

# Taking the Whole Hog: How North Carolina’s Right-to-Farm Act Strips Access to Nuisance Suits for Vulnerable Communities

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## INTRODUCTION

In North Carolina, industrial hog farming is king. Pork production contributes approximately three billion dollars to the state economy each year, and state legislators laud the industry as an important element of North Carolinian culture.<sup>1</sup> However, the impacts and benefits of hog farming are not shared equally by residents of the State. For example, Duplin County, where pigs outnumber humans nearly forty to one, has the highest concentration of Latinx community members

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1. N.C. STATE UNIV. COLL. OF AGRIC. & LIFE SCI’S., ECON. CONTRIBUTION OF N.C. AGRIC. & AGRIBUSINESS 24 (2015), <https://perma.cc/ZS5U-84RB> (stating that hogs and pigs contribute \$2.8 billion in sales each year).

in the State. Moreover, approximately a quarter of the county identifies as Black.<sup>2</sup> The foul odor of waste lagoons and the squealing of angry pigs make it nearly impossible for most residents living near hog farms to line dry their clothing, open their windows, and spend time outside their own homes.<sup>3</sup> The impact of hog waste on these communities has been both mental and physical. Residents living near these farms have higher rates of depression and respiratory illnesses than other communities in the State.<sup>4</sup>

These injustices caused by industrial agribusiness have flourished owing to the extremely restrictive Right-To-Farm (“RTF”) legislation employed by the State. All fifty states have some form of RTF legislation, which provides varying degrees of protection for farmers in nuisance litigation. In North Carolina, the Legislature has promulgated continually harsh RTF legislation to counter judicial action against agribusiness.<sup>5</sup> The current RTF, modified in 2018, only allows those living within one-half mile of the claimed nuisance to file suit.<sup>6</sup> In addition to these extremely narrow geographic requirements, the State’s RTF has a restrictive statute of limitations that only allows suits up to one year after the establishment or significant alteration of the agricultural operation.

This Note discusses the ongoing struggle to achieve justice for communities inundated by the stench of the hog industry in North Carolina. Part I describes the history of hog production in North Carolina and illustrates how the agricultural economy of the State, once centered around tobacco production on owner-operated farms, was transformed into an industrial haven for large pork producers. Part II illustrates how the increased industrialization of hog farming has created an environmental justice crisis and burdened primarily low-income Black, Indigenous, and people of color (“BIPOC”) communities in the State.

The following Sections discuss nuisance litigation in relation to farming disputes in North Carolina. Part III establishes the historical significance of nuisance as a remedy for obstruction of peaceful enjoyment of one’s property caused by animal operations. Part IV discusses the progression of North Carolina’s Right to Farm Act (“RTF Act”), originally passed in 1979. The law began as a codification of the “coming to a nuisance” defense for agricultural defendants in nuisance litigation, but it has been strengthened over time by the State legislature to the detriment of those living in communities around these industrial hog facilities. This Part goes on to discuss the judicial interpretation of the RTF Act before major

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2. *Duplin County North Carolina*, THE UNITED STATES CENSUS BUREAU (2021), <https://www.census.gov/quickfacts/fact/table/duplincountynorthcarolina/PST045219> (Census data affirming demographic information).

3. Wendee Nicole, *CAFOs and Environmental Justice: The Case of North Carolina*, 121 ENV'T HEALTH PERSP. 182, 183 (2013).

4. Julia Kravchenko et al., *Mortality and Health Outcomes in North Carolina Communities Located in Close Proximity to Hog Concentrated Animal Feeding Operations*, 79 N.C. MED. J. 278 (2018).

5. See *McKiver v. Murphy-Brown LLC*, 980 F.3d 937, 954–58 (4th Cir. 2020).

6. An Act to Make Various Changes to the Agricultural Laws 2018 North Carolina Laws S.L. 2018-113, Section 106-701(a)(2) (S.B. 711) (2018) (codified as N.C. GEN. STAT. § 106-701(a)(2)).

amendments passed in the last decade. It highlights the 2013 and 2018 changes to the RTF Act passed in response to successful nuisance action and industrial pressure, and how the courts interpret these alterations to the RTF Act. Part IV ultimately illustrates that the courts, which tend to be more sympathetic to plaintiffs, are at odds with the State legislature, which is decidedly pro-industry and beholden to the pork lobby in the State.

Community activists and environmental justice organizations in the State are working tirelessly to push back against legislative action and achieve justice for themselves and their neighbors. Hog waste poses a threat to the environment and public health, specifically for BIPOC communities in North Carolina. Yet, the State legislature has continually stripped away access to nuisance suits, which are—and historically have been—a critical form of relief from industrial overstep on private property.

This Note contributes to the broader discussion of environmental justice as it relates to Black land ownership. There exists a wide body of literature discussing how property laws have contributed to environmental racism and Black land loss throughout United States history,<sup>7</sup> but there is little discussion of how RTF laws inhibit justice for vulnerable populations. Black communities, which have existed in the State for generations, are forced to either leave their familial homes with little access to fair compensation, or withstand the noxious stench of hog waste. This Note seeks to illustrate how legislative alterations to the RTF Act in North Carolina have inhibited justice by limiting access to nuisance litigation for BIPOC communities in the State.

## I. THE HISTORY OF HOG PRODUCTION IN NORTH CAROLINA

Separating North Carolina from its history as an agricultural state is nearly impossible. From its colonial beginnings, it has always been a rural state with a high concentration of agricultural production. The State's initial cash crop, tobacco, drove the economy until the 1980s.<sup>8</sup> As tobacco became less profitable, land was converted to support industrial livestock, which provided a more lucrative business endeavor.

Since the 1980s, the number of large-scale industrial hog operations has increased tremendously. The increase in industrial livestock agriculture caused a shift in the business structure for livestock farming in the State. Rather than a horizontally integrated system, in which individual farmers would raise pigs for slaughter and then sell them for processing, the industry operates using vertical integration, wherein all processes from birth to slaughter and processing are

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7. See generally Thomas Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505 (2001).

8. See Barry Yeoman, *Environmental Justice and the Disparate Impact of North Carolina Industrial-Scale Hog Farming on Minority Communities*, 14 U. ST. THOMAS J.L. & PUB. POL'Y 82 (2020).

controlled by a single corporate entity.<sup>9</sup> This “co-location of large processing and production facilities has resulted in an unprecedented concentration of hog farms” in Eastern North Carolina.<sup>10</sup> What began as an industry driven by small farms has been transformed into a corporate structure driven by a single company, Smithfield Foods, a subsidiary of the Chinese company, WH Foods.<sup>11</sup> Smithfield, which has incorporated other production companies including Murphy-Brown LLC, the defendant in *McKiver v. Murphy-Brown*, is the largest producer and processor of pork in the world.<sup>12</sup>

By the mid-1990s and continuing today, the average farmer in North Carolina owned no hogs.<sup>13</sup> Instead, hog farmers are employed as contract growers, agreeing to house and feed the hogs until slaughter without direct ownership over the pigs. Often, the contract growers receive a set fee per pig while the industrial owner take on the majority of market and production risks.<sup>14</sup> The shift to industrialization has caused a drastic increase in the number of hogs and a drastic decrease in the number of farms. The shift to industrial production has altered the system of liability for nuisance as well. Rather than addressing the nuisance within the community, affected individuals are forced to bring suit against major corporations.

By the end of the twentieth century, hog farming had surpassed most other agricultural production in the State, and the hog population exceeded the human population. The vertical integration system and Concentrated Animal Feeding Operation (“CAFO”) technologies allowed for higher concentrations of hogs in smaller areas than ever before. During the 1980s and 1990s, the State legislature encouraged the continued industrialization of the pork industry in the state through a series of laws that incentivized building CAFOs, while stripping local communities of their ability to stop industrialization.<sup>15</sup> These so-called “Murphy Laws,” named after industrial pork executive and state legislator Wendell Murphy, often passed without a single dissenting vote and made it easier for pork

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9. HARRISON PITTMAN, CONCENTRATION, HORIZONTAL CONSOLIDATION, AND INTEGRATION IN THE HOG AND CATTLE INDUSTRIES: TAKING STOCK OF THE ROAD AHEAD 3 (2005), <https://perma.cc/4LQS-LCDC>.

10. Cordon M. Smart, *Right to Commit Nuisance in North Carolina: A Historical Analysis of the Right-to-Farm Act*, 94 N.C. L. REV. 2097, 2104 (2016).

11. Jennifer Wang, *The Chinese Billionaire Whose Company Owns Troubled Pork Processor Smithfield Foods*, FORBES (Apr. 16, 2020), <https://perma.cc/RH5B-VYGN>.

12. *Id.*

13. Joby Warrick & Pat Stith, *Hundreds of contract farmers make up a franchise system run by a few big companies. Meanwhile, traditional hog farming is fading*, RALEIGH NEWS & OBSERVER (Feb. 21, 1995), <https://perma.cc/V4NU-R9HL>.

