LITIGATION STRATEGY:
Challenging Pennsylvania's CAFO Immunity Law

SPRING 2020
PREPARED BY
Simon Engler
Tim Ibbotson-Sindelar
Angus McLean
Lexi Smith
Executive Summary

• CAFO* immunity laws (or "right-to-farm laws") are statutes that prevent plaintiffs from seeking redress in court for some of the health and environmental harms caused by industrial animal agriculture.

• Overturning or modifying CAFO immunity laws could help communities stand up for themselves against CAFO pollution. In the longer term, doing so could force big integrators to internalize some of the costs that they impose on rural communities, making it more expensive for factory farms to exploit animals, workers, the environment, neighboring communities, and the public at large.

• This white paper proposes a litigation strategy to overturn or curtail Pennsylvania’s CAFO immunity law. It focuses on three main theories, positing that the law violates Pennsylvania’s Environmental Rights Amendment; represents an impermissible taking of Pennsylvanians’ property; and impairs residents’ existing contractual rights.

• Before bringing a case, advocates should carefully consider the risks of litigation; standing requirements; plaintiff and defendant selection; and the prospect of complementary interventions outside of the courtroom. This white paper discusses these practical and strategic considerations and recommends next steps for interested advocates.

* "CAFO" stands for Concentrated Animal Feeding Operation.
Introduction

Industrial animal agriculture contributes to climate change, undermines workers’ rights, and causes animal suffering. [1] It also produces local environmental harms—with human consequences. By contaminating water and polluting the air, concentrated animal feeding operations, or CAFOs, can reduce local property values, damage public health, and lower local communities’ quality of life. [2] Many of those harms can occur even when CAFOs adhere to the letter of the regulations that govern them.

Longstanding principles in common law suggest that people and communities should be able to seek redress for such harms in court. By bringing suits in nuisance—a tort in which one property owner’s use of their land—plaintiffs could ask courts either to require CAFOs to stop the practices that are harming them, or to mandate that CAFOs compensate them for those harms.

Thanks to statutes commonly known as “right to farm” laws, however, many communities are barred from doing just that. “Right to farm” laws prohibit suits in nuisance against agricultural operations. This white paper proposes a litigation strategy to remove that roadblock in Pennsylvania, opening up a new avenue for communities to defend themselves from the harms caused by CAFOs.

Theory of Change

The words “right to farm” conjure up a rosy picture, evoking family farmers pursuing free enterprise on a bucolic frontier. There may have been some truth to that image in the 1970s, when state legislatures first introduced right-to-farm laws in an attempt to stop America’s growing suburbs from swallowing up its farmlands. Over the last half-century, however, American agriculture has grown more mechanized and concentrated, and the effects of right-to-farm laws have changed. Instead of preserving traditional livelihoods, right-to-farm laws now help corporate CAFOs pollute with impunity. [3]

Right-to-farm laws make agricultural operations, including CAFOs, immune to nuisance suits brought by neighboring landowners. If a family lives on a property abutting a CAFO, and that CAFO’s stench prevents that family from opening the windows of their house or spending time outside, a right-to-farm law may eliminate that family’s power to seek redress in court. To reflect their real effects, this whitepaper refers to right-to-farm laws as “CAFO immunity laws.”

All fifty states have some version of a CAFO immunity law. [4] The statutes remove an avenue for pushing CAFOs to internalize the costs that they foist upon local communities. They also demobilize a constituency—CAFOs’ neighbors—that is personally affected but currently has few ways to enforce its rights in court. The constituency is one of the most broadly sympathetic available because they are not big-city greens or animal rights activists with ideological opposition to CAFOs, they are rural residents who are suffering because big corporations are not taking responsibility for their actions. Litigation against these laws is worth supporting in places where it could help restore the ability of one of the movement’s most useful allies to take part in the fight against the injustices wrought by CAFOs.

Challenges to CAFO immunity laws have been brought in several states. While some won major victories, perhaps most notably in Iowa, [5] there have also been setbacks. [6] Though past losses are discouraging and should caution advocates to only bring challenges under the right conditions (more on the mechanics of building a case in the section titled “Practical Considerations for Bringing a Case” below), there is reason to believe that a challenge in Pennsylvania could be successful.

