

A BREATH OF FRESH AIR: METHODS AND OBSTACLES FOR ACHIEVING AIR POLLUTION REDUCTION IN WASHINGTON FACTORY FARM COMMUNITIES

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Abstract: “Animal feeding operations (AFOs),” or, if large enough, “concentrated animal feeding operations (CAFOs),” have become increasingly concentrated in ownership, location, and quantity of animals since the 1950s. The Yakima Valley of central Washington is one area that has been subject to an influx of these industrial farms, raising health and environmental concerns for residents. Despite scientific evidence of potential harm, citizens have had difficulty enforcing air emissions regulation. The problem is twofold: the EPA is still working with the industry to develop a methodology for emission monitoring—the effectiveness of which remains unclear—and, assuming monitoring methods existed, the statutory framework provides numerous agricultural exemptions. State “Right-to-Farm” statutes further exempt some farms from liability under the common law. Nonetheless, this comment will demonstrate that nuisance, trespass, and/or negligence actions, if teed up correctly in light of the state Right-to-Farm statute, can operate to combat pollution from AFOs.

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I. INTRODUCTION

The typical American farm has transitioned over the last five decades from a small, family-owned establishment to a large-scale industrial facility.¹ Prior to the 1950s, American farmers raised a variety of animals and plants on their land and recycled the waste back into their fields as fertilizer.² While this image still permeates the American conception of food production, since World War II the nation has rapidly moved away from this traditional farming model.³ In the pursuit of efficiency, farms now often operate more like factories, mass-producing only one type of crop or animal.⁴

Of the nation's 1.3 million farms, the Environmental Protection Agency (EPA) defines about 238,000 as "animal feeding operations (AFOs)"⁵ that confine animals for at least forty-five days per year and do not contain grass or vegetation in the confinement area.⁶ About five percent of these AFOs house enough animals to be classified as "concentrated/confined animal feeding operations (CAFOs)."⁷ The EPA only regulates the largest CAFOs⁸ under the Clean Water Act's permitting program as industrial point sources of water pollution.⁹ These so-called "factory farms" have

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1. Holly Cheever, *Concentrated Animal Feeding Operations: The Bigger Picture*, 5 ALB. L. ENVTL. OUTLOOK 43, 43-44 (2000).

2. *Id.*

3. *Id.* at 44.

4. *Id.*; see also Natural Resources Defense Council, *America's Animal Factories: How States Fail to Prevent Pollution from Livestock Waste: Introduction and Executive Summary* 1 (1998) [hereinafter *America's Animal Factories*] (explaining the factory-like nature of livestock operations).

5. National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176, 7179 (Feb. 12, 2003) (to be codified at 40 C.F.R. pts. 9, 122, 123, and 412).

6. Concentrated Animal Feeding Operations, 40 C.F.R. § 122.23(b)-(c) (2010).

7. Claudia Copeland, *Air Quality Issues and Animal Agriculture: A Primer* 1 (Cong. Research Serv., Ser. No. RL 32948, 2010) [hereinafter *Air Quality Issues and Animal Agriculture*].

8. See 40 C.F.R. § 122.23(a)-(f) (2010).

9. See Clean Water Act of 1972 § 402, 33 U.S.C. § 1342 (2006). This comment focuses on air quality rather than water quality and Clean Water Act related issues. For an analysis of the relevant water pollution issues, see Terrence J. Centner, *Nutrient Pollution from Land Applications of Manure: Discerning a Remedy for Pollution*, 21 STAN. L. & POL'Y REV. 213 (2010).

decreased in number and become larger and geographically concentrated¹⁰ in the areas that are likely the most favorable to the industry, including the Pacific Northwest.¹¹ This concentration of AFOs dramatically affects the surrounding communities by impacting air quality, water quality, and public health.¹² For example, a single large dairy farm with 1,900 cows is capable of producing more than 48,000 tons of manure in one year.¹³ This manure typically ends up stored in large “lagoons” before being spread on the surrounding fields as fertilizer (land application),¹⁴ despite the fact that the farmland at an AFO¹⁵ is often too confined to adequately absorb the waste.¹⁶

In Washington, the total number of farms decreased by fifty percent between 1982-1998, while the number of animals per facility grew, indicating the shift toward larger, more concentrated facilities.¹⁷ As of 2007, thirty-one of Washington’s farms were considered CAFOs,¹⁸ sixteen of which are large enough to be regulated under the Clean Water Act’s permitting

10. National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. at 7180.

11. See, e.g., *Air Quality Issues and Animal Agriculture*, *supra* note 7, at 15 (“States with high livestock populations, and with significant numbers of large operations (i.e., with more than 300 animal units), include . . . Northwest states.”); Scott Weaver, *Cow Country: The Rise of the CAFO in Idaho*, BOISE WEEKLY, Sept. 1, 2010, available at <http://www.boiseweekly.com/boise/cow-country-the-rise-of-the-cafo-in-idaho/Content?oid=1755457> (“Dairy operators fleeing California’s regulations found in Idaho a state with space and a welcoming attitude.”).

12. 68 Fed. Reg. at 7180-7181; see also *Air Quality Issues and Animal Agriculture*, *supra* note 7, at 1 (noting human health and environmental impacts of animal agriculture).

13. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-944, CONCENTRATED ANIMAL FEEDING OPERATIONS, EPA NEEDS MORE INFORMATION AND A CLEARLY DEFINED STRATEGY TO PROTECT AIR AND WATER QUALITY FROM POLLUTANTS OF CONCERN 18 (2008) [hereinafter GAO STUDY], available at <http://www.gao.gov/new.items/d08944.pdf>.

14. 68 Fed. Reg. at 7180-7181.

15. This comment will use the more general term “AFO” to encompass both AFOs and CAFOs except where noted.

16. 68 Fed. Reg. at 7180; see also *America’s Animal Factories*, *supra* note 4, at 7.

17. *America’s Animal Factories*, *supra* note 4, at Chapter 28: Washington 1 (citing Washington Dairy Products Commission, *Dairy Trends in Washington State*, Fact Sheet (1997)).

18. Leah Beth Ward, *Defining a CAFO*, YAKIMA HERALD-REPUBLIC, Oct. 11, 2008, available at <http://www.yakima-herald.com/stories/2008/10/11/big-dairy-regulations-delayed>.

program as point sources of water pollution.¹⁹ Rural Yakima County in Central Washington has been subject to an onslaught of AFOs since the early 1990s.²⁰ The county is home to eighty-one active dairy production facilities,²¹ including ten CAFOs regulated by CWA permits,²² comprising at least 129,000 cows.²³ Faced with increasingly strict state environmental laws and high land prices, many dairy farms relocated in the last few decades, taking advantage of areas with more lax regulations.²⁴ The Yakima Valley has experienced a related influx of intense odors and decreased air and water quality. Residents now face a multitude of adverse health effects, prompting the EPA to list the Yakima Valley as one of ten environmental justice “Showcase Communities” in the United States.²⁵ One resident put it bluntly: “Everything I own is covered with fly specks and dried feces.”²⁶

Environmentalists, government agencies, and community leaders across the country have become concerned about air pollution from these factory farms. However, political pressure from the agricultural industry, in addition to the difficulty and the lack of standard methodology for measuring the volume of air emissions given off by these facilities,²⁷ have made the EPA

19. See Washington Dep’t of Ecology, *Water Quality Permitting and Reporting Information System (PARIS)*, located at <https://fortress.wa.gov/ecy/wqreports/public/?p=110:300:2476496851663749> (Select Permit Type “CAFO GP,” as search criteria and sixteen active results are displayed). (Last visited Feb. 28, 2011).

20. DAVID KIRBY, ANIMAL FACTORY: THE LOOMING THREAT OF INDUSTRIAL PIG, DAIRY, AND POULTRY FARMS TO HUMANS THE ENVIRONMENT 42-44, 51 (2010); see also *Down on the Factory Farm: The Lower Yakima Valley*, ME AND MY PLANET: WATERSHED MEDIA’S ONLINE JOURNAL (November 18, 2010), <http://watershedmedia1.blogspot.com/2010/11/down-on-factory-farm-lower-yakima.html>.

21. See Washington Dep’t of Ecology, *Facility/Site Search* [hereinafter *Facility/Site Search*], available at <https://fortress.wa.gov/ecy/facilitysite/SearchData/ShowSearch.aspx?ModuleType=FacilitySite&RecordSearchMode=New> (Search by Program “WATQUAL” and select “Dairy,” “CAFO GP,” and “Dairy Unpermitted,” and select “Yakima County” under Search by Location) (last visited Feb. 28, 2011).

22. See *id.* (searching only for “CAFO GP” yields 10 results).

23. David Lester, *Air Pressure – a battle to breathe*, YAKIMA HERALD-REPUBLIC (Nov. 16, 2010, 10:39 PM), <http://www.yakima-herald.com/stories/2010/11/16/11-17-10-dairy-emissions>.

24. KIRBY, *supra* note 20, at 43–44.

25. U.S. Env’tl. Prot. Agency, *Environmental Justice Showcase Communities*, (Mar. 15, 2011) <http://www.epa.gov/compliance/ej/grants/ej-showcase.html>.

26. Lester, *supra* note 23.

27. *Air Quality Issues and Animal Agriculture*, *supra* note 7, at 6; see also U.S.

hesitant to regulate air pollution associated with AFOs. Further, much of the focus on these operations by environmentalists and governmental regulation alike is centered on water quality issues rather than air quality.²⁸ However, due to changes brought by the Obama Administration and increasing congressional and public attention on global climate change, greenhouse gas emissions,²⁹ and the interconnectedness of air and water quality,³⁰ both the environmental and regulatory communities have recently started to focus instead on the air emissions from these facilities.³¹ Additionally, most AFO facilities are not large enough to be subject to CWA regulation, and slip through the cracks as a result.

In addition to the difficulty of obtaining accurate emission measurements, there are a variety of barriers and exemptions inherent in air pollution enforcement litigation against AFOs. For example, even if citizens beat the odds and are successful in an air pollution lawsuit, current federal laws do not allow citizens to recover individual damages.³² Suit under the common law is also difficult as a result of state Right-to-Farm laws and other defenses.³³ Citizen plaintiffs must also be willing to face the social consequences that initiating a lawsuit can bring. Pressures may arise such as hostility and intimidation from fellow community members who value the economic benefits of farms, and threatening home visits from angry agricultural defendants, like those experienced by citizens in the Yakima Valley during a suit against a local

ENVTL. PROT. AGENCY, EPA/600/R-04/042, RISK MANAGEMENT ASSESSMENT FOR CONCENTRATED ANIMAL FEEDING OPERATIONS 1 (2003), *available at* <http://www.epa.gov/nrmrl/pubs/600r04042/600r04042.pdf> [hereinafter RISK MANAGEMENT ASSESSMENT].

28. *Air Quality Issues and Animal Agriculture*, *supra* note 7, at 1.

29. *Id.*

30. *Id.* at 9.

31. *Id.* at 1.

32. See Clean Air Act § 304, 42 U.S.C. § 7604(g) (2006) (establishing a penalty fund for damages awarded in citizen suits); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 310, 42 U.S.C. § 9659(c) (2006) (authorizing courts to order civil penalties or injunctive relief); Resource Conservation and Recovery Act § 7002, 42 U.S.C. § 6972(a)(1) (2006) (authorizing courts to award civil penalties as necessary).

33. See *infra* Part IV.A.1.

dairy operator in the late 1990s.³⁴

This comment will explore the applicable statutory and common law remedies a litigant may seek, and examine litigation from Washington and other states in order to suggest a litigation model that addresses the air quality problems related to AFOs. This recommendation is tailored to the problems in the Yakima Valley and similarly situated communities.³⁵ Part I of this note provides a background of the impact that air pollution from AFOs has on the environment and public health. Part II reviews the relevant federal and Washington State statutes relating to agricultural emissions and the various shortcomings of the traditional statutory enforcement route. Part III discusses applicable common law as a gap-filler, and successful litigation attempts, as well as the hindrances to common law enforcement, including the state Right-to-Farm statute. Finally, Part IV highlights the Yakima Valley of central Washington State as an example that illustrates how to best remedy its air pollution situation.

II. AIR POLLUTION FROM AGRICULTURAL SOURCES AND RELATED HEALTH AND ENVIRONMENTAL EFFECTS

A. *Emissions From Animal Feeding Operations And Resulting Environmental Effects*

AFOs produce large quantities of untreated animal waste, which is typically stored in piles or storage lagoons until it is disposed of via application to the surrounding land as fertilizer.³⁶ Emissions from animal agriculture operations originate primarily from this vast quantity of manure located in the buildings that contain the animals, stored in the open-air lagoons, or applied as fertilizer.³⁷ This manure is often

34. See KIRBY, *supra* note 20, at 111-121.

35. For a short documentary portraying the situation in the Yakima Valley, observe: Michael Harris, *Dairyman Blues*, YOUTUBE.COM, <http://www.youtube.com/watch?v=LHK5WTYOGig> (uploaded Mar. 23, 2009).

36. RISK MANAGEMENT ASSESSMENT, *supra* note 27, at 6.

37. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4958, 4959 (Jan. 31, 2005) (Notice of consent agreement and final order and request for public comment); see also *Air Quality Issues and Animal Agriculture*, *supra* note 7, at 5.

spread or sprayed in quantities larger than the soil is capable of absorbing, and the excess contributes to air and water pollution.³⁸

The resulting emissions contributing to decreased air quality include ammonia, hydrogen sulfide, particulate matter (PM), volatile organic compounds (VOC), microorganisms, and related foul odors produced by these emissions.³⁹ Emission rates can vary depending upon the weather, time of day, species of farm animal, and methods of feeding and housing.⁴⁰ Carbon dioxide and methane, both greenhouse gases, are emitted as byproducts⁴¹ and are becoming increasingly important environmental concerns. However, the focus of this comment is on the aforementioned pollutants that effect ambient air quality in communities surrounding AFOs.

