

**AGRICULTURE AS INDUSTRY: THE
FAILURE OF ENVIRONMENTAL AND
AGRICULTURAL POLICY TO ADAPT TO
THE MODERN AGRICULTURAL
LANDSCAPE**

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INTRODUCTION

Joe Lemire is a cattle rancher situated in the State of Washington.¹ His property sprawls 256 acres, is home to “a couple of dozen cattle,” and is crossed by the Pataha creek, a small creek which was first cited for needing cleaning in the early 1990s.² The State of Washington claims that, throughout the span of seven years, Lemire was asked eight times to construct a fence, which would keep his cattle away from the banks of the stream, in order to prevent dirt and feces from entering the stream, to protect plants that grow along the creek bed, and to filter pollution.³ The state offered to pay for the fences; Lemire refused.⁴

The Washington State Department of Ecology informed Lemire that his cattle operation had the potential to pollute the creek and cited “violations of water quality standards for fecal coliform bacteria below [his] operation.”⁵ Lemire received an administrative order that would require his cattle to be contained at least thirty-five feet from the creek bed.⁶ Lemire appealed this order first to the state Pollution Control Hearings Board that ruled in favor of the Department of Ecology, then to a superior court judge who dismissed the order of the Pollution Control Hearings Board.⁷ In response to the ruling of the superior court judge, the Department of Ecology appealed to the Washington Supreme Court.⁸ Attorneys argued the case in November of 2012, and a decision was filed on August 15, 2013, surprisingly, in favor

¹ Steve Brown, *Washington Supreme Court Hears Arguments on Livestock Water Pollution*, CAPITAL PRESS (Dec. 12, 2012, 2:12 PM), http://www.capitalpress.com/content/SB-Supreme-Court-water-111312-art?goback=%2Egde_121100_member_185765015#%21 [hereinafter *Washington Supreme Court*].

² *Id.*; *Farm Pollution Draws Scrutiny as Industrial Dumping Declines*, OPB: EARTHFIX (Aug. 16, 2012), <http://earthfix.opb.org/water/article/agricultural-pollution-draws-scrutiny-as-industrial/> [hereinafter *Farm Pollution*]; *Little Creek Sparks Pivotal Court Battle*, CAPITAL PRESS (Dec. 20, 2012 9:29 AM), <http://www.capitalpress.com/content/cs-rancher-editorial-112312> [hereinafter *Little Creek*].

³ *Farm Pollution*, *supra* note 2.

⁴ *Id.*

⁵ *Lemire v. Dep’t of Ecology*, 178 Wash. 2d 227, 235 (2013); *Little Creek*, *supra* note 2.

⁶ *Little Creek*, *supra* note 2.

⁷ *Lemire*, 178 Wash. 2d at 230; *Id.* See *Washington Supreme Court*, *supra* note 1.

⁸ See *Washington Supreme Court*, *supra* note 1.

of the State of Washington Department of Ecology.⁹

Lemire asserted, in superior court, that there was a lack of proof that Lemire's herd of cattle had actually caused the river to be polluted; the state responded that it "has the authority to take corrective action over potential pollution before it impacts public health."¹⁰ Lemire's attorney had also raised the argument that the thirty-five foot requirement would, collectively, result in eight acres around the bank of the creek to be unusable, which would amount to three percent of Lemire's total acreage, and equate to a "taking" of his property.¹¹ The Department of Ecology contended that the order requiring Lemire to keep his cattle thirty-five feet from the bank of the river was not a "per se" taking because there would be no physical invasion of the property, and because the order would "not deprive Mr. Lemire of all economically viable use of the property."¹²

The facts and circumstances of *Lemire v. Dep't of Ecology* raise some interesting legal controversies and illustrate the conflict between those who advocate for environmental protection and those who advocate for farmers' rights. Lemire is sixty-nine years old, and is concerned that the loss of acreage and lack of access to the creek water, for his cows, may threaten his livelihood.¹³ However, if the water continues to be polluted, whether by Lemire or by other upstream and downstream farmers, there is a risk that others who depend on the well-being of the river, aside

⁹ See *Lemire*, 178 Wash. 2d at 227, 244. The Washington Supreme Court concluded that the Department of Ecology had acted within its statutory authority in issuing the order, and that the order itself was not unconstitutional. *Id.* at 242. Significantly, the court determined that Ecology had appropriately interpreted its statutory authority to allow it to regulate non-point source pollution. *Id.* at 239, 240. The court also pointed out that a causation element need not exist for Ecology to exercise its regulatory authority—all that was required in this case was that a showing by Ecology that the creek is polluted and that Lemire's cattle had access to the creek. *Id.* at 237, 242. As for Lemire's challenge to the order as an unconstitutional taking, the court held that Lemire had failed to show ". . . an economic loss that constitutes a taking." *Id.* at 243. The trial court was reversed and the decision of the Pollution Control Hearings Board was reinstated. *Id.* at 244.

¹⁰ *Id.* at 236; *Washington Supreme Court*, *supra* note 1.

¹¹ *Lemire*, 178 Wash. 2d at 242; *Washington Supreme Court*, *supra* note 1; *Little Creek*, *supra* note 2.

¹² Brief of Appellant at 34, 39–40, *Lemire v. Dep't of Ecology*, 2011 WL 7563129 (Wash. Ct. App. Dec. 14, 2011) (No. 30288-1-III).

¹³ *Lemire*, 178 Wash. 2d at 242; *Little Creek*, *supra* note 2. See also *Washington Supreme Court*, *supra* note 1 (Lemire was quoted as saying: "I don't compromise . . . [i]f I lose, I'm willing to gamble it all. Why not? I have no backup plan.").

from agricultural or industrial operations, will be negatively affected. Other creek users, like Lemire, can avoid protective regulation and continue to operate as they have in the past. Ongoing pollution would affect biodiversity within the river and have far-reaching effects on other ecosystems within the area.¹⁴ Despite the obvious environmental harms, in American society, the first inclination may be to protect the interests of farmers like Joe Lemire. In fact, a number of farm bureaus in Lemire's community, as well as other agricultural groups and organizations, banded together to offer Lemire financial support to offset the costs of his legal battle.¹⁵

In Lemire's case, it may seem easy to look the other way as his farming operation degrades the environment around him. It may be possible to justify any pollution to the creek by considering the size of Lemire's cattle operation, and the fact that he is probably unable to establish a new livelihood when taking into account his age and financial resources. Because of these factors, it seems as though Lemire has become sort of an icon in the battle of "Agriculture v. Environmental Regulators." There are a number of reasons why this generalization is inaccurate. First, Lemire is part of a larger industry. While the pollution attributed to his operation seems slight, collectively, the pollution to Pataha Creek and other bodies of water from smaller to mid-sized farming operations is likely to be significant. Second, and most relevant to this article, farmers, like Lemire, are not representative of today's agricultural industry. Regardless, it is likely that the public perceives farmers like Lemire as representative of the industry. Lemire's image, combined with the economics and politics of the modern agricultural industry, are responsible for the weaknesses in the regulatory framework and common law as it relates to the agricultural industry and the environment.

