Turning the Dirty Tide: The Farmer Fairness Act's Attempt to Create Integrator Liability

Evan Anderson*

I. INTRODUCTION 199
II. BACKGROUND 200
A. *The American Meat Industry* 200
B. *Production Contracts Between Integrators and Growers* 201
C. *Environmental Effects and Liability* 202
D. *The Clean Water Act and NPDES Permits* 203
E. *The Farmer Fairness Act* 204
1. *A Mention of States' NPDES Permit Use* 205
III. ANALYSIS 206
A. *State Attempts at Solving the Issue* 206
1. *Applying the Clean Water Act* 206
2. *Good Faith* 207
3. *Formatting Requirements* 208
B. *Caselaw Mentioning "Substantial Operational Control"* 208
C. *The Language of the FFA Is Too Broad* 209
D. *Using a Balancing Test to Solve the Issue* 210
1. *Advantages of the Balancing Test* 211
2. *Issues with the Balancing Test* 211
IV. RECOMMENDATION 212
A. *CERCLA and Its Similarities to Integrator Liability* 212
B. *Amendment to the FFA* 213
C. *Remaining Problems* 214
D. *A Lingering Question* 215
V. CONCLUSION 216

I. INTRODUCTION

A person without much knowledge of the meat industry may misunderstand how meat

* I would like thank John-Mark Stensvaag, Ed Tormey, and Jerry Anderson for inspiring this topic and for the tremendous feedback they gave me during the drafting process.

gets to their table. A farmer probably raised a few animals, prepared them for the market one day, and shipped it over to the store, right? In reality, the meat production industry is a complicated system of farmers and production contracts. This Note will focus primarily on the relatively early stage in which the animals are raised.

A large number of animals are typically kept in a facility, and the livestock produce enormous amounts of waste. Oddly enough, the industry operates in such a way that all of the managed livestock is owned by a large company, while the waste is owned by the farmer. This waste is collected in basins, which can sometimes overflow and pollute the environment—usually, a water source.

This kind of damage is addressed by various environmental statutes, and the smaller farmers end up footing the bill for these violations. But how fair are these contracts? Should the farmers be liable for this damage when the larger companies own all of the animals and control much of the business's management?

A new proposed amendment to the Clean Water Act, the Farmer Fairness Act ("FFA") seeks to attach broad liability for these environmental violations to the larger company.[1] First, in Part II, this Note will analyze the general structure of the American meat industry, including how and why contracts are formed between large companies and farmers. It will also include a discussion of the environmental liability attached to meat production, and how the FFA seeks to solve the issue.

Next, in Part III, this Note will consider whether the current state of affairs and environmental statutory structure takes care of the problem already. In addition, this Note will consider whether the courts provide any insight into the problem, followed by the advantages and disadvantages to the FFA and different potential tests that could be used to approach the issue.

Finally, in Part IV, this Note will propose a new version of the FFA that will remedy the major concerns associated with different potential approaches.

II. BACKGROUND

A. The American Meat Industry

The meat industry is an important pillar of the American economy. A study conducted by the North American Meat Institute concluded the meat and poultry industry had a total economic output of over one trillion dollars in 2015, which accounted for roughly 5.6 percent of GDP.[2] Food manufacturing accounts for 14% of all U.S. manufacturing jobs.[3] The meat and poultry industry provided over 29.3% of the 1.7 million jobs provided by the food and beverage sector in 2018.[4]

The market share of the industry is also heavily concentrated, with a few enormous corporations dominating the competitive industry.[5] For example, in 2014, 75% of the beef

1. *See* Farmer Fairness Act, H.R. 3844, 116th Cong. (2019).

2. JOHN DUNHAM & ASSOCS., 2016 ECONOMIC IMPACT OF THE MEAT AND POULTRY INDUSTRY 2 (2016), http://meatfuelsamerica.com/sites/default/files/docs/Meat%20Impact%20Methodology.pdf [https://perma.cc/RLM5-BUTT].

3. *Ag and Food Sectors and the Economy*, U.S.D.A. ECON. RSCH. SERV., (May 4, 2020) https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy.aspx [https://perma.cc/W4FS-E7FZ].

