

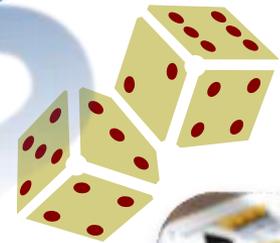
Risk and Liability Management Strategies and Resources for AgriTourism

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

Ramiro E. Lobo
UCCE Farm Advisor – San Diego County

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

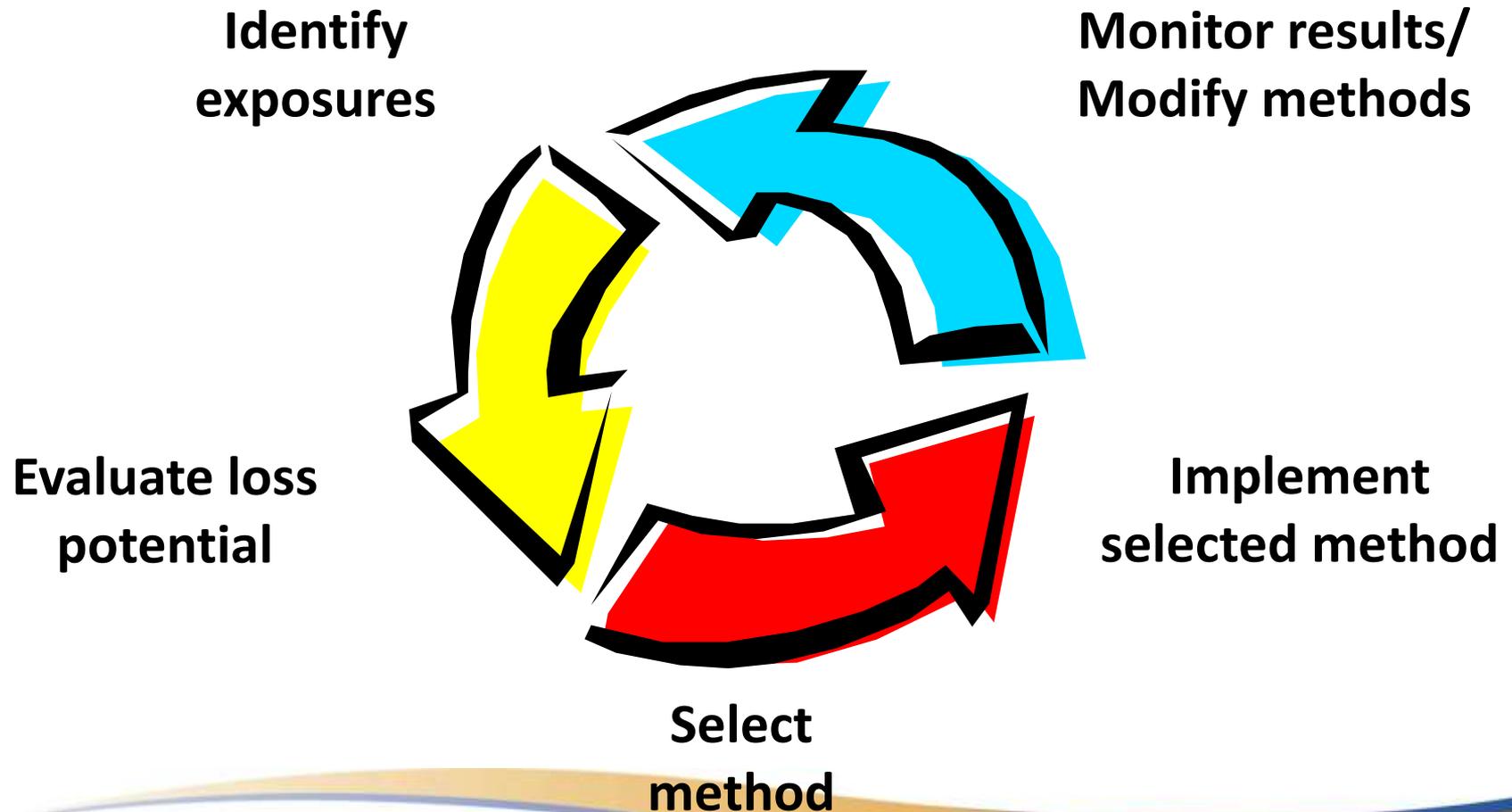
INSURANCE

- **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?

Ramiro Lobo, Farm Advisor

UC Cooperative Extension San Diego County

Email: relobo@ucanr.edu

Phone: 858.246.1860