Ammonia is a colorless gas with a strong odor⁴² produced by animal manure or other organic matter as it decomposes and adheres to particles in the air, affecting ambient air quality.⁴³ Upon release into the air, ammonia can travel over 300 miles before returning to the ground or into water systems.⁴⁴ Upon entering water systems, ammonia can harm aquatic life by contributing to increased algae growth and acidification.⁴⁵ The EPA estimates that eighty percent of total ammonia emissions in the United States originate from livestock waste.⁴⁶

Hydrogen sulfide is colorless, flammable and accompanied

38. RISK MANAGEMENT ASSESSMENT, *supra* note 27, at 1, 6; *see also* John A. Lory, et al., *Using Manure as Fertilizer for Crop Production* 1–2, available at http://www.epa.gov/owow_keep/msbasin/pdf/symposia_ia_session8.pdf.

39. *Air Quality Issues and Animal Agriculture*, *supra* note 7, at 2.

40. RISK MANAGEMENT ASSESSMENT, *supra* note 27, at 63.

41. *Air Quality Issues and Animal Agriculture*, *supra* note 7, at 2.

42. Dep't of Health & Human Servs., Agency for Toxic Substances & Disease Registry, CAS 7664-41-7, *ToxFAQs for Ammonia* (2004), available at <http://www.atsdr.cdc.gov/toxfaqs/tfacts126.pdf> [hereinafter *ToxFAQs for Ammonia*].

43. *Air Quality Issues and Animal Agriculture*, *supra* note 7, at 3–4.

44. National Resources Defense Council, *Facts about Pollution from Livestock Farms*, <http://www.nrdc.org/water/pollution/ffarms.asp> (last visited Feb. 28, 2011).

45. *Air Quality Issues and Animal Agriculture*, *supra* note 7, at 3; *see also* RISK MANAGEMENT ASSESSMENT, *supra* note 27, at 64.

46. MICHAEL R.J. DOORN ET AL., ENVTL. PROT. AGENCY, REVIEW OF EMISSIONS FACTORS AND METHODOLOGIES TO ESTIMATE AMMONIA EMISSIONS FROM ANIMAL WASTE HANDLING 1 (2002), available at <http://www.epa.gov/nrmrl/pubs/600r02017/600sr02017.pdf>.

by a rotten egg odor.⁴⁷ Similar to ammonia, the decomposition of organic matter in animal manure at AFOs produces hydrogen sulfide emissions.⁴⁸ The liquid storage lagoons at AFOs often host the largest quantities of hydrogen sulfide, and the gas is released into the air whenever the pool is agitated and liquid waste is pumped out.⁴⁹

Particulate matter (PM) is constituted of direct material, such as soil, dust, or manure that is dispersed into the air as a result of chemical or mechanical processes.⁵⁰ PM is classified as either coarse particles, or those less than ten microns in diameter (PM₁₀), or fine particles that are less than two and a half microns in diameter (PM_{2.5}).⁵¹

Policymakers have had difficulty encouraging AFO operators to make changes to the management of their facilities to reduce these emissions, due to the cost of the technology and the lack of economic or regulatory incentives.⁵² Research is still being conducted to reduce emissions including hydrogen sulfide, ammonia, and PM,⁵³ yet the industry lacks the technology to completely eliminate these emissions.⁵⁴ As a result, AFOs commonly dispose of waste by simply applying the manure directly to the land as fertilizer.⁵⁵

B. Public Health Impacts of Animal Feeding Operations

In addition to environmental impacts, these operations have serious and multifarious effects on public health and welfare.

47. Dep't of Health & Human Servs., Agency for Toxic Substances & Disease Registry, *ToxFAQs for Hydrogen Sulfide CAS 7664-41-7*, 1 (2006) [hereinafter *ToxFAQs for Hydrogen Sulfide*], available at <http://www.atsdr.cdc.gov/tfacts114.pdf>.

48. RISK MANAGEMENT ASSESSMENT, *supra* note 27, at 65.

49. *Id.*

50. *Id.* at 66.

51. *Id.*

52. Iowa State University and The University of Iowa Study Group, *Iowa Concentrated Animal Feeding Operations Air Quality Study, Final Report 209*, February 2002 [hereinafter *Iowa CAFO Air Quality Study*], available at http://www.ehsruiowa.edu/cafo_air_quality_study.html.

53. *Air Quality Issues and Animal Agriculture*, *supra* note 7, at 6.

54. *Iowa CAFO Air Quality Study*, *supra* note 52, at 203.

55. National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176, 7180 (Feb. 12, 2003) (to be codified at 40 C.F.R. pts. 9, 122, 123 & 412); see also *Air Quality Issues and Animal Agriculture*, *supra* note 7, at 5.

For example, in the Yakima Valley, residents have complained of vomiting from the amount of fecal material in the air, and the asthma rate is thirty-three percent higher in the area than in the rest of the state of Washington.⁵⁶ The Yakama Nation Asthma Awareness Project was recently awarded one of nine EPA grants because of the heightened rate of asthma on the reservation.⁵⁷ At low levels, ammonia and hydrogen sulfide can cause eye, nose, and throat irritation and burns, and the gases can be lethal at high, short-term levels.⁵⁸ Permanent, long-term effects of hydrogen sulfide exposure include irritation of asthma, headaches, and poor memory and motor function.⁵⁹ In addition, PM can be deposited in the respiratory tract, which contributes to lung and breathing problems and cardiovascular disease.⁶⁰

The University of Iowa conducted a comprehensive study of AFO air emissions and the associated health effects, finding that workers at these facilities commonly complain of chronic bronchitis, muscle aches and pains, asthma, and declines in lung function.⁶¹ Another study of people living near hog farms in North Carolina found that the residents experienced burning eyes, respiratory problems, and diarrhea.⁶² As compared to the control group that did not live near any intensive agricultural operations, the North Carolina residents living near the farms also reported a decreased quality of life and a heightened experience of physical symptoms.⁶³ In 1998, the Minnesota Pollution Control Agency (MPCA) tested

56. Brenda Austin, *Yakama Indian Nation Fighting Battle Against Cattle Industry*, INDIAN COUNTRY TODAY, Sept. 17, 2008, at 15.

57. American Lung Association, *Children Will Breathe Easier in Toppenish*, <http://www.alaw.org/asthma/children-will-breathe-easier-in-toppenish> (last visited Feb. 28, 2011).

58. *ToxFAQs for Ammonia*, *supra* note 42, at 1; *ToxFAQs for Hydrogen Sulfide*, *supra* note 47, at 1. See also *Air Quality Issues and Animal Agriculture*, *supra* note 7, at 3.

59. *ToxFAQs for Hydrogen Sulfide*, *supra* note 47, at 1.

60. *Air Quality Issues and Animal Agriculture*, *supra* note 7, at 4.

61. Iowa CAFO Air Quality Study, *supra* note 52, at 5–6.

62. *Id.* at 6-7.

63. Steve Wing & Susanne Wolf, *Intensive Livestock Operations, Health, and Quality of Life among Eastern North Carolina Residents*, 108 ENV'T HEALTH PERSPECTIVE 233, 237 (2000), available at <http://www.ehponline.org/members/2000/108p233-238wing/wing2-full.html>.

hydrogen sulfide levels at ten factory farms.⁶⁴ The MPCA tested these farms after over fifty families experienced nausea, vomiting, blackouts, and flu-like symptoms following the opening of seventeen nearby hog farms.⁶⁵ Half of the farms tested by the MPCA exceeded the state's hydrogen sulfide safety standards by as much as fifty times.⁶⁶

Odors represent an indirect cause of health effects that are inseparable from any consideration of the human impacts of these operations' siting and emissions. While not intrinsically harmful themselves, odors often provide clues to potential hazards in the environment⁶⁷ that can lead to psychosomatic symptoms and changes in perceived well-being without actually causing direct negative health effects.⁶⁸ Foul odors can affect quality of life, property values, and indirectly affect health by discouraging outdoor activities like exercise and exposure to sunlight. However, due to the inherent subjectivity of odor, it is difficult to quantify health effects and empirically analyze the impact on public health.⁶⁹

At least sixty-eight peer-reviewed or government-sponsored studies of AFOs were conducted between 2002 and 2008, with twenty-seven or more finding direct or indirect links between pollutants from animal waste and adverse health effects.⁷⁰ Due to the EPA's lack of data regarding the exact number of AFOs and the quantity of their discharges and emissions, it has not evaluated the actual public health impact of AFOs.⁷¹ Nonetheless, the EPA recognizes that risks exist.⁷²

64. *America's Animal Factories*, *supra* note 4, at *Minnesota* 1-2 (citing Chris Ison, *State Air Tests Find High Levels of Toxic Gas Near 5 Feedlots; Agency's Findings Confirm Neighbors' Complaints*, MINNEAPOLIS STAR TRIBUNE, Apr. 26, 1998, at A1).

65. *See id.*

66. *Id.*

67. Agency for Toxic Substances and Disease Registry, *The Health Effects of Environmental Odors* 20 [hereinafter *Health Effects of Env't Odors*], <http://www.atsdr.cdc.gov/sites/intel/docs/Intel%20Package%20-%20Odors%20Health%20Effects%20Generic%20for%20Communities.pdf> (last visited Feb. 28, 2011).

68. *Id.* at 10.

69. *Id.* at 12-15 (noting the subjectivity of odor experiences).

70. GAO STUDY, *supra* note 13, at 23.

71. *Id.*

72. *See, e.g.*, Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4958, 4959 (January 31, 2005) (Notice of consent agreement and final order, and request for public comment) ("EPA recognizes that AFOs can have a negative

III. TRADITIONAL ENVIRONMENTAL STATUTES PROVIDE EXEMPTIONS FOR AGRICULTURAL ACTIVITIES AND ARE NOT ADEQUATELY ENFORCEABLE AGAINST ANIMAL FEEDING OPERATIONS

The federal and state environmental statutes, many of which offer exemptions for agricultural practices, allow certain environmental impacts of the animal agriculture industry to go unregulated,⁷³ particularly with respect to air pollution. This section will discuss the relevant federal and Washington State statutes and the obstacles that can arise when they are applied to AFOs.

A. *The Clean Air Act*

Congress enacted the Clean Air Act (CAA) in 1963 and significantly amended it in 1970 and 1990.⁷⁴ The CAA grants the EPA authority to establish minimum national standards for air quality⁷⁵ and delegates responsibility to the states when the EPA accepts State Implementation Plans (SIPs).⁷⁶ SIPs are sent to the EPA Administrator to demonstrate how the state plans to meet and maintain the National Ambient Air Quality Standards (NAAQS).⁷⁷ Individual states have the discretion to implement air quality standards that are more stringent than EPA requirements. For example, states may regulate

impact on nearby residents, particularly with respect to objectionable odors and other nuisance problems that can affect their quality of life. EPA also recognizes that concerns have been raised recently regarding the possible health impacts from AFO emissions"); U.S. Env'tl. Prot. Agency, *Premium Standard Farms, Inc. and Continental Grain Company, Inc. Civil Settlement: Fact Sheet 1* (Nov. 19, 2001), available at <http://www.epa.gov/compliance/resources/cases/civil/mm/psffs.pdf> ("Significant human health and environmental risks are generally associated with large-scale Concentrated Animal Feeding Operations (CAFOs)."); RISK MANAGEMENT ASSESSMENT, *supra* note 27, at 1 (discussing the various health and environmental risks of CAFOs).

73. See J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 *ECOLOGY L.Q.* 263, 265 (2000) ("[F]arms are virtually unregulated by the expansive body of environmental law that has developed in the United States in the past 30 years.").

74. Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963) (current version at 42 U.S.C. §§ 7401-7671q).

75. 42 U.S.C. § 7409 (2006).

76. *Id.* § 7410(a)(1).

77. *Id.*

additional categories of sources such as odors.⁷⁸ Overall, SIPs must demonstrate how a state will bring non-attainment areas (those that fail to meet NAAQS) into compliance.⁷⁹

The CAA requires that all “major stationary sources”⁸⁰ obtain an operating permit.⁸¹ Congress crafted the permit system to document the pollutants being released at a particular site, the respective quantities, and any mitigation measures undertaken to reduce these emissions.⁸² Despite the fact that environmentalists claim that emissions from large CAFOs likely exceed this 100 ton per-year threshold and should be subject to a permit,⁸³ the CAA has not required emissions monitoring thus far.⁸⁴ This is partially due to pressures from the industry,⁸⁵ as well as the difficulty in establishing uniform and adequate methods in monitoring agriculture emissions.⁸⁶ The EPA Administrator also has discretion to “establish a greater threshold quantity for, or to exempt entirely, any substance that is a nutrient used in agriculture when held by a farmer.”⁸⁷

After the 1990 CAA Amendments, which created the operating permit program,⁸⁸ states began to enact their own

78. *Air Quality Issues and Animal Agriculture*, *supra* note 7, at 11.

79. 42 U.S.C. § 7502 (2006).

80. *See id.* § 7602(j) (defining “major stationary source” as a facility or source of air pollution that emits 100 tons per year or more of any pollutant).

81. *Id.* § 7661(2); § 7412; § 7602(j).

82. U.S. Env'tl. Prot. Agency, *The Plain English Guide to the Clean Air Act* 19 (Apr. 2007), available at <http://www.epa.gov/air/caa/peg/peg.pdf>.

83. *Air Quality Issues and Animal Agriculture*, *supra* note 7, at 11.

84. *See* Air Pollution Prevention and Control Act, 42 U.S.C. §§ 7401–7671(q) (2006). *See also* Sarah C. Wilson, *Hogwash! Why Industrial Animal Agriculture is Not Beyond the Scope of Clean Air Act Regulation*, 533 PACE ENVTL. L. REV. 439, 441–442 & 460–461 (2007).