This article seeks to identify the biases that exist in the scheme of regulatory and common law, and their resulting harms,¹⁶ and

¹⁴ See generally *Farm Pollution*, *supra* note 2 (discussing similar pollution in Idaho's Lemhi river valley where a demand of water for cattle and an increase in alfalfa in the river have resulted in a drastic decrease in the river's salmon population and the tendency for the river and its tributaries to run dry).

¹⁵ *Id.*; *Little Creek*, *supra* note 2.

¹⁶ See generally J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 *ECOLOGY L.Q.* 263, 263 (2000). This includes a detailed analysis of the harms caused by agricultural exemptions or lack of environmental regulation related to, or arising from, a habitat loss and degradation, soil erosion and sedimentation, water resources depletion,

to understand the driving forces that have prevented these laws from adapting to the changing agricultural landscape. Some of these forces are clearly political and economic. However, it is possible that certain social and cultural biases exist as well. Agriculture appears to be deeply rooted in American ideology, and it is this ideology that often allows certain protections to extend not only to farmers like Lemire, but also to larger, more industrial agricultural operations. As a result, modern, commercial agricultural operations have, collectively, largely escaped environmental regulation through exceptions not similarly afforded to other industrial polluters.¹⁷

Part I of this article will illustrate the ways in which agriculture has evolved into an industry and how agricultural policy and anti-regulation has promoted this shift. Part II will identify the biases in the federal and common law. Finally, Part III contains a discussion of extraneous factors such as cultural and historical ideology as it relates to agriculture, as they are additional pressures that contribute to the lack of adequate environmental regulation pertaining to agriculture.

I. THE DEVELOPMENT OF “MODERN” AGRICULTURE

During Thomas Jefferson’s presidency, ninety-five percent of

agrochemical releases, animal waste production, nonpoint water source water pollution, and air pollution. *Id.* at 263. Habitat diversity has decreased due to the elimination of pastures and shifts to monocultures. *Id.* at 276. Farms are also cited as the leading cause of soil erosion leading directly to sedimentation that contains pollutants such as pesticides. *Id.* at 277–78. Depletion of groundwater is also common, as is water salinization from irrigation waters entering other water sources after being used to wash away saline in soil. *Id.* at 280–81. Water sources are also threatened when fertilizer seeps into groundwater and waterways causing an increase in nitrogen and phosphorous in the environment which fosters excessive plant growth disrupting ecosystems. *Id.* at 285. Additionally, nonpoint water pollution, such as groundwater runoff from Concentrated Animal Feeding Operations (CAFOs) or across fertilized fields accounts for large amounts of water pollution. *Id.* at 288. Fertilizer also causes pesticides to be released into the air as well as the release of greenhouse gases into the atmosphere. *Id.* at 291. *See also* Dennis Keeney & Loni Kemp, *A New Agricultural Policy for the United States*, in 41 SCIENCE & TECHNOLOGY POLICY: THE ROLE OF BIODIVERSITY CONSERVATION IN THE TRANSITION TO RURAL SUSTAINABILITY 29, 29 (Stephen S. Light ed. IOS Press, 2004) (citing the loss of land devoted to resource conserving crops, “loss of biodiversity, increased water pollution, soil erosion and other environmental damages including major pollution flows to the Gulf of Mexico” as byproducts of the shift to row agriculture).

¹⁷ *See* Ruhl, *supra* note 16, at 266, 268.

people living in the United States made their livings as full-time farm workers.¹⁸ The agricultural landscape has changed dramatically from the small-scale, local farming operations of the Jeffersonian era. The result of technological advances and government-implemented agricultural policy has led to a continuous increase in farm size, and corporate control of those large-scale farming operations.¹⁹ Unfortunately, all of this growth has been to the detriment of individual and small-scale farmers and their communities.²⁰

As an early example of government agricultural policy, the Homestead Act promoted movement to and cultivation of land in the Midwest and increased the amount of farmable land in the United States.²¹ In 1862, the Department of Agriculture and schools were established to teach mechanized farming methods, and scientific research related to agriculture started to move farming into an industrial practice.²² Following the conclusion of the Civil War in the mid-1800s, government policy encouraged the growth of commercial crops for export and use outside of production areas, and the size of the average U.S. farm began to grow.²³ This led to a larger number of farmers who were growing crops as commercial commodities rather than for local use.²⁴ As mechanical technology was developed, outputs increased due to increased efficiency, as well as farm size.²⁵ Some of the technology incorporated into agricultural production by the 1900s included the mechanical reaper, combine, railroad systems, and refrigerated trains.²⁶

By 1920, twenty percent of Americans were farmers, compared to fifty percent in the late 1800s.²⁷ The 1920s also saw increased production due to a combination of the promotion of “overzealous” planting and mechanical devices.²⁸ A result of this

¹⁸ William S. Eubanks, *The Sustainable Farm Bill: A Proposal for Permanent Environmental Change*, 39 ENVTL. L. REP. 10493, 10494 (2009).

¹⁹ Keeney & Kemp, *supra* note 16, at 30.

²⁰ *See id.*

²¹ *Id.* at 31.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *See* Jodi Soyars Windham, *Putting Your Money Where Your Mouth Is: Perverse Food Subsidies, Social Responsibility & America's 2007 Farm Bill*, 31 ENVIRONS ENVTL. L. & POL'Y J. 1, 6 (2007).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Eubanks, *supra* note 18, at 10494.

overproduction was that prices fell, benefiting commercial buyers of crops, and harming farmers as their incomes dropped.²⁹ This was the state of agricultural affairs when the American economy slid into the Great Depression.³⁰

As part of President Franklin D. Roosevelt's New Deal, the Agricultural Adjustment Act of 1933 was implemented in an effort to protect the small, family farmer.³¹ The AAA, or 1933 Farm Bill, sought to:

[B]ring crop prices back to stability by weaning the nation from its affinity for agricultural overproduction; utilize surplus crops productively to combat widespread hunger and provide nutritional assistance to children in the form of school lunch programs; implement strategies to prevent further erosion and soil loss from poor land conservation policies and weather events; provide crop insurance and credit assurances for subsistence farmers; and build community infrastructure for rural farming towns.³²

The 1933 Farm Bill functioned by providing farmers with non-recourse loans for certain commodity crops.³³ When the market price for a commodity fell below a set target price, a farmer could apply for a loan rather than selling his crop in the open marketplace.³⁴ If prices rose, the farmer could sell his grain in the marketplace and if prices did not rise, the government would accept the farmer's crop as payment for the loan.³⁵ This system was successful in maintaining stable prices for crops and was implemented at a low cost.³⁶

The market stability resulting from the New Deal was not permanent. During the 1950s, farmers had fully adopted mechanized farming practices, increasing agricultural outputs.³⁷ Following World War II, use of chemical fertilizers became cost-effective and widespread.³⁸ Fertilizer abolished the need for crop rotation, however, the lack of crop diversity that existed at this time led to more pests and insects threatening crops, and more pests and insects led to an increase in the amounts of pesticides

²⁹ *Id.*

³⁰ *See id.* at 10495.