14. James Rhode, *The Industrialization of Hog Production*, 17 REV. AGRIC. ECON. 107, 109 (1995).

15. Pat Stith & Joby Warrick, *Murphy's Law: For Murphy, good government means good business*, RALEIGH NEWS & OBSERVER (Feb. 22, 1995), <https://perma.cc/V4NU-R9HL> (“[Murphy] voted for, and sometimes co-sponsored bills giving hog and poultry producers tax breaks, protection from local zoning and exemptions from tougher environmental regulations”).

and poultry producers to finance and build their facilities in the State.<sup>16</sup> The bills included protections for industry against environmental regulation and limited the ability of local governments to enact zoning regulations limiting CAFO expansion.<sup>17</sup> The passage of these laws raised ethical concerns surrounding industrial leaders in the legislature. Still, many of these concerns have gone unnoticed by governmental actors, and there continues to be zealous support for the industry in the general assembly.<sup>18</sup> These laws, championed by industrial leaders, set the groundwork for nearly forty years of factory farming in the State, and a precedent for lawmakers in the future. In the North Carolina State Legislature, industrial support trumps public welfare whole hog.

The largest problem associated with these industrial hog farms is waste. A 2008 study conducted by the United States Government Accountability Office found that in the five North Carolina counties with the highest concentrations of hogs (Sampson, Duplin, Bladen, Wayne, and Green), pigs produced over 15.5 million tons of manure in a single year—more than the average small city.<sup>19</sup> The majority of hog CAFOs in the State are confined in these six counties in the southeast, where the population is primarily made up of BIPOC and low-income communities, raising environmental justice concerns discussed more in-depth in Part II of this Note.<sup>20</sup>

In an industrial setting, pigs are kept confined for nearly all their lives. The urine and fecal matter produced by the hogs are gathered through grates in pen floors and are periodically flushed into storage lagoons.<sup>21</sup> These lagoons are large open-air pits designed to allow solid waste to settle to the bottom and liquids to float on the surface. The liquid waste in lagoons is then spread onto spray fields, usually Bermuda grass or animal feed.<sup>22</sup> This process releases large amounts of fecal matter and urine into the air, causing entire communities to be perpetually infected by the smell of animal waste.<sup>23</sup> Additionally, these open-air lagoons are

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16. *Id.* (noting that Murphy’s laws included an exemption from sales tax for building materials, equipment, and machinery).

17. *Id.* (stating that Murphy included an amendment to a 1991 law prohibited the Department of Environmental Quality from implementing its own effluent standards or limitations “except as required by federal law”).

18. Warrick & Stith, *supra* note 13, at 15 (stating that District Attorney of Wake County was concerned about the movement of campaign donations during the passage of these laws and that there was a general concern about how much Murphy would profit from these changes).

19. U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-944, CONCENTRATED ANIMAL FEEDING OPERATIONS: EPA NEEDS MORE INFORMATION AND A CLEARLY DEFINED STRATEGY TO PROTECT AIR AND WATER QUALITY FROM POLLUTANTS OF CONCERN 21 (2008).

20. N.C. Office of State Budget & Management, *NC Complete Count Committee*, <https://perma.cc/U2RH-WHVV> (last visited Mar. 29, 2021) (census data shows that Duplin county is 25% Black and 23% Latinx; Sampson County is 26.6% Black and 20.6% Latinx; Bladen County is 34% Black; Wayne County is 32% Black and 12.4% Latinx; Green County is 36.8% Black and 15.7% Latinx; and Robeson County is 23.6% Black and 42.3% Native).

21. Nicole, *supra* note 3, at 186.

22. *Id.* at 183.

23. *Id.*

prone to overflow and leakage, releasing manure into groundwater and wreaking havoc on local waterways.<sup>24</sup> During major hurricanes, lagoons are prone to break-ages that can release millions of gallons of waste into waterways.<sup>25</sup>

Although the State legislature instituted a moratorium on the construction or expansion of anaerobic waste lagoons in 1997, all existing lagoons could remain active.<sup>26</sup> There are still nearly 4,000 active lagoons brimming with sickly pink hog waste across the State.<sup>27</sup> Communities living near these lagoons experience mental and physical health illnesses as a result of the smell.<sup>28</sup> The odors and sounds of hog CAFOs significantly impact the property value of neighboring properties.<sup>29</sup> This makes it nearly impossible for homeowners to sell the property for enough to relocate, and many are thus forced to withstand the perpetual stench of feces and screeches of angry pigs.<sup>30</sup>

## II. INEQUALITY IN HOG FARMING: THE IMPACT OF CAFOs ON LOW INCOME AND BIPOC COMMUNITIES

Hog CAFOs in North Carolina overwhelmingly impact low-income and people of color, particularly Black, Native, and Latinx communities. Duplin County, situated in the southeastern part of the State, produces more hogs than any other county in the United States, and generated approximately 614 million dollars in pork products in 2012.<sup>31</sup> CAFOs in Duplin contribute 100 million dollars more than the next highest producing county, Sampson, which faces many of the same environmental justice issues as Duplin and has a similar demographic makeup.<sup>32</sup> The majority of this Note focuses on the impact of CAFOs on Black communities because the overwhelming majority of plaintiffs in recent nuisance claims against

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24. *Id.* at 186.

25. Kendra Pierre-Louis, *Lagoons of Pig Waste are Overflowing After Florence. Yes, That's as Nasty as it Sounds*, N.Y. TIMES (Sept. 19, 2018), <https://perma.cc/ATD8-V74K>.

26. 1997 N.C. SESS. LAWS. 1998-188 (stating that the moratorium on construction and expansion of anaerobic lagoons does not extend to already permitted operations nor to operations established before March 1997); N.C. GEN. STAT. ANN. § 143-215.101 (West 2020) (most current version of law reaffirming the moratorium).

27. Editorial Board, *North Carolina's Noxious Pig Farms*, N.Y. TIMES (Oct. 25, 2016), <https://perma.cc/5E2C-CQBA>.

28. *See infra* Part II(B).

29. Raymond Palmquist, Fritz Roka, & Tomislav Vukina, *Hog Operations, Environmental Effects, and Residential Property Values*, 73 LAND ECON. 114, 123 (1997) ("The estimates from a hedonic model show that proximity to hog operations has a statistically significant and negative impact on property values").

30. *See* RIGHT TO HARM (Hourglass Films 2018) (film discussing the impacts of industrial farming on homeowners across the nation).

31. 2012 Census of Agr., *Hog and Pig Farming: A \$22.5 billion industry, up 25 percent since 2007*, U.S. DEPT. OF AGRIC. (June 2014), <https://perma.cc/N2KR-5JRW>.

32. *Id.*

industrial producers have been Black residents of these counties.<sup>33</sup> Part A of this Section discusses the historical significance of Black landownership in North Carolina. Part B addresses how mental and physical health are impacted by residing near CAFOs in the State. Part C highlights the difficulty of achieving relief for environmental justice communities through administrative relief in the State. Ultimately, this Section illustrates how mismanagement and underwhelming enforcement of environmental statutes have created immediate mental and physical health impacts for, and threatened the longevity of, these historically significant communities.

#### A. IMPORTANCE OF BLACK LANDOWNERSHIP IN SOUTHERN STATES

The majority of these high concentration swine operations are located in the coastal plains region of the State, which is part of the Southern Black Belt, an area defined by a history of slave labor, sharecropping, and Jim Crow.<sup>34</sup> Residents in this area suffer high rates of unemployment and poverty, as well as little access to quality education, healthcare, or proper housing.<sup>35</sup> But the communities living in the Black Belt have a rich history and deeply rooted familial connections linked to land ownership. The Black Belt is historically significant for Black Americans. Many Black landowners live on and maintain the land that was passed down for generations, with their land ownership tied to the early Reconstruction Era.<sup>36</sup> With hog CAFOs comes a fear that these communities and their traditions will not survive if the facilities continue to operate as they have for the last three decades.<sup>37</sup> This is especially true of the residents in Duplin, Sampson, and Bladen counties, who are being forced out of their familial homeland because of the overwhelming stench of hog CAFOs.

The homeowners in these rural communities have deep, generational ties to the land that acts as a physical representation of their connection to their familial ancestors.<sup>38</sup> These families, who have kept this land and honored it for

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33. Complaint at 65, Rural Empowerment Ass'n for Cmty. Help v. State, 2019 WL 3456702 (N.C. Super. Jun. 19, 2019) (No. 19-CVS-008198) (“[M]ore than 400 plaintiffs – almost all of whom are African American – filed nuisance actions against Murphy-Brown LLC . . .”).