Pennsylvania’s CAFO Immunity Law

Pennsylvania’s CAFO immunity law, passed in 1982, is particularly vulnerable to legal challenges because it creates a very strong bar to agricultural nuisance suits. It prohibits suits against any “normal agricultural operation,” meaning one that follows customary practices, that has been in operation for a year or more. It also limits municipal regulations on CAFOs, barring cities, towns, and counties from defining nuisance to include manure application; limiting the expansion of agricultural operations; and regulating farms differently based on the type of production (by, for instance, treating animal operations differently from plant farming). [7] In 1998, the state legislature amended the statute to grant even broader protections to expanding farms. While a farm must have been in lawful [8] operation for a year prior to the nuisance action to be protected, substantially expanded or altered farms are protected from nuisance suits related to those changes immediately, so long as they have already filed an approved nutrient management plan with the state. [9]

Courts have not ruled on the constitutionality of Pennsylvania’s CAFO immunity law because such a challenge has never before been brought, so the strategies outlined in this whitepaper remain viable. While past judicial interpretations of the statute are discouraging in one sense because courts have generally applied it strictly, they are also helpful because they have not softened the law’s most constitutionally questionable provisions.
Litigation Strategies

This section details several legal theories that could be used to challenge Pennsylvania’s CAFO immunity law, listed in order of their apparent potential.

I. Environmental Rights Amendment

Article I, Section 27 of the Pennsylvania State Constitution, known as the Environmental Rights Amendment (ERA), creates a right to a healthy environment (RTHE) and enshrines the state’s public trust doctrine:

"The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." [10]

Under these provisions, plaintiffs could argue that the state legislature has an affirmative obligation to conserve and maintain public natural resources, including clean air and water, to benefit all Pennsylvanians, and that this obligation limits the legislation that the General Assembly can pass. [11] The CAFO immunity law is arguably unconstitutional under those limitations because it protects harmful pollution and narrows avenues for redress through litigation or local ordinances. This line of reasoning offers perhaps the most promising route to striking down or curtailing the CAFO immunity law.

The resources protected under the ERA are quite broad. [12] and encompass the air and water pollution harms associated with CAFOs. Pennsylvania courts have also understood the ERA to limit the state legislature’s ability to restrict local environmental ordinances. [13] This also likely applies to the CAFO immunity law, which overrules local control of land use decisions, fosters decisions that do not consider local concerns, produces disproportionate environmental burdens, and commands municipalities to ignore their ERA obligations and do away with environmental protections.

It is worth noting that most of the recent precedent-setting ERA cases were related to the fracking industry. That may be useful because Pennsylvania’s fracking industry has key similarities to the state’s animal agriculture industry. Both CAFOs and fracking sites are dispersed throughout rural Pennsylvania, bringing economic gains to corporations and environmental harms to their neighbors.

II. Takings

A second strategy would involve a plaintiff arguing that Pennsylvania’s CAFO immunity law is unconstitutional on the grounds that an element of his or her property rights has been taken by the government without just compensation, in violation of the Pennsylvania Constitution’s takings clause. [14] Successful facial challenges were brought to Iowa’s CAFO immunity law using this strategy. [15] Pennsylvania’s law may be vulnerable to a similar approach because the two states constructed their statutes in similar ways.

There are two main categories of takings: physical and regulatory. Physical takings involve an invasion of property, while regulatory takings occur when a regulation goes too far in restricting the use and enjoyment of property. Arguing that Pennsylvania’s CAFO immunity law results in a physical taking would be a more promising route; that was the strategy used in the Iowa cases. [16] Regulatory takings cases in other states have not seen success.
The judgments in Iowa have not carried over to other states because few states have laws that prescribe immunity as broadly as Iowa’s did. In Iowa, even plaintiffs who did not “come to the nuisance”—that is, who obtained the affected properties after the activities that caused the alleged nuisance had already begun—were barred from bringing suit. In other states, there is generally a period of time after the start of a nuisance activity during which neighbors may bring suit. But Pennsylvania’s law is constructed in a way that more closely resembles Iowa’s. The 1998 amendments provide total and immediate immunity to existing farmers who begin new nuisance activities through expansion or operational changes, so long as they have already submitted an approved nutrient management plan to the state.

Were the 1998 amendments to be struck down via a successful takings suit, the remainder of the law could remain intact due to the law’s severability clause. This would still represent a victory, however, as the amendment is perhaps the most harmful aspect of the law, shutting aggrieved property owners out of the judicial system with no window of opportunity to bring a suit against a new nuisances.