³¹ *Id.* at 10494.

³² *Id.*

³³ Soyars Windham, *supra* note 25, at 6–7.

³⁴ *Id.* at 7.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

used.³⁹ Chemical fertilizers and pesticides increased the existence of monocultures and yields, while also posing threats to the environment.⁴⁰ By this time, biodiversity, the environment, and rural development had taken a “back seat” to what had now become industrial agriculture.⁴¹

While industrial agriculture had been on the rise since the late 1800s and through the early to mid-1900s,⁴² another significant threat to the family farm was the agricultural policies of the 1970s. The agricultural era of the 1960s and 1970s, known as the “Green Revolution,” was a product of Richard Nixon’s appointment of Earl Butz as Secretary of Agriculture.⁴³ Butz had served as a board member for some larger agribusiness before his appointment, and this influence was readily apparent.⁴⁴ Butz’s messages to the small family farmer were “adapt or die” and “[g]et [b]ig or [g]et [o]ut.”⁴⁵ He encouraged farmers to maximize yields using pesticides, herbicides, and fertilizers and to grow single crops in the largest quantities possible.⁴⁶ One other important feature of Butz’s agricultural policy was the removal of protections for smaller farmers that were present in previous farm bills, such as the non-recourse loan program. These protections were completely removed from the 1973 Farm Bill and replaced with production-based subsidies.⁴⁷ Throughout the 1970s and 1980s, the demand for commodity crops for export, and for use as inputs for high-consumption products, supported subsidized, high-crop yields.⁴⁸ A high demand for commodity crops plus direct subsidy payments for the highest yield producers meant that smaller family farms could not compete with their larger, more industrialized counterparts. The loss of protection from the previous farm bills and large subsidy payments were almost guarantees that the family farm would fail. The obvious result is that, by the end of the twentieth

³⁹ *Id.* at 8.

⁴⁰ *See id.*

⁴¹ Keeney & Kemp, *supra* note 16, at 32.

⁴² *See generally* Soyars Windham, *supra* note 25, at 6, 7.

⁴³ Eubanks, *supra* note 18, at 10495; Will Allen, *The New Green Revolution: A Vision For Small-Scale Urban Farming*, FORBES (May 10, 2012, 1:50 PM), <http://www.forbes.com/sites/kerryadolan/2012/05/10/the-new-green-revolution-a-vision-for-small-scale-urban-farming/>.

⁴⁴ Eubanks, *supra* note 18, at 10496.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See* Soyars Windham, *supra* note 25, at 9.

century, agricultural production was concentrated amongst a smaller number of large farm operations who were using industrialized farming methods, with great environmental consequences, to reach and maintain their scale of operations.

II. BIASES IN THE LAW

A. *Federal Framework*

1. Clean Air Act

The Clean Air Act largely exempts farming practices from regulation.⁴⁹ Pollution from agriculture was not a serious concern due to the nature and scale of farming practices when the Clean Air Act was initially drafted.⁵⁰ The Clean Air Act focuses most of its regulations on pollution sources that qualify as “major sources” by definition, and most agricultural operations, with the exception of concentrated animal feeding operations, escape regulation, and permitting requirements, by virtue of not qualifying as a “major source” emitter.⁵¹

Some chemicals designated as harmful materials under the Clean Air Act are exempt from regulation if farmers are using the materials.⁵² The Clean Air Act also provides exemptions from emission standards for certain vehicles and machines used for agricultural purposes.⁵³ States, which are largely in charge of implementing standards and plans relating to air pollution, are subject to influences from groups with interests relating to agriculture, or those wanting to attract an agricultural operation to a particular area.⁵⁴

While the Clean Air Act does contain provisions to regulate the

⁴⁹ Ruhl, *supra* note 16, at 305.

⁵⁰ Sarah C. Wilson, Comment, *Hogwash! Why Industrial Animal Agriculture is Not Beyond the Scope of Clean Air Act Regulation*, 24 PACE ENVTL. L. REV. 439, 439 (2007) (explaining that the “family” farm was still the traditional agricultural model when the Clean Air Act was drafted and was therefore not considered to be a serious threat to air quality).

⁵¹ Ruhl, *supra* note 16, at 305.

⁵² Wilson, *supra* note 50, at 448; *Risk Management Plan*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/agriculture/trmp.html> (last updated June 27, 2012) (explaining that while the use of chlorine and ammonia both require a risk management plan, agricultural users are exempt from this requirement if the amount of the materials used does not exceed a threshold amount).

⁵³ See Wilson, *supra* note 50, at 448.

⁵⁴ See Ruhl, *supra* note 16, at 305–06.

emissions of Concentrated Animal Feeding Operations (CAFOs), the statute does not extend to standard Animal Feeding Operations (AFOs).⁵⁵ AFOs arose as a product of industrial agriculture and the separation of livestock and crop agriculture.⁵⁶ Animals confined in AFOs do not graze, and rarely leave their assigned areas.⁵⁷ Waste collects in grates beneath the animal pens before it is carried into on-site lagoons where it sometimes leeches into streams and groundwater.⁵⁸ Fortunately, the Clean Water Act does address water pollution arising from CAFOs.⁵⁹ In fact, concentrated animal feeding operations are included in the statutory definition of “point source” and thus fall under the regulatory scheme of the Clean Water Act.⁶⁰

A similar framework of regulation does not exist within the Clean Air Act. This is problematic because of the sheer volume of waste that an AFO or CAFO creates which in turn emits harmful pollutants into the air.⁶¹ The presence of such a large number of animals and breakdown of animal manure leads to the release of ammonia, particulate matter, volatile organic compounds, hydrogen sulfide, methane gas, and nitrous oxide.⁶²

As mentioned previously, the EPA establishes an area’s air quality standards and leaves the state with the task of designing an implementation program for its area to attain the established standards.⁶³ While the federal government has failed to respond to the problem, California and Oregon have recognized the seriousness of this air pollution problem and have removed the agricultural exemptions in its State Implementation Plans (SIPs).⁶⁴ The exceptions for agriculture remain in the federal regulatory framework. The EPA reacted somewhat in 2005 when it implemented the Air Compliance Agreement, which was a two-year study of the emissions from animal feeding operations and, more specifically, monitored the emission of ammonia, hydrogen

⁵⁵ See Wilson, *supra* note 50, at 456.

⁵⁶ See *id.* at 443–44.

⁵⁷ *Id.*

⁵⁸ *Id.* at 441.

⁵⁹ See LAUREN BROOKS, CONCENTRATED ANIMAL FEEDING OPERATIONS 6 (2010) (explaining that CAFOs are regulated under the National Pollutant Discharge Elimination System (NPDES)).