85. *See* CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms, 73 Fed. Reg. 76,948, 76,951 (Dec. 18, 2008) (to be codified at 40 C.F.R. pts. 302 and 355) (“In 2005, EPA received a petition (poultry petition) from the National Chicken Council, National Turkey Federation, and U.S. Poultry & Egg Association, seeking an exemption from the CERCLA and EPCRA reporting requirements for ammonia emissions from poultry operations.”); *see also* Ruhl, *supra* note 73, at 323–325 (discussing the political power of the farming industry); Wilson, *supra* note 84, at 451 (“[A]griculture has historically been a strong political force, and has successfully evaded regulation through extensive congressional lobbying.”).

86. *Air Quality Issues and Animal Agriculture*, *supra* note 7, at 11.

87. 42 U.S.C. § 7412(r)(5) (2006).

88. U.S. Env'tl. Prot. Agency, *Overview – The Clean Air Act Amendments of 1990*

laws supplementing the CAA requirements in order to focus on regulating air pollution from AFOs and to work toward attainment of air quality standards.⁸⁹ California, for example, requires CAFOs in federal non-attainment areas to obtain state operating permits and install remediation technology.⁹⁰ Oregon and Pennsylvania, in contrast, completely exempt AFOs from all air emissions regulation,⁹¹ which would directly conflict with the CAA if the AFOs qualify as major sources.⁹²

The CAA provides for citizen suits to enforce compliance if the requirements in the SIP are not met.⁹³ If the SIP incorporates the state's laws related to air quality, those state laws will also be enforceable under the federal CAA citizen suit provision in Section 304(a).⁹⁴ For example, in *Idaho Conservation League v. Adrian Boer*, the United States District Court for the District of Idaho held that the state's Department of Environmental Quality could regulate AFOs more stringently by including dust, animal dander and small particulate pollution in their emissions standards.⁹⁵ Subsequently, Idaho became the first state to regulate ammonia emissions from CAFOs by requiring that facilities emitting 100 tons per year or more obtain a permit.⁹⁶

The small-scale farms in existence in the 1960s differed from modern industrial AFOs, and Congress probably did not

(Dec. 19, 2008), http://epa.gov/oar/caa/caaa_overview.html.

89. J.C. Lester, *Air Quality: Policies and Standards* 106 (2005), available at www.ncsu.edu/airworkshop/Air_Quality_Policies_and_Standards.pdf. See also Andrew C. Hanson, *Concentrated Animal Feeding Operations and the Common Law: Fixing Wrongs Committed Under the Right-to-Farm*, in CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT 302 (Clifford Rechtschaffen & Denise Antolini eds., 2007).

90. Hanson, *supra* note 89, at 302-303; *Air Quality Issues and Animal Agriculture*, *supra* note 7, at 13-14.

91. OR. REV. STAT. § 468A.020(1)(a) (2009); 25 PA. CODE § 123.31(c) (2010).

92. Hanson, *supra* note 89, at 304.

93. 42 U.S.C. § 7604(a) (2006).

94. *Id.* See also *Idaho Conservation League v. Adrian Boer*, 362 F. Supp. 2d 1211, 1214 (D. Idaho 2004) ("Approved SIPs are enforceable by either the State, the EPA, or via citizen suits brought under § 304(a) of the CAA").

95. *Idaho Conservation League*, 362 F. Supp. 2d at 1217.

96. See Idaho Dep't of Env'tl. Quality, *Air Quality: Permit by Rule for Dairy Farmers*, http://www.deq.idaho.gov/air/permits_forms/permitting/pbr_dairies.cfm (last visited Mar. 16, 2011) (click on "Rules for the Control of Ammonia from Dairy Farms" to see rule).

conceive of this shift when it enacted the CAA in 1970.⁹⁷ Because modern farming operations are larger and more concentrated than ever before, it is more feasible—and also more necessary—to regulate their emissions.⁹⁸

B. The Comprehensive Environmental Response, Compensation, and Liability Act and the Emergency Planning and Community Right-To-Know Act

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as “Superfund,” in 1980, in order to regulate the clean-up of pollution at hazardous waste sites that are no longer in operation.⁹⁹ CERCLA requires that any release of designated hazardous substances in excess of the EPA threshold be reported to the National Response Center.¹⁰⁰ In 1986, Congress amended CERCLA to include the Emergency Planning and Community Right-To-Know Act (EPCRA),¹⁰¹ requiring additional notice to local and state emergency planning agencies upon the release of hazardous substances.¹⁰² EPCRA also allows these reports to be made available to the public.¹⁰³

Ammonia and hydrogen sulfide are considered hazardous substances under CERCLA¹⁰⁴ and any quantities over the

97. See Wilson, *supra* note 84, at 439–440 (discussing the transition from small to factory farms); see also Susan M. Brehm, Comment, *From Red Barn to Facility: Changing Environmental Liability to Fit the Changing Structure of Livestock Production*, 93 CALIF. L. REV. 797, 813 (2005) (“When Congress passed the CAA in 1970, it had no reason to suspect that animals could cause air pollution rising to a level that would justify government regulation. Today, the increasing use of large confinement operations in livestock production makes it easier to identify and measure the air pollution animals create because the sources are obvious: waste lagoons and exhaust systems from confinement buildings are clear sources of air pollution.”).

98. See Brehm, *supra* note 97, at 813 n. 78 (measuring emissions is more feasible than in past years due to fewer large operations and larger lagoons and confinement areas).

99. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified at 42 U.S.C. §§9601–9675 (2006)); see also U.S. Env’tl. Prot. Agency, *Superfund: CERCLA Overview* (last visited Apr. 12, 2011), <http://www.epa.gov/superfund/policy/cercla.htm>.

100. 42 U.S.C. § 9603(a) (2006); Notification requirements, 40 C.F.R. § 302.6 (2010).

101. Emergency Planning and Community Right-To-Know Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. §§ 11001–11050 (2006)).

102. 42 U.S.C. § 11004 (2006).

103. *Id.*

104. Designation of Hazardous Substances, 40 C.F.R. § 302.4 (2010).

EPA-established reportable quantity (RQ) must be reported.¹⁰⁵ The RQs for ammonia and hydrogen sulfide are each set at 100 pounds per day and are subject to the reporting requirements.¹⁰⁶ However, both statutes exempt the majority of agricultural emissions. Air emissions resulting from the “normal application” of manure as fertilizer are exempt from the reporting requirements under CERCLA,¹⁰⁷ and EPCRA excludes releases from having to be reported if the substance released is “used in routine agricultural operations.”¹⁰⁸

The EPA has only twice enforced the provisions of CERCLA and EPCRA against hazardous air pollutants released by CAFOs.¹⁰⁹ In 2001, Premium Standard Farms, the second largest pork producer in the United States, along with Continental Grain Company, settled with the EPA and the Department of Justice (DOJ) regarding Clean Water Act (CWA), CERCLA, EPCRA, and CAA claims against them.¹¹⁰ The agreement requires both companies to monitor air emissions of ammonia, hydrogen sulfide, PM, and VOC, and to apply for a CAA permit from the state of Missouri if their emissions exceed the thresholds in the CAA.¹¹¹ As part of the settlement, both companies funded a Supplemental Environmental Project (SEP) to reduce odor and air pollution from swine facilities.¹¹²

The EPA announced another settlement in 2006, between the DOJ and Seaboard Foods (a prominent pork producer with numerous farms across the Midwest) and PIC USA (an international pork producer) relating to CAA, CERCLA, EPCRA, and Resource Conservation and Recovery Act (RCRA) violations.¹¹³ The settlement included a \$240,000 civil penalty

105. 42 U.S.C. § 9603(a) (2006); 40 C.F.R. § 302.6 (2010).

106. 40 C.F.R. § 302.4 (2010).

107. 42 U.S.C. § 9601(22) (2006).

108. *Id.* § 11021(e)(5).

109. *Air Quality Issues and Animal Agriculture*, *supra* note 7, at 18.

110. U.S. Env'tl. Prot. Agency, *Premium Standard Farms (PSF) and Continental Grain Company, Inc. Multimedia Settlement* (Jan. 2, 2009), <http://www.epa.gov/compliance/resources/cases/civil/mm/psf.html>.

111. U.S. Env'tl. Prot. Agency, *Premium Standard Farms, Inc. and Continental Grain Company, Inc. Civil Settlement: Fact Sheet* (Nov 19, 2001), <http://www.epa.gov/compliance/resources/cases/civil/mm/psffs.pdf>.

112. *Id.* at 2.

113. U.S. Env'tl. Prot. Agency, *Civil Enforcement: Seaboard Settlement* (Jan. 1,

and required the swine facilities to apply manure to their fields at appropriate rates.¹¹⁴ The EPA's guidelines for appropriate rates of manure application to land are applicable only to large CAFOs, and are determined based on each facility's individual nutrient management plan,¹¹⁵ leaving the standard of what is "appropriate" undefined for other AFOs.

CERCLA and EPCRA are only useful for extracting public information when applied to AFOs and do not have a direct effect on reducing emissions or health impacts. However, citizens can still sue AFOs that fail to comply with reporting requirements,¹¹⁶ and have had some success in doing so.¹¹⁷ The U.S. District Court for the Eastern District of Washington recently granted partial summary judgment in favor of an environmental organization after the defendant dairy farm failed to comply with the court's Consent Decree and CERCLA/EPCRA by not reporting its ammonia emissions.¹¹⁸

1. *EPA Further Exempts Air Emissions from Farm Animal Waste from CERCLA/EPCRA Reporting Requirements*

Following these successful citizen suits, the poultry and egg industries petitioned the EPA for an exemption from CERCLA and EPCRA reporting requirements in 2005.¹¹⁹ The EPA

2009), <http://www.epa.gov/compliance/resources/cases/civil/mm/seaboard.html>.

114. U.S. Env'tl. Prot. Agency, *News Releases By Date: Government Reaches Settlements with Seaboard Foods and PIC USA*, Sept. 15, 2006, <http://yosemite.epa.gov/opa/admpress.nsf/7c02ca8c86062a0f85257018004118a6/3933bb91f85c53fd852571ea0059b7f4!OpenDocument>.

115. Best Management Practices (BMPs) for Land Application of Manure, Litter, and Process Wastewater, 40 C.F.R. § 412.4(c) (2010).

116. Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046(a)(1) (2006).

117. *See, e.g.*, *Sierra Club v. Seaboard Farms Inc.*, 387 F.3d 1167, 1176 (10th Cir. 2004) (holding that various components of a farm complex (e.g. barns and lagoons), count as a single "facility" subject to CERCLA reporting requirements); *Sierra Club v. Tyson Foods, Inc.*, 299 F. Supp. 2d 693, 723-724 (W.D. Ky. 2003) (holding that farm complexes constituted "facilities" and were not exempt from CERCLA/EPCRA reporting requirements with respect to gaseous ammonia emissions not applied as fertilizer); *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263 (N.D. Okla. 2003), vacated pursuant to settlement (Jul. 16, 2003) (holding that phosphate in poultry litter is a hazardous substance under CERCLA).

118. *Cnty. Ass'n for Restoration of the Env't v. Nelson Faria Dairy, Inc.*, No. CV-04-3060-LRS, 2011 WL 61882, at 3 (E.D.Wash. Jan. 7, 2011).

119. CERCLA/EPCRA Administrative Reporting Exemption for Air Releases, 73 Fed. Reg. 76,948, 76,951 (Dec. 18, 2008) (to be codified at 40 C.F.R. pts. 302 and 355).

responded by releasing a proposal in December of 2007 to exempt air emissions from farm animal waste, such as manure, urine and digestive emissions, from CERCLA and EPCRA reporting requirements.¹²⁰ In 2008, during the EPA's finalization of the exemption, the Government Accountability Office (GAO) issued its own report regarding the EPA's regulation of air and water pollution from AFOs.¹²¹ It found that the EPA lacks sufficient information about emissions from factory farms and how to measure them and called the proposed exemption into question.¹²² The GAO criticized the EPA's study currently underway pursuant to the Air Consent Agreement,¹²³ and recommended that the EPA instead conduct a comprehensive study of AFOs and come up with a process to measure air emissions.¹²⁴

Despite the GAO report, the EPA promulgated the final rule in 2008, exempting not only the poultry industry, but all livestock operations.¹²⁵ In response to public comments, the EPA retained some of EPCRA's reporting requirements for medium and large CAFOs qualifying as point sources of pollution that are subject to the CWA's National Pollution Discharge Elimination System (NPDES) permit requirements.¹²⁶

C. *The Resource Conservation and Recovery Act*

Congress enacted the Resource Conservation and Recovery Act (RCRA) in 1976 to reduce the risks of hazardous waste disposal.¹²⁷ RCRA prohibits the dumping of solid waste, including agriculture waste,¹²⁸ but offers an exemption for manure applied to fields as fertilizer.¹²⁹ RCRA also exempts all

120. CERCLA/EPCRA Administration Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste, 72 Fed. Reg. 73,700 (proposed Dec. 28, 2007). See also *Air Quality Issues and Animal Agriculture*, supra note 7, at 19.

121. GAO STUDY, supra note 13, at 4-7.

122. *Id.* at 7.

123. *Id.* at 6-7; see *infra* Part III.D.2.

124. *Id.* at 7-8.

125. CERCLA/EPCRA Administrative Reporting Exemption for Air Releases, 73 Fed. Reg. 76,948, 76,951 (Dec. 18, 2008) (to be codified at 40 C.F.R. pts. 302 and 355).

126. *Id.* at 76,953-55.

127. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq. (2006).

128. 42 U.S.C. § 6903(27) (2006).

129. 40 C.F.R. § 257.1(c)(1) (2010).

CAFOs that are already subject to CWA regulation as point source industrial discharges.¹³⁰ This leaves the remaining smaller CAFOs and AFOs potentially subject to RCRA regulation.