4. *Id.*

5. *See* Adam Jones, *Tyson Foods Commands 24% Of The Beef Market*, MKT. REALIST (Dec. 11, 2014),

industry was concentrated in the hands of the "Big Four" (Tyson Foods, JBS, Cargill, and Smithfield Foods).[6] This consolidation creates a situation in which those few behemoths control many aspects of the industry from top to bottom. These companies are so large and dominating that they were being investigated for anti-trust violations and potential price fixing during the coronavirus outbreak.[7]

B. Production Contracts Between Integrators and Growers

The current structure of meat production—with the larger integrators keeping a firm grasp on farmers—is not a new industry formula.[8] This Note will refer to these larger companies, such as the aforementioned "Big Four," as "integrators." Integrators are able to reduce costs and risks by controlling their product at every step of production.[9] This begins at the level of the farmer, or "grower," as they are referred to in the standard form production contracts, who owns the animal feeding operation (AFO).[10] In the current structure, growers lose much of the independence they once had by entering into contractual agreements with larger companies.[11]

In a typical production contract, the integrator owns all of the livestock, can dictate how the facility is structured, and can direct the grower's work methods.[12] However, the grower maintains control of the manure and its storage.[13] Because the most severe environmental damage that could stem from an AFO comes from manure issues, the grower is usually on the hook for environmental violations occurring at the facility.[14]

The bargaining power that integrators have over growers is significant.[15] As previously mentioned, the meat industry is dominated by a few large corporations.[16] This means growers have few options to sell their product to and enter the market with, and they are often given little choice when presented with an opportunity to work with one of these integrators.[17] Because there are few integrators and a large number of growers, the integrators can impose certain unfair and economically inefficient conditions on growers—such as environmental liability.[18]

---

https://marketrealist.com/2014/12/tyson-foods-commands-24-of-the-beef-market/ [https://perma.cc/5K92-XP39] (discussing consolidation in the market).

6. *Id.*

7. Isabel Vincent, *World's Largest Beef Producer Faces Probe for Alleged Price Fixing*, N.Y. POST (May 9, 2020, 4:31 PM), https://nypost.com/2020/05/09/worlds-biggest-beef-producer-faces-federal-anti-trust-probe/ [https://perma.cc/82RS-QG2T].

8. Paul Stokstad, *Enforcing Environmental Law in an Unequal Market: The Case of Concentrated Animal Feeding Operations*, 15 MO. ENV'T L. & POL'Y REV. 229, 236 (2008) ("Contracting has been the dominant model in the poultry industry for many years . . . .").

9. *See id.* at 237 (discussing the benefits integrators gain from contracting).

10. *Id*. at 230.

11. *Id*. at 230–31 (stating the view of agricultural reformers that these contracts have "robbed [farmers] of their independence").

12. *Id.*

13. Stokstad, *supra* note 8, at 238 ("[C]ontracts often specify that growers are solely responsible for manure handling.").

14. *Id.* (pointing out that the "most severe" environmental issues from AFOs arise from contamination of water by manure).

15. *Id.* at 246.

16. *See* Jones, *supra* note 5 (showing that four producers control the majority of the market share).

17. Stokstad, *supra* note 8, at 231.

18. *Id*. at 247 ("Often there are few, if any, other buyers with whom to contract; in the hog and cattle

C. Environmental Effects and Liability

AFOs (and the growers taking contractual responsibility for environmental impacts) are capable of affecting the environment in various ways, including impacts on water quality.[19] Livestock produce an enormous amount of manure—equivalent to a small or medium-sized city[20]—which must be contained in large lagoons or pits.[21] The manure is kept in these basins until the manure is applied to farmland as fertilizer.[22] In the meantime, if these basins are not managed properly, an unusually large rainfall can cause the manure to spill over the basin wall.[23] Cracks or fissures in the containment structure can also lead to spills.

If this spilled manure flows into nearby water sources, it can severely damage water quality.[24] The most immediate effects are fish kills,[25] which normally occur at or near the point where the manure enters the water source. Manure also contaminates water with increased levels of nitrate and ammonia.[26] Livestock are given large amounts of antibiotics, which are carried into the water as well, contributing to the effects of the pollution.[27] The nutrients in manure can create algae blooms—which produce dangerous toxins—leading to beach closures and compromised water sources.[28]

These operations can also affect air quality.[29] AFOs release gases and odors reaching workers and nearby residents, creating various health risks.[30] Short-term effects include runny noses, watery eyes, coughing, and nausea.[31] More serious, long-term effects include increased likelihood of asthma and chronic bronchitis.[32]

If these environmental issues are frequent and intense enough, citizens may be motivated to bring suit against an AFO individually or as a class-action lawsuit. The odor and air quality can negatively affect individuals' well-being by inciting headaches and worry, creating unbearable odors, and limiting outdoor recreation.[33] Depending on the state's statutory structure and AFO protection, these nuisances can create liability in the form of potential class-action lawsuits. Similar to air quality issues, citizens may be

---

industries for example, there is often only one buyer, and rarely more than three, in any given area. So when the contract renewal is being negotiated, the processor holds all the cards and so can dictate the terms of the new contract" (footnote omitted)).