⁶⁰ Wilson, *supra* note 50, at 457 (citing the Federal Water Pollution Control Act § 502(14), 33 U.S.C. § 1362(14) (2006)).

⁶¹ See *id.* at 441.

⁶² See *id.* at 445–46.

⁶³ Ruhl, *supra* note 16, at 305–06.

⁶⁴ See Wilson, *supra* note 50, at 459–60, 465.

sulfide, particulate matter, and volatile organic compounds.⁶⁵

The goals of the study were to “[r]educe air pollution, [e]nsure compliance with applicable Clean Air Act, Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), and Emergency Planning and Community Right-to-Know Act (“EPCRA”) provisions, [m]onitor and evaluate AFO emissions, [and p]romote a national consensus on methodologies for estimating AFO emissions[.]”⁶⁶ While this action on behalf of the EPA may seem like a step in the right direction, certain provisions of the agreement actually created safe harbors for agricultural air polluters.⁶⁷ Animal Feeding Operations that participate in the study may not be sued by the EPA for any Clean Air Act preexisting violations discovered, and the fines imposed upon participating AFOs for violations are negligible.⁶⁸ Additionally, once any new methodologies for regulation are imposed because of data derived from the study, the deadline for compliance will, most likely, be loosely enforced for AFOs who participated in the study.⁶⁹

2. Clean Water Act

The Clean Water Act prohibits the discharge of any pollutant by any person into waters of the United States,⁷⁰ with allowances made for those who obtain the proper permits.⁷¹ The definitions pertaining to the Clean Water Act are extremely broad. The term “pollutant” includes a number of different materials, including “agricultural waste.”⁷² However, the Clean Water Act focuses on waste from industrial processes and provides numerous permitting exceptions for farms.⁷³

The Clean Water Act excludes agricultural storm water runoff from its regulatory scheme, when storm water runoff is a significant source of water pollution, as moving water picks up

⁶⁵ *Id.* at 466–67.

⁶⁶ *Animal Feeding Operations Air Quality Compliance Agreement Information Sheet*, U.S. ENVTL. PROTECTION AGENCY (Mar. 11, 2009), <http://www.epa.gov/compliance/resources/agreements/caa/cafo-infosht-0309.html>.

⁶⁷ *See id.*

⁶⁸ *Id.*

⁶⁹ *See* CLAUDIA COPELAND, Cong. Research Serv., RL32947, *Air Quality Issues and Animal Agriculture: EPA’s Air Compliance Agreement 8* (2006).

⁷⁰ 33 U.S.C. § 1311(a) (2006); Ruhl, *supra* note 16, at 293.

⁷¹ 33 U.S.C. § 1311(h); Ruhl, *supra* note 16, at 293.

⁷² Ruhl, *supra* note 16, at 293.

⁷³ *See id.* at 293–94, 296.

pesticides and animal waste prior to deposit into a waterway.⁷⁴ In fact, agricultural polluters are often cited as a major source of impairment of assessed rivers and streams.⁷⁵ In 1987, an amendment to the Clean Water Act allowed the EPA to implement a permit plan to address storm water discharges from industrial activity, from any conveyance.⁷⁶ While it would appear as though agricultural storm water would be a prime target for the legislation, Congress specifically excluded “return flows from irrigated agriculture” from the broad definition of “point source.”⁷⁷

Generally, Section 402 of the Clean Water Act, which outlines the National Pollutant Discharge Elimination System (NPDES), requires a permit from any facility, which intends to discharge into waters of the United States.⁷⁸ This section of the Act also specifically excludes “agricultural return flows” from permitting requirements, and prohibits the EPA from directly, or indirectly, requiring any State to require a permit in the administration of its regulatory program.⁷⁹

Section 404 of the Clean Water Act requires permits for “dredged or fill material” that is discharged into “navigable waters.”⁸⁰ As with Section 402, Section 404 also provides exceptions for agricultural activities.⁸¹ Section 404 excludes from the permitting requirements the discharge of dredged or fill material:

from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices; . . . for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches; . . . [and] for the purpose of construction or maintenance of farm roads or forest roads . . .⁸²

⁷⁴ *Id.* at 296.

⁷⁵ Linda Breggin & D. Bruce Myers Jr., *Subsidies with Responsibilities: Placing Stewardship and Disclosure Conditions on Government Payments to Large-Scale Commodity Crop Operations*, 37 HARV. ENVTL L. REV. 487, 498 (2013).

⁷⁶ Ruhl, *supra* note 16, at 296.

⁷⁷ *Id.* at 295 (quoting Clean Water Act of 1977, 33 U.S.C. § 1362(14) (1994)).

⁷⁸ Federal Water Pollution Control Act, 33 U.S.C. §§ 1342(a)(1), (2), (4) (2006); Ruhl, *supra* note 16, at 294.

⁷⁹ Ruhl, *supra* note 16, at 295; Water Quality Act of 1987, 33 U.S.C. § 1342(l)(1) (2006).

⁸⁰ 33 U.S.C. § 1344(a).

⁸¹ Ruhl, *supra* note 16, at 296.

⁸² 33 U.S.C. §§ 1344(f)(1)(A), (C), (E).

Generally, the Clean Water Act excludes all non-point source pollution from its regulatory scheme. As mentioned previously, large amounts of agricultural pollution are deposited into waterways via storm water runoff that travels through conveyances, thus qualifying as pollution deposited via point source, but excluded from regulation under one of the exceptions for farms. In addition to storm water runoff from point sources, storm water runoff from non-point sources is also a significant source of pollution, and occurs when storm water travels over the surface of farmland and feedlots and is deposited in streams, rivers, and tributaries.⁸³ The EPA has not implemented a program to address pollution arising from surface runoff. If a waterway is not reaching the water quality standards for its designated use, the State is encouraged and has total discretion to place the waterway on a priority list and limit the total maximum daily loads that may be deposited into the waterway from all sources.⁸⁴ Unfortunately, state implemented programs to limit non-point source pollution, especially from agricultural sources, are few in number and loosely enforced.⁸⁵

3. Supervision of Dangerous Chemicals

Agricultural operators, not surprisingly, are some of the most abundant users of large amounts of chemical pesticides.⁸⁶ Perhaps surprising is the lack of supervision or accountability attributed to this use. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) “provides [the] EPA with the authority to oversee the sale and use of pesticides” and, at its inception, “was primarily aimed at protecting consumers from ineffective products and deceptive labeling.”⁸⁷ Today, an amendment to the law authorizes the EPA to “regulate the use and sale of pesticides to protect human health and preserve the environment.”⁸⁸ FIFRA

⁸³ Ruhl, *supra* note 16, at 288; Melanie J. Wender, Comment, *Goodbye Family Farms and Hello Agribusiness: The Story of How Agricultural Policy is Destroying the Family Farm and the Environment*, 22 VILL. ENVTL. L.J. 141, 149–51 (2011).

⁸⁴ 33 U.S.C. §§ 1313(d)(1)(A), (C); Ruhl, *supra* note 16, at 302, 304.