However, manure that is applied as fertilizer may not be exempt under RCRA if it is added to fields in excess of normal application, as this deems it no longer “fertilizer.”¹³¹ In *Water Keeper Alliance v. Smithfield Foods, Inc.*, the plaintiffs alleged a RCRA violation against the defendant hog farm that applied a large amount of manure to its fields as fertilizer.¹³² The U.S. District Court for the Eastern District of North Carolina denied Smithfield’s motion for summary judgment, holding the issue of manure application as fertilizer to be a question of fact.¹³³ The case later settled without a RCRA action or liability.¹³⁴

Coon ex rel. Coon v. Willet Dairy, L.P. was another case in which the plaintiffs alleged Clean Water Act (CWA) and RCRA violations against a dairy farm.¹³⁵ There, the U.S. Court of Appeals for the Second Circuit held that the defendant dairy could not be sued for RCRA violations when it was already regulated as a point source by the CWA permit program,¹³⁶ because CAFOs regulated as point sources have “permit shields” against duplicate actions under RCRA.¹³⁷

As a result of *Water Keeper* and *Coon*, some scholars have noted that a RCRA enforcement action against an AFO has been rarely used and is experimental.¹³⁸ This suggests RCRA may be better applied as a supplement to a CWA action against smaller facilities that are not subject to the CWA’s

130. 42 U.S.C. § 6903(27) (2006).

131. *Water Keeper Alliance, Inc. v. Smithfield Foods, Inc.*, Nos. 4:01-CV-27-H(3), 4:01-CV-30-H(3), 2001 WL 1715730, at *1, *4-5 (E.D.N.C. Sept. 20, 2001).

132. *See id.* at *1.

133. *Id.* at *5.

134. Consent Decree, *Waterkeeper Alliance, Inc. v. Smithfield Foods, Inc.*, Civil Action Nos. 4:01-CV-27-H(3), 4:01-CV-30-H(3), 4:02-CV-41-H(3) (E.D.N.C. Jan. 20, 2006), quoted in Tarah Heinzen, Comment, *Stopping the Campaign to Deregulate Factory Farm Air Pollution*, 17 N.Y.U. ENVTL. L.J. 1482, 1498 n.112 (2009).

134. Hanson, *supra* note 89, at 302.

135. *Coon ex rel. Coon v. Willet Dairy, L.P.*, 536 F.3d 171, 174 (2d Cir. 2008).

136. *Id.* at 174.

137. *Id.*

138. Hanson, *supra* note 89, at 302; Heinzen, *supra* note 114, at 1498–1499.

NPDES permit requirements.¹³⁹ A RCRA action standing alone would probably be ineffective, as the smaller AFOs would be exempt to the extent that their application of fertilizer is not excessive.

D. Pitfalls to Emissions Enforcement Against Animal Feeding Operations Under the Federal Environmental Statutes

In addition to the various exemptions that agricultural facilities enjoy under the environmental statutes, and the fact that citizens cannot obtain individual damages,¹⁴⁰ there are a number of pitfalls that can hinder citizen suits from successful enforcement throughout the litigation process.

1. Notice, Motions to Dismiss and “Sweetheart Deals”

The enforcement litigation process does not always welcome citizen participation. Federal environmental statutes require all potential litigants to provide 60 days’ notice of intent to file suit, including the date, location, and nature of the violations.¹⁴¹ The statutory notice requirements are more specific than Federal Rules of Civil Procedure requirements,¹⁴² which make it difficult for plaintiffs to obtain enough of the required data to satisfy the notice procedures. This is especially problematic when polluters are located on private property or are making efforts to cover up their violations.¹⁴³

Citizen suits must also evade the inevitable motion to dismiss filed by the defendant once it receives the citizens’ notice of intent to file suit.¹⁴⁴ The plaintiff has the burden of demonstrating that the violation of the statute is “ongoing” or

139. Hanson, *supra* note 89, at 302.

140. See 42 U.S.C. § 7604 (2006) (CAA citizen suit provision); 42 U.S.C. § 9659 (2006) (CERCLA citizen suit provision); 42 U.S.C. § 11046 (2006) (EPCRA citizen suit provision); 42 U.S.C. § 6972 (2006) (RCRA citizen suit provision). All indicate relief is in the form a civil penalty.

141. See 40 C.F.R. §§ 54.2-.3 (2010) (CAA notice requirements); 40 C.F.R. §§ 254.2-.3 (2010) (RCRA notice requirements); 40 C.F.R. §§ 374.2-.3 (2010) (CERCLA/EPCRA notice requirements).

142. See Robin K. Craig, *Notice Letters and Notice Pleading: The Federal Rules of Civil Procedure and the Sufficiency of Environmental Citizen Suit Notice*, 78 OR. L. REV. 105 (1999).

143. Hanson, *supra* note 89, at 306.

144. *Id.*

“likely to be repeated.”¹⁴⁵ The defendant can receive the notice and rush into compliance before the 60-day time period is up, leaving the plaintiff a minimal amount of time to re-investigate an already difficult-to-substantiate claim and document evidence that the facility will not permanently remain in compliance.¹⁴⁶ This often requires the help of expensive experts and occurs before the plaintiffs may request discovery.¹⁴⁷

A further difficulty is a Washington statute which requires that specific information state and local agencies collect from dairies and other small and medium-sized AFOs, such as the total number of animals and volume of nutrients (animal waste) generated, remain confidential.¹⁴⁸ Only the data from medium and large CAFOs that are required to obtain CWA permits is available to the public.¹⁴⁹ Information about an industrial farm that may be necessary to file a citizen suit is only accessible if the operation is of a certain size or pollutes enough to trigger designation as a CAFO by the director of the Washington State Department of Ecology.¹⁵⁰ In addition, during the 60-day notice period, local, state, or federal authorities may initiate their own civil or administrative proceeding against the defendant, often at the behest of the defendants themselves that are seeking a “sweetheart deal.”¹⁵¹ These deals often include relatively small fines or administrative penalties, and prohibit concurrent citizen suits under the “diligent prosecution” provision of the CWA.¹⁵²

Finally, due to the nature of air pollution, it can be difficult

145. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 57-59 (1987) (finding that the Clean Water Act’s present-tense statutory language requires that violations must be ongoing at the time the suit is filed); *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171-72 (4th Cir. 1988) (holding on remand that citizens can demonstrate an ongoing violation either “(1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations.”).

146. Hanson, *supra* note 89, at 307.

147. *Id.*

148. WASH. REV. CODE § 42.56.610 (2010).

149. *Id.*

150. WASH. REV. CODE § 90.64.020 (2010).

151. Hanson, *supra* note 89, at 307.

152. Hanson, *supra* note 89, at 307-308; 33 U.S.C. §1365(B)(1)(B); 33 U.S.C. §1319(g)(6)(a) (2006).

or impossible for citizens to quantify or measure the emissions from private farming facilities without any federal guidance on the preferred method of data collection and measurement, or financial resources to obtain expert scientists to collect and interpret data.¹⁵³

2. *The Air Consent Agreement Grants Further AFO Immunity and Allows the Industry to Run Its Own Emissions Study*

As if these barriers were not enough to stop most citizen suits from compelling enforcement of the relevant laws, the Air Consent Agreement between the EPA and nearly 14,000 AFOs and CAFOs creates additional roadblocks to enforcement actions by state and federal governments, and likely by citizens, too.

As environmental awareness and discussions of potential applicability of the environmental statutes to animal agriculture operations grew in the early 2000s, the AFO industry approached the EPA with a safe harbor agreement proposal.¹⁵⁴ The industry suggested participating in a study of air emissions at AFOs, and underwent negotiations with the EPA for the next two years.¹⁵⁵ The final agreement was published in the Federal Register in early 2005, and allowed AFOs to participate in the study and contribute public comments.¹⁵⁶

Called the Air Consent Agreement,¹⁵⁷ or Air Compliance Agreement¹⁵⁸ interchangeably, environmentalists responded

153. Hanson, *supra* note 89, at 309.

154. Heinzen, *supra* note 134, at 1506; *Air Quality Issues and Animal Agriculture*, *supra* note 7, at 4; Jennifer S. Lee, *Proposal Would Ease Rules of Livestock Farm Pollution*, N.Y. TIMES, May 6, 2003, available at <http://query.nytimes.com/gst/fullpage.html?res=9804EFDE113CF935A35756C0A9659C8B63>; Cindy Skrzycki, *From EPA Plan, a Whiff of Danger*, WASHINGTON POST, April 15, 2003, at E1, available at <http://www.washingtonpost.com/ac2/wp-dyn/A26778-2003Apr14?language=printer>.

155. CLAUDIA COPELAND, CONG. RESEARCH SERV., RL 32947, AIR QUALITY ISSUES AND ANIMAL AGRICULTURE: EPA'S AIR COMPLIANCE AGREEMENT 4 (2008).

156. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4958, 4958 (Jan. 31, 2005) (Notice of consent agreement and final order, and request for public comment).

157. *Id.* See also Heinzen, *supra* note 134, at 1507.

158. See, e.g., Copeland, *supra* note 155.

with opposition,¹⁵⁹ calling the settlement a “sweetheart deal”¹⁶⁰ between the EPA and the AFO industry. Participating AFOs were to pay a civil penalty from \$200 to \$1,000 based on the quantity of animals at the facility,¹⁶¹ and an additional \$2,500 per AFO to contribute to an emissions monitoring study.¹⁶² The study would measure the emissions of volatile organic compounds (VOC), hydrogen sulfide, ammonia, and three size classes of particulate matter at selected facilities.¹⁶³ Industry participants would run a non-profit organization, the Agricultural Air Research Council (AARC), funded with money raised by the AFOs.¹⁶⁴ The AARC and its AFO-industry board of directors were responsible for choosing its own Science Advisor to head up the study.¹⁶⁵ The study aimed to develop a means of measuring air emissions from AFOs to bring them into CAA, CERCLA, and EPCRA compliance.¹⁶⁶

In return for participation in the study, the EPA granted participating AFOs a “safe harbor” from EPA enforcement of certain provisions of the CAA, CERCLA, and EPCRA.¹⁶⁷ Under the proposal, and incorporated into the final rulemaking, the EPA could only enforce criminal violations of these laws or intervene in cases of imminent and substantial endangerment to public health, welfare, or the environment.¹⁶⁸

The Agreement does not mention whether citizen suits are included under the safe harbor umbrella.¹⁶⁹ The

159. *Id.* at 7.

160. See Laura Karvosky, Comment, *EPA Gives Animal Feeding Operations Immunity from Environmental Statutes in a “Sweetheart Deal*, 8 V.T. J. ENVTL. L. 115, 115 (2007); see also Michael Janofsky, *E.P.A. Offers an Amnesty if Big Farms Are Monitored*, N.Y. TIMES, Jan. 22, 2005, available at <http://www.nytimes.com/2005/01/22/politics/22enviro.html>.

161. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4958, 4959 (Jan. 31, 2005) (Notice of consent agreement and final order and request for public comment).

162. *Id.*

163. Purdue University, *National Air Emissions Monitoring Study Frequently Asked Questions*, <https://engineering.purdue.edu/~odor/NAEMS/faqs.htm> (last visited Apr. 2, 2011); Copeland, *supra* note 155, at 5.

164. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. at 4970.

165. *Id.*

166. *Id.*

167. *Id.* at 4959.

168. *Id.* at 4958.

169. *Id.* at 4958 (making no mention of citizen suits).

CERCLA/EPCRA exemption of 2008 also does not mention citizen suits.¹⁷⁰ However, the initial 2005 proposal says that the Agreement “will not affect the ability of States or citizens to enforce compliance with non-federally enforceable State laws, existing or future, that are applicable to AFOs.”¹⁷¹ Thus, citizen suits arising under the federal environmental statutes appear to be barred under both the safe harbor agreement and the CERCLA/EPCRA exemption, leaving only state-level causes of action available to citizens.

A total of 2,681 AFOs signed up for the program, with 2,568 final agreements ratified by the EPA’s Environmental Appeals Board.¹⁷² Continuous barn emissions monitoring occurred at just fourteen of the AFOs: five dairies (including the barn and lagoon at an unidentified dairy in the Yakima Valley),¹⁷³ five pork production sites, three egg laying operations, and one boiler ranch.¹⁷⁴ Notably, the Agreement applies only to egg, broiler, dairy cattle, and swine facilities, not AFOs with open-air feedlots.¹⁷⁵

The GAO and others have questioned whether such a small study will provide useful data,¹⁷⁶ especially given the role of the industry in the study.¹⁷⁷ Others claim that the Agreement was unnecessary, because data documenting emissions from industrial farming facilities previously existed, and that Section 114 of the CAA¹⁷⁸ already gives the EPA the authority to require emissions monitoring data from AFOs.¹⁷⁹

Citizens have had little success challenging the Agreement. In 2007, several environmental advocacy organizations filed suit against the EPA, alleging that the agency failed to promulgate the Agreement via proper rulemaking

170. See CERCLA/EPCRA Administrative Reporting Exemption for Air Releases, 73 Fed. Reg. at 76,948. (making no mention of citizen suits).

171. 70 Fed. Reg. at 4959.

172. Copeland, *supra* note 155, at 6.

173. U.S. Env’tl. Prot. Agency, *Monitored AFOs* (Jan. 13, 2011), <http://www.epa.gov/airquality/agmonitoring/data.html>; see also Lester, *supra* note 23.

174. *Purdue University*, *supra* note 163.

175. Copeland, *supra* note 155, at 4.

176. GAO STUDY, *supra* note 13, at 6–7; Heinzen, *supra* note 134, at 1508-09.

177. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. at 4960.