19. *See generally* JAMES MERCHANT & DAVID OSTERBERG, THE EXPLOSION OF CAFOS IN IOWA AND ITS IMPACT ON WATER QUALITY AND PUBLIC HEALTH (2018) (discussing the impact AFOs have on water quality).

20. EPA, RISK ASSESSMENT EVALUATION FOR CONCENTRATED ANIMAL FEEDING OPERATIONS 7 (2004).

21. *Id.* at 21.

22. *See* Erin Jordan, *Manure Tanks Overflow in Western Iowa Floods*, THE GAZETTE (Mar. 5, 2019), https://www.thegazette.com/subject/news/public-safety/overflowing-manure-tanks-western-iowa-eastern-iowa-runoff-flooding-fish-kill-degrade-water-quality-risk-spring-flooding-20190325 [https://perma.cc/B6CH-FF33] (mentioning an example of the practice).

23. *Id.*

24. *See generally* MERCHANT & OSTERBERG, *supra* note 19 (asserting that when manure from animal feeding operations is introduced to bodies of water, water quality is degraded).

25. *Id.* at i, 13.

26. *Id.* at i.

27. *Id.* at i, 6.

28. *Id.* at 15.

29. MERCHANT & OSTERBERG, *supra* note 19, at 3.

30. *Id.* at ii, 4.

31. *Id.* at 3–4.

32. *Id.*

33. *Id.* at 10–12.

inclined to hold AFOs accountable for these effects, although some states have statutes granting immunity to AFOs for these types of lawsuits.[34]

Although all of these issues are important and may lead to serious damage to human health, the issue this Note is concerned with is enforcement of water quality violations. These violations are regulated under the National Pollutant Discharge Elimination System (NPDES) program of the Clean Water Act (CWA), which holds AFOs accountable by penalizing unpermitted discharges of pollutants.[35]

It is important to recognize integrators are capable of avoiding a great amount of financial responsibility under the current structure. Manure spill violations can amount to substantial losses for the grower.[36] For instance, the District Court of Southern Iowa issued an AFO $50,000 in penalties for a manure discharge in early 2019.[37] Although this is on the higher end of typical penalties for manure spills, given the number of AFOs over which integrators may have operational control, the total cost of avoided penalties is considerable.[38] As a result, the allocation of environmental liability is a considerable factor in the financial structure of the meat industry and the smaller farms comprising its lowest rungs.

Economists' argument for requiring the integrators to bear the cost of environmental liability is rooted in the idea that costs should be allocated to the party in the best position to pass them on to the consumer.[39] In the vertically integrated meat industry, growers bear the cost of environmental liability, while the integrators dealing most directly with consumers are avoiding the true cost of meat production.[40]

Another argument is more straightforward: Liability should align with control. If an integrator is managing a majority of the operations of an AFO without bearing the consequences of a discharge, the integrator has no incentive to attempt to diminish the risk.

D. The Clean Water Act and NPDES Permits

The 1972 amendments to the Federal Water Pollution Control Act formed what is commonly referred to today as the CWA.[41] The principal goal of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[42] The Administrator of the Environmental Protection Agency (EPA) is given the responsibility of carrying out the laws outlined in the CWA.[43]

---

34. *See, e.g.*, N.C. GEN. STAT. § 106-701 (2013) (establishing elements of a nuisance action, including legal possession of the affected property, proximity of half a mile from the nuisance, and a statute of limitations of one year from the initiation of the agricultural or forestry operation, or nuisance-causing change in such an operation).

35. *See generally* Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1251 (1972) (regulating the permitting program for National Pollutant Discharge Elimination System (NPDES) at § 1342).

36. *Etcher Family Farms Sentenced for Violating Clean Water Act*, U.S. DEP'T OF JUST. (Feb. 28, 2019), https://www.justice.gov/usao-sdia/pr/etcher-family-farms-sentenced-violating-clean-water-act [https://perma.cc/QV8V-AUUA].

37. *Id.*

38. Once again, although the grower may have technical control over the manure, the integrator has a great amount of control over the operations of the AFO as a whole.

