹ See 1980 Op. Att'y Gen. No. 80-071.

¹ R.C. Chapter 3767 is entitled "Nuisances." Various sections within that chapter contain specific prohibitions of offensive conduct that clearly are intended to define

R.C. 3767.13(A) may apply to the situation you have described if the egg farm involves "the keeping...of an animal which, by occasioning...offensive smells," has become "injurious to the health, comfort, or property of...the public." R.C. 3767.13(B) may apply if the egg farm operation results in the collection of "offal, filth, or noisome substances...in any place to the damage or prejudice of...the public."²

Although R.C. 3767.13(A) and (B) may prohibit the operation of an egg farm which creates a significant health hazard, an exception for agricultural activities is found in R.C. 3767.13(D) which provides:

(D) Persons who are engaged in agriculture-related activities, as "agriculture" is defined in section 519.01³ of the Revised Code, and who are conducting those activities outside a municipal corporation, in accordance with generally accepted agricultural practices, and in such a manner so as not to have a substantial, adverse effect on the public health, safety, or welfare are exempt from divisions (A) and (B) of this section, from any similar ordinances, resolutions, rules, or other enactments of a state agency or political subdivision....(Footnote added.)

Thus, pursuant to R.C. 3767.13(D), the egg farm may be exempted from R.C. 3767.13(A) and (B) and any other similar ordinances or rules if the farm is operated outside a municipality "in accordance with generally accepted agricultural practices" without "a substantial, adverse effect on the public health, safety, or welfare." I am unable to find any statutory or case law expounding on this standard. Thus, the determination must be made according to the facts of the particular case.⁴

various types of nuisances. See, e.g., R.C. 3767.14 (prohibition against throwing or dumping refuse or filth into lakes and streams); R.C. 3767.16 (prohibition against deposit of dead animals or offal upon land or water). Moreover, R.C. 3767.27 allows for appointment of a county "nuisance inspector" who is authorized to investigate violations of R.C. 3757.13-.29, inclusive.

² For a discussion of the standard for determining injury to comfort, see Callahan v. Wasmire, 31 Ohio Op. 135 (C.P. Stark County 1943).

³ According to R.C. 519.01, "agriculture" includes animal and poultry husbandry.

⁴ If it is found that the egg farm is conducted "in accordance with generally accepted agricultural practices, and in such a manner so as not to have a substantial, adverse effect on the public health, safety, or welfare," I draw your attention to R.C. Chapter 6115 on sanitary districts. Of particular relevance are the following sections: R.C. 6115.01(G) (definition of "biting arthropods" includes mosquitoes and biting flies); R.C. 6115.24 (specific prohibitions and remedies involving biting arthropods); R.C. 6115.99(B) (penalties for violations of R.C. 6115.24). If the problem you have described is not, by definition, a nuisance, the establishment of a sanitary district may provide a method for elimination of the associated arthropod problem.

Assuming that the egg farm operation qualifies as a statutory nuisance, I turn now to the question of which officials are responsible for rectifying the problem. I first direct your attention to R.C. 3707.01 which provides that "[t]he board of health of a city or general health district⁵ shall abate and remove all nuisances within its jurisdiction." (Footnote added.) Thus, if the egg farm operation qualifies as a nuisance, the board of health of a general health district has the statutory authority to abate and remove such nuisance. See also R.C. 3709.11 (board of health of general health district shall appoint health commissioner who shall enforce all sanitary laws and regulations); R.C. 3709.35 (penalties for failure of board of health or health commissioner to perform duties). Under R.C. 301.24, in counties where a county health department has been established for the administration of public health services, the county health department "shall exercise all the powers and perform all the duties which are vested in or imposed upon the authorities of city or general health districts." Thus, a county health department also has authority to undertake removal and abatement of a nuisance.⁶