178. Clean Air Act, 42 U.S.C. §7414 (2006).

179. Copeland, *supra* note 155, at 8.

procedures.¹⁸⁰ The D.C. Circuit dismissed the case, holding that the Agreement was an enforcement action, not a rulemaking, and was thus not subject to judicial review.¹⁸¹ Citizens have not challenged the Agreement since, and additional citizen suits are unlikely to follow. Though the Agreement does not expressly prohibit citizen suits, many farming industry lawyers have advised their clients that the Agreement would include citizen suit immunity, and it has been suggested that courts would thus not respond positively to citizen challenges.¹⁸² Citizens are arguably less likely to make claims against participating AFOs because of the perceived lack of success and judicial support that such a claim would have.¹⁸³

The EPA received the data at the end of the two-year study in July 2010.¹⁸⁴ While the EPA has only released the raw data without interpretation,¹⁸⁵ the Environmental Integrity Project (EIP), an environmental non-profit, released its own report based on the data in March 2011.¹⁸⁶ The EIP report indicates that the raw data shows some CAFOs are emitting over 100 pounds per day of hydrogen sulfide and ammonia on average days, and that fine particle pollution at levels higher than the CAA health-based limits occurred on the worst days, including at the monitored Washington dairy.¹⁸⁷

Citing the documented adverse health effects of ammonia and the EIP report findings that factory farms emit ammonia at industrial levels, the EIP and twenty other environmental

180. *Ass'n of Irrigated Residents v. E.P.A.*, 494 F.3d 1027, 1028 (D.C. Cir. 2007).

181. *Id.* at 1037.

182. Heinzen, *supra* note 134, at 1510.

183. *Id.*

184. National Milk Producers Federation, *Update on National Air Emissions Monitoring Study*, http://www.nmpf.org/washington_watch/environment/airquality (last visited Apr. 29, 2011); *See also* Purdue University, *National Air Emissions Study (NAEMS)*, <https://engineering.purdue.edu/~odor/NAEMS/> (last visited Apr. 29, 2011).

185. Press Release, Richard Yost, U.S. Env'tl. Prot. Agency, *Emissions Data from Animal Feeding Operations Study Now Available/EPA also solicits additional information to further understand emissions* (Jan. 13, 2011), <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/dc13b657ff6203ce85257817005ed001!OpenDocument>; *see also* National Milk Producers Federation, *supra* note 184.

186. Press Release, Environmental Integrity Project, *Unregulated Factory Farm Air Pollution at Some Sites Now Dirtier than America's Most Polluted Cities* (Mar. 9, 2011), http://environmentalintegrity.org/03_09_2011.php.

187. *See id.*

and animal rights non-governmental organizations (NGOs) petitioned the EPA to list ammonia as a criteria air pollutant under the CAA in April 2011.¹⁸⁸ By listing ammonia as a criteria pollutant, the EPA would be required to establish air quality standards for the toxic gas that protect public health and the environment.¹⁸⁹

During the next 18 months, the EPA plans to analyze the emissions data, with expected completion in December 2011¹⁹⁰ and anticipates finalization of the methodologies to measure air pollution at AFOs by June 2012.¹⁹¹ The dairy industry in Washington expects that the results of the study will require it to comply with CAA,¹⁹² but in light of the criticism of the study, its potential for obtaining usable data is unclear.¹⁹³

E. Washington State Statutes and Local Ordinances

Washington State has its own statutory scheme aimed at protecting the environment, at both the state and local levels. This section will discuss the Washington Model Toxics Control Act (MTCA), the Washington Clean Air Act (WCAA) and the local laws that have been enacted in the Yakima Valley. As these statutes are modeled after their respective federal counterparts, they come with the same exemptions for farming operations, and the inability to accurately measure air emissions in order to compel regulation remains present. Even at the local level, officials have virtually ignored public input and are working with the industry to develop their own “sweetheart deal.”

1. Model Toxics Control Act

Under Washington’s Model Toxics Control Act (MTCA) the

188. Press Release, Environmental Integrity Project, *Broad Coalition Petitions EPA to Regulate Ammonia Gas Pollution From Factory Farms* (Apr. 6, 2011), http://environmentalintegrity.org/04_06_2011.php.

189. *See id.*

190. National Milk Producers Federation, *supra* note 184. *See also* Purdue University, *supra* note 184.

191. U.S. Env’tl. Prot. Agency, *Basic Information: Emissions Monitoring at Animal Feeding Operations (AFOs)* (Jan. 13, 2011), <http://www.epa.gov/airquality/agmonitoring/basicinfo.html>.

192. Lester, *supra* note 23.

193. GAO STUDY, *supra* note 13, at 6-7.

Washington State Department of Ecology (Ecology) has the authority over toxic waste cleanup and is charged with investigating both actual and threatened release sites.¹⁹⁴ Like CERCLA, MTCA primarily addresses cleanup of past waste sites, but it may also apply to potential or current polluters.¹⁹⁵

MTCA applies to any Washington State facility where there is a “release or threatened release of a hazardous substance that may pose a threat to human health or the environment.”¹⁹⁶ An AFO meets the definition of a “facility,” which includes a storage “lagoon,” or “any site or area where a hazardous substance. . .has been deposited, stored, disposed of, or placed, or otherwise come to be located.”¹⁹⁷ However, MTCA allows defenses to liability not found in CERCLA, one of which exempts the application of fertilizers or pesticides for purposes of growing food crops, as long as the application is in accordance with the law and is not negligent.¹⁹⁸ Washington Courts have not yet determined whether AFO crops are “food crops” and therefore exempt under MTCA.

2. *Washington Clean Air Act*

Washington enacted the Washington Clean Air Act (WCAA)¹⁹⁹ in 1957, and amended it in 1991 pursuant to the federal CAA Amendments of 1990.²⁰⁰ The WCAA gives Ecology the authority to regulate air quality within the state, and establishes air pollution control authorities at the local level.²⁰¹ These seven local agencies undertake most of the enforcement and may enact more stringent standards.²⁰²

194. WASH. REV. CODE § 70.105D.030 (2010); WASH. REV. CODE § 70.105D.050(1) (2010).

195. WASH. ADMIN. CODE § 173-340-100 (2009).

196. *Id.* § 173-340-110(1).

197. WASH. REV. CODE § 70.105D.020(5) (2010); WASH. ADMIN. CODE § 173-340-200 (2009).

198. WASH. REV. CODE § 70.105D.040(3)(d) (2010).

199. WASH. REV. CODE §§ 70.94.11-.996 (2010).

200. Washington Clean Air Act of 1991, Laws 1991, ch. 199 (1991) (codified as amended at RCW 70.94 (2010)); *see also* 23 TIMOTHY BUTLER & MATTHEW KING, WASHINGTON PRACTICE: ENVIRONMENTAL LAW AND PRACTICE § 5.1, at 81 (2d ed. 2010) (“The Washington CAA was substantially revised in 1991 to implement the requirements of the federal 1990 CAA Amendments.”).

201. WASH. REV. CODE § 70.94.141 (2010).

202. WASH. REV. CODE § 70.94.860 (2010); *see also* BUTLER & KING, *supra* note 200, at § 5.1 p. 90-92 (“The local authorities conduct most of the air quality enforcement

Like the federal CAA, the WCAA requires that major stationary sources—those emitting 100 tons or more per year of a regulated air pollutant²⁰³—register with Ecology or the local air authority.²⁰⁴ Non-major sources are considered exempt from the requirements unless Ecology or the administrator promulgates a rule that states otherwise²⁰⁵ or deems the facility a threat to public health or welfare.²⁰⁶ Thus, because AFOs rarely qualify as a “major source” due to their uncertain emission quantities, the WCAA, like the CAA, is unable to enforce air quality standards against them.

a. Local Air Control in the Yakima Valley: Yakima Regional Clean Air Agency

The Yakima Regional Clean Air Agency (YRCAA) governs air quality in the Yakima Valley.²⁰⁷ It enforces certain federal regulations, the WCAA, other Washington State regulations, and its own local regulations in Yakima County, except for the portions of the county that are part of the Yakama Indian Reservation, which are governed by the EPA.²⁰⁸ In 2002, the YRCAA enacted an amendment that repealed the existing emissions standards for AFOs,²⁰⁹ despite Yakima Valley’s non-attainment status for particulate matter.²¹⁰

In July 2010, under pressure from local citizen groups concerned about the decline in air quality from dairy-producing AFOs in the area,²¹¹ the YRCAA prepared a draft

actions in the state and they have the power to adopt emission standards more stringent than the state’s.”)

203. WASH. ADMIN. CODE § 173-401-200(19) (2009).

204. WASH. REV. CODE § 70.94.151 (2010); WASH. ADMIN. CODE § 173-400-100 (2009).

205. WASH. ADMIN. CODE § 173-401-300(2)(a) (2009).

206. *Id.* at 1(b).

207. Yakima Regional Clean Air Agency, *About Us*, <http://www.yakimacleanair.org/about.htm> (last visited April 26 2011).

208. *Id.*

209. Yakima Regional Clean Air Agency, *Regulation 1 of the YRCCA* (2002), available at http://www.yakimacleanair.org/PDFs/Regulation%201%20YRCAA/YRCAA%20Regulation%201_2002i.pdf.

210. See BUTLER & KING, *supra* note 200, at § 5.22 (“Nonattainment areas for PM10 include Spokane, Yakima, Wallula and some localized areas around Puget Sound.”).

211. See Yakima Regional Clean Air Agency, *Air Quality Management Pilot (Research) Project for Dairies*, <http://www.yakimacleanair.org/DairyEmissions.html> (last visited Apr. 13, 2011) (“In June this year citizens voiced concerns about the

policy with input from local dairy operators (but with no public involvement).

Under the draft policy, all commercial dairy operations where “the potential for significant air pollution exists” must install economically and technologically feasible best management practices (BMPs) for minimizing emissions.²¹² Dairy operations must also prepare an annual Air Quality Management Plan (AQMP) and identify the BMPs and operational procedures that the facility plans to use to control its emissions.²¹³ The AQMP must also describe the facility and all of its areas in detail, including how the specific emissions of particulate matter, ammonia, volatile organic compounds, hydrogen sulfide, odor, methane, and nitrous oxide will be reduced in each area.²¹⁴ The YRCAA commits to make a good faith effort to negotiate with the dairy operators in approving the AQMPs.²¹⁵ Once approved, the YRCAA will inspect the facilities and may issue a Notice of Violation if the operation is not in compliance.²¹⁶ RCW Section 42.56.610 prohibits disclosure of such information, and unless the facility is a CAFO, some details of the AQMPs will not be available to the public.²¹⁷ The YRCAA may propose additional or alternative BMPs if the approved plan is ineffective, and will collaborate with dairy operators to attain effective BMPs.²¹⁸

effects of emissions from dairies to the Yakima Regional Clean Air Agency (YRCAA) Board of Directors. As a result the Board directed staff to address these concerns. In July this year staff proposed a policy-making process aimed at identifying and implementing BMPs at dairy operations in YRCAA’s jurisdiction.”).

212. Yakima Regional Clean Air Agency, *Draft Air Quality Management Policy and Best Management Practices for Dairy Operations* 1-2 (2010), available at <http://www.yakimacleanair.org/PDFs/draft%20policy%2009nov10.pdf>.

213. *Id.* at 3.

214. *Id.* at 4–5.

215. *Id.* at 6.

216. *Id.* at 7.

217. Yakima Regional Clean Air Agency, *Concise Explanatory Statement: Pilot Project for the Air Quality Management Policy and Best Management Practices for Dairy Operations* 41 (2011) [hereinafter *Concise Explanatory Statement, 2011*], available at http://www.yakimacleanair.org/PDFs/Dairy/Concise%20Explanatory%20Statement_web.pdf.

218. Yakima Regional Clean Air Agency, *Concise Explanatory Statement: Pilot Project for the Air Quality Management Policy and Best Management Practices for Dairy Operations* 3 (2010) [hereinafter *Concise Explanatory Statement, 2010*], available at http://www.yakimacleanair.org/PDFs/Dairy/Dairy%20Policy%20COMMENTS%20ONLY_14Dec10.pdf

The YRCAA began the pilot project in February 2011 and plans to continue it until the end of 2011.²¹⁹ At the end of the pilot project, the YRCAA will assess the effectiveness of the program, modify it as necessary, and present a final policy proposal to the YRCAA Board of Directors.²²⁰

The proposal was open for public comment for just one month, from November 8 to December 9, 2010.²²¹ Despite the short duration of time citizens had to respond to the proposal, the YRCAA received twenty-three heavily critical comments from community members and environmentalists.²²² Many commenters were upset that the public was not included in the “work group.”²²³ One commenter pointed out that excluding members of the environmental community in the process, and working solely with industry representatives, violates RCW Section 70.94.240.²²⁴ The statute provides that at least one member of an air pollution control advisory council must represent the environmental community.²²⁵

Others, including researchers from the Environmental Health Engineering program at the Johns Hopkins Bloomberg School of Public Health, recommended that the proposal be completely revamped and re-released for public comment, because it is vague and lacks scientific references.²²⁶ They also alleged that it fails to address how the suggested BMPs will be effective and will not increase other sources of pollution, like water pollution.²²⁷

Citing the concurrent Air Consent Agreement program as a potential source of conflict, the Northwest Dairy Association argued that the regulation of the substances in the proposal, without any consideration of whether or not they exceed the regulatory thresholds, exceeds the authority granted under the CAA.²²⁸ The industry also noted that the proposal is more

219. *Concise Explanatory Statement, 2011*, *supra* note 217, at 1.

220. *Id.*

221. *Concise Explanatory Statement, 2010*, *supra* note 218, at 7.

222. *Id.* at 3.

223. *Id.* at 41, 56. *See also* Lester, *supra* note 23.

224. *Concise Explanatory Statement, 2010*, *supra* note 218, at 41.

225. WASH. REV. CODE § 70.94.240 (2010).

226. *Concise Explanatory Statement, 2010*, *supra* note 218, at 47-52.

227. *Id.* at 51-52.