39. Cynthia M. Roelle, *Pork, Pollution, and Priorities: Integrator Liability in North Carolina*, 35 WAKE FOREST L. REV. 1055, 1073–74 (2000).

40. *Id.*

41. 33 U.S.C. § 1251.

42. *Id.* § 1251(a).

43. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 101(d), 86 Stat. 816.

The method used to achieve the goal of maintaining and improving water quality is the NPDES permit program.[44] Essentially, if an entity wants to discharge a pollutant to certain water sources, the entity must first acquire a special permit granted by the Administrator of the EPA—or in most instances, a delegated state.[45] While the language initially seems to be quite straightforward as to what actors are required to acquire a permit, the definitions set forth by Congress complicate the matter. "Discharge of a pollutant" means addition of any pollutant to navigable waters from a point source.[46] So, essentially, three conditions are required: (1) The discharged material must be a pollutant; (2) The pollutant must be discharged to a water of the United States, and; (3) The pollutant must be discharged from a point source.[47]

Navigable waters are defined only as "waters of the United States . . . ."[48] This clearly does not do much to help interpret the phrase. Courts, agencies, corporations, and environmental organizations have battled over its application,[49] but a recent statement by the EPA delineating the phrase includes waters used in interstate or foreign commerce, certain wetlands, and waters used for specific purposes.[50] Accordingly, an AFO under a contract with an integrator may not need an NPDES permit if it is not capable of polluting waters of these kinds.

To qualify as a "point source,"[51] the pollutant must be discharged from a "discernible, confined and discrete conveyance."[52] This definition excludes agricultural stormwater discharges and return flows from irrigated agriculture, but it specifically includes concentrated animal feeding operations.[53]

Therefore, AFOs are generally under the umbrella of entities meeting the "point source" requirement of an NPDES permit.

E. The Farmer Fairness Act

The Farmer Fairness Act (FFA), sponsored by Representatives Ro Khanna and Mark Pocan, was introduced in the U.S. House of Representatives on July 18, 2019.[54] The FFA functions as an amendment to the CWA.[55] Specifically, the bill adds a paragraph at the end of the section governing NPDES permits.[56] The bill is short and simple and gets right to the point—integrators need to be held accountable for violations at their growers' facilities.[57] The bill places the responsibility for obtaining permits for CAFOs on the entity with "substantial operational control," which is defined as:

---

44. *Id.* § 1342(a).

45. *See generally id.* (detailing conditions for permits for discharge of pollutants, state permit requirements, and permit regulations and limitations).

46. *Id.* § 1362 (12).

47. JOHN-MARK STENSVAAG, ENVIRONMENTAL LAW SUPPLEMENT 709 (2019).

48. 33 U.S.C. § 1362(7).

49. *See, e.g.*, Rapanos v. United States, 547 U.S. 715 (2006).

50. *See* Definitions, 40 C.F.R. § 122.2 (2009). Other specific purposes covered by EPA's interpretation include interstate waters used for recreational or industrial purposes.

51. 33 U.S.C. § 1362 (14).

52. *Id.*

53. *Id.*

54. Farmer Fairness Act, H.R. 3844, 116th Cong. (2019).

55. *Id.*

56. *Id.*

57. *Id.*

> (2) SUBSTANTIAL OPERATIONAL CONTROL—For purposes of this subsection, a person exercises substantial operational control over a concentrated animal feeding operation if the person—
>
> (A) has an ownership interest in the livestock, land, or other capital of the concentrated animal feeding operation;
>
> (B) exercises any control over the activities, operation (including specifying how the livestock of the concentrated animal feeding operation is fed, grown, or medicated), or management (including waste management practices) of a concentrated animal feeding operation; or
>
> (C) meets any other criteria that the Administrator determines appropriate.[58]

The bill focuses on the phrase "substantial operational control." The legislation would require integrators to acquire an NPDES permit if the integrator (a) has an ownership interest in the livestock, land, or capital of the AFO, (b) exercises any control over the activities, operation, or management of the AFO, or (c) meets any other criteria the EPA Administrator determines.[59]

1. A Mention of States' NPDES Permit Use

The FFA seeks to remedy the situation in which integrators escape liability by attaching responsibility to the integrators via NPDES permits.[60] Of course, this assumes all AFOs operate with NPDES permits. While one would assume operations with so much waste functioning near water sources would need to have NPDES permits as a precaution, this is not always the case. The NPDES permit system grants states the ability to enact their own state permit programs complying with the requirements of the CWA.[61] So, states have some discretion to use definitions to tweak the way the CWA is actually enforced, or follow cases that have provided guidance on the issue.[62]

While an AFO qualifies as a point source under which an NPDES permit would be required, a permit is only required if a discharge occurs.[63] So, even if an operation meets the requirements of an AFO, but the operation does not discharge, there is no reason for the operation to have a permit. Therefore, this legislation would not be immediately applicable to many AFOs that have only the potential to discharge but would become applicable if a discharge occurred.