While the board has statutory authority to abate and remove a nuisance, the method of abatement and removal is discretionary. The board of health "may, by order, compel the owners, agents, assignees, occupants, or tenants of any lot, property, building, or structure to abate and remove any nuisance therein...." R.C. 3707.01. See also R.C. 3709.21 ("board of health of a general health district may make such orders and regulations as are necessary for...the prevention, abatement, or suppression of nuisances"). If such an order is disobeyed the board may choose one of several alternatives. R.C. 3707.02 provides that when an order of the board of health "is neglected or disregarded, in whole or in part, the board may elect to cause the arrest and prosecution of all persons offending," or the board may "perform, by its officers and employees, what the offending parties should have done." The board also has the option of petitioning the court of common pleas for an injunction requiring all persons to whom an order is directed to comply with such order. R.C. 3707.021. See also R.C. 3709.211 (board of health of general health district may petition for injunctive relief where order made pursuant to

⁵ A general health district is defined in R.C. 3709.01, which provides that "[t]he townships and villages in each county shall be combined into a [general] health district."

⁶ Since R.C. 301.24 expressly provides that county health departments "exercise all the powers and perform all the duties which are vested in or imposed upon the authorities of city or general health districts," any references in this opinion to the powers and duties of the board of health of a general health district should be read to include a county health department if one has been created.

R.C. 3709.20 or R.C. 3709.21 is not complied with)⁷; R.C. 3709.99 (penalties for failure to comply with R.C. 3709.20, R.C. 3709.21, R.C. 3709.22 or order of board of health).

Boards of health and county health departments also enjoy broad statutory power to abate nuisances which are dangerous to the public health or comfort. R.C. 3709.22 provides: "The board may also provide for the inspection and abatement of nuisances dangerous to public health or comfort, and may take such steps as are necessary to protect the public health and to prevent disease." In a previous opinion, I addressed the authority of a board of health of a general health district to post a sign on public or private property warning of a hazard to health or safety on such property. I stated that "it has been held that the statutory procedure for abating nuisances is not exclusive, and that a board of health may take other steps if it finds them more efficacious. State ex rel. Pansing v. Lightner, 32 Ohio N.P. (n.s.) 376 (C.P. Montgomery County 1934)." 1984 Op. Att'y Gen. No. 84-090 at 2-309. See also R.C. 3709.211 (board of health may petition for injunction and the court may grant the injunction "or other appropriate relief as the equities of the case require").

Thus, pursuant to R.C. 3707.01, the board of health of a general health district or county health department has the authority to abate and remove nuisances within its territory. R.C. 3707.01 empowers the board or department to issue an order for abatement and removal of a nuisance. If such an order is not obeyed, the board or department may then cause the prosecution of the offender, or may remove the nuisance pursuant to R.C. 3707.02. The board may seek an injunction pursuant to R.C. 3707.021. Pursuant to R.C. 3709.22, the board or department may take such other steps as are necessary to protect the public health.

While the board of health has statutory authority to undertake the abatement of a nuisance, both a prosecuting attorney and the Attorney General have independent authority to bring a civil action to remedy a nuisance problem. R.C. 3767.03 provides:

Whenever a nuisance exists, the attorney general, the prosecuting attorney of the county in which such nuisance exists, or any person who is a citizen of such county may bring an action in equity in the name of the state, upon the relation of such attorney

⁷ If the board of health seeks injunctive relief, the county prosecutor must represent the board. See R.C. 3709.33 (county prosecutor shall act as the legal representative of the board of health of a general health district in a proceeding in which such board is a party); R.C. 309.09(A) (county prosecutor shall represent county boards and prosecute all suits and actions to which the board is a party). If the board or department elects to pursue criminal charges, the county prosecuting attorney will prosecute the case if it is filed in the court of common pleas. R.C. 309.08 (county prosecutor shall prosecute complaints to which the state is a party). However, if charges are filed in municipal court, the case will be prosecuted by the city law director of the city in which the offense occurred or the municipal court is located. See infra.

general, prosecuting attorney, or person, to abate such nuisance and to perpetually enjoin the person maintaining the same from further maintenance thereof.

See also R.C. 3767.04 (providing that an abatement action brought pursuant to R.C. 3767.03 must be brought in the court of common pleas of the county in which the property is located). Thus the Attorney General or the county prosecutor may bring a civil action to abate a nuisance.