III. Contractual Impairment

Section 17 of the Pennsylvania Constitution, [17] which deals with the impairment of contracts and grants of special privileges or immunities through statutes, has never been used to challenge Pennsylvania’s CAFO immunity law, but plaintiffs looking to bring such a challenge could potentially use the provision in two ways.

First, plaintiffs could demonstrate that a contract for purchasing or mortgaging land in proximity to a CAFO has been impaired by the imposition of the CAFO immunity law, which took away the ability to bring a nuisance suit for harms on the property. This strategy would only work for a landowner who purchased their land prior to the law’s passage in 1982, or perhaps its amendment to bar a broader variety of nuisance suits in 1998. This approach would be more likely to succeed if plaintiffs demonstrated that the expectation of nuisance redressability was implicit in their contract; [18] that the contractual impairment is unreasonable in comparison to the purported public purpose behind the CAFO immunity law; [19] and that their right to redress for nuisance has been entirely eliminated, thus materially impairing the benefits of ownership. [20]

The second strategy would be to demonstrate that the CAFO immunity law makes an irrevocable grant of special privileges or immunities through special protection from rights of action that are normally universally available. This strategy, however, is less likely to succeed than the first based on the way Section 17 has been interpreted by Pennsylvania courts. [21]

Benefits and Drawbacks of Litigation

Advocates considering any of the above approaches should keep the risks and benefits of using litigation in mind. Legal battles can be long, expensive, and uncertain. In cases that raise constitutional claims, such as the one this whitepaper proposes, there is an additional risk of setting broad precedents, making the consequences of failure more consequential (and the rewards of success more sweeping). But there are also benefits to bringing a lawsuit. First, the discovery process can bring facts and stories to light and into the public record. Second, advocates can carefully select the judicial arena, defendants, and plaintiffs to increase the chances of a favorable outcome, which is particularly important in a state like Pennsylvania, where the legislature is unfriendly to environmental and animal welfare reforms in the factory farming industry. [25] And lastly, when advocates combine the discovery process with careful party and case selection, they can create and present a compelling narrative to the public, the courts, and the legislature.

Litigants should also recall the importance of accompanying litigation with a broader legislative or advocacy intervention plan. A successful case, if isolated, can potentially lead to transient change, while even an unsuccessful case that is part of a larger strategy can produce long-term benefits. Potential legislative interventions to pair with litigation strategies are discussed in the section titled “Legislative Measures to Pair with Litigation,” below.
Case Study: CAFO Nuisance Suits in North Carolina

In 2014, 26 nuisance cases were filed against Murphy-Brown LLC—a division of Smithfield Foods—by nearly 500 plaintiffs in North Carolina who lived near farms operated by the company. [26] To date, five of these cases have been heard, and the plaintiffs prevailed in each one. Cumulatively, juries have awarded nearly $550 million in damages to the 36 plaintiffs involved in the five cases. Due to a state law that limits punitive damages to three times compensatory damages, the total awarded was reduced to $98 million. However, there are still 21 cases pending, and this already represents a significant blow to the CAFO business model. North Carolina’s CAFO immunity law did not apply in these lawsuits because the plaintiffs did not “come to the nuisance” in question. These cases thus represent what can be possible for communities when CAFOs are not protected by overreaching immunity laws.

Practical Considerations for Bringing a Case

This section details how to bring a challenge to the CAFO immunity law in practice, how to select plaintiffs and defendants, and a number of other nuts-and-bolts considerations.

The CAFO immunity law could be challenged in three ways:

- By bringing a facial challenge against the CAFO immunity law, using the fact that the ERA is self-enforcing;
- By bringing a nuisance suit that counters the use of the CAFO immunity law as a defense with constitutional challenges; or
- By passing an ordinance that strategically conflicts with the CAFO immunity law in partnership with a municipality, and then raising constitutional challenges as a defense when a CAFO sues the municipality under the CAFO immunity law.

Each approach comes with benefits and drawbacks. A facial challenge would allow for a broader coalition of plaintiffs and would raise constitutional issues most directly, which could be overlooked in other suits if the court decides to rule narrowly on other grounds. Using a nuisance suit, on the other hand, would ground the case in a specific story of human suffering and would more easily meet standing requirements around demonstrated harm. As for the municipal ordinance strategy, it would also ground the case in concrete harms and would bring the added benefit of positioning the CAFO as the aggressor, but it could be challenging to find a rural municipality willing to take on a highly political ordinance and case.

