

Risk and Liability Management Strategies and Resources for AgriTourism

Yolo County Agritourism Professional Development Workshop
Woodland, CA
November 15, 2017

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Farmers Face Many Challenges!

RISKS



What is Risk?

Possibility

EXPOSURE

Threat

DANGER

Jeopardy

Peril

Chance

Consequence

ENDANGER

GAMBLE

Hazard

Menace

What is Risk?

- In general, risk is defined as...“the possibility of loss or injury.”

<https://www.merriam-webster.com/dictionary/liability#legalDictionary>

- Risk is...*the possibility of adversity or loss, and refers to “uncertainty that matters.”*

USDA/ERS Managing Risk in Farming: Concepts, Research and Analysis (1999)

What is Agricultural Risk?

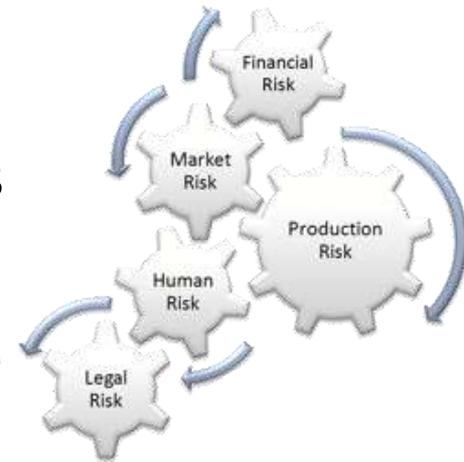
- Agricultural Risk is “the probability that an unpredictable event occurs which will negatively affect your farm business.”
 - Reduce productivity and annual income
 - Impact your financial situation & repayment capacity
 - Affect your personal or family satisfaction and wellbeing

What is your Risk Tolerance?

- **Are you Risk Averse or Risk Taker?**
- **Assessing your Risk Tolerance and Assessing your risks will help**
 - Identify and exclude alternatives with greater exposure to unacceptable risks
 - Guide providers of risk management services to offer the best options for you
 - Ensure your insurance dollars are spent wisely
 - Improve likelihood you will select the best combination of risk management strategies

Sources or Types of Risk

- **Production Risk** – affects yields & quality
- **Market or Price Risk** – changes in prices for inputs/outputs or market conditions
- **Financial Risk** – Changes in income, debt to asset ratio, repayment capacity
- **Human Resource Risk** – Labor availability & management
- **Legal/Institutional Risk** – changes in policies and regulations, contractual agreements
- **Business Interruption Risk** – loss of income due to weather, natural disasters



What About Agritourism?

Any income-generating activity conducted on a working farm or ranch for the enjoyment and education of visitors.

- Strategy to manage or mitigate marketing and financial risks for existing farm operations
- But, it often results in **liabilities** and greater risk exposure for farmers or farm operations!!

What About Liability?

- **Contingent Liability:** An amount that may or may not be owed depending on the outcome of a contingency
- **Fixed Liability:** Accountability & responsibility to another (party) enforceable by civil remedies or criminal sanctions (injuries caused by products)

<https://www.merriam-webster.com/dictionary/liability#legalDictionary>

How to Determine Liabilities?

Reasonable care approach:

Requires landowner to exercise reasonable care in any given situation

Status-equals-duty-approach:

Duty of the landowner varies according to the status of the injured person and the relation to the landowner at the time of injury

- Whether trespasser, licensee, invitee, social guest or recreational user

Types of Liability Exposure

- **Premises Liability** – property owner fails to protect people from potentially hazardous conditions
- **Product Liability** – injuries caused by products prepared/served by landowner
- **Property Damage** – Damage to property of customer by business/employee
- **Personal Liability** – when business provides a service and service provided causes personal harm
- **Employees** – Employment status (employee vs. contractor), proper training and vicarious liability (landowner responsible for actions of employees and independent contractors)

Liability Issues

- The National Agricultural Law Center
 - <http://www.NationalAgLawCenter.org>
- Nature of Agritourism: Legal Risk Management for Agritourism Operators
 - PPT by Shannon Myrus, Staff Attorney
 - http://nationalaglawcenter.org/wp-content/uploads/assets/articles/mirus_natureofagritourism-ppt.pdf

Liability Issues

Arise when you allow People in your Farm

3 Categories of People on Your Premises

- Trespassers
 - Lowest duty of care
- Licensee
 - Higher duty of care than trespasser, but less than invitee
- Invitee
 - Highest duty of care

Premises Liability

- Based on the notion of negligence
- **Negligence** - The failure to exercise the care that a *reasonably prudent person* would exercise in like circumstances



