

The legal trend to shift liability for environmental damage onto integrators is gaining momentum. With courts looking critically at the contractual relationship between growers and integrators, courts have concluded integrators are liable for the environmental damage from CAFO operations. While the focus in lawsuits has been on CERCLA (Comprehensive Environmental Response Compensation and Liability Act) and EPCRA (Emergency Planning and Community Right to Know Act) violations, statutory and common law demonstrates many avenues to shift liability onto integrators. This often frees growers from liability for environmental harm resulting from production methods required by integrators. However, growers are concerned about the negative impact on their contracts and ability to manage their farms.

### **Environmental Effects of CAFOs**

CAFOs are increasingly cited for environmental damage resulting from water, air and soil pollution. Most lawsuits focus on CAFOs rather than traditional, small farm operations because of the environmental effect of the large number of animals contained in the CAFOs.

Environmental groups allege CAFO's pollute water through the run-off from waste disposal sites. When the Oklahoma Attorney General filed suit against Tyson Foods and 13 other poultry producers, he stated: "Run off from the improper dumping [of animal waste] is attributable to significant levels of phosphorus and other pollutants in the Illinois River Watershed. The complaint filed in July 2005 cites water pollution from CAFOs improper handling of animal waste resulted in elevated levels of the following substances: phosphorus, nitrogen, arsenic, zinc, copper, hormones, and microbial pathogens.

Air pollution has become a serious concern regarding the operation of CAFOs. Traditionally, air pollution concerns were largely about odor. Now, the concern, specifically in poultry operations, is the release of measurable quantities of ammonia, a hazardous substance under federal laws. In *Sierra Club v. Tyson Foods*, Sierra Club asserted Tyson Foods CAFOs were liable under CERCLA minimum reporting requirements because their CAFOs, composed of multiple of chicken houses, released more than 100 pounds of ammonia daily. Sierra Club presented evidence each poultry house released approximately 10 pounds of ammonia from the venting of the chicken houses. The lawsuit focused on the larger operations, such as the Tyson Facility with 24 chicken houses, released approximately 235 pounds of ammonia daily. The evidence was sufficient to convince the judge at the summary judgment hearing to find the entire CAFO operation subject to CERCLA reporting requirements.

The issue of water and air pollution has resulted in many lawsuits whereby the integrators were found liable or potentially liable before settling. This shifting liability occurs despite industry contracts placing liability on the growers. First, the courts are critical of the contracts between growers and integrators because they are often contracts of adhesion: contracts prepared by a dominant party that dictate often unfavorable contract terms to the weaker party. For example, *Gatlin v. Sanderson Farms*, ([http://www.rafiusa.org/programs/CONTRACTAG/Gatlin\\_Case.pdf](http://www.rafiusa.org/programs/CONTRACTAG/Gatlin_Case.pdf)), the Mississippi Supreme Court found the contract between the integrator and grower was one of adhesion and the arbitration clause unconscionable. Second, courts conclude integrators' intense involvement in the operations makes them liable for the CAFO's environmental effects. In such circumstances, the courts are not convinced growers are truly independent contractors and find them to be agents or employees of the integrators. *Tyson Foods v. Stevens*, the Alabama Supreme Court

found Tyson Foods pervasively controlled the operations thus growers were agents of Tyson Foods. In the *Sierra Club v. Tyson Foods*, the court cited the *Stevens* decision to support its finding Tyson Chicken, was “the person in charge” thus required to report under CERCLA. In the most recent case, *OK v. Tyson Foods*, the complaint describes the relationship between grower and integrator as one of employer and employee or principal or agent despite growers’ status as an independent contractor. The complaint further states: integrators “dominate and control its respective growers.” As a result, courts are placing liability on integrators who dictate the contractual terms and the minute details of growers’ operations.

### **Common and Statutory Law**

Under statutory law, courts look the relationship between growers and integrators as reason to shift liability. Additionally, there are many aspects of common law and statutory law to further support the shifting of liability. Under common law, trespass and nuisance law, coupled with vicarious liability support holding integrators liable. In many of federal statutory laws, the language in the statute can be interpreted to hold integrators liable because of integrators’ role and relationship to the CAFO.

Common law nuisance and trespass laws have traditionally been a means to assert a claim for environmental harm. In a nuisance claim, neighbors and communities can allege the activities of a CAFO interfere with the enjoyment of their property. Trespass claims allege measurable particles of pollution or polluting causing constituents trespass on individual property.

Vicarious liability coupled with a nuisance or trespass claim extends the liability beyond the owner-grower to the integrator. Under common law, vicarious liability found employers, principals or masters liable for the activities of their respective employees, agents or servants. In the case of independent contractors, courts looked to the role and involvement of the contractor.