The maxim “bad facts make bad law” applies in this case, as in any other. Regardless of which of the above strategies are pursued, potential litigants must carefully consider a variety of key elements in order to bring a successful suit.

First, defendant selection turns on:

- **Insufficient environmental consideration in the existing regulatory scheme by the state legislature.** The Pennsylvania Supreme Court has held that failure to consider environmental effects in the passage of legislation with such effects constitutes a violation of the ERA. [27] so a suit against the state will turn in part on the legislative record for the CAFO immunity law.

- **The CAFO’s noncompliance with existing regulations.** Since compliance with existing requirements can be raised as a defense, [28] the ideal defendant would be one with a significant track record of major violations of existing law. [29]
• **Ease of establishing causation:** Broad environmental problems (such as the degradation of a watershed) are difficult to attribute to any single source. Therefore, if challenging a specific CAFO or working in a specific municipality, advocates should seek plaintiffs with specific harms traceable to a particular CAFO. For the broader constitutional challenges, whether raised in a suit against a CAFO or the state government, demonstrating a causal link between the CAFO immunity law and environmental harms will be essential.

• **Issues of successorship:** If the CAFO committed major violations in the past but has since changed ownership, that would make the case significantly more difficult to bring. Ideally, the CAFO would have been in the hands of the same owner with frequent, significant, and ongoing violations over a long period.

• **Role in the supply chain:** It would be best to bring suit against the largest possible entity involved in a given CAFO, such as a national poultry or hog integrator. Doing so would bring a variety of strategic benefits: larger operations cause more harm, making it easier to demonstrate causation; bigger integrators are less sympathetic and avoid common narratives around family farms; they have more resources with which to compensate victims, and they do not raise some of the equity concerns that come with suing small farmers. [30]

When selecting a plaintiff, litigators should consider:

• **Limitations on the self-enforcing nature of the ERA:** While the ERA has been found to be self-executing and enforceable by citizen suits, [31] its terms are not absolute. [32] A plaintiff with demonstrable and significant harms from a CAFO is most likely to succeed.

• **Standing:** Standing to sue under the ERA depends on proximity to environmental harm, [33] and in some cases, whether the government has properly balanced competing industrial and ecological interests. [34]

• **Exhaustion:** ERA claims have been dismissed for failure to exhaust administrative remedies in the past, [35] but there is an exemption to the doctrine of exhaustion of administrative remedies where the constitutionality of the statutory scheme is challenged. [36] Litigators could also seek plaintiffs who have tried to get redress through existing regulatory avenues.

Finally, litigators should consider:

• **Resources needed to meet the burden of proof:** For challenges under the ERA, the burden of proof is on the plaintiffs. [37] Meeting this burden will likely require scientific evidence and expert testimony to demonstrate harm.

• **Courts’ tendencies to fall back on the political questions doctrine and separation-of-powers issues when confronted with broadly impactful rulings:** By structuring the case to counter the assumption that environmental rights are secondary to other rights, and reassuring the bench that changes resulting from enforcement will not exceed the court’s jurisdiction, advocates can increase their chances of overcoming the political questions doctrine. Briefing should therefore emphasize the dependency of industry on environmental integrity as well as the economic benefits of environmental preservation. By upending the industry versus environment paradigm, advocates would increase the chances of a substantive ruling.

**Legislative Measures to Pair with Litigation**

Litigation has greater potential to produce significant on-the-ground impacts when advocates combine it with another strategy, such as a push for new or amended legislation. Judges are constrained to deciding the specific matters put before them, while legislative bodies have the freedom to directly shape policy. An effective accompanying legislative strategy would also be critical to safeguarding the outcome of successful litigation. [38] [39]
In Pennsylvania, the legislature is currently under Republican control, and ballot measures or local legislation may offer a more promising route than state-level lawmaker. Many of the proposals discussed below can be framed in non-partisan terms, giving them broader appeal to voters.

1. Local resolution that conflicts with the CAFO immunity law. As mentioned in the previous section, one way to pair legislation and litigation is to pass an ordinance that strategically conflicts with the CAFO immunity law in partnership with a municipality, and then raise constitutional challenges as a defense when a CAFO sues the municipality under the CAFO immunity law. This would ground the case in concrete harms, frame the CAFO as the aggressor, and allow advocates to challenge the CAFO immunity law’s limitations on municipal control over land use. The resolution could also be popular with residents; presumably, any municipality that would work with advocates on such a resolution would do so in response to serious local harms from CAFOs. One difficulty may be finding a municipality that is willing to take on a risky ordinance and case.