Some states do not necessarily require an NPDES permit to be issued if a violation or discharge occurs.[64] For instance, the Iowa Department of Natural Resources uses a method in which a violating AFO can choose to put in place a "permanent remedy" to fix the

58. *Id.*

59. Farmer Fairness Act, H.R. 3844, 116th Cong. (2019).

60. *Supra* Section II.D.

61. 33 U.S.C. § 1342.

62. *See generally* Nat'l Pork Producers Council v. EPA, 635 F.3d 738 (5th Cir. 2011) (imposing duties); Waterkeeper All., Inc. v. EPA, 399 F.3d 486 (2d Cir. 2005) (vacating duties).

63. 33 U.S.C.A. § 1362 (12), 1362 (14).

64. *See, e.g.*, IOWA DEP'T OF NAT. RES., LEGAL UPDATE FROM THE IOWA DEPARTMENT OF NATURAL RESOURCES TO THE IOWA STATE BAR ASSOCIATION (2017).

situation instead of acquiring an NPDES permit.[65] A permanent remedy does not have a definition, and environmental groups have challenged this practice as being too subjective and subject to substantial abuse.[66] These remedies may not be effective, and they may not necessarily enforce the CWA in the way Congress likely intended, but some states do use these methods. Thus, the FFA may not reach as many AFOs as it intends.

III. ANALYSIS

A. State Attempts at Solving the Issue

If enough is being done at the state level to remedy the issue of integrators placing environmental liability on growers—the essence of integrator liability—a federal bill would be redundant and may offend state governments, damaging the relationship between state and federal forces. Many states have approached the issue by attacking the root of the contractual process.[67] Ensuring growers can contract fairly at the front end of the relationship with integrators eliminates the concern growers are being taken advantage of.

1. Applying the Clean Water Act

There are a few reasons why states would approach the issue by placing liability within the CWA and the NPDES permit program. Placing entities within the scope of a permit sets clear expectations for the way entities should behave. When a violation occurs, it is relatively easy to point to the permit and take care of the issue with little ambiguity or difficulty in enforcement. For these reasons, it is understandable that some states (and the FFA) have chosen this approach to solve the issue.[68]

Maryland's legislature attempted to fix the problem with its poultry industry in 2000 by utilizing CWA permits.[69] At the time, Maryland had increasing issues with poultry manure and deterioration of water quality.[70] The grower typically owns the manure, so the integrator escapes liability.[71] However, with new permits, the draft language of a new law required integrators to keep track of, and submit to the state, records of their contracted growers. Additionally, integrators would be fined each day there was a manure violation.[72] Although the financial penalty did not make the final version of the permit, integrators were still required to keep track of manure amounts and ensure their growers had

65. *Id.* This "permanent remedy" is based on federal guidance. *See* Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper, 73 Fed. Reg. 70418-01 (Nov. 20, 2008) (codified at 40 C.F.R. pts. 9, 122, 412), at IIIA(3)(c)(iii).

66. Letter from Hugh Espey, Exec. Dir., Iowa Citizens for Cmty. Improvement, to Scott Pruitt, EPA Adm'r (June 19, 2018) (on file with Iowa Citizens for Community Improvement).

67. *See* Section III.A.

68. *See* Section III.A.1.

69. Josh Marks, *Regulating Agricultural Pollution in Georgia: Recent Trends and the Debate Over Integrator Liability*, 18 GA. ST. U. L. REV. 1031, 1051–52 (2002); *see also* Anita Huslin, *Md. Tightens Poultry Permits*, WASH. POST (July 21, 2001), https://www.washingtonpost.com/archive/local/2001/07/17/md-tightens-poultry-permits/5f2ca541-6b36-4ded-a366-e8c8d5991409/ [https://perma.cc/5JY2-UJD4] (describing new Maryland permit laws for poultry waste).

70. Marks, *supra* note 69, at 1051–52.

71. *Id.* at 1052.