228. *Id.* at 53.

stringent than an Idaho rule that focuses only on ammonia.²²⁹

The YRCAA responded to the public comments and approved the pilot project on February 10, 2011, to begin immediately and run to the end of the year.²³⁰ In response to concerns about excluding the public, the YRCAA said, “participants . . . were chosen by the Air Pollution Control Officer to best accomplish the purpose of the Work Group,”²³¹ and “[i]t is because we represent all people that YRCAA is undertaking this effort.”²³² The agency also said it was not an authority on public health and could not comment on those issues, leaving them for someone with adequate expertise.²³³

In light of the YRCAA’s response to the public comments, and with the pilot project underway, concerned citizens in the Yakima Valley have little ability to influence the YRCAA through administrative means. It is unclear how this method of policymaking at the local level promotes the YRCAA’s stated mission statement “to protect the people and the environment of Yakima County from the effects of air pollution,” or whether it is in line with its vision of “[a]n unceasing commitment to build and maintain partnerships in the continuous improvement of air quality for all current and future generations in Yakima County.”²³⁴

IV. COMMON LAW CAN BE USED AS AN ALTERNATIVE IN ACTIONS AGAINST AFOS

Due to the shortcomings of the statutory enforcement route under federal, state, and local law, environmentalists have proposed using the common law as an alternative method of enforcement and as a gap-filler in various areas of

229. *See id.* (“[The proposal] subjects dairies in the Yakima area to air quality requirements that do not exist for dairies anywhere else in the country.”); *see also* Idaho Dep’t of Env’tl. Quality, *supra* note 96.

230. Press Release, Yakima Regional Clean Air Authority, *Pilot (Research) Project Approved* (Feb. 10, 2011), available at <http://www.yakimacleanair.org/Dairy%20Emissions.html>.

231. *Concise Explanatory Statement, 2011, supra* note 217, at 24.

232. *Id.*

233. *Id.* at 38.

234. Yakima Regional Clean Air Agency, *About Us*, <http://www.yakimacleanair.org/about.htm> (last visited April 26 2011).

environmental law.²³⁵ This approach suggests that litigants may be able to recover private damages and injunctive relief, unlike the solely public relief available in the statutory scheme. There are several potential common law causes of action available in Washington State suits against AFOs, but substantial hurdles still exist. State Right-to-Farm laws can pose significant roadblocks to many nuisance actions, and defendants can assert several other affirmative defenses to nuisance, trespass, and negligence actions.

A. Nuisance

Washington State law defines nuisance as an act or omission that “annoys, injures, or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct . . . or in any way renders other persons insecure in life, or in the use of property.”²³⁶ Washington common law similarly defines nuisance as interference with the use and enjoyment of one’s property.²³⁷ Interference caused by an unlawful activity is a nuisance *per se*, and is “not excusable under any circumstances.”²³⁸

Nuisance can be inflicted intentionally, recklessly, or negligently²³⁹ and can be public or private.²⁴⁰ A public nuisance is an unreasonable interference with a right that is common to the general public,²⁴¹ while a private nuisance is the interference with the personal use and enjoyment of private land.²⁴² Air pollution typically constitutes both a public and a private nuisance.²⁴³ In Washington, a nuisance claim has a

235. See, e.g., CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT (Clifford Rechtschaffen & Denise Antolini eds., 2007).

236. WASH. REV. CODE § 7.48.120(20) (2010).

237. See *Bodin v. City of Stanwood*, 79 Wash. App. 313, 318 n. 2, 901 P.2d 1065, 1068 (Wash. Ct. App.1995) (citing 1 WILLIAM H. RODGERS, ENVIRONMENTAL LAW § 2.2, at 33 (1986)).

238. *State ex rel. Bradford v. Stubblefield*, 36 Wash. 2d 664, 669, 220 P.2d 305, 308-309 (Wash. 1950); see also *Hardin v. Olympic Portland Cement Co.*, 89 Wash. 320, 325, 154 P. 450, 451 (Wash. 1916).

239. RESTATEMENT (SECOND) OF TORTS § 822 (1979).

240. *Id.* § 821A.

241. *Id.* § 821B.

242. *Id.* § 821D.

243. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW § 14.2, at 637 (1998).

two-year statute of limitations.²⁴⁴ Litigants can obtain both injunctive relief and monetary damages in a nuisance action,²⁴⁵ but courts will often deny an injunction if it would cause significant hardship to the defendant or the community.²⁴⁶

To have a successful nuisance claim, the action interfering with the enjoyment of property must be unreasonable and cause significant harm.²⁴⁷ The standard for significant harm is objective and the nuisance must be an invasion that would offend a reasonable person.²⁴⁸ An offensive odor cannot be the only grounds for a nuisance action – the plaintiff must also suffer from objective, physical symptoms as a result of the odor.²⁴⁹

Further, the activity causing the nuisance must be an unreasonable use of the land, taking the surrounding circumstances into consideration.²⁵⁰ The activity can amount to a nuisance if the location for the activity or the manner in which it is carried out is unreasonable.²⁵¹ In a known agricultural area, for example, a new suburban development cannot complain of a nuisance from previously established farms.²⁵² A nuisance claim against an AFO can be successful if the plaintiffs are able to demonstrate the significant harm element and show that they lived in the area before the facility began operating, in order to avoid applicability of the state Right-to-Farm Act.

244. WASH. REV. CODE § 4.16.130 (2010).

245. JUERGENSMEYER & ROBERTS, *supra* note 243, at § 14.5 p.641-642.

246. *See* *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870 (N.Y. 1970) (imposing damages instead of injunction when injunction would result in defendant having to close down \$45,000,000 plant that employs over 300 people).

247. RESTATEMENT (SECOND) OF TORTS § 821F (1979); *see also* *Bodin v. City of Stanwood*, 79 Wash. App. 313, 318, 901 P.2d 1065, 1068 (Wash. Ct. App.1995).

248. RESTATEMENT (SECOND) OF TORTS § 821F (1979).

249. *Mathewson v. Primeau*, 64 Wash. 2d 929, 395 P.2d 183 (Wash. 1964) (holding that odor and aesthetics alone did not amount to a nuisance); *Morin v. Johnson*, 49 Wash. 2d 275, 300 P.2d 569 (Wash. 1956) (finding that there was no nuisance when only some residents complained of odor and physical symptoms and tire plant was in commercial area).

250. *Riblet v. Spokane-Portland Cement Co.*, 41 Wash. 2d 249, 248 P.2d 380 (Wash. 1952) (overruled on other grounds); *Powell v. Superior Portland Cement*, 15 Wash. 2d 14, 129 P.2d 536 (Wash. 1942) (holding that in an industrial area, emissions and noises did not amount to nuisance).

251. *Tiegs v. Watts*, 135 Wash. 2d 1, 13, 954 P.2d 877, 883 (Wash. 1998).

252. *Buchanan v. Simplot Feeders, Ltd. Partnership*, 134 Wash. 2d 673, 952 P.2d 610 (Wash. 1998).

1. *The Right-to-Farm Act as a Defense to Nuisance Actions*

During the 1980s, as suburban developments spread across the country and into rural areas, policymakers became concerned about the possibility of small farmers being subject to nuisance lawsuits by individuals moving into what was previously farmland.²⁵³ In response, every state enacted some kind of “right-to-farm” law.²⁵⁴ Such laws typically protect existing farms from nuisance liability, essentially codifying what is called the “coming to the nuisance” defense.²⁵⁵ Even as farms have increasingly become more industrialized and concentrated, the right-to-farm (or RTF) laws have continued to apply to them, just as if they were small family farms.²⁵⁶

Washington’s RTF law, titled “Agricultural Activities-Protection from Nuisance Lawsuits (the Act),” was enacted in 1979,²⁵⁷ with a goal to protect “agricultural activities conducted on farmland . . . in urbanizing areas . . . from nuisance lawsuits.”²⁵⁸ The Act provides a rebuttable presumption that a farm or other agricultural activity is not a nuisance when three conditions are met: (1) the farming activity does not have a substantial adverse effect on public health and safety; (2) the activity is consistent with the applicable laws, rules, and good agricultural practices; and (3) the activity was established before the surrounding nonagricultural activities.²⁵⁹ As long as the AFO or CAFO complies with the applicable laws and local rules, it is presumed to be undertaking good agricultural practices and not negatively affecting the public health and

253. See Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 97–98 (1983).

254. See generally Terence J. Centner, *Governments and Unconstitutional Takings: When do Right-to-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. REV. 87 (2006); Neil D. Hamilton, *Right-To-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective*, 3 DRAKE J. AGRIC. L. 103 (1998); Alexander A. Reinert, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694 (1998).

255. JUERGENSMEYER & ROBERTS, *supra* note 243, at § 14.6 p.645.

256. See, e.g., *Buchanan v. Simplot Feeders, Ltd. Partnership*, 1998 U.S. Dist. LEXIS 21780 at *14 (1998); see also Hanson, *supra* note 89, at 325.

257. WASH. REV. CODE §§ 7.48.300–310 and .905 (2010).

258. *Id.* § 7.48.300.

259. *Id.* § 7.48.305.

safety,²⁶⁰ unless it significantly expands or changes its established “activity.”²⁶¹ The Act was amended in 1992 to include the passage, “[n]othing in this section shall affect or impair any right to sue for damages.”²⁶² The Act does not mention any conferred immunity from negligence or trespass actions, unlike some of the RTF laws in other states that afford broader immunity.²⁶³

a. Limitations on Washington’s Right-to-Farm Act

One of the nation’s few successful Right-to-Farm Act challenges occurred in Washington State, prompting analysis by many legal scholars.²⁶⁴ In *Buchanan v. Simplot Feeders, Ltd. Partnership*, a Washington couple brought an action against a neighboring cattle feedlot and meat processing plant, challenging the Act in federal court, and alleging that the facilities were liable for nuisance, stemming from the odor; trespass, from the flies and manure dust; and negligence.²⁶⁵ The defendants, who were in compliance with applicable permits and regulations, asserted that the Act insulated them from liability for nuisance.²⁶⁶ The Buchanans pointed out that they had lived in the area and established their own farm 8 years before the other farms began operating, rendering the statute inapplicable²⁶⁷ because the Act’s legislative intent was to protect existing farms from nuisance claims by newcomers to the area.²⁶⁸

The plaintiffs further relied on the language of the 1992

260. *Id.* § 7.48.305(2).

261. *Buchanan*, 134 Wash.2d at 680, 952 P.2d at 614; *but see* *Payne v. Skaar*, 127 Idaho 341, 344, 900 P.2d 1352, 1355 (1995) (holding that Idaho’s Right-to-Farm Act does not confer nuisance immunity to a feedlot that expands and subsequently causes a nuisance).

262. WASH. REV. CODE § 7.48.305(4) (2010).

263. *Id.* § 7.48.305 (referring only to negligence); *Hanson*, *supra* note 89, at 326.

264. *See generally* Jesse J. Richardson, Jr. & Theodore A. Feitshans, *Nuisance Revisited After Buchanan and Bormann*, 5 DRAKE J. AGRIC. L. 121 (2000); *see also* Jennifer L. Beidel, Comment, *Pennsylvania’s Right-to-Farm Law: A Relief for Farmers or An Unconstitutional Taking?*, 110 PENN. ST. L. REV. 163, 165–66 (2005); *Jordan*, *supra* note 297, at 959–60.

265. *Buchanan*, 134 Wash.2d at 676, 952 P.2d at 611.

266. *Id.* at 676, 952 P.2d at 611.

267. *Id.* at 677, 952 P.2d at 611.

268. *Id.* at 678, 952 P.2d at 610, 613.

amendment, claiming that even if the Act was applicable, the amendment only prohibited nuisance actions for injunctions, not actions for damages.²⁶⁹ The Washington State Supreme Court, answering a certified question from the district court, disagreed with the plaintiffs, holding that despite the 1992 amendment, the statute did confer nuisance immunity from both damages and injunctions.²⁷⁰ The Court explained that the plaintiff's interpretation of the 1992 amendment would "fully gut the Right-to-Farm Act."²⁷¹

While the question of whether the Act could be used as a defense for the defendant's particular conduct was not certified to the Washington Supreme Court, the Court discussed the issue in its opinion.²⁷² Based on legislative intent, the Court agreed with the plaintiffs that nuisance immunity should be construed narrowly and should apply only when "urbanizing areas" are encroaching on established farms.²⁷³ In this way, the Act does not apply to situations where the plaintiff is "agricultural . . . or rural . . . especially if the plaintiff occupied the land before the nuisance activity was established."²⁷⁴ Citing public policy reasons, the Court also said in dictum that the Act is similar to a prescriptive easement because it gives farms "quasi-easements" against urban developers who have notice of the existing agricultural activities.²⁷⁵

Relying on the Washington State Supreme Court's interpretation of the scope of immunity created by the Act, the district court allowed the plaintiffs' nuisance claim to go forward, and held that the Buchanans were farmers who had moved to the area before the defendants' farms were established.²⁷⁶ After the district court denied the defendants' motion for summary judgment,²⁷⁷ the plaintiffs settled out of court with the feedlot on the nuisance and trespass claims, and the meat processing plant on the nuisance claim.²⁷⁸

269. *Id.* at 677, 952 P.2d at 612.

270. *Buchanan*, 134 Wash.2d at 673, 952 P.2d at 610.

271. *Id.*

272. *Id.* at 684-685, 952 P.2d at 616.

273. *Id.* at 680, 952 P.2d at 615.

274. *Id.* at 684, 952 P.2d at 615-616.

275. *Id.* at 683, 952 P.2d at 615.

276. *Buchanan*, 1998 U.S. Dist. LEXIS 21780 at *14.

277. *Id.*

278. Email correspondence with counsel for plaintiffs, David S. Mann (Jan. 25, 2010)

Yakima County enacted its own form of the RTF Act, which protects “farm operation[s]” from being considered a public or private nuisance.²⁷⁹ However, county ordinances in Washington State are only valid if they do not conflict with the state law.²⁸⁰ Here, the Washington State Supreme Court’s decision in *Buchanan* preempts the Yakima ordinance, and thus, the Yakima ordinance is likely of little relevance to nuisance suits.

b. Other Constitutional Challenges to State Right-to-Farm Statutes

Scholars and litigants have argued that some RTF statutes may in fact be unconstitutional under both federal and state constitutions.²⁸¹ Iowa is the only state that found its RTF Act contrary to the state and federal constitution.²⁸² In *Bormann v. Board of Supervisors*, the Iowa Supreme Court held that conferring nuisance immunity to an agricultural area effectively gave the farm an easement over the neighboring property by giving the farm the right to maintain a nuisance.²⁸³ Because an easement is considered a property interest subject to the protections in the Fifth Amendment of the United States Constitution,²⁸⁴ and Iowa’s state constitution,²⁸⁵ the Iowa RTF Act functioned as a taking of the farm’s surrounding private property without just compensation.²⁸⁶ The U.S. Supreme Court subsequently denied certiorari to hear the case.²⁸⁷

Iowa later clarified this holding in *Gacke v. Pork Xtra, LLC*.²⁸⁸ There, the Iowa Supreme Court explained that the

(on file with author).