2. Undeveloped Lands Protection Act: [40] This model state legislation provides a useful basis for a replacement to the CAFO immunity law by striking a fair balance between farmers’ and neighbors’ property rights and interests. The law still allows nuisance immunity from actions associated with plant-based agriculture, but removes immunity for CAFO-related activities.

3. Codification of tort law. Part of the issue with expecting courts to enjoin or find significant damages against CAFOs is that judges are often reluctant to unilaterally shut down a business in their communities. If state law could define nuisances from farms with bright-line rules, judges could then look to that codification of tort law as a justification for their decisions and therefore feel less reluctant to enforce the law.

4. Protect courts’ discretion regarding damages. Some states have passed laws that deter potential plaintiffs from suing by automatically awarding attorney’s fees to defendants if a suit is deemed frivolous and by putting low caps on compensatory damages. [41] Legislation or a ballot measure that anticipates this response could essentially codify common law on the issue. Under common law, parties are generally responsible for their own attorney’s fees and court costs, while judges are given discretion to award reasonable amounts of damages on a case-by-case basis.

5. Local resolutions expressing desire for more control of property rights. A campaign pushing a template-style local resolution expressing desire for local discretion surrounding pollution from CAFOs could send a strong signal to the state legislature that state law in its current form is not working. It could also help build a broad coalition of local allies. The passage of climate-emergency resolutions around the country mirrors the type of movement this could create. [42]

---

Much of today’s environmental and animal-welfare litigation focuses on using procedural tactics to fight discrete violations. A challenge to Pennsylvania’s CAFO immunity law following the approaches set out above would be based on rights, potentially boosting its public appeal, and would seek to create a wider opening for challenges against industrial animal agriculture across a jurisdiction. That points to the real promise of curtailing or overturning CAFO immunity laws: the prospect of letting communities stand up to the injustices of the industrial animal agriculture industry themselves.

Please contact the authors if you have questions about this white paper:
- Simon Engler: simon.engler@yale.edu
- Tim Ibbotson-Sindelar: tim.ibbotson-sindelar@yale.edu
- Angus McLean: angus.mclean@yale.edu
- Lexi Smith: lexi.m.smith@yale.edu
Acknowledgments

We would like to thank the following people for their generosity in advising us on our project; any errors remain our own:

- Douglas Kysar, Deputy Dean and Joseph M. Field ’55 Professor of Law, Yale Law School
- Jonathan Lovvorn, Lecturer in Law, Clinical Lecturer in Law, Senior Research Scholar in Law, and Faculty Co-Director of the Law, Ethics, & Animals Program, Yale Law School
- Viveca Morris, Executive Director, Law, Ethics & Animals Program, Yale Law School
- Cortney Ahern Renton, Research Fellow, Climate, Animal, Food, & Environmental Law and Policy Lab, Yale Law School
- Representative Franklin Kury, former Pennsylvania state legislator and drafter of Pennsylvania’s Environmental Rights Amendment
- Marianne Engelman-Lado, Visiting Clinical Professor of Law, Yale Law School
- David Muraskin, Food Project Litigation Director, Public Justice
- Danielle Diamond, Director of Field Operations, Socially Responsible Agriculture Project
- Laura Fox, Staff Attorney, Humane Society of the United States

Endnotes


[4] For that reason, it is worth considering whether elements of the strategy detailed in this paper may be replicable elsewhere; a number of states have both something like a CAFO immunity law as well as either constitutionally enshrined rights to a healthy environment or well-developed public trust doctrines.


In Com., Office of Atty. Gen. ex rel. Corbett v. Richmond Tp., a town zoning ordinance that required daily disposal of waste from “intensive agriculture” like poultry operations was held to violate the CAFO immunity law. 2 A.3d 678, Cmwlth.2010. Daily disposal is not a customary practice, and therefore a municipality could not mandate it. This demonstrates how much the statute infringes upon municipalities’ abilities to regulate their own lands in accordance with local needs and preferences.