Adapted from: Mirus, Shannon's "Nature of Agritourism: Legal Risk Management for Agritourism Operators" The National Agricultural Law Center <https://www.nationalaglawcenter.org>

Negligence

- There are 4 parts to a cause of action for negligence:
 - **Duty of Care**
 - Your responsibilities as a land owner; different in each situation
 - Typically the “reasonable person” standard
 - Duty of Care changes with the person
 - **Breach of Duty**
 - A failure on your part regarding your responsibilities
 - **Causation**
 - Your failure caused the “injury”
 - **Damages**
 - There must be an actual harm that can be redressed

Liability Issues: Trespasser

Trespassers

- Entered upon land without permission or invitation
- Knowledge of trespasser
 - No knowledge - no duty, no liability
 - Knowledge - duty not to affirmatively harm
 - A course of action which shows a deliberate intention to harm or utter indifference to, or conscious disregard of, the safety of others
- Example: Teenagers going out to your pond and fishing without your permission
 - Do you know about them? What can't you do about them?

Liability Issues: Licensee

Present for a non-commercial, non-business purpose with the consent of the possessor of the property, such as a social **guest** at someone's residence

- **Your Duty:**

- Refrain from injuring the person through willful or wonton conduct (i.e., deliberate behavior such as setting booby traps)
- Warn of hidden dangers where the person does not know or is unlikely to know of the conditions or risks

- **Example:**

- Someone asks your permission to walk, hunt or use land without paying a fee

Liability Issues: Invitee

- Person who is invited upon the premises in order to conduct business with the possessor
- Came on the land for *your* benefit
 - Customers in store or shopping center
 - **Employees**
 - Students
 - Business visitor

Liability Issues: Invitee

- Your duty:
 - Highest duty of care
 - A general duty to use ordinary care to keep the premises reasonably safe for the benefit of the invitee.
 - You typically show these people the most concern anyways (i.e. “the customer is always right”)
 - But what about employees?
 - What kind of concern do you show them? What kind of jobs do they typically perform? How are they covered?
 - This means making sure your employees have safe equipment, facilities, proper training, etc.

Status of Entrant

The status of a person on your land can change fluidly and suddenly.

- If you allow someone to fish in your pond, but they explore other parts of your land, they may change from a licensee to a trespasser,
 - But, if you catch them and accept money for their access to the other parts of the land they become an invitee.
-
- It is important to clearly define the area that visitors have permission to use.

How to Manage Risks/Liabilities?

- ✓ Identify the risks you are dealing with
- ✓ Understand the legal considerations
- ✓ Understand the regulatory environment
- ✓ Assess the risks specific to the enterprise
- ✓ Identify methods to manage risks
- ✓ Consults experts (Attorneys, CPAS, etc.)
- ✓ Learn about insurance options & terms
- ✓ Develop safety measures and reevaluate often

What is Risk Management?

- **Process** of choosing among alternatives to reduce the financial effects of risk or uncertainties
- **Conscious** effort of planning, organizing, directing, and controlling resources and activities.
- Requires the evaluation of tradeoffs between changes in risk, expected returns, entrepreneurial freedom and other variables

Risk management strategies

- **Avoid the Risk** _____



- **Reduce the risk** _____



- **Transfer the risk** _____



- **Assume the risk** _____



Risk Management Method Matrix

Illustrates which risk management method relate to the severity and frequency combinations

Risk Management Method Matrix		
	LOW SEVERITY	HIGH SEVERITY
LOW FREQUENCY	Reduce or Accept	Reduce or Accept
HIGH FREQUENCY	Reduce or Transfer	Reduce, Transfer or Avoid

Managing Liabilities in Agritourism

Rutgers Extension Training for Agritourism
Development:

<http://agritourism.rutgers.edu/training/modules.html>

Managing Liabilities

- Keep the farm safe for customers and employees
- Select the proper business structure
- Be a good neighbor
- Understand and comply with applicable federal, state, local laws/regulations/codes/permit requirements)
- Consider the use of waivers
- Keep good records
- Maintain appropriate insurance

AGRICULTURAL LIABILITY



- Farm owners, or those who lease land for a farming operation, face liability issues
- If someone enters your property, invited or not, the land owner has some level of responsibility for that person's safety
- Liability can apply to both the owner and the 'possessor' of the property.
 - Many states define 'possessor' as the party who is 'in control' of the property area where an injury occurred

DETERMINING LIABILITY

- **Reasonable care approach**: Requires landowner to exercise reasonable care in any given situation
- **Status-equals-duty-approach**: Varies the duty of the landowner according to the status of the injured person and their relation to the landowner at the time of injury

Categories of persons on land:

- **Trespasser** - neither invited nor permitted
- **Licensees** - not invited but permitted
- **Invitee** - comes by invitation, whether express or implied
- **Social guest** - invited onto property for mutual enjoyment of hospitality (e.g., party guest)
- **Recreational user** - visitor using nonresidential property for recreational purposes with permission from possessor/owner & without providing compensation.