For example, *OK v. Tyson Foods*, the complaint states the relationship between integrators and growers is akin to employer-employee or principal-agent to support a vicarious liability on its claims for nuisance and trespass.

### **Federal Laws**

Frequently, the statutory definitions or the court interpretation of statutory language supports shifting liability onto integrators. In *Sierra Club v. Tysons Foods*, a federal judge interpreted the terms “owner or operator” in CERCLA and EPCRA as applicable to the integrators because of their intense involvement in poultry operations.

(<http://www.dsl.psu.edu/centers/aglawpubs/SierraClubvTyson.pdf>) Case law in other related federal statutes such as Clean Water Act (CWA) and Resource Conservation Resource Act (RCRA) may support the same result.

RCRA regulates generators and transporters of hazardous waste from generation to disposal. Like many other federal environmental statutes, there is an exemption for agriculture. However, courts have found that CAFOs do not fall into these agricultural exemptions. In *Concerned Residents of the Environment v. Southview*, the court found the animal waste from the CAFO met the criteria for waste under RCRA. In *Waterkeeper Alliance v. Smithfield Foods*, the RCRA claims survived a summary judgment motion on the basis the excessive quantities of waste spread onto fields was not what Congress intended in its exception for livestock waste used to benefit the land. Looking to other case law surrounding federal environmental law, it is likely integrators would be held liable under RCRA.

Under the Clean Water Act, most CAFOs are defined as point sources. Owners, generally the grower, must obtain a permit from National Pollutant Discharge Elimination

System. EPA's application of CWA requires all operations, meeting definition of a CAFO, to get permits and the permits will cover any land under the control of the CAFO.

There is a controversy on whether the storm water exemption, applicable to agricultural waste reused as fertilizer, applies to CAFO's treatment of animal waste. Case law indicates courts will not view the excessive application of animal waste to fields, one of ways some CAFOs handle waste, as exempt under CWA. For example, *Water Keeper Alliance*, the U.S. District court denied the defendant's argument and motion to dismiss the CWA violation. It concluded the spray fields, where the CAFOs deposited the animal waste, were part of the CAFO despite the defendant contention it was separate from the CAFO because there were no animals located on the fields. The court found limiting the CAFO to only where the animals were located, not the congruent fields where the waste was deposited, would compromise the goals of CWA and permit widespread pollution by industrial feedlots pumping waste onto other areas of the farm. Further, the new permitting rules promulgated by the EPA include areas of the farm used for waste disposal.

This rule coupled with recent attempts to require co-permitting of growers and the integrators foreshadow integrators shared liability for CWA violations. In 2001, EPA proposed amendments to the CWA requiring integrators to jointly apply with growers for permits. The new definitions of "operator", one required to get a permit, applied to the role and activities of integrators in CAFOs. However, the final applicable CAFO amendments in the CWA did not include these provisions. Under the CWA, it is not clear whether integrators will be held liable any, all or part of any CWA violation. If the case law surrounding CERCLA and EPRCA is indicative, judgments from courts will not be favorable to integrators.

Under CERCLA and EPRCA, integrators have been held as liable to reporting requirements under both statutory schemes in the *Sierra Club v. Tyson Foods*. In *Sierra Club*, the judge found that Tyson Chicken was an “owner or operator” under the CERCLA and EPRCA definitions thus liable to report measurable releases of ammonia. *OK v. Tyson Foods*, the complaint claimed damages under CERCLA and EPRCA provisions for all Oklahoma’s past and present necessary response costs for the CAFO’s release of hazardous material into the Illinois River Watershed.

### **Industry Response**

The industry responded to the *Sierra Club* decision by lobbying for a proposal to exempt CAFOs from CERCLA reporting requirements. In November 2005, Senator Craig, R-ID, offered an amendment to exempt CAFOs waste and waste processes from toxic release reporting requirements under CERCLA. The amendment endorsed by a party line vote of the senate conferees did not make the final bill likely because of threat of procedural challenge by committee Democrats, Dianne Feinstein (CA) and Richard Durbin (IL). At the hearing, American Farm Bureau Federation, The National Cattleman’s Beef Association, large scale dairy CAFOs and U.S. Egg and Poultry Association all testified in support for the exemption. In opposition to the exemption the following groups testified: Sierra Club, Institute for Agriculture and Trade, Iowa Environmental Council, Izaak Walton League of America, Land Stewardship, a representative from the OK Attorney General’s office and Assistant City Manager of Waco, Texas.

There were other legislative attempts to exempt CAFOs from liability under Super Fund and CERCLA. At the hearing about the proposed bill, Barry Breen from the EPA indicated that numerous groups such as the US Poultry and Egg Association and National Chicken Council had

petitioned the EPA to exempt poultry CAFOs from the ammonia reporting requirements under Super Fund and CERCLA. Finally, Representatives Roy Blount (R- MO) and Ralph Hall (R-TX) introduced H.R. 4341, House legislation to exempt CAFO animal waste and emissions from Superfund Act and CERCLA. The results from these legislative attempts to shield CAFOs from federal environmental laws will be indicative of whether integrators will be held liable for environmental harm.