⁸⁵ Ruhl, *supra* note 16, at 302, 304.

⁸⁶ *Id.* at 282.

⁸⁷ *Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)*, EPA.GOV, <http://www.epa.gov/oecaagct/lfra.html#Summary%20of%20the%20Federal%20Insecticide,%20Fungicide,%20and%20Rodenticide%20Act> (last visited Oct. 14, 2013).

⁸⁸ *Id.*

does not meaningfully extend regulation beyond product licensing.⁸⁹ The closest the statute comes to regulation of agricultural use is by defining rules that describe who may apply the pesticide.⁹⁰ As FIFRA applies to the agricultural use of pesticides, “no permits are required, no environmental or efficiency performance standards are imposed, no technology-based standards are applied, no regular public reporting of pesticide applications is required, and no monitoring of pesticide levels in soils, runoff, or groundwater is required.”⁹¹

B. Statutory Modification of Common Law

1. Ag-Gag Laws

One of the newer developments of the agricultural regulation (or “anti-regulation”) framework is the development of Agricultural Gag, or “Ag-Gag” laws, which modify the general claim of trespass in the agricultural setting.⁹² Ag-Gag laws seek to prohibit the exposure of operations within farming and animal processing operations whose practices fall under the category of “factory farming.”⁹³ Generally, an individual (usually animal rights activist) will gain entry into one of these facilities by obtaining employment, sometimes by supplying the facility with false information.⁹⁴ The individual will then record operations via hidden camera and release the footage to the public to expose unsanitary conditions or inhumane treatment of animals.⁹⁵ Some laws focus on the suppression of the footage itself,⁹⁶ raising first amendment concerns, while other laws focus on criminal fraud charges to punish the whistleblower.⁹⁷ Six states currently have some form of an Ag-Gag law on the books: North Dakota, Montana, Kansas, and, most recently, Iowa, Missouri, and Utah.⁹⁸

⁸⁹ Ruhl, *supra* note 16, at 310–11.

⁹⁰ *Id.* at 310. See 7 U.S.C. §§ 136(e)(1)–(3) (2012).

⁹¹ Ruhl, *supra* note 16, at 311.

⁹² See Kevin C. Adam, Note, *Shooting the Messenger: A Common-Sense Analysis of State “Ag-Gag” Legislation Under the First Amendment*, 45 SUFFOLK U. L. REV. 1129, 1130, 1157 (2012).

⁹³ *Id.* at 1144, 1157.

⁹⁴ *Id.* at 1130–31.

⁹⁵ *Id.* at 1151.

⁹⁶ *Id.* at 1131.

⁹⁷ *Id.*

⁹⁸ Dan Flynn, *2013 Legislative Season Ends With ‘Ag-Gag’ Bills Defeated in 11 States*, FOOD SAFETY NEWS (July 30, 2013), <http://www.foodsafetynews.com/>

North Dakota, Montana, and Kansas have had Ag-Gag laws on the books for about twenty years.⁹⁹ The laws in all three of these states criminalize the act of recording video.¹⁰⁰ In North Dakota, “it is a class B misdemeanor to enter an animal facility and use or attempt to use a camera, video recorder, or any other video or audio recording device.”¹⁰¹ It is defined as “unlawful interference with animal facilities” and as “prohibited activity.”¹⁰² Violators face jail terms of thirty days.¹⁰³ In Montana, it is “[u]nlawful . . . [t]o enter an animal facility to take pictures by photograph, video camera, or other means with intent to commit criminal defamation,” and to “enter . . . an animal facility if the person had notice that the entry was forbidden.”¹⁰⁴ Finally, in Kansas, “it [is] a class A, nonperson misdemeanor to enter an animal facility that is not open to the public and take pictures or video.”¹⁰⁵ The law in Kansas is part of the state’s “farm animal and field crop and research facilities protection act.”¹⁰⁶

Iowa and Utah, the two newcomers to Ag-Gag laws, have statutes titled “Agricultural production facility fraud” and “Agricultural operation interference,” respectively.¹⁰⁷ The Iowa statute criminalizes the fraud associated with gaining employment at the animal facility and states that:

A person is guilty of agricultural production facility fraud if the person willfully does any of the following:

- a. Obtains access to an agricultural production facility by false pretenses.
- b. Makes a false statement or representation as part of an application or agreement to be employed at an agricultural production facility, if the person knows the statement to be false, and makes the statement with an intent to commit an act not authorized by the owner of the agricultural

2013/07/2013-legislative-season-ends-with-ag-gag-bills-defeated-in-11-states/#.UlwWixCzK8o.

⁹⁹ Adam, *supra* note 92, at 1157.

¹⁰⁰ Flynn, *supra* note 98.

¹⁰¹ *Id.*; N.D. CENT. CODE § 12.1-21.1-02(6) (2013); N.D. CENT. CODE § 12.1-21.1-04 (2013).

¹⁰² Flynn, *supra* note 98.

¹⁰³ *Id.*; N.D. CENT. CODE § 12.1-21.1-04 (stating the violation is a class B misdemeanor); N.D. CENT. CODE § 12.1-32-01(6) (2013) (stating a class B misdemeanor has a maximum penalty of thirty days).

¹⁰⁴ MONT. CODE ANN. § 81-30-103 (2012).

¹⁰⁵ Flynn, *supra* note 98; KAN. STAT. ANN. §§ 47-1827(c)(1), (c)(4) (2013).

¹⁰⁶ KAN. STAT. ANN. § 47-1825 (2013).

¹⁰⁷ IOWA CODE ANN. § 717A.3A (West 2012); UTAH CODE ANN. § 76-6-112 (West 2012).

production facility, knowing that the act is not authorized.¹⁰⁸

The Utah statute, however, is somewhat of a combination of the older statutes and Iowa's statute and provides that:

[a] person is guilty of agricultural operation interference if the person: without consent from the owner of the agricultural operation, or the owner's agent, knowingly or intentionally records an image of, or sound from, the agricultural operation by leaving a recording device on the agricultural operation; obtains access to an agricultural operation under false pretenses; applies for employment at an agricultural operation with the intent to record an image of, or sound from, the agricultural operation[.]¹⁰⁹

As of this writing, Pennsylvania and North Carolina are also considering proposals for Ag-Gag laws.¹¹⁰ In addition to state regulations, a federal regulation known as the "Animal Enterprise Terrorism Act"¹¹¹ has a similar chilling effect on farm factory whistle blowers. The AETA makes it a criminal act to "interfere" with any animal enterprise, and the statute has been used to prosecute individuals attempting to organize their own undercover animal-rights investigations.¹¹² The AETA seemingly functions similar to state Ag-Gag laws in providing protection to certain agricultural operations from transparency and accountability in their operating methods.¹¹³ These statutes are in stark contrast to other state and federal laws, such as the Whistleblower Protection Act, which offers protection as an incentive for federal employees to disclose fraud and other illegal activity in the workplace.¹¹⁴

2. Nuisance & "Right to Farm"

"[R]ight-to-Farm" laws protect farmers from nuisance action and exist in all fifty states.¹¹⁵ These laws are formed because non-

¹⁰⁸ IOWA CODE ANN. §§ 717A.3A(1)(a)–(b).