**Imposes the
highest
duty of care**



Types of Visitors to Farm Property and the typical Duty of Care for Each		
Status of Visitor	Examples	Possessor's Duty
Invitee	Customers U-pick customers Clients Salespeople Delivery persons	Discover and eliminate all known and unknown dangerous conditions, or Warn of all known and unknown dangerous conditions.
Licensee	Firewood cutter, with permission	Eliminate known dangerous conditions, or Warn of known dangerous conditions.
Social guest	Guests at social gathering	Eliminate known dangerous conditions, or Warn of known dangerous conditions.
Recreational User	Hiker Hunter	No duty if meets the state's Recreational User's Statute.
Known Trespasser	Without permission, possessor aware of	Eliminate known dangerous conditions, or Warn of known dangerous conditions.
Unknown Trespasser	Without permission, possessor unaware of	Refrain from harming by willful conduct.
Child Trespasser	Without permission, presence foreseeable	Protect from actively dangerous instrumentalities.

EXAMPLES OF LIABILITY EXPOSURE

■ Premises Liability

- Property owner fails to protect people from potentially hazardous conditions.
- Customer is injured on property or 'premises'
- Examples: slip and fall, equipment usage, contact with animals

■ Product Liability

- Injured by a product that was prepared and/or served to them.
- Examples: foreign object in food, becoming ill after consuming food

■ Property Damage

- Damage to property of customer by business/employee
- Example: employee hits a customer's car in the parking lot

EXAMPLES OF LIABILITY EXPOSURE

■ Personal Liability

- For businesses that provide a service & service provided inadvertently causes personal harm
- Example: employee spills hot beverage on a customer & it causes a burn

■ Employees

- Employer is responsible for employee's actions ("vicarious liability")
- Know employment status – employee vs. independent contractors
- Provide proper employee training to recognize, mitigate, and report risks & hazards
- Vicarious liability – landowner responsible for his/her own actions & for those of people acting on the landowner's behalf (employees & independent contractors)

MANAGING LIABILITY

- **Keep your farm safe for visitors and employees!**
 - Routine safety inspections
 - Farm safety plan detailing hazard mitigation strategies/plans of operation
 - Employee training
 - Appropriate communication with farm visitors
 - Response plan for emergencies
- **Organize the business under the appropriate legal structure**
- **Be a good neighbor**
- **Understand and be compliant with applicable federal, state and local laws/regulations/codes/permitting requirements**
 - Understand applicable Right to Farm protections (statute and/or ordinance)
- **Consider the use of waivers**
- **Keep good records**
- **Maintain appropriate insurance**

Keeping the Farm Safe

- Employee training
- Develop a farm safety plan identifying hazards, mitigation strategies and plan of operations
- Develop a food safety plan
- Develop a risk management plan
- Conduct routine safety inspections
- Communicate with farm visitors
- Develop a response plan for emergencies

ORGANIZE THE BUSINESS TO LIMIT LIABILITY

- **Decide which business structure best meets the needs of the owner/operation (e.g., in terms of liability protection, taxes, etc.)**
 - Consult, as needed, with legal/accounting/insurance professionals
 - May involve separating the “farm” and “agritourism” businesses

Examples

- | | |
|---|-------------------------------------|
| <ul style="list-style-type: none">▪ Sole Proprietorship (unincorporated)▪ General Partnership | } Greater liability exposure |
| <ul style="list-style-type: none">▪ Limited Liability Partnership▪ Corporations (C- & S-Corps) | } Affords more liability protection |

BE A GOOD NEIGHBOR!