A violation of R.C. 3767.13 may result in criminal prosecution. R.C. 3767.99(C) states that violation of R.C. 3767.13 is a third degree misdemeanor. Thus, if the egg farm constitutes a violation of R.C. 3767.13, the operators may be charged criminally with a third degree misdemeanor. In Union County, the Marysville Municipal Court has countywide jurisdiction over misdemeanors. See R.C. 1901.02(B); R.C. 1901.20(A). However, the Union County Court of Common Pleas also has concurrent jurisdiction. State ex rel. Coss v. Hoddinott, 16 Ohio St. 2d 163, 243 N.E.2d 59 (1968) (a court of common pleas has concurrent jurisdiction over misdemeanor prosecutions unless jurisdiction has been vested exclusively in an inferior court). If criminal charges are filed in the court of common pleas, the county prosecuting attorney must prosecute the case. R.C. 309.08 ("[t]he prosecuting attorney may inquire into the commission of crimes within the county. The prosecuting attorney shall prosecute...all complaints...in which the state is a party"). Except as provided in R.C. 1901.34(B), when criminal charges are filed in a municipal court for a violation of R.C. 3767.13, the village solicitor, city law director, or similar chief legal officer of the municipality in which the municipal court is located must prosecute the case if the violation occurred in the unincorporated territory of the municipal court. R.C. 1901.34(A). See 1987 Op. Att'y Gen. No. 87-093.

I conclude, therefore, that if the egg farm creates a nuisance as defined in R.C. 3767.13, the board of health of a general health district or county health department has the authority to abate and remove the nuisance. Other officials also have authority to take action to remedy such a nuisance. The Attorney General or county prosecutor may bring a civil action for abatement of the nuisance. The county prosecutor may bring a criminal action to remedy the nuisance problem. If a criminal action is brought in municipal court, certain other officials, such as a city law director, will have the duty to prosecute the action.⁸

Therefore, it is my opinion and you are advised that:

1. If an egg farm operation creates conditions injurious to the public health, comfort, or property by maintaining a place for the keeping

⁸ Pursuant to R.C. Chapter 3745, the Ohio Environmental Protection Agency (OEPA) has authority to control and abate air pollution. However, after examining the relevant statutes and administrative rules, I conclude that the OEPA is without authority to regulate the activities you describe in your opinion request. See generally 4 Ohio Admin. Code 3745-15-01(D) (definition of air pollution); 4 Ohio Admin. Code 3745-15-07(B) (activity must qualify as, for example, emission of particulate matter before OEPA regulations and prohibitions are triggered).

- of animals which produces offensive smells, or creates conditions which damage others due to the collection of filth, offal, or noisome substances, it may qualify as a nuisance under R.C. 3767.13 unless the conditions are the result of agriculture conducted outside a municipality in accordance with generally accepted agricultural practices, and in such a manner so as not to have a substantial, adverse effect on the public health, safety, or welfare.
2. Pursuant to R.C. 3707.01, a board of health of a general health district has authority to undertake the abatement of a nuisance. In counties which have created a county health department under R.C. 301.24, the county health department has authority to undertake abatement of a nuisance.
 3. Under R.C. 3707.01, a board of health of a general health district created pursuant to R.C. 3709.01, or a county health department created pursuant to R.C. 301.24, may issue an order for the abatement of a nuisance. If the order is not obeyed, the board or department may then prosecute pursuant to R.C. 3707.02 or seek an injunction pursuant to R.C. 3707.021.
 4. Under R.C. 3709.22, a board of health of a general health district created pursuant to R.C. 3709.01 or a county health department created pursuant to R.C. 301.24 may provide for the inspection and abatement of nuisances and may take such steps as are necessary to protect the public health and prevent disease.
 5. Under R.C. 3767.03, the Attorney General or a county prosecuting attorney may file a civil action for abatement and other injunctive relief in connection with a violation of R.C. 3767.13.
 6. Under R.C. 309.08, the county prosecuting attorney is to prosecute any criminal charge filed in the court of common pleas charging a violation of R.C. 3767.13.
 7. Except as provided in R.C. 1901.34(B), when criminal charges are filed in a municipal court for violation of R.C. 3767.13, the village solicitor, city law director, or other similar chief legal officer of the municipality in which the municipal court is located shall prosecute the case if the offense occurs in an unincorporated area within the territory of the municipal court.