72. *Id.*

management plans in place.[73]

Kentucky and Georgia also attempted to solve this issue with legislation, but rather than imposing fines on the integrators, the proposed legislation required the integrator to apply for an NPDES permit along with the growers themselves.[74] However, these attempts were met with staunch opposition and were shot down due to pressure from the states' respective agricultural departments and lobbyists from the industry.[75] States' attempts to solve the issue in alternative ways, such as issuing emergency regulations and lessening the co-permitting requirement to a case-by-case basis, also ultimately failed.[76]

North Carolina has a system in place in which a grower must register any integrator with which they have a contractual relationship.[77] This includes sending information to the state about the name and location of the grower's farm and the name of the integrator.[78] When the state realizes a grower violated or has a deficiency at their facility, the state is required to notify the integrator of this deficiency.[79] Beyond this, however, the system does not seem to attach any obligations on the integrator, so the approach does not have much bite.

Although this system alone has no mechanism for actually holding the integrator legally or financially accountable for growers' violations, the North Carolina Attorney General made some noteworthy comments regarding his interpretation of the state's statutory structure as a whole in a 2002 opinion.[80] The Attorney General made the argument that the state could require co-permitting if an integrator exercised "substantial operational control" over the grower's facility.[81] Because the state requires entities to acquire an NPDES permit if they "operate" an AFO—and integrators supply livestock and have ownership interests in growers' operations—there would be a point of control at which an integrator is "operating" the growers' facility.[82] This is the idea behind integrator liability.

2. Good Faith

Minnesota's statute states an element of good faith is implied in all agricultural contracts.[83] Minnesota defines "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing."[84] The idea is to ensure that integrators will not strong-arm growers with unfair terms. Kansas has a statute seeking to solve the

---

73. *Id.* at 1054.

74. RENA STEINZOR ET AL., INTEGRATOR LIABILITY: LEGAL TOOLS TO HOLD THE BIGGEST CHICKEN COMPANIES RESPONSIBLE FOR WASTE 4 (2015).

75. *Id.*

76. *Id.*

77. N.C. GEN. STAT. ANN. § 143-215.10H(b) (West 1999).

78. *Id.*

79. *Id.* § 143-215.10H(d).

80. *See* Letter from James C. Gulick, Senior Deputy Att'y Gen., Kathryn Jones, Cooper Special Deputy Att'y Gen., & Anita LeVeaux, Assistant Att'y Gen., to Daniel C. Oakley, Gen. Couns. N.C. Dep't of Env't and Nat. Res., NCDOJ (May 17, 2002), https://ncdoj.gov/opinions/proposed-npdes-general-permits/ [https://perma.cc/E3J5-3S8K] (arguing that the state had the ability to require co-permitting if an integrator met certain criteria).

81. *Id.*

82. *Id.*

83. MINN. STAT. § 17.94 (2019).

84. MINN. STAT. § 336.1-201(20) (2019).

issue of integrator liability with a similar good-faith provision.[85] To incentivize the integrators to follow this practice, the penalty for failure to exercise good faith is damages, court costs, and attorney fees.[86]

Although the spirit behind these types of statutes is important for the general practice of good faith and fairness in the meat industry, they appear to be redundant. For instance, Minnesota has already recognized the need for good faith in contracts in the form of Supreme Court opinions and by adoption of the Uniform Commercial Code.[87]

3. Formatting Requirements

Some states have sought to increase transparency in the contracts to make sure growers know exactly what they are getting into.[88] These requirements include readable font specifications, making sure the contract does not contain excessively complicated vocabulary, and making sure reference documents are attached to the contract.[89] Another method is to require a cover sheet explaining the risks and terms plainly to the grower.[90]

Again, this method is helpful and helps ensure clarity in the contracting process. However, it does not do nearly enough to solve the issue of integrator liability on a large enough scale, especially because these contracts carry requirements, conditions, and implications that cannot possibly be solved by attempting to explain the provisions in a single sheet of paper or making sure the even more complicated references are attached. When it comes down to transparency, the best (and only) way to make sure growers know what they are getting into is by hiring a lawyer—a luxury that many growers may not be able to afford.