- **Recommended Reading:** New Jersey's State Agriculture Development Committee's "Farmer-to-Farmer Advice for Avoiding Conflict" booklet
- Many agritourism farmers acknowledge that "the best right-to-farm protection often amounts to just being a good neighbor."
 - *Get to know neighbors* - "People who know each other are more likely to approach each other when problems arise" (versus complaining to the township or filing a legal complaint)
 - *Help neighbors get to know you!* - Invite neighbors to tour the farm, educate them about what you do.
 - *Communicate* - Listen to neighbors when they express concerns and respect the view point of others. "Respect goes both ways"
 - *Use common courtesy* - Make efforts to minimize noise during certain hours; Promptly remove litter generated by farm/visitors
 - *Other farmer advice: Be involved in the community. Keep the farm clean and attractive. Make the farm an asset in the eyes of the community.*

FEDERAL, STATE, & LOCAL REGULATIONS

- Identify applicable laws, regulations, codes, and permits **before** starting a project
 - What are they?
 - How long will it take to become compliant?
 - How much will it cost?

EXAMPLES – REGULATIONS, PERMITS & LICENSES

General Regulations

- Land Use and Development (county, city)
- Business License and Taxes (county, city)
- Lodging Taxes (county, city)
- Sales Tax Collection and Remittance (state, county, city)
- Americans with Disabilities Act (federal)

Employment Regulations

- Fair Labor Standards Act (federal, state)
- Child Labor Act (federal, state)
- Occupational Safety and Health Act (federal, state)
- Workers' Compensation (federal, state)
- Unemployment Taxes (federal, state)
- Income Tax Withholding (federal)

Permits and Licenses for Specific Enterprise Types

- Food Service Permits and Inspections (state, county)
- Retail Food Store Permits and Inspections (state)
- Animal Exhibitor Licensing (federal)
- Winery Licensing (state)
- Access to Public Lands & Wildlife Resources (federal, state, county)

From: [Agritourism in focus: A guide for Tennessee farmers.](#)
Agricultural Extension Service – The University of Tennessee.

NOTICES & LIABILITY WAIVERS

- **Have visitors sign a liability waiver before entering the farm or engaging in an agritourism activity**
 - A document whereby a farm guest “agrees to indemnify and hold harmless the landowner from any claims made by the user or third parties arising from the use of the land or activities”
 - *Waivers **do not** remove landowner responsibility for the safety of farm visitors...but they are legal documents in the eyes of the court system*
- **Post rules and warnings regarding known safety hazards.**
Examples:
 - “No consumption of alcoholic beverages allowed”
 - “No smoking on farm”
 - “This is a working farm”
 - “Caution electric fence”
 - “No swimming in pond”
 - “Do not touch animals – they may bite”

KEEP GOOD RECORDS

- Document all property inspections (e.g., what was done, when, and by whom)
- Record each repair & safety practices installed
- Document all steps & procedures taken to ensure safety
 - Training, emergency plans, signage, fences, etc.
 - Consider taking photos/video to document the condition of the premises and actions to protect visitors
- Keep records of accidents (e.g., incident report forms)
- Make sure important documents can be easily found

INSURANCE

- An agritourism business should NOT operate without insurance
- Discuss in detail all aspects of a planned agritourism enterprise with an insurance provider
 - Some insurance providers may not accept the risks of an agritourism enterprise
 - Discuss types of coverage appropriate for the operations (e.g., general business liability, umbrella policy, etc.)
 - Understand what is included/covered by each policy.
 - Understand what is specifically **excluded** by each policy (e.g., the policy's exclusions section)
 - Obtain quotes for various levels of coverage (Considerations: What can the farm afford? What level of risk is the farm willing to accept?)
 - Decide on an insurance strategy (e.g., insure as a single company with multiple policies or separate companies and policies)
- Review insurance policies regularly (at least annually) with an attorney and insurance provider