279. Yakima County Code (YCC) §§ 6.22.010–040 (1990).

280. *Entm’t Indus. Coal. v. Tacoma-Pierce County Health Dep’t*, 153 Wash.2d 657, 663, 105 P.3d 985, 987–988 (2005).

281. Hanson, *supra* note 89, at 328–331; JUERGENSMEYER & ROBERTS, *supra* note 243, § 14.7 at 646–47.

282. *Bormann v. Board of Supervisors*, 584 N.W.2d 309, 29 *Env’tl. L. Rep.* 20,235 (Iowa 1998), *cert denied* 119 S.Ct. 1096.

283. *Id.* at 316.

284. *United States v. Welch*, 217 U.S. 333, 339 (1910).

285. *Bormann*, 584 N.W.2d at 321.

286. *Id.*

287. *Id.*

288. *Gacke v. Pork Xtra, LLC*, 684 N.W.2d 168, 173–74, 2004 Iowa Sup. LEXIS 193,

Iowa RTF Act is only unconstitutional when a diminution in the plaintiff's property value occurs, as this loss functions as the uncompensated taking of private property.²⁸⁹ Aside from damages available for diminution of property value as a result of the nuisance, all other immunity conferred by the state legislature in the RTF Act is constitutional.²⁹⁰

In contrast, the New York Supreme Court, Appellate Division came out the opposite way in a similar case.²⁹¹ New York's RTF Act does not automatically give farms nuisance immunity without first having an opinion issued by the Commissioner of Agriculture and Markets, determined on a case-by-case basis, that the agricultural practice is sound.²⁹² Citizens are able to challenge the Commissioner's opinion that the farm is not a nuisance.²⁹³ The New York Supreme Court held that because the state RTF Act does not automatically provide farms with immunity from a nuisance suit, it is not unconstitutional.²⁹⁴

Similarly, the Oregon Court of Appeals held that the state's RTF Act was constitutional in a nuisance suit against a farm, but failed to discuss why.²⁹⁵ California interpreted its RTF Act broadly based on its legislative purpose, holding in one case that it did not even allow a trespass claim, even though the statute only expressly confers nuisance immunity.²⁹⁶

The differing approaches to the constitutionality of the RTF laws may be due to states' diverse views about urban development and public policy, in addition to differences in the text of each statute.²⁹⁷ Due to the varying outcomes in different

*8-*11 (Iowa 2004).

289. *Id.*

290. *Id.* at 175.

291. *See Pure Air and Water, Inc. of Chemung County v. Davidsen*, 246 A.D.2d 786 (N.Y. App. Div. 1998) (holding that New York's Right-to-Farm law was constitutional because it does not create a property right subject to a compensable taking under the Fifth Amendment of the U.S. Constitution or under the New York State Constitution); Jeff Feirick, *Upholding the New York Right to Farm Law*, AGRIC. L. UPDATE, Aug. 1999, at 1 (discussing *Davidsen*).

292. N.Y. AGRIC. & MKTS. LAW § 308 (McKinney 2010).

293. Feirick, *supra* note 291, at 1.

294. *Davidsen*, 246 A.D.2d at 787.

295. *Linn v. Pitts*, 858 P.2d 1352 (Or. Ct. App. 1993).

296. *Rancho Viejo, L.L.C. v. Tres Amigos Viejos, L.L.C.*, 100 Cal. App. 4th 550 (Dist. Ct. App. 2002).

297. Jason Jordan, *A Pig in the Parlor or Food on the Table: Is Texas's Right to Farm*

states, and the U.S. Supreme Court's denial of certiorari in *Bormann*, federal constitutionality of RTF Acts remains unclear.

2. *The Plaintiff "Came to the Nuisance"*

Another common defense to a nuisance action is that the defendant established its farming facility first, and the plaintiff later moved into a known farm area and should thus assume that odors and emissions come with the territory.²⁹⁸ The fact that a plaintiff came to a nuisance, however, does not bar the plaintiff from recovery—it only becomes a factor in determining the plaintiff's relief.²⁹⁹ As discussed previously,³⁰⁰ an AFO cannot use this defense in Washington if the plaintiff is "rural" or "agricultural," especially if the plaintiff resided in the area first.³⁰¹

B. *Trespass*

Trespass frequently overlaps with nuisance,³⁰² and often both apply under the same set of facts, especially in air pollution cases.³⁰³ Unlike nuisance, trespass is not statutorily defined in Washington; instead trespass is a common law doctrine involving the intentional interference with the right of exclusive possession of property.³⁰⁴ Thus, courts in Washington look to the Restatement (Second) of Torts and the common law when evaluating a trespass action.³⁰⁵ Restatement Section 158 defines trespass as the intentional entrance onto land in possession of another, by a person or a thing, or subsequently

Act an Unconstitutional Mechanism to Perpetuate Nuisances or Sound Public Policy Ensuring Sustainable Growth? 42 TEX. TECH L. REV. 943, 962 (2010).

298. RESTATEMENT (SECOND) OF TORTS § 840D (1979).

299. *Id.* at cmt. b (1979).

300. *See supra* Part IV.A.1.

301. *Buchanan*, 134 Wash.2d at 684, 952 P.2d at 615–616.

302. 1 RODGERS ENVIRONMENTAL LAW: AIR AND WATER § 2:15 (West 2010).

303. *Bradley v. American Smelting and Refining Co. (ASARCO)*, 104 Wash. 2d 677, 689, 709 P.2d 782, 789 (Wash. 1985).

304. *Id.* at 681–682, 709 P.2d at 785; *see also* RESTATEMENT (SECOND) OF TORTS § 158 (1979).

305. *See, e.g., Zimmer v. Stephenson*, 66 Wash. 2d 477, 403 P.2d 343 (1965); *Bradley*, 104 Wash. 2d 677, 709 P.2d 782.

remaining on the land without permission of the possessor.³⁰⁶ A modern trespass can include an invasion that was traditionally considered an “indirect” trespass or a nuisance,³⁰⁷ such as the deposition of microscopic particulates onto one’s property.³⁰⁸ It must be reasonably foreseeable that deposition of the particles would interfere with the plaintiff’s possessory interest.³⁰⁹

The trespasser is liable for damages from this type of trespass,³¹⁰ but the harm caused must be “actual and substantial.”³¹¹ The Washington State Supreme Court adopted the “actual and substantial” standard in cases involving airborne particles in order to curtail a flood of litigation by “every landowner within a hundred miles of a manufacturing plant.”³¹² The “actual and substantial” standard contrasts the traditional form of trespass, which was historically subject to strict liability.³¹³ Courts used to award nominal damages in the absence of any actual damages other than the entrance of the person or thing onto the property.³¹⁴

Litigants often combine nuisance and trespass claims into the same action, as it is difficult to conceive of an AFO interfering with the exclusive possession of property without having a corresponding interference with the use and enjoyment of that property. Furthermore, in Washington, trespass has a three-year statute of limitations,³¹⁵ as compared to two years for a nuisance action.

306. RESTATEMENT (SECOND) OF TORTS § 158 (1979).

307. *See Bradley*, 104 Wash. 2d at 684–692, 709 P.2d at 786–791. *See also* 1 *Envtl. L.* (West) § 2:15 (2010).

308. *Bradley*, 104 Wash. 2d at 691, 709 P.2d at 790; *but see* *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546 (Minn. Ct. App., 2003) (finding that odors and microscopic parties do not interfere with exclusive possession of land and do not constitute trespass).

309. *Bradley*, 104 Wash. 2d at 691, 709 P.2d at 790.

310. *Zimmer*, 66 Wash. 2d 477, 403 P.2d 343.

311. *Bradley*, 104 Wash. 2d at 691, 709 P.2d at 790.

312. *Id.*

313. *Id.* at 685.

314. *Id.*

315. WASH. REV. CODE § 4.15.080(1) (2010).

1. *Prescriptive Easements Allow Continuous Pollution and Defend Against Trespass Claims*

A common defense to a trespass action is that a prescriptive easement gave the trespasser a right to use the property. To establish proof of an easement, the defendant must show that his or her use was adverse to the title owner; was open, notorious, continuous, and uninterrupted for the entire prescriptive period; and that the owner had knowledge of the adverse use while she was able to enforce her rights.³¹⁶

The defendants in *Bradley v. ASARCO* argued that their smelter had obtained a prescriptive easement over the plaintiff's property and they were not subject to an action for trespass.³¹⁷ The Washington State Supreme Court disagreed, and held that the deposition of particulate matter onto one's property did not meet the "open and notorious" element and that in order to gain an easement over neighboring land, the pollution would have to be "blatant and flagrant."³¹⁸

An AFO defendant in a trespass action would likely argue that its farm had obtained a prescriptive easement by the obvious nature of its activities if the situation allows for it. This would especially be the case if the plaintiff asserts significant harm, wherein she would likely need to concede that the trespass was blatant in the AFO context to meet that threshold.

C. *Negligence*

A defendant can commit nuisance and trespass negligently³¹⁹ as long as the plaintiff establishes the required elements of a negligence claim—duty, breach, causation, and damages.³²⁰ Litigants can also bring a negligence action on its own, without attaching it to a nuisance, trespass, or other theory of liability.³²¹

316. *See, e.g.*, *Dunbar v. Heinrich*, 95 Wash.2d 20, 22, 622 P.2d 812, 813 (1980).

317. *Bradley*, 104 Wash.2d at 694.

318. *Id.*

319. *See, e.g.*, *Gaines v. Pierce County*, 66 Wash. App. 715, 719, 834 P.2d 631, 633 (Wash. App. Div. 2 1992).

320. *Id.*

321. *See, e.g.*, *Pepper v. J.J. Welcome Const. Co.*, 73 Wash. App. 523, 546, 871 P.2d 601, 614 (Wash. App. Div. 1 1994); *Kaech v. Lewis County Public Utility Dist. No. 1*, 106 Wash. App. 260, 282, 23 P.3d 529, 541 (Wash. App. Div. 2 2001).

Negligence requires that the defendant had a duty of ordinary care that it violated or breached when the defendant failed to act as a reasonable person under like circumstances.³²² One potential way to establish this breach of ordinary care is to prove that an AFO or CAFO violated a federal or state environmental statute.³²³ Negligence *per se*, or an automatic finding of negligence in the event of a breach of a duty imposed by a statute, ordinance, or administrative rule,³²⁴ is limited under Washington State law.³²⁵ Washington State law deems the breach of statutory duty to be evidence of negligence rather than proof of negligence.³²⁶

Even absent a direct violation of an environmental statute, failure to comply with agency recommendations or suggested practices may also be sufficient to establish a deviation from the duty of ordinary care.³²⁷ For example, the Second Restatement of Torts provides that, “compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions.”³²⁸

The third element of causation, however, can be difficult for litigants to prove because they must demonstrate that the nearby AFO constituted a “substantial factor” in causing their damages.³²⁹ In an area like the Yakima Valley, home to over 70 dairy facilities, it could be difficult to pinpoint just which farm was a substantial factor in causing air pollution and foul odors.

D. Other Defenses to Common Law Causes of Action an AFO May Invoke

In addition to the cause-of-action-specific defenses of the Right-to-Farm Act, “coming to the nuisance,” and the obtainment of a prescriptive easement, there are broader defenses that an AFO may raise in a common law action.

322. RESTATEMENT (SECOND) OF TORTS § 283 (1979).

323. *Id.* § 286. *See also* Hanson, *supra* note 89, at 313.

324. Mattson v. American Petroleum Environmental Services, Inc., 155 Wash.App. 1024, 2010 WL 1453997 at *2 n.4 (Wash. App. April 13, 2010).

325. WASH. REV. CODE § 5.40.050 (2010).

326. *Id.*

327. Hanson, *supra* note 89, at 314.

328. RESTATEMENT (SECOND) OF TORTS § 288C (1965).

329. *Id.* § 431.

1. *The Plaintiff's Claim is Preempted by Environmental Statutes*

Defendants in common law environmental suits have argued that state and federal environmental statutes preempt some common law actions.³³⁰ In *Bradley*, the defendant smelter plant asserted that because the text of the WCAA only mentioned that it would not preempt nuisance,³³¹ the WCAA preempted trespass actions.³³² Relying on another section of the WCAA that provides that it “shall not be construed to create in any way nor to enlarge, diminish or otherwise affect in any way any private rights in any civil action for damages,”³³³ the Washington State Supreme Court disagreed.³³⁴ The Court held that, based on this provision, the WCAA does not preclude a suit for damages for additional common law actions like trespass.³³⁵

The U.S. Supreme Court has held that a federal statute will preempt a federal common law action if the action relates to a pollutant already regulated by the relevant federal statute.³³⁶ However, in *International Paper Company v. Ouellette*, the Court later held that federal environmental statutes do not preempt state common law actions because Congress intended to allow the states to regulate their resources.³³⁷ As such, state common law suits would not be inconsistent with the goals of the federal statute.³³⁸ In line with *Ouellette*, the Ninth Circuit held in 2002 that CERCLA did not preempt a local ordinance making the release of a hazardous substance a nuisance *per se*.³³⁹ Following this reasoning, so long as litigants bring a

330. See, e.g., *Bradley v. American Smelting and Refining Co.*, 104 Wash. 2d 677, 694-695, 709 P.2d 782, 792 (Wash. 1985).