34. Nicole, *supra* note 3, at 183.

35. Christine Ball-Blakely, *CAFOs: Plaguing North Carolina Communities of Color*, 18 SUSTAINABLE DEV. L. & POL'Y 4, 5 (2017).

36. Erica Hellerstein & Ken Fine, *A Million Tons of Feces and an Unbearable Stench: Life Near Industrial Pig Farms*, THE GUARDIAN (Sept. 2017), <https://perma.cc/U8RC-RVXK> (Discussing the impact of the hog industry on black landownership. “Miller makes this trip often, to honor her family and pay her respects. She points ahead to her family cemetery . . . it’s a stone’s throw from her one story, white walled house, part of a tract of land her great grandmother inherited as part of a post-slavery land grant.”).

37. Complaint at 164, Rural Empowerment Ass'n for Cmty. Help v. State, 2019 WL 3456702 (N.C. Super., June 19, 2019) (No. 19-CVS-008198) (“Although serving a meal as part of a community meeting is a deep tradition, oftentimes the stench from the hog and poultry facilities makes it impossible to eat or even cook outside”).

38. Hellerstein & Fine, *supra* note 36.

generations, are being suffocated without legal remedy by the hog industry.<sup>39</sup> As is common with many BIPOC communities facing environmental harm, the residents of these historically Black neighborhoods are often viewed by industry as what Dr. Robert Bullard—the father of the environmental justice movement—calls “the path of least resistance.”<sup>40</sup> Thus, these communities are the first to be heavily inundated with environmental harms, and, in North Carolina, that means industrial hog operations become their unwelcome neighbors.

#### B. MENTAL AND PHYSICAL IMPACTS OF LIVING NEAR CAFOS

In addition to the loss of enjoyment and use of the land, living near CAFOs causes various mental and physical health problems. A study conducted by Duke University found that residents living near industrial hog operations have a shortened life expectancy, even after adjusting for socioeconomic factors that influence life spans.<sup>41</sup> This study also found higher mortality rates for all studied diseases, “including infant mortality, anemia, kidney disease, septicemia, and tuberculosis.”<sup>42</sup>

Beyond the striking mortality changes, living in these areas can cause long-term respiratory problems stemming from constantly inhaling particulate matter from the spray field system.<sup>43</sup> Certain chemical compounds found in hog waste are extremely dangerous when inhaled by humans. Ammonia, a compound with a bleach-like smell, is found in urine and can cause severe respiratory irritation, chemical burns, and chronic lung disease.<sup>44</sup> Hydrogen Sulfide, which creates a foul odor reminiscent of rotten eggs, is an extremely dangerous irritant that causes mucosal inflammation and can lead to chronic respiratory illnesses, pulmonary edema, and death.<sup>45</sup> Other forms of particulate matter found in hog waste have been linked to chronic respiratory illnesses, such as bronchitis and asthma,

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39. Complaint at 35, *McKiver v. Murphy-Brown LLC*, 2018 WL 4189408 (E.D. N.C. Sept. 28, 2018) (No. 7:14-cv-00180-BR) (“Ms. McKiver, now over 80 years old, has lived on Pearl Lloyd Road for over 50 years. To the best of her recollection, her late husband, Dennis McKiver, Sr., purchased the property from Gladwin Tatum some years before their marriage in or about 1951 . . . Upon her own death, she plans to leave her property interest to her family but is upset because the property is far less pleasant now than it would be if not for the thousands of hogs being located so close nearby”).

40. ROBERT BULLARD, *DUMPING IN DIXIE* 4 (3d ed. 2000) (“Historically, toxic dumping and the location of locally unwanted land uses (LULUs) have followed the ‘path of least resistance,’ meaning black and poor communities have been disproportionately burdened with these types of externalities”).

41. Duke Health News, *N.C. Residents Living Near Hog Farms Have Elevated Disease, Death Risks*, DUKE SCHOOL OF MED.: DUKE SURGERY (Sept. 19, 2018), <https://perma.cc/ZF9T-FSYD>.

42. *Id.*

43. *Id.*

44. CARRIE HRIBAR, *UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES* 6 (Mark Shultz ed., 2010), <https://perma.cc/7U28-YHMB>.

45. *Id.*

declining lung function, and organic dust toxic syndrome, a flu-like illness caused by inflammation of the respiratory tract.<sup>46</sup>

The health impacts are particularly concerning for the most vulnerable populations in the affected areas: children and the elderly. “Twenty-six percent of schools surveyed in North Carolina reported that CAFO odors are noticeable outside the school, and eight percent reported that the odors were noticeable inside the school.”<sup>47</sup> Children from economically disadvantaged households are more prone to suffer respiratory illnesses associated with CAFO exposure, specifically asthma, because they are more likely to live close to an industrial animal operation.<sup>48</sup>

In addition to air quality concerns, hog CAFOs, especially those that use a lagoon and spray field system, raise various water quality concerns that impact access to safe drinking water. In rural North Carolina, these concerns are exacerbated by the use of private well water, which is extremely vulnerable to contamination and not regulated by the Safe Drinking Water Act.<sup>49</sup> The high water table, sandy soil, and tendency to flood increase the risk of contamination.<sup>50</sup> There are also concerns about pathogen contamination in water, leading to widespread outbreaks of illnesses such as *E. coli* and *Salmonella*.<sup>51</sup> Ingesting contaminants from tainted water can cause severe gastrointestinal issues, which are common among residents in communities surrounding CAFOs.<sup>52</sup>

Beyond the physical impacts, living near a CAFO has a severe negative effect on mental health, mood, and cognitive function.<sup>53</sup> A study conducted by Duke University School of Psychiatry in 1994 found that “persons living near the swine operations who experienced the odors had significantly more tension, more depression, more anger, less vigor, more fatigue, and more confusion than control subjects,” as well as decreased mood stability and increased mood disturbances.<sup>54</sup> Living near a hog CAFO impacts every facet of life, from access to the most basic necessities—clean air and water—to the ability to enjoy quality time with friends and family. The negative mental and physical health consequences of life near CAFOs are not spread equally among residents of the State, with the majority of impacted residents identifying as Black, Native American, or Latinx.

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46. *Id.*; S. Dee Jepson, Kent McGuire & Danielle Poland, *Respiratory Impairment in Agriculture*, OHIO STATE UNIVERSITY (2013), <https://perma.cc/9GLA-H2X5>.

47. Ball-Blakely, *supra* note 35, at 6.

48. *See id.* (Stating that schools located in close proximity to CAFOs were most “often attended by students of lower socioeconomic status”).

49. Virginia Guidry et al., *Connecting Environmental Justice and Community Health: Effects of Hog Production in North Carolina*, 79 N.C. MED. J. 324, 326 (2018).

50. *Id.*

51. HRIBAR, *supra* note 45, at 10.

52. Ball-Blakely, *supra* note 35, at 6.

53. *See generally* Susan Schiffman, E.A. Miller, M.S., Suggs & B.G. Graham, *The Effects of Environmental Odors Emanating from Swine Operations on the Mood of Nearby Residents*, 37 BRAIN RSCH. BULLETIN 369 (1995).

54. *Id.* at 371.

## C. ENVIRONMENTAL JUSTICE, HOG FARMING, AND BARRIERS TO ADMINISTRATIVE RELIEF

The principles of environmental justice have deep roots in eastern North Carolina,<sup>55</sup> yet the State legislature continues to perpetuate environmental inequality by limiting access to necessary relief through nuisance litigation. Environmental justice is grounded in the belief that all people deserve equal access to environmental benefits and protection from environmental harms regardless of race, income, or national origin.<sup>56</sup> Environmental justice concerns center around the disproportionate impact of environmental harms on people of color and low-income communities. In 1991, leaders of the environmental justice community adopted the Seventeen Principles of Environmental Justice during the People of Color Environmental Leadership Summit. These principles call for a shift in public policy and economic activity to secure environmental safety for all people. The principle most relevant to the discussion of this Note states, “[e]nvironmental justice protects the right of victims of environmental injustice to receive full compensation and reparations for damages . . . .”<sup>57</sup> Many of the community members impacted by CAFOs have been stripped of their access to meaningful, just compensation in courts because of the 2013 and 2018 amendments to the Right to Farm Act. These amendments protect the industry at the expense of vulnerable community members.

The Environmental Protection Agency (“EPA”) has also noted significant environmental justice concerns surrounding the current hog production system in North Carolina. On January 12, 2017, the EPA External Civil Rights Compliance Office (“ECRCO”) issued a letter of concern addressing “alleged discriminatory impacts from North Carolina Department of Environmental Quality’s (“NC DEQ”) operation of the Swine Waste Management General Permit (“General Permit”).”<sup>58</sup> This letter was in response to a 2015 complaint filed by Earthjustice, on behalf of several North Carolina environmental organizations, under Title VI of the 1964 Civil Rights Act. The North Carolinian organizations claimed that the 2014 renewal of the General Permit without alterations to the lagoon and spray field system has a discriminatory impact on “African Americans, Latinos, and Native Americans.”<sup>59</sup> The complainants and NC DEQ began the Alternative Dispute Resolution process in 2015. This process was unsuccessful, and the groups could not reach a settlement agreement by 2016.<sup>60</sup> As the next procedural

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55. BULLARD, *supra* note 41, at 30–32 (discussing the earliest fight against environmental racism in Warren County, NC, after the County “which was mostly black, was selected as the burial site for more than 32,000 cubic yards of soil contaminated with PCBs”).