¹⁰⁹ UTAH CODE ANN. §§ 76-6-112 (2)(a)–(c)(1)

¹¹⁰ NC Commerce Protection Act of 2013, N.C. S.B. 648 (Apr. 4, 2013); P.A. H.B. 683 (Feb. 12, 2013).

¹¹¹ 120 Stat. 2652 (2006); *The Animal Enterprise Terrorism Act (AETA)*, CENTER FOR CONSTITUTIONAL RIGHTS, [https://ccrjustice.org/learn-more/faqs/factsheet%3A-animal-enterprise-terrorism-act-\(aeta\)](https://ccrjustice.org/learn-more/faqs/factsheet%3A-animal-enterprise-terrorism-act-(aeta)) (last visited Oct. 12, 2013) [hereinafter *AETA*].

¹¹² 18 U.S.C.A. §§ 43(a)(1), (2)(A), (b)(1) (2006).

¹¹³ See *AETA*, *supra* note 111.

¹¹⁴ See L. Paige Whitaker, CONG. RESEARCH SERV., RL33918, THE WHISTLEBLOWER PROTECTION ACT: AN OVERVIEW 1 (2007).

¹¹⁵ Ruhl, *supra* note 16, at 315.

agricultural development must be prohibited from interfering with farming due to farming's inherent value to society.¹¹⁶ The following New York statute illustrates this protectionist mentality:

It is hereby found and declared that many of the agricultural lands in New York state are in jeopardy of being lost for any agricultural purposes. When nonagricultural development extends into farm areas, competition for limited land resources results. Ordinances inhibiting farming tend to follow, farm taxes rise, and hopes for speculative gains discourage investments in farm improvements, often leading to the idling or conversion of potentially productive agricultural land.

The socio-economic vitality of agriculture in this state is essential to the economic stability and growth of many local communities and the state as a whole. It is, therefore, the declared policy of the state to conserve, protect and encourage the development and improvement of its agricultural land for production of food and other agricultural products. It is also the declared policy of the state to conserve and protect agricultural lands as valued natural and ecological resources which provide needed open spaces for clean air sheds, as well as for aesthetic purposes.

The constitution of the state of New York directs the legislature to provide for the protection of agricultural lands. It is the purpose of this article to provide a locally-initiated mechanism for the protection and enhancement of New York state's agricultural land as a viable segment of the local and state economies and as an economic and environmental resource of major importance.¹¹⁷

Most Right-to-Farm laws seek to protect farms from nuisance liability, complex regulations that would burden farming operations, and high litigation costs.¹¹⁸ Essentially, Right-to-Farm laws protect farmers from nuisance actions brought by those who "com[e] to the nuisance."¹¹⁹

Initially, these laws were implemented to protect smaller

¹¹⁶ See N.Y. AGRIC. & MKTS. LAW § 300 (McKinney 2004) (citing the "socio-economic vitality of agriculture in this state").

¹¹⁷ *Id.*

¹¹⁸ Garrett Chrostek, *A Critique of Vermont's Right-To-Farm Law and Proposals for Better Protecting the State's Agricultural Future*, 36 VT. L. REV. 233, 233 (2011).

¹¹⁹ *Fact Sheet: Right-to-Farm Laws*, AMERICAN FARMLAND TRUST, <http://www.farmlandinfo.org/right-farm-laws> (last visited May 17, 2013) [hereinafter *Fact Sheet*].

family farms from suburban sprawl.¹²⁰ Most commonly, newcomers to an area would complain about the noise and smells associated with preexisting animal feeding operations, or AFOs. However, CAFOs also invoke this protection, an ability that may not be appropriate as the nuisance surpasses smells and sounds, and results in air and water pollution and threats to the health of nearby residents.

Most protection against nuisance suits offered by Right-to-Farm laws only extends to agricultural operations that existed before the party claiming the nuisance arrived in the area.¹²¹ However, many Right-to-Farm statutes contain language that protects “farm areas” rather than individual farm operations. For example, in Indiana:

The general assembly declares that it is the policy of the state to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. The general assembly finds that when nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result, agricultural operations are sometimes forced to cease operations, and many persons may be discouraged from making investments in farm improvements. It is the purpose of this section to reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance.¹²²

Theoretically, the construction of an additional industrial farm operation (which would result in additional pollution) is protected against nuisance suits if the area is already characterized as an agricultural area. While, generally, agricultural operations are only afforded protection when they already exist at the time that the non-agricultural use (usually residential) enters the area,¹²³ there are provisions of some Right-to-Farm statutes that function in a way that extends protection to a broader category of agricultural operators.

For example, nuisance claims laws in some states are subject to

¹²⁰ See Chrostek, *supra* note 118, at 233.

¹²¹ See *Fact Sheet*, *supra* note 119.

¹²² Compare IND. CODE ANN. § 32-30-6-9(b) (West 2013) with COLO. REV. STAT. ANN. § 35-3.5-102(1)(a) (West 2013): “Except as provided in this section, an agricultural operation shall not be found to be a public or private nuisance if the agricultural operation alleged to be a nuisance employs methods or practices that are commonly or reasonably associated with agricultural production.”

¹²³ See *Fact Sheet*, *supra* note 119.

a statute of limitations.¹²⁴ A failure to file a claim within a certain period after commencement of the activity will likely cause the nuisance lawsuit to fail.¹²⁵ Potentially, an operator could commence operations of a new agricultural operation in an area and evade a nuisance lawsuit if the claimant fails to file the claim timely. In this way, a nuisance law that, on its face, only protects pre-existing agricultural operations may fail to be limited in this way if a statute of limitations exists to limit claims against new operations. In some statutes, the time limitation is not considerably long. For example, in Pennsylvania, the statute of limitations prohibits a nuisance action if the agricultural operation has already been in lawful operation for one year.¹²⁶ The language of the Pennsylvania statute states that the statute of limitations begins when operation begins, not when the complaining party discovers the change in operation or expansion.¹²⁷ As a result, by the time the environmental impacts resulting from the new, changed, or expanded operations are discovered, it may be too late to bring a nuisance claim against the responsible party.

Not all Right-to-Farm laws are imposed without limitations, and in Iowa, two Right-to-Farm laws have been invalidated by courts within the state.¹²⁸ The Iowa Supreme Court found one law to have created an easement, resulting in an unconstitutional taking of property, and the other law was held to be an invalid limitation on inalienable rights.¹²⁹ The court in the former instance equated the right to maintain a nuisance to a physical invasion of property, and held that a taking had occurred when a law was created that immunized farms from nuisance suits.¹³⁰ In the latter case, the plaintiffs prevailed because the court held

¹²⁴ Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right-To-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. REV. 87, 98 (2006).