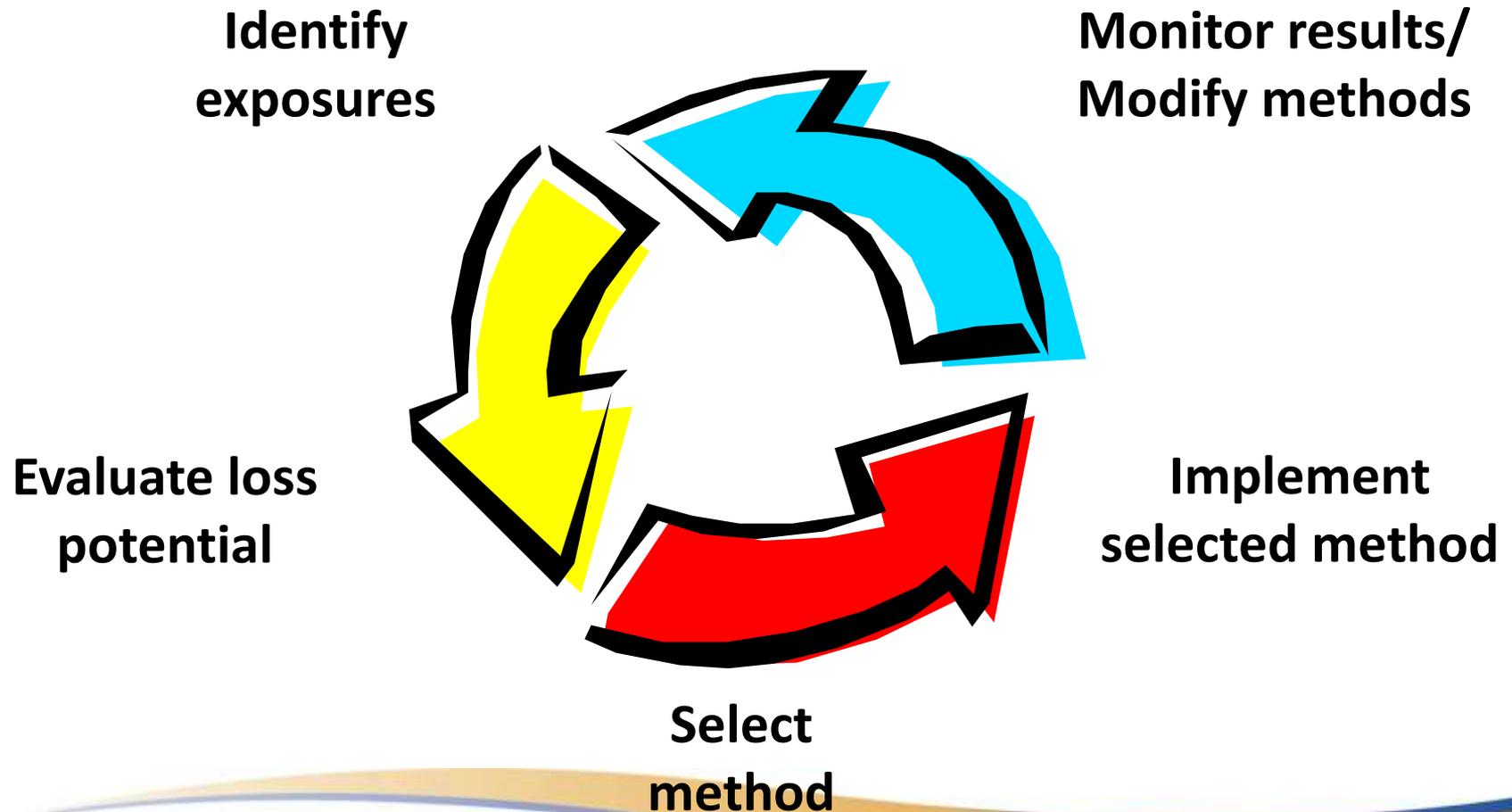
INSURANCE

- **Consult with the insurance provider before changing the type(s) or extent of activities offered**
 - Avoid the risk of having a claim denied because an activity is not specifically included in the farm's insurance policy
- **Consult with an insurance provider if visitation levels change**
- **Understand strategies to transfer risk to other parties**
 - E.g., If a third party offers a service or activity on the farm (for example, a food vendor or pony ride operator), be sure they demonstrate proof of appropriate insurance and name the farm/operator as an additional insured
 - Have a written agreement detailing each party's responsibilities

Insurance Terms & Definitions

TERM	DEFINITION
Policy	Written contract for insurance coverage
Coverage	The dollar amount available from the insurance company to meet liabilities or cover damages as defined in the policies
Premium	The price paid to the insurance company for the policy.
Deductible	The amount specified in an insurance policy that the insured party must pay out of pocket. It relieves the insurer of responsibility for an initial specified loss.
Covered Peril	Something that imperils or causes risk of injury or loss that is eligible for coverage.
Excluded Peril	Something that causes risk of injury or loss that is not eligible for coverage. Usually, perils not specifically listed as covered are assumed to be excluded.
Claim	A request for payment for damages or loss sustained.
Exposure	The potential for damages or loss.

Risk Management Decision Process: It Never Ends



Other Resources?

- UC Small Farm Program: <http://sfc.ucdavis.edu>
- CalAgTour: <http://calagtour.org>
- USDA Risk Management Agency:
<https://www.rma.usda.gov/>
- Regional Centers for Risk Management Education:
<http://westrme.wsu.edu/>
- The National AgRisk & Farm Management Library:
<https://agrisk.umn.edu/>
- California E-rightrisk:
<http://california.erightrisk.com/2015/default.htm>

The End!!

Questions? Comments?

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