B. Caselaw Mentioning "Substantial Operational Control"

To predict how the FFA will be applied, it is useful to look at how courts have interpreted similar language in other contexts. The courts have not used the phrase "substantial operational control," which is the central test of the FFA, in a very helpful manner. In the few cases which use the specific wording, the court is typically using the term to assess whether an individual can be held personally liable for the actions of a company.[91] In other cases, the court has used the phrase to assess whether one company is an "alter ego" of another company, which would distribute liability for certain actions to both companies.[92] In an even less helpful case, the court used the phrase to explain

85. KAN. STAT. ANN. § 16-1501 (2019).

86. MINN. STAT. § 17.94 (2019).

87. MINN. STAT. § 336.1-304 (2019); *See In re* Hennepin Cnty. 1986 Recycling Bond Litig., 540 N.W.2d 494, 502 (Minn. 1995) (detailing the implied covenant of good faith and fair dealing under Minnesota law and supporting cases).

88. *See, e.g.*, 505 ILL. COMP. STAT. 17/20 (2019) (stating specifics of Illinois agriculture contracts).

89. *Id.*

90. MINN. STAT. § 17.91 (2019).

91. *See, e.g.*, Morgan v. Rig Power, Inc., No. 7:15-CV-073-DAE, 2017 WL 11017230, at *8-9 (W.D. Tex. Sept. 1, 2017) (holding position as president and operational control makes him individually liable); Orozco v. Plackis, No. A–11–CV–703 LY, 2012 WL 2577522, at *5 (W.D. Tex. July 3, 2012) (debating whether defendant "exercised substantial operational control over the administration of the enterprise"); Aguado v. Lara's Trucks, Inc., No. 1:11-CV-04279-MHS, 2012 WL 13135371, at *1 (N.D. Ga. June 18, 2012) (arguing the defendant is liable due to his substantial operational control).

92. Satcorp Int'l Grp. v. China Nat'l Imp. & Exp. Corp., 917 F. Supp. 271, 279 (S.D.N.Y. 1996).

someone's handling and operation of an ocean vessel.[93]

The specific phrase was used in a somewhat relevant manner in a dissenting opinion of a single Sixth Circuit case in 2016.[94] In this dissent, the court mentioned a few factors, specific to the case at hand, that helped establish "substantial operational control."[95] These factors included the exclusivity of the products involved in the agreement, the extensive use of the controlled corporation's resources, and the inability of the controlled company to manage its own assets.[96]

Overall, current case law does not show courts making any relevant use of the phrase. Although the dissenting opinion of a single circuit court sheds some light on what the phrase could mean,[97] the court fails to present any test that would be useful for evaluating the term in a different fact-pattern. In addition, phrases and terms in different statutes can have entirely different meanings and definitions, so it would be unwise to assume any previous interpretation of the phrase could be a "one size fits all" approach to the language.

C. The Language of the FFA Is Too Broad

The FFA seeks to solve the issue of integrator liability by amending the CWA to extend NPDES permit obligations to integrators exercising "substantial operational control" over growers' operations.[98] The FFA defines "substantial operational control" in an extremely broad manner.[99] Instead of suggesting a test allowing a court to consider many different variables and weigh various circumstances, the definition creates three separate cases, leaving no room for a reasonable consideration of the facts.

The first situation is when an integrator has "an ownership interest in the livestock, land, or other capital" of the grower's operation.[100] Under this language, an integrator buying a single hog for a grower would apparently have an ownership interest in the whole operation and would be liable for any environmental damage resulting from an NPDES permit violation.

The second way an integrator can be defined as exercising "substantial operational control" is when the integrator exercises "any control over the activities, operation . . . or management" of the AFO.[101] Again, this creates an absurd situation in which the NPDES program would consider an integrator a co-permittee if the integrator merely required AFO workers to wash their hands at the beginning of the work day. This language also creates a problematic and circular definition in which an integrator exercises substantial operational control of an AFO if it exercises any control over the AFO's operations.

The third way creates a relatively reasonable alternative to the issue, in which an integrator could have substantial operational control by "any other criteria that the

93. Cintorino v. Ocean Ships, Inc., No. 99-00277HGFIY, 2000 WL 33179300, at *3 (D. Haw. July 12, 2000).

94. Med. Ctr. Elizabeth Place, LLC v. Atrium Health Sys., 817 F.3d 934, 950–51 (6th Cir. 2016) (Griffin, J., dissenting).

95. *Id.*

96. *Id.*

97. *See generally Med. Ctr. at Elizabeth Place*, 817 F.3d. (explaining how substantial operational control can be ascertained from a few different factors).

98. *See* Farmer Fairness Act, H.R. 3844, 116th Cong. (2019).