¹²⁵ *Id.* at 98.

¹²⁶ 3 PA. STAT. ANN. § 954(a) (LexisNexis 2013).

¹²⁷ Compare *id.* (stating that a nuisance action cannot be brought when an agricultural operation has been in existence for one year, where the operation has “existed substantially unchanged since the established date of operation . . .”), with Centner, *supra* note 124, at 100 (describing the application of a statute of limitations in the context of a Texas “right-to-farm” statute, stating that a party’s discovery of a nuisance is irrelevant, and that the relevant inquiry is whether the operation has been in existence for one year).

¹²⁸ See Centner, *supra* note 124, at 89.

¹²⁹ *Id.*

¹³⁰ See Adam Van Buskirk, *Right-To-Farm Laws As “Takings” in Light of Bormann v. Board of Supervisors and Moon v. North Idaho Farmers Association*, 11 ALB. L. ENVTL. OUTLOOK 169, 178–79 (2006).

that the decrease in their property value due to the ongoing nuisance of noxious odors from a nearby pork operation was an unconstitutional taking.¹³¹ Other states have not been quick to follow Iowa's interpretation of the constitutionality of Right-to-Farm laws, but the Iowa holdings do present interesting new precedent.

3. A Welcome Exception

On November 1, 2007, A.J. Bos began the process of constructing two CAFOs near Nora, Illinois, which would accommodate approximately 5,500 dairy cows.¹³² In accordance with Illinois law, a public hearing was conducted and it was determined that, of those in attendance, the majority of citizens were opposed to the construction of the dairy operation.¹³³ The board of the county in which the CAFO would be located, in an 11-5 vote, rejected the application for construction of the facility.¹³⁴ Despite the opposition from the town and the vote rejecting the application, the Illinois Department of Agriculture granted the permit allowing Bos to go forward with construction.¹³⁵

On June 3, 2008, the group Helping Others Maintain Environmental Standards (HOMES) filed a lawsuit against the Illinois Department of Agriculture and Bos,¹³⁶ alleging construction in violation of the law.¹³⁷ Despite the impending lawsuit, Bos continued with construction of the operation and invested \$1.2 million in corn silage to feed the cows.¹³⁸ In fact, when a final decision was rendered five years after the filing of the initial lawsuit, construction of the operation had already been over fifty percent completed.¹³⁹

This case provides a great outline of some of the environmental and health concerns, which accompany a dairy operation of this

¹³¹ *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 175, 180–81 (Iowa 2004).

¹³² M. Alschuler, *Timeline of Events*, STOP THE MEGA DAIRY.ORG, <http://stopthemegadairy.org/timeline-of-events.html> (last updated Mar. 26, 2011).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*; Chris Hunt, *Stopping a CAFO: The Biggest Victory You Never Heard About*, CIVIL EATS (Mar. 22, 2013), <http://civileats.com/2013/03/22/stopping-a-cafo-the-biggest-victory-you-never-heard-about/>.

¹³⁷ Alschuler, *supra* note 132.

¹³⁸ Hunt, *supra* note 136; Alschuler, *supra* note 132.

¹³⁹ Hunt, *supra* note 136.

magnitude. The Bos dairy operation would have been located on top of an area composed of karst bedrock.¹⁴⁰ Citizens were concerned that the karst would allow dairy waste to reach groundwater located beneath the karst and contaminate a local source of drinking water.¹⁴¹ In fact, the karst contaminated a local water source before a single cow ever set foot on the dairy.¹⁴² The corn that Bos purchased to feed the cows in the CAFO was left uncovered and eventually fermented, creating an acidic leachate that polluted surface and groundwater.¹⁴³ The pollution was so severe that nearby water sources actually turned purple from the contamination.¹⁴⁴

Bos finally agreed to halt construction of his CAFO only after: a request of a Water Quality Certificate from the EPA, a preliminary injunction, a negative report from the Illinois State Geological Survey, an initial ruling against HOMES by the Supreme Court of Illinois, a decision of the 2nd District Appellate Court upholding the Illinois Supreme Court's decision, threats from the Department of Justice arising from noncompliance with EPA investigations, and charges filed by the Attorney General.¹⁴⁵

Most challenges to large agricultural operations are unsuccessful. In Bos's case, success was surprising given the support from the Department of Agriculture for construction of the operation and the significance to the Illinois economy of other CAFOs within the state.¹⁴⁶ It is important to recognize that success in this case is likely attributable to the fact that this CAFO had not yet been constructed. It is unlikely that the small group of citizens who challenged this dairy would have been successful if the dairy was already in operation and/or if the citizens brought the suit as a nuisance challenge. However, it is significant that the EPA and Attorney General did recognize the environmental harms that had arisen during construction and were possible in the future, and followed through with their permitting demands and threat of prosecution in spite of the fact that the violating party was involved in dairy farming. While similar examples will not likely arise concerning challenges to

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *See id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*; Alschuler, *supra* note 132.

¹⁴⁵ *Hunt*, *supra* note 136; Alschuler, *supra* note 132.

¹⁴⁶ *See Hunt*, *supra* note 136.

existing CAFOs or large-scale agricultural operations, this is certainly a step in the right direction as far as preventing additional agricultural pollution from new sources.

III. RETHINKING THE BIAS

The tendency for regulatory agencies and policy makers to excuse farms from the larger regulatory framework of environmental law suggests the presence of both political and economic influences.¹⁴⁷ The economic dimension suggests that farmers are afforded protection due to the economic value of the agricultural industry to suppliers and consumers, as well as the precarious financial situation that many farming operations experience.¹⁴⁸ The existence of a political dimension is fairly evident by the sheer number of farmers in the voting pool and the lobbying power of the agrochemical and food processing industries, both of which are huge stakeholders in the farming industry.¹⁴⁹ A prime example of political influence is Earl Butz, former Secretary of Agriculture and board member of agribusiness companies, whose economic agricultural policies encouraged not only the growth of agribusiness, but encouraged industrial farming practices that are in direct conflict with positive environmental policy.¹⁵⁰

As suggested before, the majority of agricultural production no longer occurs on family farms but within large, industrial agricultural operations.¹⁵¹ The Agricultural Adjustment Act, or Farm Bill, while implemented to sustain struggling farmers, created a system in which farmers lost control over their own production levels and began to depend on subsidy payments from the federal government.¹⁵² However, the subsidies only applied to corn, cotton, rice, soybeans, and wheat, forcing farmers financially dependent on the subsidies to concentrate their farming operations into individual, rather than diversified

¹⁴⁷ Ruhl, *supra* note 16, at 328.

¹⁴⁸ *See id.* at 330.

¹⁴⁹ *See generally* *Lobbying Spending Database: Dept. of Agriculture*, OPENSECRETS.ORG, <http://www.opensecrets.org/lobby/agencysum.php?id=023> (last visited Oct. 12, 2013) (providing a breakdown of corporations involved in the agricultural market and their corresponding lobbying activities).