56. *17 Principles of Environmental Justice*, ENV'T WORKING GROUP (Oct. 2, 2007), <https://perma.cc/P8LL-STJB>.

57. *Id.*

58. Letter of Concern from EPA External Civil Rights Compliance Office to Sec. William Ross Jr. (Jan. 12, 2017), <https://perma.cc/58V5-AHTG> [hereinafter ECRCO Letter].

59. *Id.* at 2.

60. *Id.*

step, ECRCO launched its formal investigation into the discriminatory impacts of the General Permit and the claims that NC DEQ played a role in allowing retaliatory action by CAFO owners and hog producers against the complainants.<sup>61</sup>

Under EPA regulations, Title VI protection is extended to “intentional discrimination as well as practices that have a discriminatory effect on the basis of race, color, or national origin.”<sup>62</sup> Additionally, under 40 C.F.R. § 7.100, intimidation and retaliation against a party “for the purpose of interfering with rights protected by Title VI” or in response to participation in a claim is prohibited.<sup>63</sup> ECRCO has the authority to conduct compliance reviews of any recipient of EPA assistance to ensure compliance with Title VI. To investigate the issue of discriminatory impact, ECRCO conducted on-site interviews with residents living near CAFOs on the General Permit, primarily in Duplin and Sampson Counties—both of which have high concentrations of hogs.<sup>64</sup> The eighty-five resident interviews collected by ECRCO paint a disturbing picture of communities desperate for aid.

The primary impacts noted by ECRCO echo those discussed earlier in this Note. Residents complained of the overwhelming odor that permeates every fiber of life and inundates the community without warning on days when the CAFOs turn on confinement house fans, spray waste on fields, or transport dead hogs past their homes.<sup>65</sup> Residents described “feeling as though they are prisoners in their own homes.”<sup>66</sup> In addition to the stench, ECRCO noted the increase in “severity of asthma and other respiratory illnesses, nausea, headaches, and other health conditions.”<sup>67</sup> Beyond the physical impacts, ECRCO notes the loss of community that stems from increased CAFO activity.<sup>68</sup> ECRCO also reviewed various studies conducted by health professionals, which concluded that living near a hog CAFO that uses the outdated lagoon and spray field system has severe impacts on mental and physical health.<sup>69</sup> The ECRCO letter also highlights that BIPOC individuals in the state are more likely to live within three miles of a CAFO than their white counterparts.<sup>70</sup>

To mitigate the discriminatory impact, the ECRCO letter recommends that NC DEQ reevaluate their General Permit requirements to determine what necessary changes should be made to the General Permit application process and how these

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61. *Id.* (“On July 11, 2016 the Complainants filed an additional complaint alleging NC DEQ violated EPA’s regulation prohibiting retaliation, intimidation, and harassment of Complainants (40 C.F.R. § 7.100)”).

62. ECRCO Letter at 3; *see also* 40 C.F.R. §§7.35(a), 7.35(b) (2018).

63. ECRCO Letter at 3.

64. *Id.*

65. *Id.* at 4.

66. *Id.*

67. *Id.*

68. *Id.* (The ECRCO notes that many residents “have lived in these communities for generations” but are now experiencing loss of community because “young adults leave and do not return because of the odor [and] fear of health impacts from air and water”).

69. ECRCO Letter at 6; *see* Part III(B).

70. ECRCO Letter at 7.

changes can be implemented smoothly. Additionally, they recommend that NC DEQ make changes to the regulatory scheme in the State “to substantially mitigate the adverse impacts,” as well as to conduct a series of internal self-evaluations to determine whether the current procedures of the NC DEQ support the obligations under the federal nondiscrimination statutes. While these recommendations sound promising, they are not binding on the State, and thus the NC DEQ is under no obligation to address these recommendations. As of 2021, the General Permit is still in effect, and while some changes to address transparency and monitoring requirements have been made, there have been no changes addressing the environmental justice concerns raised by ECRCO.<sup>71</sup>

The ECRCO letter gives further insight into the pitfalls of administrative relief for impacted communities in North Carolina and highlights the importance of relief in the tort system. While conducting the investigation, ECRCO asked residents why they had not filed complaints with the NC DEQ. Residents stated that “filing complaints would be pointless and has resulted in retaliation, threats . . . and harassment from swine facility operators.”<sup>72</sup> During the mediation processes between NC DEQ and environmental groups, NC DEQ encouraged representatives from the pork industry to join the sessions.<sup>73</sup> ECRCO voiced its concerns about this practice, but the letter did not contain any binding requirements to mitigate this problem. Ultimately, ECRCO did not issue a formal finding of discrimination,<sup>74</sup> and the investigation was suspended after the Complainants and NC DEQ agreed to re-enter mediation.<sup>75</sup> Overall, this letter illustrates the difficulty of pursuing administrative action in the State, owing to the hostility of NC DEQ towards complainants and the lack of oversight by federal enforcement

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71. Waterkeeper Alliance, *North Carolina Riverkeeper Respond to Swine Waste Management General Permit*, WATERKEEPER ALLIANCE (Apr. 12, 2019), <https://perma.cc/HT8S-MXD2>.

72. ECRCO Letter, *supra* note 59, at 4, 8. (“Those interviewed stated that [physical and verbal threats from swine producers] are regular events, rather than an exception, creating a climate where residents believe that if they file an environmental complaint with NC DEQ, they will likely be retaliated against by neighboring swine facility operators or employees . . . . Particularly egregious instances brought to ECRCO’s attention include a local industrial swine facility operator entering the home of an elderly African American woman and shaking the chair she sat in while threatening her and her family with physical violence if they continued to complain about the odors and spray”).

73. *Id.* at 8 (“ECRCO has grave concerns about these reports indicating a potential hostile and intimidating environment for anyone seeking to provide relevant information to NC DEQ or EPA. Also, ECRCO is concerned about the circumstances surrounding the attendance by pork industry representatives during the mediation session”).

74. Hannah Perls, *EPA Undermines its Own Environmental Justice Programs*, HARV. ENV'T & ENERGY L. PROGRAM (Nov. 12, 2020), <https://perma.cc/M6HK-ENEH>.

75. The mediation process concluded in 2018. The NC DEQ agreed to alter the General Permit to include more monitoring and public participation in the permitting process, but the agreement did not discuss concerns around environmental justice. *See* Settlement Agreement, N.C. Env't Justice Network v. N.C. Dep't of Env't Quality, EPA File No. 11 R-14-R4 (ECRCO Sept. 3, 2014) (May 3, 2018), <https://perma.cc/5N2S-LLK6>.

agencies.<sup>76</sup> With administrative relief unlikely at the state level, it is critical that impacted communities have access to forms of tort relief, most importantly nuisance litigation.

### III. HISTORICAL SIGNIFICANCE OF NUISANCE LITIGATION IN FARM DISPUTES

Since before the inception of the United States, nuisance claims have been vital in protecting the property interests of individuals living near animal agriculture. Some of the earliest common law uses of agricultural nuisance claims discuss odor stemming from improper livestock management.<sup>77</sup> In *Aldred's Case* from 1610, one of the most widely cited private nuisance cases, the plaintiff claimed that the defendant's erection of a hog sty created such a strong odor as to deprive the plaintiff of his enjoyment of his land.<sup>78</sup> The King's Bench ultimately held that the defendant's actions constituted a nuisance, and he was liable to the plaintiff for damages. This case set the groundwork for nearly 400 years of private nuisance suits and has been extremely important in the development of environmental law.<sup>79</sup> As a remedy under the common law, private nuisance litigation was often used to protect one's property rights and the use and enjoyment of one's land.<sup>80</sup> Prior to the passage of major environmental regulations in the United States, common law nuisance claims, similar to those made in *Aldred's Case*, were the primary remedy for environmental harms.<sup>81</sup> Even after the passage of major environmental regulations, a nuisance suit remains the most effective remedy to make plaintiffs whole after environmental harms. A nuisance suit allows plaintiffs to collect damages, unlike many environmental and administrative remedies, which do not allow for punitive or compensatory damages.<sup>82</sup>

The Second Restatement of Torts mirrors language in the common law. It states that private nuisance claims arise where the defendant's conduct causes "the invasion of another's interest in private use and enjoyment of land."<sup>83</sup> Additionally, under the Restatement, a party may be liable for a private nuisance where the property invasion is either "intentional and unreasonable" or

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76. The ECRCO has been heavily criticized by environmental justice activists and scholars because it has failed to adequately enforce its Title VI mandate. The ECRCO has investigated less than a quarter of the complaints it has received since 1996 and rarely issues a finding of discriminatory intent. Perls, *supra* note 75.