### **Effect on Growers**

In the midst of this legal and political conflict, growers are concerned about the negative impact on them and their farms. Specifically, growers fear shifting liability will worsen the already oppressive contractual relationship with integrators and continue to limit growers' control of production methods on their farms. As result, the ultimate success of environmentalists' goals of cleaner and healthier agricultural methods is dependent upon addressing growers' concerns.

With the vertical integration of the industry, integrators increasingly dictate production methods. This limits essential farmer-driven innovations in agriculture. Vertical integration has had the positive effect of supplying the economic viability of family farms and preserving rural communities. However, vertical integration has resulted in the "corporization" of the family farm. While integrators seek to produce a more consistent and economically efficient product, they limit the autonomy of the grower and inhibit farmer-driven innovations.

While pursuing stronger environmental regulations in agriculture, it seems shifting liability on the corporations who dictate the production methods would be the best way to assure environmentally sound methods. However, it will further inhibit farmer-driven innovations that produce better methods to satisfy both the environmental community and food industry.

Arguably, farmer-driven innovations are more likely to be reflective of local conditions and more environmentally friendly because the direct relationship a grower has with his neighbors and surrounding community. By advocating for growers' autonomy, environmentalists will find more support from growers as well as assure innovation in agriculture.

The contractual relationship between growers and integrators is tenuous. Growers have struggled against these contracts of adhesion in which the integrator dictates the terms in a standard form instead of the parties bargaining terms equally. In *Gatlin*, the Mississippi Supreme court concluded the grower's contract with the poultry producer was one of adhesion and specifically found the arbitration clause oppressive and unconscionable. As in the *Gatlin* case, many of the contracts have oppressive, unfair terms and they are presented as "take-it-or-leave-it." The integration of agriculture has significantly limited any market for independently produced livestock. As result, it worsens growers' ability to negotiate terms because without the contract growers are not likely to have a market to sell their product.

Growers legitimately fear shifting liability on integrators will result unfair contract termination and worsening of contracts terms. In the *Gatlin* case, the grower seeks damages from the unfair termination of his fifteen-year contract. The integrator had alleged the grower had violated a state regulation of the disposal of dead birds; then, the integrator terminated the contract before engaging in proper administrative procedures with the state agency. A contemporaneous investigation found the grower had been compliant with all regulations. With shifting liability, this unfortunate situation is likely to repeat itself. Integrators will likely terminate contracts at the mere possibility of an regulatory infraction. Further, integrators would more likely avoid administrative process which is essential to assure the growers' due process.

## Conclusion

There is a clear legal trend integrators will increasingly be held liable for environmental damage resulting from CAFOs even on grower owned farms. Case and statutory law supports the shifting of liability. While shifting liability onto integrators seems the best means to assure compliance to environmentally sound production methods, growers may feel more of the burden than the integrators. A successful environmental campaign in agriculture must address growers' contractual relationship with integrators and strengthen growers' autonomy in the management of their farms

## Resources:

Susan M. Brehm, *From Red Barn to Facility: Changing Environmental Liability to Fit Changing Structure of Livestock Production*, 93 Calif. L. Rev. 797 (May 2005)

*Tyson Foods v. Stevens*, 783 So. 2d. (Ala. 2000).

*Concerned Residents for the Environment v. Southview Farm* 34 F.3d 114 (2<sup>nd</sup> Cir. 1994).

*Water Keeper Alliance v. Smithfield Foods*, 2001 U.S. Dist. LEXIS 21314 (No. 4:01-CV-30-H(3) (E.D.N.C. Sept.20, 2001).

*Sierra Club v. Tysons Foods* 299 F. Supp. 2d 693 (W.D.K.Y. 2003).

*Gatlin v. Sanderson Farms*, 848 So. 2d 828 (Miss. 2003)

*Ok v. Tysons Foods*, No. 05-0329 (N.D. Okla.).

*US v. Best Foods*, 524 U.S. 51 (1998).

CERCLA, 42 U.S.C. § 9601-9675, specifically § 103, 14

EPRCA, 42 U.S.C. § 11004

Clean Water Act, 33 U.S.C. § 1251-1387

Clean Air Act, 42 U.S.C. 7401-7700

Resource Conservation and Recovery Act, 42 U.S.C. § 6903

*Animal Feeding Operations Consent Agreement and Final Order*, 70 Fed. Reg. 4958 (Jan. 31, 2005).

*Oklahoma Attorney General Sues 14 Poultry Producers for Contaminating Water*, 18-10

Measley's Poll. Liab. Report 11 (2005).