331. WASH. REV. CODE § 70.94.230 (“[N]othing herein shall be construed to supersede any local county, or city ordinance or resolution, or any provision of the statutory or common law pertaining to nuisance ...”) (2010).

332. *Bradley*, 104 Wash. 2d at 694-695, 709 P.2d at 792.

333. WASH. REV. CODE § 70.94.901 (2010) (“This 1967 amendatory act shall not be construed to create in any way nor to enlarge, diminish or otherwise affect in any way any private rights in any civil action for damages.”).

334. *Bradley*, 104 Wash. 2d at 695, 709 P.2d at 792.

335. *Id.*

336. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981).

337. See *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987).

338. See *id.*

339. *Fireman's Fund v. City of Lodi, CA*, 271 F.3d 911, 53 ERC 1417 (9th Cir. 2001).

common law action under state common law, environmental statutes will not preempt it.

2. *The Harm Caused is Not Actual, Substantial or Significant*

One of the most difficult hurdles for a plaintiff to overcome is establishing that the harm to their property was “significant,” for nuisance actions³⁴⁰ or caused the “actual and substantial” harm required for a trespass.³⁴¹ Odor is subjective, and it is difficult to prove that foul odors cause more than a “slight inconvenience or petty annoyance.”³⁴²

In an article discussing common law strategies for litigation against CAFOs, Andrew Hanson, currently an attorney for the Department of Justice, suggests that agricultural defendants would not have a difficult time finding neighbors and other community members, and perhaps even other AFO owners, to testify that the odors and air pollution are not a nuisance to them, which would make the plaintiff’s experience appear subjective and hypersensitive.³⁴³ However, depending on the particular situation, a plaintiff living in close proximity to an AFO and suffering from the brunt of the emissions may have an easier time showing substantial harm than a plaintiff who lives further down the road.³⁴⁴ There may also be a point where nearly any reasonable person would recognize an obvious nuisance stemming from the waste and related emissions of thousands of animals and the constant application of animal manure to the land.

V. UTILIZING THE STATUTORY AND COMMON LAW FRAMEWORK TO SUPPORT CLAIMS AGAINST ANIMAL FEEDING OPERATIONS

The air quality situation in the Yakima Valley provides a

Opinion withdrawn by Fireman’s Fund Ins. Co. v. City of Lodi, CA, 287 F.3d 810 (9th Cir. 2002).

340. RESTATEMENT (SECOND) OF TORTS § 821F (1979).

341. Bradley v. American Smelting and Refining Co., 104 Wash. 2d 677, 692, 709 P.2d 782, 791 (Wash. 1985).

342. RESTATEMENT (SECOND) OF TORTS § 821F cmt. c (1979); Hanson, *supra* note 89, at 318.

343. Hanson, *supra* note 89, at 318.

344. *Id.* at 319.

concrete case study for examining how citizens can utilize the existing statutory frameworks and the common law to curb air emissions from AFOs, and potentially gain monetary or injunctive relief. Despite exemptions the farms enjoy from environmental statutes and the RTF statute, and in the face of likely defenses to common law actions, there is reason to believe that directly violating the law, deviating from standard agricultural practices, and causing substantial, significant harm are all actions that citizens can document to break down the exemptions and obtain desired relief.

A. Violations of Laws, Ordinances, and Administrative Rules

Citizens may be able to work around the statutory exemptions if the offending farm violated a federal or state law, administrative rule, or local ordinance. For example, residents could observe a large CAFO violating its CWA permit by activities like unlawful spreading of manure on frozen ground.³⁴⁵ Other violations of NPDES permits at regulated CAFOs, or violations of the RCRA at unregulated CAFOs and AFOs, such as the over-application of manure to a saturated field, would also constitute noncompliance and have happened at local dairies.³⁴⁶ Similarly, the failure to report hazardous releases under CERCLA and EPCRA (to the extent the statutes are applicable to the facility) would also be unlawful. However, the CWA permit system regulates only ten CAFOs in Yakima County,³⁴⁷ which are the only facilities required to obtain permits and comply with the CWA. The numerous remaining dairies are small enough to be considered AFOs or small CAFOs, and could, alternatively, be targeted by a RCRA action if they violate the statute.

In addition to direct causes of action pursuant to violations of environmental statutes, evidence that an AFO has violated a federal or state law, administrative rule, or local ordinance can be valuable for several reasons. First, violation of federal or state law can be direct evidence to establish a claim of

345. *Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy*, 65 F. Supp. 2d 1129, 1151 (E.D. Wash. 1999); 40 C.F.R. § 412.46(a)(1)(i) (2010).

346. *See State Fines Yakima Valley Dairy for Runoff*, SEATTLE TIMES (May 20, 2010, 12:19 PM) http://seattletimes.nwsources.com/html/localnews/2011912390_apwadairyfine.html.

347. *Facility/Site Search*, *supra* note 22.

negligence³⁴⁸ and of a nuisance *per se*.³⁴⁹ A nuisance *per se* finding would allow a litigant to circumvent the RTF Act, if applicable, which requires defendants to comply with all applicable laws.

Second, MTCA provides that fertilizer application is only exempt if it is performed lawfully and is not negligent.³⁵⁰ If a regulated CAFO over-applied manure, for example, the MTCA reporting exemption would no longer apply, and citizens could sue to enforce reporting requirements if and when the CAFO emissions exceed the 100 pounds per day threshold when applying manure to fields. Third, violations can show that the farm operator deviated from standard or good agricultural practices, since obeying the law is a standard farming practice.³⁵¹

B. Deviation From Standard Agricultural Practices

Even in the absence of direct violations of the law, litigants could avoid applicability of the RTF Act by showing that an AFO or CAFO in the area deviates from standard practices by, for example, over-applying liquid manure to a saturated field. The Act would not provide nuisance immunity if the AFO did not use the Act's required good practices, and it would arguably demonstrate negligence as a breach of ordinary care.³⁵² It should be noted, however, that establishing exactly what the "standard practice" is, in a changing climate of farming, could prove difficult.³⁵³

Additionally, even lawful discharges of pollutants in compliance with a CWA permit can amount to a nuisance in

348. WASH. REV. CODE § 5.40.050 (2010).

349. *Tiegs v. Watts*, 135 Wash. 2d 1, 14, 954 P.2d 877, 884 (1998) ("Discharges in violation of permit requirements constitute a nuisance which subjects violators to damages.")

350. WASH. REV. CODE § 70.105D.040(3)(d) (2010).

351. Hanson, *supra* note 89, at 313.

352. Hanson, *supra* note 89, at 313; Terrence J. Centner, *Nutrient Pollution from Land Applications of Manure: Discerning a Remedy for Pollution*, 21 STAN. L. & POL'Y REV. 213, 240-241 (2010).

353. See Reinert, *supra* note 254, at 1720-21 ("In statutes that rely on generally accepted practices, it is often unclear who determines these practices and who bears the burden of proving that a certain practice is generally accepted."); see also Brehm, *supra* note 97, at 816.

Washington.³⁵⁴ The fact that the government tolerates a nuisance is not a defense if the action still interferes with the plaintiff's use and enjoyment of property.³⁵⁵

Thus, the 10 large CAFOs in the Yakima Valley may have permit shields against citizen suits under the statutory scheme for violations of the environmental statutes, but CWA regulation does not shield against a common law action, even when the facilities are in compliance. Even though the environmental statutes are littered with exemptions for agricultural facilities, and the remaining AFOs in the Yakima Valley are not regulated under the CWA, the statutes can still be used to demonstrate the ordinary standard of care in a common law suit.³⁵⁶

C. Establishing Substantial or Significant Harm or Substantial Threat to Public Safety and Health

A nuisance claim requires a showing of significant harm that a reasonable person would find offensive.³⁵⁷ Similarly, a trespass of microscopic particles or odor requires "actual and substantial damages."³⁵⁸ The RTF Act also does not protect an AFO from a nuisance action if the farm is a substantial threat to public health or safety.³⁵⁹

The problems relating to AFOs in the Yakima Valley have been featured in numerous news articles,³⁶⁰ books,³⁶¹ and other media, including the Oprah magazine *O*,³⁶² and the pollution

354. *Tiegs*, 135 Wash.2d at 14-15, 954 P.2d at 884.

355. *Id.*

356. Hanson, *supra* note 89, at 313.

357. RESTATEMENT (SECOND) OF TORTS § 821F (1979).

358. *Bradley v. American Smelting and Refining Co.*, 104 Wash. 2d 677, 692, 709 P.2d 782, 791 (Wash. 1985).

359. WASH. REV. CODE § 7.48.305(1) (2010).

360. *See, e.g.*, Lester, *supra* note 23; Ward, *supra* note 18; Leah Beth Ward, *Obscure Rule on Manure Stirs Controversy*, YAKIMA HERALD-REPUBLIC (Aug. 17, 2009, 11:31 PM), <http://www.yakima-herald.com/stories/2009/08/17/obscure-rule-on-manure-stirs-controversy>; *State fines Yakima Valley Dairy for Runoff*, SEATTLE TIMES (May 20, 2010, 12:19 PM) http://seattletimes.nwsources.com/html/localnews/2011912390_apwadairyfine.html.

361. *See, e.g.*, KIRBY, *supra* note 20.

362. *The Hidden Costs of Eating Meat*, O, THE OPRAH MAGAZINE, Apr. 2010, available at <http://www.oprah.com/health/CAFOs-Exposed-in-Animal-Factory-by-David-Kirby>.

from the Yakima Valley's dairy farms has been the subject of several lawsuits.³⁶³ The EPA even deems the area as one of the EPA's environmental justice "Showcase Communities."³⁶⁴ Interviewed residents have said that they cannot go outside their homes,³⁶⁵ and one author said that spending time in the presence of the farms in the Yakima Valley caused him to develop "manure flu:" a mild fever, aching joints, a "phlegmatic hack," and a raspy throat.³⁶⁶ He also recounts opening his suitcase after he returned home and being hit with the smell all over again from his odor-soaked clothing.³⁶⁷

With all of this in mind, a jury should not have a hard time finding substantial harm, especially if the "right" plaintiff—one who has suffered from living near an AFO—brought suit. The attention the area has received for its air pollution, as well as the science backing the health effects related to living near an AFO, should qualify as substantial harm for the typical resident living near an AFO who has concrete proof of experiencing the health effects AFOs typically cause.

D. Right to Farm Statute May Not Apply if Farms Were in Existence Before AFOs Moved to the Area

Under Washington's RTF Act, as interpreted by the Washington State Supreme Court, AFOs and CAFOs only receive immunity from nuisance actions if an individual who has encroached on an established farm or agricultural area brings the suit.³⁶⁸ In the case of the Yakima Valley, many of the residents are rural and grew up as farmers,³⁶⁹ making the

363. *Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy*, 65 F. Supp. 2d 1129 (E.D. Wash. 1999); *Community Ass'n for Restoration of the Environment v. Sid Koopman Dairy*, 54 F. Supp. 2d 976 (E.D. Wash. 1999).

364. *Environmental Justice Showcase Communities*, *supra* note 25.

365. See, e.g., Lester, *supra* note 23; KIRBY, *supra* note 20 at 3, 43; *Down on the Factory Farm: The Lower Yakima Valley*, ME AND MY PLANET: WATERSHED MEDIA'S ONLINE JOURNAL (Nov.18, 2010), <http://watershedmedia1.blogspot.com/2010/11/down-on-factory-farm-lower-yakima.html>.

366. David Kirby, *From Homeland to Wasteland*, ALL ANIMALS MAGAZINE, July/August 2010, available at http://www.humanesociety.org/news/magazines/2010/07-08/from_homeland_to_wasteland_1.html.

367. *Id.*

368. *Buchanan v. Simplot Feeders, Ltd. Partnership*, 134 Wash. 2d 673, 684, 952 P.2d 610, 615 (Wash. 1998).

369. KIRBY, *supra* note 20, at 43.

RTF defense by an AFO inapplicable under *Buchanan*. Additionally, most of the AFOs did not move into the area until the 1990s, and some of the residents lived there long before the invasion of the factory farms.³⁷⁰

Residents that lived in the Yakima Valley before the AFOs moved in would be excellent candidates to maintain a nuisance action because their situation would be analogous to that of the Buchanans, who had an existing farm before the nuisance farms sprung up next door.³⁷¹ Also, as discussed above, the RTF Act's immunities may not apply if the AFO is deviating from standard agricultural practices and/or is a threat to public health or safety.

VI. CONCLUSION

American history and ideology reveres farmers and agriculture, which leads to potential difficulties in enforcement litigation.³⁷² However, today's AFOs are more industrial and are responsible for large amounts of air and water pollution.³⁷³

Despite the fact that CAFOs and AFOs emit hydrogen sulfide, ammonia, volatile organic compounds, and particulate matter into the air, causing documentable environmental and health problems as well as foul odor, these industries enjoy exemption under federal and Washington State environmental statutes unless they deviate from standard agricultural practices or violate the law. Common law actions often prove difficult because the harm must be substantial and objectively unreasonable. Furthermore, state right-to-farm laws insulate AFOs from nuisance liability unless the plaintiff lived in the area first, is a farmer, or the AFO is a substantial public health risk. In addition, no formal structure is in place for measuring air emissions from farming facilities, even if the aforementioned exemptions did not exist, and citizens have had little success working with the local Yakima Regional Clean Air Authority.

In light of these exemptions, and in order to succeed in their quest for relief from AFO-related air pollution and odor,

370. *Id.*

371. *Buchanan*, 134 Wash. 2d at 676.

372. Ruhl, *supra* note 73, at 265.

373. *Id.*

litigants in Washington State can still utilize the statutory and common law in certain circumstances. By documenting the adverse public health effects experienced, proving that they are “substantial,” and showing the potential deviations from standard agricultural practices or the law by AFO and CAFO operators, Washington citizens may achieve a reduction in air emissions and obtain individual or public relief. This may, in turn, influence industrial farmers in Washington State and across the nation to change their practices and reduce their impact on the environment and human health.