77. William Aldred's Case, (1610) 77 Eng. Rep. 816 (KB).

78. Jonathan Morris, "One Ought Not Have So Delicate a Nose": CAFOs, Agricultural Nuisance, and the Rise of the Right to Farm, 47 ENV'T. L. 261, 263 (2017).

79. *Id.* at 261.

80. Jason Czarnezki & Mark Thomsen, *Advancing the Rebirth of Environmental Common Law*, 34 B. C. ENV'T AFF. L. REV. 1, 3-4 (2007) ("At common law, landowners have the right to enjoy the benefits of their land free from 'unwanted and unreasonable invasions by people or pollution'").

81. Smart, *supra* note 10, at 2098.

82. *Basic Information on Enforcement*, ENV'T PROT. AGENCY, <https://perma.cc/U4J3-BFBM> (Jan. 13, 2021).

83. RESTATEMENT (SECOND) OF TORTS § 822 (AM. L. INST. 1979).

unintentional and negligent, reckless, or unusually dangerous.<sup>84</sup> The North Carolina Supreme Court has incorporated the Restatement's definition of private nuisance and has stated that a private nuisance can be "a substantial non-trespassory invasion of another's interest in the private use and enjoyment of property."<sup>85</sup> The Court stated that to make a prima facie showing, the plaintiff must prove that a) defendant's actions, under the circumstances, produced an unreasonable invasion of the plaintiff's right to use and enjoy her property, and b) the plaintiff suffered some "substantial injury" as a result.<sup>86</sup> Prior to the passage of the Right to Farm Act in 1979, which is discussed in detail in Part IV, any person who could establish a prima facie case using the criteria above could reasonably bring suit. The claim was not barred if the plaintiff voluntarily came to the nuisance.<sup>87</sup> However, the passage of the RTF Act has significantly limited who can bring a nuisance suit against an agricultural producer by implementing a strict statute of limitation and a broad "coming to the nuisance" defense.

As the law currently stands, nuisance, rather than other tort or administrative remedy, provides the most direct access to relief, in the form of monetary damages, for individuals impacted by industrial farming. Administrative remedies, such as citizen suit provisions under the Clean Air Act or Clean Water Act, are insufficient because they cannot provide individuals with damages and have strict procedural requirements that inhibit suit.<sup>88</sup> Additionally, owing in part to the Murphy's Laws discussed previously, the State legislature has limited the ability of state administrative agencies to regulate CAFOs.<sup>89</sup> There also exists a lack of federal oversight by the EPA, which rarely takes an active role in addressing environmental justice concerns at the state level.<sup>90</sup> Before the passage of RTF laws, nuisance litigation remained the most effective route for a legal remedy against industrial animal agriculture because of precedent, both in the state courts and throughout history in the common law. Unfortunately, as industrial agriculture grew in importance, many states began to significantly limit access to nuisance remedies against producers under the law. In North Carolina, a series of amendments to the State's RTF Act have significantly limited the ability of impacted communities to get relief.

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84. *Id.*

85. *Watts v. Pama Mfg. Co.*, 124 S.E.2d 809, 813 (N.C. 1962) (emphasis omitted); see N.C. Law of Torts § 25.30 (3d ed. 2015).

86. *Id.* at 814.

87. *Id.* at 815 (stating that "the fact that a person voluntarily comes to a nuisance by moving into the sphere of its injurious effect, or by purchasing adjoining property, or erecting a residence or building in the vicinity after the nuisance is created, does not prevent him from recovering damages" but may be a factor in determining whether or not the actions of the defendant are unreasonable).

88. See 33 U.S.C. § 1319; see also 42 U.S.C. § 7413.

89. See *supra* Part II.

90. Perls, *supra* note 75.

#### IV. THE RIGHT TO FARM LAW: LIMITING ACCESS TO TRADITIONAL NUISANCE REMEDIES

All fifty states have passed RTF laws designed to protect farmers, ranchers, and other agricultural industries from nuisance litigation.<sup>91</sup> The primary element of many RTF laws is the codification of a common law principle, the “coming to the nuisance” defense, which protects agricultural operations from nuisance suits brought by individuals who moved into the vicinity during the ongoing operation of the farm.<sup>92</sup> Additionally, nearly every state includes animal agriculture and CAFOs in the definition of agricultural operation.<sup>93</sup>

The RTF Act in North Carolina played an influential role in developing similar laws across the nation. This Section will discuss the earliest iteration of the law, which was passed in 1979 and was used by at least nineteen states as a model for their legislation.<sup>94</sup> North Carolina’s RTF Act and the amendments that have followed have slowly stripped away landowners’ access to nuisance suits against agricultural producers. The initial version began this process by providing a broad coming to the nuisance defense and limiting the authority of local governments to create zoning regulations that would impact agricultural operations.<sup>95</sup> Subsequent versions of the law have expanded the scope of covered industries to include forestry,<sup>96</sup> altered definitions in response to judicial interpretation,<sup>97</sup> and further limited the ability for individuals to bring suit by implementing strict geographical requirements for standing.<sup>98</sup>

The law was put in place originally to protect farming from the increased suburbanization.<sup>99</sup> The law asserts that it is the State’s policy “to conserve and protect and encourage the development and improvement of its agricultural land and forestland for the production of food, fiber, and other products.”<sup>100</sup> The ultimate goal of the law is to protect existing agricultural operations from the increased residential development that was trickling into rural areas of the State, which was highly concerning to lawmakers.<sup>101</sup> To achieve this goal, the RTF Act has the

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91. Alexander A. Reinert, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694, 1695 (1998).

92. Morris, *supra* note 79, at 277.

93. *Id.* at 278.

94. *Id.* at 276 n.149; Reinert, *supra* note 92, at 1707 n.80.

95. N.C. GEN. STAT. § 106-701 (2021).

96. Act effective Oct. 1, 1991, ch. 892, 1991 N.C. Sess. Laws 892 (H.B. 978) (amending N.C. GEN. STAT. § 106-701 to include forestry operations).

97. NC Agriculture and Forestry Act, ch. 314, 2013 N.C. Sess. Laws 314 (H.B. 614) (amending N.C. GEN. STAT. § 106-701(a) to change the definition of fundamental change).

98. Act of June 27, 2018, ch. 113, 2018 N.C. Sess. Laws 113 (S.B. 711) (amending N.C. GEN. STAT. § 106-701(a) by adding three requirements in order to bring suit).

99. Smart, *supra* note 10, at 2116.

100. N.C. GEN. STAT. § 106-700 (2021).

101. *Id.* (“When other land uses extend into agricultural and forest areas, agricultural and forestry operations often become the subject of nuisance suits. As a result, agricultural and forestry operations

stated purpose “to reduce the loss to the State of agricultural and forestry resources by limiting the circumstances under which an agricultural or forestry operation may be deemed to be nuisance.”<sup>102</sup> With each iteration of the law, the stated purpose has remained mostly unchanged, and the State legislature continues to expand these limitations over nuisance suits brought against agricultural and forestry operations.

North Carolina’s RTF Act provides farm owners with an affirmative defense for preexisting agricultural and forestry operation defendants against nuisance claims brought by neighboring landowners who had come to the nuisance.<sup>103</sup> The Act broadly defines agricultural and forestry operations to include nearly every commercial producer in both industries, making the defense widely available.<sup>104</sup> As is customary for affirmative defenses, the defendant has the burden of proving that the plaintiff had come to the nuisance and is thus barred from bringing the action.<sup>105</sup>

The Act includes certain exceptions to the general applicability of the coming to the nuisance defense. Still, these limits have been repealed over time as a result of unfavorable interpretations by the courts.<sup>106</sup> The early versions of the Act included an exception allowing damages if the defendant causes water pollution or causes overflow of water onto plaintiff property, but the State repealed this provision in the 2018 amendment.<sup>107</sup> The current RTF Act only protects preexisting agricultural and forestry operations that have *not* undergone a fundamental change within the last year, but fundamental change is defined broadly to include a wide range of activities.<sup>108</sup>

While not the focus of this Note, it is important to highlight how the RTF Act inhibits local governmental ability to curtail industrial agriculture and forestry operations in their communities. The law restricts the ability of local municipalities from enacting any zoning ordinances that may “make the operation of any such agricultural or forestry operation” a nuisance or any ordinances that would provide for nuisance abatement regarding agricultural and forestry operations.<sup>109</sup> The ability of local governments to regulate swine and poultry production has been further limited by the North Carolina Supreme Court decisions that preempt

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are sometimes forced to cease. Many others are discouraged from making investments in farm and forest improvements”).

