



Tactics for Attorneys with Clients Suffering Harms from Industrial Animal Agriculture

Our nation is catching up with what we at Public Justice have known for a long time: bad actors in this industry can create serious problems in our nation's heartland. But not every instance of harm is actionable in court. Knowing what set of facts give rise to a viable claim may spare your clients from needless disappointment. Many rural community members who have experienced prolonged harm, or fear harm to their community from a proposed facility, feel lost in a system they perceive as broken. When complaints are ignored by agencies, voices are dismissed in public hearings, and elected officials disregard their constituents in favor of industry support, it is no wonder that community members often see courts as their last hope. When cases are dismissed because the facts alleged in a complaint fail to state a viable claim, communities may experience a second wave of disappointment and feel as if both systems have failed them.

The Food Project offers resources to help you screen and evaluate cases against potential harms from new and expanding factory farms, slaughterhouses. We have expertise in almost every area of the law you need to protect your client. **Join the Local Support Network and Become a Public Justice Member.** Public Justice is launching a network of attorneys interested in factory farm litigation and in the next several months will begin offering legal materials to help attorneys involved in local "site fights." As a member of the network, we will also refer potential clients in your state to you if you indicate interest in receiving referrals. [Click this link](#) to request to join this network and become a Public Justice Member.

Environmental Review. Environmental review requirements are often triggered by local permitting decisions under state law. Generally speaking, these laws require analysis of project-level and cumulative impacts and some impose a duty to mitigate or avoid impacts. *See, e.g.* California Environmental Quality Act, Public Resources Code §§ 21000 *et seq.* Federal review under the National Environmental Policy Act applies to any major federal action such as federal financing for factory farm construction. *See Buffalo River Watershed Alliance v. Department of Agriculture*, 2014 WL 6837005 (E.D. Ark. Dec. 2, 2014). It is possible that an endangered or threatened species lives within the siting area of a new facility, and that should be explored during any environmental review process. *See also* Endangered Species Act, 16 U.S.C. § 1531 *et seq.*; 91 50 C.F.R. § 402 *et seq.*

Local and State Siting. Local construction permit laws, municipal and county zoning regulations and ordinances, and each state, and often each county, addresses factory farming differently. Find out how your state and county refer to animal agriculture in their laws and what they require on part of the factory farm, slaughterhouse, or processing plant.

Air Quality. Depending on the severity of the air pollution problem in the area and the size of the factory farm, federal or state level air pollution permits and pollution controls may be required. Depending on the type of factory farm, emissions factors could help estimate emissions, or the environmental review discussed above could be used as a tool to publicly disclose the sources and amounts of air pollution.

The Clean Air Act requires that all new and modified “major” stationary sources within nonattainment areas obtain a preconstruction permit, install pollution control equipment to achieve the Lowest Achievable Emission Rate, carry out an alternative siting analysis, purchase “offsets” from other sources in the nonattainment area to reduce the severity of the air pollution in the area, and refrain from causing or making worse the violation of an ambient air quality standard. 42 U.S.C. §§ 7502(c)(5), 7503(a); 40 C.F.R. § 51.165 (minimum NSR requirements). While the Act directs EPA to promulgate national ambient air quality standards to limit the amount of harmful air pollutants, it also commands the states to devise State Implementation Plans (“SIPs”) to bring polluted areas into compliance with these health-based standards. 42 U.S.C. § 7410; *Vigil*, 366 F.3d at 1029. For any given state, certain provisions may impose specific factory farm requirements. See San Joaquin Valley Air Pollution Control District Rule 4570 (Confined Animal Facilities). Other provisions may impose more stringent new source permitting than the minimum required by the Act. See San Joaquin Valley Air Pollution Control District Rule 2201 (NSR rules requiring a permit and Best Available Control Technology at an emission unit that exceeds 2 lbs./day). Still other provisions may target specific pollutants, such as ammonia or hydrogen sulfide.