¹⁵⁰ *See supra* Part I.

¹⁵¹ *Id.*

¹⁵² *See* Wender, *supra* note 83, at 143–44.

crops.¹⁵³ Unfortunately, large corporate producers were able to produce individual crops more efficiently and in larger quantities, and therefore received the largest amount of subsidy payments.¹⁵⁴ In 2007, the United States Department of Agriculture confirmed that the top ten percent of operations receiving subsidies were receiving over two-thirds of subsidy payments.¹⁵⁵ As a result of this framework of agricultural policy, the large producers thrived while the smaller farm operations floundered or failed. Therefore, the agricultural policies and protections for small farms in federal regulatory and the common law that, in a sense, sought to protect small farms actually contributed to the growth of the larger agricultural operations that are responsible for increased levels in agricultural pollution. As the agricultural business became composed of fewer and larger operators, the greater financial viability of these operations led to powerful lobbying groups and the political influence to prevent changes to the regulatory framework.

In 2007 alone, \$80 million was invested into lobbying efforts by agribusiness.¹⁵⁶ Most of these funds were invested to ensure the maintenance of the Farm Bill, and that large producers continued to receive large subsidies.¹⁵⁷ While lobbying activities involving the Farm Bill are not in direct relation to environmental regulation, maintaining the scale of operation of agribusiness is somewhat dependent on federal agricultural policy, therefore, the profitability and political influence of agribusiness depends on maintaining the “status quo.”¹⁵⁸ It is important for agribusiness to maintain a strong political influence within not only the federal government, but in state governments as well, as federal environmental regulations are carried out through plans implemented by individual states.¹⁵⁹ Agribusiness has been successful in these areas. For example, in 2011 Debbie Stabenow was elected to the U.S. Senate.¹⁶⁰ Before her election, Senator

¹⁵³ *Id.* at 144.

¹⁵⁴ *See id.*

¹⁵⁵ Windham, *supra* note 25, at 13.

¹⁵⁶ David Ryan Quintanilla, Comment, *A Bitter Policy Shoved Down Our Throats: How a Once Admirable and Necessary Agricultural Program has Resulted in Major Profits for Big Business and Major Frustrations for Others*, 15 *Scholar* 341, 359 (internal citations omitted).

¹⁵⁷ *See id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See, e.g., supra* Part II (A)(1).

¹⁶⁰ Quintanilla, *supra* note 156, at 360.

Stabenow served as general counsel to an influential lobbying firm—now she sits as the Chairwoman for the Senate Agricultural Committee.¹⁶¹

Culturally and historically, the image of the American family farmer is no longer relevant, generally as a result of a shift in agricultural policy throughout the last two centuries. Currently, it does not appear as though there exists a firm understanding within the public, and perhaps even within the lawmaking bodies, of what constitutes a modern family or industrial farm. Quoting the organization Farm Aid, “[a]s farming in the United States becomes increasingly consolidated and industrialized, the face of agriculture is rapidly changing. Terms like ‘family farm’ and ‘factory farm’ are not necessarily mutually exclusive, and the lines distinguishing between one kind of farming and another are readily blurred.”¹⁶²

It is reported that “[t]he vast majority of farms and ranches in the United States are family owned and operated.”¹⁶³ There are a number of reasons why this paints a misleading image of American agriculture, some of which were discussed above.¹⁶⁴ I believe that an increase in transparency would not only raise awareness among consumers surrounding the source and environmental costs surrounding their food products, but would also alert the consumer to the fact that small family farmers (like Joe Lemire), while committing their own environmental harms, are really the minority in the agricultural sector. This transparency would also alert people to the fact that the environmental harms and consumer costs associated with agribusiness are much more severe than they realize.

For example, it is estimated that the size of the average farm has increased by two thirds since 1900, while, at the same time, the number of farms has dropped by the same amount.¹⁶⁵ The number of commodities produced at individual farms has decreased from five to one over that same span of time.¹⁶⁶ The small-scale family farmer who grows a number of different crops

¹⁶¹ *Id.*

¹⁶² *What Exactly is a Family Farm? How Does it Differ From a Factory Farm?*, FARMAID.ORG (Apr. 2010), <http://www.farmaid.org/site/apps/nlnet/content2.aspx?c=qlI5lhNVJsE&b=2723877&ct=8214687>.

¹⁶³ *Planning for Families in Agriculture*, MATPA.NET (last visited Oct. 17, 2013), http://www.matpa.net/Page/planning_for_families_in_agriculture.

¹⁶⁴ *See supra* Part I.

¹⁶⁵ Linda Breggin, *supra* note 75.

¹⁶⁶ *Id.*

is rare, while large-scale operations that essentially operate as commodity factories are the norm.¹⁶⁷ In the 1980s, the public reacted strongly when the media publicized stories and movies about “the plight of farmers and the environmental consequences of large-scale farming” resulting from the failure of many smaller farms due to a lack of a market for the high-yield production of the 1970s.¹⁶⁸ The public demanded a response from the federal government, which resulted in additional price support policies further promoting the shift to industrial agriculture.¹⁶⁹ It is possible then, that an incensed public would likely demand a regulatory and policy change within the federal government if the true face of agricultural production and policy were exposed. A rejection of industrial agriculture and its related economic policies would eliminate the need for bias in environmental regulation that extends protections to agribusiness.

CONCLUSION

In light of the current agricultural landscape, responsibilities lie with both the decision makers who impose regulations, and the consumers of agricultural production. Decision makers must realize that the scale of environmental harms imposed on our air quality, waterways, and ecosystems is no longer justifiable or appropriate given the current state of industrial agriculture. Steps must be taken to develop a framework of regulation that places requirements and costs of environmental stewardship proportionally upon agricultural producers. For this to occur, consumers must realize that Joe Lemire is not the face of modern agriculture.¹⁷⁰ Perhaps it is also appropriate for those who would rally around him, and farmers like him, during their challenges to environmental regulations to consider the long-term effects of essentially advocating for an agricultural producer’s right to pollute.

Farmers and policy makers may be unable to view regulation as other than a form of punishment for farmers. Agriculture is firmly held as part of the American tradition, and it seems to be difficult for policy makers to balance the protection of that tradition with the protection of the environment. However, there

¹⁶⁷ See Wender, *supra* note 83, at 144.

¹⁶⁸ Keeney & Kemp, *supra* note 16, at 33.

¹⁶⁹ *Id.*

¹⁷⁰ See *supra* intro.

is no longer a justification for the legal exceptions afforded to the agricultural sector, or for a lack of regulation altogether. Agricultural methods and operations have changed drastically in the past two centuries, and the increases in agricultural pollution have reflected this shift. The “American Ideology” of agriculture is no longer aligned with the realities of modern farming. Production of large-scale non-diversified crops has grown with the assistance of subsidies; and economics determines production, rather than demand.¹⁷¹ It is clear that agriculture has developed into an industry, and the time has come to regulate it as such.

¹⁷¹ See *infra* Part III.