[9] In Builingame v. Dagostin, the Superior Court of Pennsylvania held that when applying manure generated at a CAFO to fields on another farm, the latter farm, rather than the CAFO, is the "agricultural operation" under the statute. 185 A.3d 462, Super.2018, appeal denied 194 A.3d 125, appeal denied 194 A.3d 539. In the same case, the CAFO involved constructed a new 40,000 square foot hog operation with a 1.8 million gallon manure pit, but was still held immune because it had a nutrient management plan, even though the court acknowledged that an injury had occurred. That demonstrates the scale of expansion that is protected without any sort of period during which potential plaintiffs could sue.

[10] The public trust doctrine is the concept that certain assets are inherently public and essential to the public interest, and are thus held in trust by the state regardless of private property ownership.

[11] Pennsylvania’s ERA has also been understood to place significant duties and limitations on its General Assembly: "(1) it limits the power of the state to act in derogation of protected environmental interests, and (2) it obligates the Commonwealth to act as a trustee of Pennsylvania’s public natural resources." Clean Air Council v. Sunoco Pipeline L.P., 185 A.3d 478, Cmwlth.2018. Furthermore, past precedent limiting the reach of the ERA and the public trust doctrine has been overturned, and "any laws that unreasonably impair the right [to clean air, pure water, and to the preservation of the values of the environment] are unconstitutional." Pennsylvania Environmental Defense Foundation v. Commonwealth, 161 A.3d 911, 640 Pa. 55, Sup.2017 (rejecting Payne v. Kassab, 11 Pa.Cmwlth. 14, 312 A.2d 86); see also Funk v. Wolf, 144 A.3d 228, Cmwlth.2016, affirmed 158 A.3d 642, 638 Pa. 726; Robinson Tp., Washington County v. Com., 83 A.3d 901, 623 Pa. 564, Sup.2015 (also notable for holding that the beneficiaries of the public trust are all the people of Pennsylvania, including future generations); Com. v. National Gettysburg Battlefield Tower, Inc., 302 A.2d 886, 8 Pa.Cmwlth. 231, Cmwlth.1975, affirmed 311 A.2d 588, 454 Pa. 195.

[12] While some states limit their public trust doctrine to state-owned resources or narrow categories like navigable waters, Pennsylvania’s ERA-enshrined public trust doctrine has been interpreted to cover a much broader category: "resources that implicate the public interest, such as ambient air, surface and groundwater, wild flora, and fauna, including fish, that are outside the scope of purely private property." Marcellus Shale Coalition v. Department of Environmental Protection, 193 A.3d 47, Cmwlth.2018.

[13] In Robinson Tp., Washington County v. Com., state statutory provisions were found unconstitutional under the ERA because they: "permitted industrial uses as a matter of right in every type of pre-existing zoning district." "Marginalized participation by residents, business owners, and their elected representatives with environmental and habitability concerns, while fostering decisions regarding the environment and habitability that were non-responsive to local concerns." "Result[ed] in some communities carrying a much heavier environmental and habitability burden than others," and "commanded municipalities to ignore their obligations under Environmental Rights Amendment and directed municipalities to take affirmative actions to undo existing protections of the environment in their localities." 83 A.3d 901, 623 Pa. 564, Sup.2015, on remand 96 A.3d 1104. While the case is not perfectly analogous to the prospective challenge discussed in this whitepaper, given that the CAFO immunity law does not override all zoning restrictions or preclude appellate review of state agency decisions, many of the elements in Robison are similar to the restrictions on municipal ordinances that the CAFO immunity law creates.


[16] In both Bormann and Gacke, the Iowa Supreme Court ruled that the CAFO immunity law created a nuisance easement on the plaintiff’s land, and thus the state committed a per se (physical) taking, since easements are protected private property rights. In Gacke, the court stated “Whether the nuisance easement... is based on a physical invasion of particulates from the confinement facilities or is viewed as a non trespassory invasion akin to the flying of aircraft over the land, it is a taking under Iowa’s constitution.”

[17] “No ex post facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed.” Const. art. I, § 10 provides.

[18] “Any law which enlarges, abridges, or any manner changes the intention of the parties as evidenced by their contract, imposing conditions not expressed therein...impairs obligation of contract” even if the validity, construction, duration, and enforcement of the contract are unaffected by the law. Nicolette v. Caruso, W.D.Pa.2005, 315 F.Supp.2d 710; Beaver County Building & Loan Ass’n v. Winovich, 187 A. 481, 325 Pa. 483, 1936; Pennsylvania has already held that mortgages are contracts protected under Section 17. 72 Pa. 214, 1872.