102. *Id.*

103. *Id.* § 106-701(f)(2).

104. *Id.* § 106-701(b).

105. Smart, *supra* note 10, at 2118.

106. *See infra* Part IV(A)–(B).

107. N.C. GEN. STAT. §106-701(c) (2015) (stating that the nuisance provisions of subsection (a) do not impact the rights of a party to recover damages for “any injuries or damages sustained by him on account of any pollution of, or change in the condition of, the waters of any stream or on the account of any overflow of lands” for any affected party); *see* 2018 N.C. Sess. Laws 113 (S.B. 711).

108. N.C. GEN. STAT. § 106-701(a)(3); *infra* Part V(B).

109. *Id.* §106-701(d).

local regulation of these industries.<sup>110</sup> The extremely limited ability for local governments to regulate these industries further exacerbates the inequities in access to redressability. Communities inundated with CAFOs can neither address the impacts of living near industrial agriculture through administrative means nor through local policy, making access to nuisance suits for impacted individuals critical for equitable retribution.

Several cases have successfully granted compensatory damages to affected community members in the State despite the limitations of the RTF Act. In each decision, the courts have interpreted the law narrowly, allowing more plaintiffs access to suit. Yet, each successful case has been followed by increasingly harsh revisions of the law by the legislature.<sup>111</sup> In the earliest case involving the RTF Act, *Mayes v. Tabor*, the court interpreted the law narrowly as an affirmative “coming to the nuisance” defense.<sup>112</sup>

In *Mayes v. Tabor*, the North Carolina Court of Appeals rejected the argument that the RTF Act should be interpreted as a one-year statute of limitations for plaintiffs bringing suit, instead asserting that the RTF Act codified an affirmative defense to be used only when the defendant’s facility preceded the plaintiffs’ use of the land.<sup>113</sup> The plaintiffs had operated a summer camp for over sixty years. They brought suit against hog producers who had been operating a 500 hog business within yards of the camp property line for over a year.<sup>114</sup> The plaintiffs specifically cited odor as the source of the harm and asked for injunctive and compensatory relief.<sup>115</sup>

The majority of the court’s analysis focused broadly on the definition of private nuisance and whether the defendant’s actions were per se unreasonable. Importantly, the court pointed out that reasonableness is not based on whether or not the defendant operated their facility non-negligently; but rather on a balancing test that weighs the utility of the defendant’s conduct against the harm to the plaintiff.<sup>116</sup> The defendant claimed they were entitled to summary judgment because the RTF Act limited nuisance suits to within one year of operation and thus barred the plaintiff’s claim.<sup>117</sup> The court rejected this interpretation of the

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110. Smart, *supra* note 10, at 2140 n. 266 (discussing *Craig v. City of Chatham* 356 N.C. 40, 50, 565 S.E.2d 172, 179 (2002), which held that state laws governing siting and regulation of hog CAFOs preempted local regulation ordinances).

111. See *infra* Part V(A)–(B).

112. *Mayes v. Tabor*, 77 N.C. App. 197 (N.C. Ct. App. 1985).

113. *Id.* at 197.

114. *Id.* at 198.

115. *Id.* (stating that the plaintiff alleged “that the Tabor’s were confining three hundred to five hundred hogs in unsuitable sheds within ten feet of the Mayeses’ property line; that the stench from the hogs created ‘an immediate, substantial and unreasonable harm’ to the use and enjoyment of their land . . .”).

116. *Id.* at 200.

117. See N.C. GEN. STAT. § 106-701(a) (“No agricultural or forestry operation . . . shall be or become a nuisance . . . by any changed conditions in or about the locality thereof after the same has been in operation for more than one year . . .”).

Act, holding that the “more than one year” language of Section 106-701 does not bar nuisance suits but instead provides an affirmative defense where the defendant can show the agricultural use of the land preceded the plaintiff’s non-agricultural use.<sup>118</sup>

The early interpretation of the RTF Act allowed a coming to the nuisance defense in limited circumstances, giving impacted plaintiffs more access to nuisance suits than under the current version of the RTF Act. With each major interpretation provided by the courts comes pushback from the State legislature. The courts seem more sympathetic to the plights of the plaintiffs than the legislature does, and this is reflected in the rhetoric used by both institutions in discussing the RTF Act.

The following Section discusses the 2013<sup>119</sup> and 2018<sup>120</sup> amendments to the law, which mark the most recent attempts to protect industry at the expense of the State’s most vulnerable populations. Part A discusses the 2013 amendment altering the definition of “change in condition” to exclude most major operational changes for CAFOs, thus limiting the instances in which a plaintiff may bring suit. Part B discusses the more insidious 2018 amendment, passed following a significant case in which plaintiffs were able to recover against a pork producer. This 2018 amendment created new, extremely limited standing requirements, under which nearly all impacted residents are unable to bring suit. It is clear from the amendments that there is a disconnect between the courts’ decisions and the legislature’s choices. While the courts remain sympathetic to vulnerable plaintiffs, these amendments illustrate the highly problematic nature of a state legislature that is beholden to industry rather than its constituents. When state legislatures side with industry over individuals in this way, it significantly limits the abilities for courts to grant relief under traditional remedies available since early common law. The decision by State lawmakers to continually strengthen the RTF Act inhibits access to necessary retribution through nuisance suits for communities facing an environmental justice crisis.

#### A. *DURHAM V. BRITT* AND THE 2013 RTF AMENDMENT: DEFINING “CHANGE IN CONDITION”

The courts have narrowly construed the meaning of “change in condition” under the 1979 RTF Act, thus creating a broad category of actions subject to nuisance suits. The earliest version of the RTF Act stated that an agricultural operation does not constitute a nuisance “by change in conditions.”<sup>121</sup> This language

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118. *Mayes*, 77 N.C. App. at 201 (“The *Mayeses*’ nuisance action is not based on ‘changed circumstances in or about the locality’ as this phrase is intended by the statute. This is not a case in which the non-agricultural use extended into an agricultural area.”).

119. 2013 N.C. Sess. Laws 314 (H.B. 614) (amending N.C. GEN. STAT. § 106-701(a) by defining fundamental change).

120. 2018 N.C. Sess. Laws 113 (S.B. 711) (amending N.C. GEN. STAT. § 106-701(a) by adding three requirements in order to bring suit).

121. N.C. GEN. STAT. §106-701(a).

left open the question of what change in condition means. The Court of Appeals of North Carolina ultimately interpreted the provision to mean non-fundamental changes to the operation. Following this interpretation, the State legislature amended the RTF Act to include a definition of fundamental change counter to that provided by the courts. Moreover, the State legislature's interpretation had the effect of protecting industry over injured plaintiffs.

In *Durham v. Britt*, the plaintiff brought suit against a turkey producer who converted his operation to a hog production facility.<sup>122</sup> The plaintiff alleged that the change in operation created a nuisance and significantly limited his ability to conduct business on his land.<sup>123</sup> The defendant set forth an affirmative defense under the RTF Act, alleging that the plaintiff was barred from bringing a nuisance action because his facility had been in operation since the 1960s.<sup>124</sup>

The court's analysis focused on the meaning and purpose of "changed condition or locality" under the RTF Act.<sup>125</sup> Based on the law's stated purpose, the court determined that the legislature did not intend for a fundamental change in the facility to be exempted from nuisance suits.<sup>126</sup> The court reasoned that the coming to the nuisance defense is not applicable where the defendant has fundamentally changed their operation because such a change may create a significant difference in the processes and hours of operation.<sup>127</sup> The court found that the defendant had fundamentally changed his agricultural operation by shifting from turkey to hog production. Thus, the plaintiff was not barred from bringing a nuisance action against him.<sup>128</sup> This holding was the controlling law defining change in condition until legislative action in 2013, which broadened the definition of "fundamental change" to the detriment of plaintiffs like the one in *Britt*.

Following the *Britt* decision, and an increase in fear that industry would leave the State,<sup>129</sup> the State legislature altered the RTF Act by limiting the circumstances in which a change made by producers can be considered a "fundamental change."<sup>130</sup> Prior to 2013, the holding in *Britt* was the controlling law defining "fundamental change," but the 2013 RTF Act amendment completely altered the language of the act, stating that:

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122. 117 N.C. App. 250 (1994).

123. *Id.* at 252.

124. *Id.*

125. *Id.* at 253.

126. *Id.* at 253–54 ("However, we do not believe the legislature intended North Carolina General Statutes § 106-701 to cover situations in which a party *fundamentally changes the nature of the agricultural activity* which had theretofore been covered under the statute" (emphasis added)).

127. *Id.* at 255 ("For example, a fundamental change could consist of a significant change in the type of agricultural operation, or a significant change in the hours of the agricultural operation").