Groundwater Quality. When factory farms, slaughterhouses, or processing plants store waste in unlined lagoons or apply waste to land application fields in excess of agronomic needs, groundwater can become contaminated with nitrates and other pollutants. A powerful legal tool can help rural residents facing such groundwater contamination. The Resource Conservation and Recovery Act prohibits any person from handling storing, treating, transporting, or disposing of solid or hazardous waste in a way that may cause or contribute to the creation of an “imminent and substantial endangerment to human health or the environment.” 42 U.S.C. § 6972(a)(1)(b). RCRA is a strong tool for litigators to use because it had such a protective standard for endangered plaintiffs. Plaintiffs establish liability under 42 U.S.C. § 6972(a)(1)(B) by demonstrating that (1) a “person” has (2) “contributed” to (3) the “past or present handling, storage, treatment, transportation, or disposal of” (4) any “solid or hazardous waste,” and (5) the waste in question “may present an imminent and substantial endangerment to health or the environment.” *Ecol. Rights Found. v. Pacific Gas & Elec. Co.*, 713 F.3d 502, 514 (9th Cir. 2013) (citation omitted). Note that discharges to groundwater that are covered by a Clean Water Act NPDES permit are exempt from the Resource Conservation and Recovery Act.

Many states have, as part of their water pollution regulation systems, a specific requirement or permitting system around “Land Application Systems” (LAS) or other groundwater discharges that are separate from the surface water discharges. We encourage attorneys to familiarize themselves with the standards and permitting regarding groundwater in their state.

Water Pollution. A factory farm, slaughterhouse, or processing plant may require a federal Clean Water Act permit if the facility is a Concentrated Animal Feeding Operation. *See* 40 C.F.R. § 122.23. The National Pollutant Discharge Elimination System (NPDES) permitting program is the primary pollution control mechanism available to EPA and the states to regulate point source discharges.” 33 U.S.C. § 1342. “Concentrated animal feeding operations” are specifically included in the Clean Water Act’s definition of “point source.” *Id.* § 1362(14), which means that these facilities fall under the NPDES program if they discharge waste into “waters of the United States.” 40 CFR 230.3(s). NPDES permits often take the form of a general permit issued by the state which would apply to multiple facilities. There are several types of violations to look for, including discharges without a permit (33 U.S.C. § 1311(a)), permit discharge exceedences, and compliance schedule violations, such as failing to upgrade waste management equipment or a failure to submit monitoring reports or other data. In addition, permits must be renewed every five years, which opens up another opportunity for comments, especially on the adequacy of the facility’s waste management, storage, and disposal plans. 33 U.S.C.A. § 1344; 33 C.F.R. § 325.3(a)(1).

Most states also have state-level regulatory permits for “zero-discharge” or “no potential to discharge” facilities. If your client presents facts regarding water pollution, it is worthwhile to research the state-level permitting for concentrated animal feeding operations and the regulations relating to it.

Nuisance. For a resident experiencing harm from an existing factory farm, slaughterhouse, or processing plant nuisance provides a common law remedy for damages and injunctive relief. Nuisance claims remain a powerful tool even in the face of some Right to Farm Laws. *See, e.g. Gacke v. Pork Xtra, LLC*, 684 N.W.2d 164 (Iowa 2004); *McIlrath v. Prestage Farms of Iowa*, 889 N.W.2d 700 (Iowa 2016). In the context of an applicable Right to Farm law, pairing a nuisance claim with an as-applied deprivation of a property interest claim to undermine the right to farm law should be considered.

Community Organizing. In the context of factory farm site fights, do not overlook the tactical value and power of an organized and empowered community group. Employ community lawyering tactics and support the community’s organizing activities to help your clients build power. Community organizing tactics have the potential to yield favorable decisions depending on the forum, and often work well in combination with legal tactics to persuade decision-makers to deny a permit.

Stay tuned. The Food Project will develop additional materials and post them at food.publicjustice.net/attorneyresources/