[20] There has been significant litigation around how legislative acts that only affect contractual remedies are treated under Section 17. Courts have held that in order for a contract to be impaired in such a circumstance, the remedy must be entirely taken away, see Kuca v. Lehigh Valley Coal Co., 110 A. 731, 268 Pa. 163, Sup.1920, or the act must "so change the nature and extent of an existing remedy as materially to impair the rights and interests of the party who claims the benefit of the contract. ‘Williams’ Appeal. 72 Pa. 214, 1872.

[21] Courts have held that as long as such privileges are granted "only so long as such powers should be necessary or desirable for carrying out purposes of act," subject to the legislature’s discretion, the grant is not truly irrevocable. Kelley v. Earle, 190 A. 140, 325 Pa. 357, Sup.1937. Given that the General Assembly could amend or repeal the law at any time if they deemed its grant of immunity no longer necessary or desirable, the law likely does not meet the definition of revocable under Section 17.


[23] Id.


The violations would need to be significant enough to get around the precedent set in *Branton v. Nicholas Meat LLC*: if a CAFO has been cited for an action that is unlawful in their county, but has otherwise followed the law, the CAFO would most likely still be protected. If the CAFO corrected any previously cited action, or is acting in compliance with all state agricultural laws (such as those requiring a manure management plan), they are likely considered “in compliance with the law.” 159 A.3d 540, 2017 PA Super 88.

Furthermore, under *Robison* (supra n.27), courts are supposed to balance environmental rights against the “general welfare,” among other factors. A suit against a CAFO that is under contract with a giant, out-of-state integrator seems like a stronger target insofar as the profits and welfare benefits associated with that integrator accrue outside of Pennsylvania.

*Borough of Moosic v. Pennsylvania Public Utility Commission* lays out a three-part test for reviewing cases under the ERA: “(1) Was there compliance with all applicable statutes and regulations relevant to protection of the Commonwealth’s environment? (2) Does the record demonstrate reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?” 429 A.2d 1257, 59 Pa.Cmwlth. 358. The first two prongs are addressed in the section detailing defendant selection, above.

See *Clean Air Council v. Sunoco Pipeline L.P.* 185 A.3d 478, Cmwlth.2018, appeal denied 198 A.3d 1051. In some cases, standing has also turned on whether the government has properly balanced competing industrial and ecological interests.


Id. Funk raised constitutional challenges, but they were challenges regarding the applicability of the statute to her case rather than a facial challenge to the statute as a whole. In this whitepaper’s strategy, a facial challenge would be raised.


In the wake of *McKiver v. Murphy-Brown LLC*, North Carolina passed laws 1) making compensatory damages in CAFO nuisance suits equivalent to the reduction in fair market value of the plaintiffs property and 2) automatically awarding attorney’s fees to defendants in these suits if the suit was deemed frivolous. 2018 WL 6606061 (E.D. North Carolina); Nuisance Liability of Agricultural and Forestry Operations, North Carolina Code § 106.701-106.702.

After successful facial challenges to Iowa’s CAFO immunity law, the state legislature capped compensatory damages in CAFO nuisance suits to one-and-a-half times the total amount of property value loss plus medical expenses. See Iowa Code § 657.11A.

*See Terence J. Center, “Creating an Undeveloped Lands Protection Act for Farmlands, Forests, and Natural Areas,” 17 Duke Env’l Law & Policy Form (2006).*

*Supra n.3, 5-6.*

See *Climate Resolution Project, “Climate Emergency Declaration Tracking Data.”* https://docs.google.com/document/d/1VrLtB_ymKnee_Mky5nSh5aaOEmNGCSG9i_MEc3JRE/edit.

**Image Citations (in order of appearance):**


This report was researched and written in spring 2020 by a team of Yale graduate and professional school students in the **Climate, Animal, Food & Environmental Law & Policy Lab ("CAFE Lab")**, an initiative of the **Law, Ethics & Animals Program at Yale Law School**.

The CAFE Lab’s mission is to develop novel strategies to compel industrial food producers to pay the currently uncounted, externalized costs of industrial agriculture for people, animals, and the environment. For more information about the Program and the CAFE Lab and to access its publications, please visit: law.yale.edu/animals.