128. *Id.*

129. The 2013 amendment to the RTF act came only weeks after a large number of plaintiffs filed against Murphy Brown LLC for private nuisance. These filings would go on to become the *McKiver v. Murphy-Brown* case discussed in this Note. See Smart, *supra* note 10, at 2128.

130. 2013 N.C. Sess. Laws 314 (H.B. 614) (amending N.C. GEN. STAT. § 106-701(a) by defining "fundamental change").

A fundamental change to the operation does not include any of the following:

- (1) A change in ownership or size.
- (2) An interruption of farming for a period of no more than three years.
- (3) Participation in a government-sponsored agricultural program.
- (4) Employment of new technology.
- (5) A change in the type of agricultural or forestry produced<sup>131</sup>

This change significantly limits the situations in which a plaintiff can bring suit. Under the 2013 RTF Act, the plaintiff in *Britt* would be completely unable to recover. The transition from a small turkey farm to an industrial hog operation, as seen in *Britt*, is now, in the eyes of the legislature, not a fundamental change in operation. There has not been further litigation or legislative explanation defining “fundamental change,” meaning that a plaintiff would likely carry the burden of proving there has been some fundamental change.<sup>132</sup> This amendment signified a massive shift in the interpretation and understanding of the RTF Act. In addition to altering the change in condition language, the amendment included a fee-shifting provision, meaning that a party would be liable for the others’ legal fees if the claim asserted is deemed “frivolous or malicious.”<sup>133</sup> This language may serve as a further deterrent for apprehensive plaintiffs. The 2013 amendment marks the first significant attempt by the legislature to actively limit plaintiffs’ access to redress in private nuisance litigation.

B. *MCKIVER V. MURPHY-BROWN LLC* AND THE 2018 AMENDMENT: SEVERELY LIMITING STANDING

Similar in many ways to the 2013 amendment, the 2018 amendment to the North Carolina RTF Act was a direct response to a highly publicized case, *McKiver v. Murphy-Brown*. The plaintiffs, a group of long-term residents of Sampson and Duplin counties, asserted in their nuisance actions that the farming practices of defendant Murphy-Brown’s contract growers severely impacted their use and enjoyment of their land.<sup>134</sup> An amendment of the RTF Act followed the

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131. *Id.*

132. Smart, *supra* note 10, at 2131.

133. N.C. GEN. STAT. § 106-701(f).

134. Complaint at ¶ 31–32, *McKiver v. Murphy-Brown LLC*, No. 7:14-cv-00180-BR, 2018 WL 4189408 (E.D. N.C. Feb 12, 2018) (“Plaintiffs have suffered episodes of noxious and sickening odor, onslaughts of flies and pests, nausea, burning and watery eyes, stress, anger, worry, loss of use and enjoyment of their property, inability to comfortably engage in outdoor activities, cookouts, gardening, lawn chores, drifting of odorous mist and spray onto their land, inability to keep windows and doors open, difficulty breathing and numerous other harms . . . . All Plaintiffs have employed measures and incurred expenses to try to protect themselves from the odors, pests, and nuisance from the hog sites and large hog trucks that pass up and down their rural roads. They variously engage in keeping windows and doors closed and running air conditioner during mild weather, caulking and employing other sealants on windows and doors, purchasing cans of spray insecticides, paying to have their yards sprayed with

2017 appeal, where plaintiffs were awarded millions of dollars in punitive and compensatory damages, later capped by the State's punitive damage regulations.<sup>135</sup> This case was the catalyst for the 2018 amendments to the RTF Act, as evidenced by the legislature's discussion of the amendment.<sup>136</sup> After the success of *McKiver* at the trial court level, the State legislature quickly proposed and adopted changes to the RTF Act that would significantly limit community access to punitive damages in the future.

Prior to the 2018 amendment, the RTF Act did not include specific standing requirements for plaintiffs, instead stating that:

No agricultural or forestry operation or any of its appurtenances shall be or become a nuisance, private or public, by any changed conditions in or about the locality outside of the operation after the operation has been in operation for more than one year, when such operation was not a nuisance at the time the operation began.<sup>137</sup>

This language merely shielded producers from suits brought by individuals coming to the nuisance. It reflects the initial purpose of the law, which was to protect agricultural land from encroachment by non-agricultural uses. Importantly, this language does not exclude residents who lived near these operations *before* they began from bringing suit, and it does not place any statute of limitations on a suit. Under the 2013 version of the RTF Act, the plaintiffs in *McKiver*, some of whom have lived on their land for nearly 100 years,<sup>138</sup> could file suit. This is no longer the case after the passage of the 2018 amendment, which included specific requirements for standing to bring suit. The 2018 amendment states that:

No nuisance action may be filed against an agriculture or forestry operation unless all of the following apply:

- (1) The plaintiff is the legal possessor of the real property affected by the conditions alleged to be a nuisance.

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pesticides, purchasing flypaper strips, purchasing scented candles or incense, and purchasing air fresheners, purifiers, and deodorizers.”).

135. N.C. GEN. STAT. § 1D-25(b).

136. N.C. Leg., *Debate of House Bill 467* (Apr. 10, 2017), <https://perma.cc/U46V-9VEX> [hereinafter *House Debate*] (Statements of Rep. Dixon at 16:20, 23:09) (Rep. Dixon stated that “one of the focuses of attention in this issue revolves around whether or not this general assembly can craft legislation that has an effect on a pending case.” He went on to describe the lawyers involved in *McKiver* stating “there are enemies to agriculture, and especially animal agriculture that are not friendly . . . and have become allies to those who would take advantage monetarily of the very people they claim to represent.”).

137. 2013 N.C. Sess. Laws 314 (H.B. 614) (amending N.C. GEN. STAT. § 106-701(a)).

138. Third Amended Complaint at ¶ 80, *McKiver v. Murphy-Brown LLC*, 2018 WL 4189408 (E.D. N.C. Feb. 12, 2018) (No. 7:14-cv-00180-BR) (“Plaintiff Archie Wright, Jr. has lived on his current property for practically all his life. His father, Archie Wright, Sr., purchased it in or about the 1920s and there raised his family . . .”).

- (2) The real property affected by the conditions alleged to be a nuisance is located within one half-mile of the source of the activity or structure alleged to be a nuisance.
- (3) The action is filed within one year of the establishment of the agricultural or forestry operation or within one year of the operation undergoing a fundamental change.<sup>139</sup>

Under the altered law, the many plaintiffs in *McKiver* would be wholly unable to bring suit because they either live beyond a half-mile from the operation or have lived in their homes for longer than a year. Both of these new standing requirements hamper the environmental justice principle of just compensation by enacting extreme barriers to nuisance suits for those impacted by these hog operations. Additionally, this change seems to protect the most problematic producers; that is, those who utilize a lagoon and spray-field system, because those facilities have been in operation since before the lagoon moratorium was enacted.

The discussion of the 2018 RTF amendment by the State legislature paints a disturbing picture of the thought process of the legislators. The proponents of the bill suggest that the judge in *McKiver* was calling for further legislative guidance to properly decide the case, making this amendment necessary.<sup>140</sup> This assertion is patently untrue based on the decision published by the District Court.<sup>141</sup> State lawmakers attempted to include a clause that would require courts to retroactively apply the new legislation in the *McKiver* case, but this was removed due to fear of unconstitutionality. Supporters of stricter legislation paint a picture of greedy lawyers taking advantage of rural communities to extract money from hard-working family farms.<sup>142</sup> This depiction of both the *McKiver* case<sup>143</sup> and the industry<sup>144</sup> is wildly inaccurate. The proponents of the bill fail to acknowledge the serious health risks communities overwhelmed by industrial agriculture face.

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139. 2018 N.C. Sess. Laws 113 (S.B. 711) (amending N.C. GEN. STAT. § 106-701(a)).

140. *House Debate*, *supra* note 137, at 27:02–28:03 (Statements of Rep. Davis) (“Judge Britt made the statement that North Carolina law is not clear on the availability of annoyance and discovered damages in temporary nuisance actions . . . there is only one thing left that can give him guidance and that’s statutory authority, that’s why we are here.”).

141. The District Court Judge did state that the North Carolina courts have not discussed “whether discomfort or annoyance damages are recoverable for nuisance.” However, Judge Britt ultimately determined that if the Plaintiffs can establish a nuisance claim, they are entitled to damages for both discomfort and annoyance. In re NC Swine Farm Nuisance Litigation, No. 5:15-CV-00013-BR, 2017 WL 5178038 at \*8, 10 (E.D. N.C. Nov. 8, 2017).

142. *House Debate*, *supra* note 137, at 14:55 (Statements of Rep. Dixon) (“Our hard-working farm families many of whom have labored diligently for generations to achieve the status that they currently have . . .”).

143. *Id.* at 23:05 (“there are enemies to agriculture, and especially animal agriculture that are not friendly, extreme environmentalists, animal rights people, have joined together and have become allies to those who would take advantage monetarily of the very folks that they propose to represent.”).

144. *Id.* at 17:48 (describing living and working near these farms: “My children and grandchildren have played around the lagoons, and we’ve sprayed our fluid properly . . .”).

The positions and depictions of the State legislature are extremely problematic and highlight an important issue of representation in the State. While those impacted by industrial agriculture come from racially diverse communities, the representation at the state level does not reflect this diversity. The amendment's sponsor, Rep. James Dixon, represents Duplin County, one of the counties from which plaintiffs in the *McKiver* case reside.<sup>145</sup> It is critical to note that the legislature generally does not reflect the State's demographics.<sup>146</sup> Instead it reflects primarily the wealthiest, whitest members of these communities. As a result, the legislature does not give proper consideration to the needs and desires of vulnerable populations and instead prioritizes the needs of the industrial producers who finance their reelection campaigns.<sup>147</sup> This is exemplified by the statements of some lawmakers during the discussion of the amendment. Rep. Dixon, in referring to his constituents, stated that we should be thankful that "there are people who are willing to put up with the circumstances of production so that we can enjoy the benefits of consumption."<sup>148</sup> Rep. Dixon fails to mention that his constituents and many other individuals living near hog CAFOs are not willingly living near these operations but are forced to remain because of legislative actions.

Ultimately, the amendment passed in the house, with sixty-eight representatives voting in support and forty-seven in opposition. Because of these changes, plaintiffs like those in *McKiver* and *Britt* would be unable to bring a private nuisance claim against industrial producers going forward. While there have been no cases decided under the new amendment, the Court of Appeals for the Fourth Circuit in *McKiver* briefly mentioned the change and its possible impacts on the future of nuisance claims in the State.

In November 2020, the Fourth Circuit issued an opinion after defendant Murphy-Brown appealed the District Court's decision.<sup>149</sup> On appeal, the defense argued that the amendment should apply retroactively to the case at hand.<sup>150</sup> The

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145. Additionally, Rep. Dixon receives donations from major industry groups and owns a hog operation himself. *See id.* at 17:45 (Statements of Rep. Dixon) ("I've lived on a farm my whole life. My children and grandchildren have walked gleefully with me through my hog houses and through my turkey houses . . .").

146. It is important to note that, while they are in the far minority, there are representatives who spoke out against the bill. This includes Rep. Blust from Guilford County who stated, "I've been by [the Hog Operations], I've smelt it, I've smelled more chicken than hog but my first job was on a farm out picking up hay. But I would just say to appeal emotionally for support of farmer that is not fair to go to what this bill is about because this bill affects the property rights of everyone . . . Somebody's private property rights, particularly their home. The enjoyment and use of that unobstructed is one of the foundations of our freedom. It's one of the cores, one of the pillars of our freedoms and this is something the legislature should not do." *Id.* at 44:04, 50:00.

147. *The Pollution Lobby: Time to Level the Playing Field*, WE ARE DEMOCRACY N.C., <https://perma.cc/4YET-BDCX> (last visited Mar. 28, 2021).

148. *House Debate*, *supra* note 137, at 21:38.

149. *McKiver v. Murphy-Brown LLC*, 980 F.3d 937 (2020).

150. *Id.* at 954–55.

Fourth Circuit refused to apply the amendment retroactively,<sup>151</sup> meaning that the plaintiffs in *McKiver* could recover some damages. However, the initial amount rewarded by the jury was capped at 250,000 dollars per state law.<sup>152</sup>

While the 2018 amendment did not apply in *McKiver*, leading to a somewhat successful decision in the Court of Appeals,<sup>153</sup> there is a concern for how this amendment will impact nuisance litigation in the future.<sup>154</sup> Judge Wilkinson, who wrote a concurring opinion, discusses many of the concerns about industrial agriculture in the State.<sup>155</sup> Indirectly, Judge Wilkinson addresses environmental justice in his opinion, highlighting both the power imbalance between the impacted individuals and the corporate defendant and the importance of nuisance suits in protecting vulnerable communities.<sup>156</sup> The majority, however, did not address concerns around limiting future access to nuisance suits beyond mentioning that the success in *McKiver* would not be possible under the amended law.<sup>157</sup>

The role of the legislature should be to represent the population of their constituency. Yet, in North Carolina, the legislature is deeply beholden to the industrial pork lobby, which heavily funds reelection campaigns for legislators who support the industry.<sup>158</sup> As a result of the pressure from pork producers and the animal agriculture lobby, the State legislature has actively sought to protect this industry by reducing access to remedies through altering the RTF Act in favor of producers.

#### CONCLUSION

As it currently stands, the successes in *Mayes*, *Britt*, and *McKiver* are impossible to replicate. Residents across the State are forced to either remain in homes that are continually inundated with the smells and sounds of hog production or relocate with little access to financial compensation for the home they left. The continual, systematic removal of nuisance rights for citizens at the legislature's

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151. *Id.* at 956 (“the [2018] RTFA amendment expressly states it will apply to causes of action *going forward*.”).

152. N.C. GEN. STAT. § 1D-25(b); *McKiver*, 980 F.3d at 977 (the case was ultimately remanded “for the limited purpose of determining the proper amount of punitive damages . . .”).

153. *McKiver*, 980 F.3d at 977.

154. *N.C. Court Choose to Restrict Local Property Rights of Neighbors Besieged by Industrial Hog Waste*, WATERKEEPER ALLIANCE (Jan. 5, 2021), <https://perma.cc/5LPK-SB6U>.

155. *McKiver*, 980 F.3d at 977 (Wilkinson, J., concurring) (“I write separately, however, to highlight the facts in this case that support the jury’s finding that liability for compensatory and punitive damages in some amount was warranted. It is past time to acknowledge the full harms that the unreformed practices of hog farming are inflicting.”).

156. *Id.* at 978 (“Plaintiffs, almost all of modest means and minorities, live in close proximity to Kinlaw Farms.”); *id.* at 982 (“But whether a home borders a golf course or a dirt road it is a castle for those who reside in it. It is where children play and grow, friends sit and visit, and a life is built. Many plaintiffs in this suit have tended their hearths for generations- one family for almost 100 years. They are exactly whom the venerable tort of nuisance ought to protect.”).

157. *See id.* at 958.

158. *The Pollution Lobby*, *supra* note 148.

hands is motivated by greed and a desire for continued economic growth. While legislators line their pockets with funds from the pork lobby, residents with historical and emotional ties to the land are given little to no access to remedy under the law.

Yet, all hope is not lost. On Juneteenth 2019, three non-governmental organizations, Rural Empowerment Association for Community Health (“REACH”), North Carolina Environmental Justice Network (“NCEJN”), and Waterkeeper Alliance filed a claim in North Carolina Superior Court against the State, claiming that the amendment to the RTF Act is contrary to multiple provisions of the State constitution.<sup>159</sup> The complaint highlights the inequitable distribution of environmental harms from CAFOs<sup>160</sup> and the apparent biases of state legislators.<sup>161</sup> While this case is still in the pre-trial phase, it marks the critical next step in combatting the injustices perpetuated by the State legislature and industry. Even though the RTF Act amendments have limited access, nuisance litigation remains an essential form of relief for individuals impacted by industrial overstep, and dedicated community organizations have continued to tirelessly fight against the encroachment on the right of citizens to bring nuisance claims against industrial actors.

Industrial hog production continues to threaten the environment and public health, especially for BIPOC and low-income communities. In the past, nuisance claims have been an effective remedy for communities inundated with the stench of hog waste. To remedy the systemic injustices faced by BIPOCs in the State, it is critical to address how legislative actions limit access to justice for these vulnerable populations. Nuisance law remedies are critical for environmental justice, specifically regarding accessing reparations for environmental harms. Nuisance litigation remains the most effective relief for individuals impacted by industrial overstep, and access to nuisance suits is critical to facilitate justice for vulnerable communities in North Carolina.

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159. Complaint at ¶ 1, Rural Empowerment Ass’n for Cmty. Help v. State, 2019 WL 3456702 (N.C. Super. Jun. 19, 2019) (No. 19-CVS-008198).

160. *Id.* at ¶ 3. (“These laws not only violate the state constitution, but also have disparate impacts on low-wealth and non-white North Carolinians, who disproportionately live where North Carolina has permitted industrial hog facilities to develop and operate”).

161. *Id.* at ¶ 68 (“Beginning in 2017, after the federal court ruled that the nuisance claims against Smithfield could proceed to trial and continuing through the multiple jury verdicts against the company in 2018, Smithfield lobbyists and state legislators who have received substantial financial contributions from the corporation worked to immunize Smithfield from nuisance liability by amending North Carolina’s “Right to Farm” law through HB 467 and SB 711”).