99. *Id.*

100. *Id.*

101. *Id.*

Administrator [of the EPA] determines appropriate."[102] Although this clause creates the opportunity for some sort of weighing and discretion, as opposed to the rigid and overinclusive language of the previous options, the delegation to the Administrator still provides no helpful tools for analysis and would likely be challenged as unconstitutional for providing broad discretion to EPA with no stated boundaries. The Administrator would have no more guidance for making the decision than it had before, and the courts would have no means to determine whether the agency would be abusing its discretion in violation of the Administrative Procedure Act.[103]

The result of this language and the definition of "substantial operational control" within the FFA creates a situation where environmental enforcement will be dealt with in an overinclusive manner. The broad language of the FFA will create an unreasonable extension of liability to integrators in nearly all grower/integrator contracts. In some cases, growers receiving only minimal help from integrators—and are not being dominated by the integrator in an unreasonable contract—will still have to deal with a statute placing shared responsibility on both the grower and the integrator.

This, in turn, will disincentivize integrators from contracting with individual growers at all. In a worst-case scenario for growers, the integrators will instead choose to fully vertically integrate their operations all the way to the bottom, taking opportunities away from individual growers across the country. If integrators are going to be liable for environmental damage in situations in which they really do not have much control, it is reasonable to believe that integrators would choose to completely manage every aspect of their production instead of hiring some aspects out—effectively putting an end to family farms.

D. Using a Balancing Test to Solve the Issue

Recall the opinion set forth by North Carolina's Attorney General's office in 2002 regarding the state's co-permitting requirements.[104] The Attorney General made the argument that the state had the ability to require co-permitting if an integrator exercised "substantial operational control" over the grower's facility.[105] Although not outlined in the statute or interpreted this way by the courts, the opinion presented a useful method of determining "substantial operational control" relevant to the FFA.[106]

It is important to first point out the differences between the situation contemplated in the opinion and the FFA. The opinion interpreted a proposed regulation from a federal agency concerning North Carolina's statutes.[107] The FFA is a proposed statute from Congress and would be afforded much more weight. As opposed to regulations—which are created by agencies in light of power granted by a statute—a statute outlining a test for integrator liability would remove doubt that an agency is interpreting a statute incorrectly. Essentially, the FFA would achieve far more credibility than the situation contemplated in

102. *Id.*
103. Dep't of Com. v. New York, 139 S. Ct. 2551, 2568 (2019).
104. *Supra* Section III.A.2; Gulick, *supra* note 80.
105. Gulick, *supra* note 80.
106. *Id.*
107. *Id.*

the Attorney General's opinion.

The opinion sets forth several factors an agency should consider when determining whether an integrator is exercising "substantial operational control."[108] These factors include "owning the animals, providing or mandating specific food for the animals and providing for the animals' medical treatment."[109]

1. Advantages of the Balancing Test

The advantage of this test, as opposed to the FFA's blanket definition, is clear: Only integrators truly responsible for a significant part of growers' operations will be required to co-permit in the case of a discharge. The hypothetical situation in which a grower is only receiving minimal help from an integrator and will be unduly burdened by the blanket definition would be resolved because an agency would consider the situation on a case-by-case basis and use its reasoned judgment to assess the specific relationship. In short, integrators would be held accountable for environmental damage when they should be held accountable, and reasonable relationships between integrators and growers would be left alone.

2. Issues with the Balancing Test

While the balancing test set forth by the North Carolina Attorney General appears to be a useful way to evaluate these integrator/grower relationships, there are a few downsides. The first is that taking each contract on a case-by-case basis may be incredibly burdensome for the agency enforcing the standard. If an agency has to consider each and every contract and farm to decide what level of control is being exercised by an integrator, an agency may be overcome with the task and may not be able to expend the time and resources to get the job done.

Another issue with case-by-case evaluations is uncertainty. With the potential risk of a discharge under this system, both the integrator and grower are unsure of the allocation of responsibilities, or how the agency would decide their specific case. A good way to remedy this concern is for integrators to assume they will be considered co-permittees until an agency can agree that they are not exercising "substantial operational control." However, because an integrator could potentially still be forced into assuming responsibility for the time it would take for an agency to consider each situation, this approach would still harm the integrator/grower relationships that do not actually require correction.

Another concern with granting so much discretion to an agency to determine integrator liability on a case-by-case basis is the danger of powerful influence from the meat industry. This is a bleak view of agency execution, but the possibility of lobbyists influencing the governor—or some power higher than the agency—and restricting the agency's ability to implement the balancing test in a totally unbiased manner still looms in the background.

108. *Id.*
109. *Id.*

IV. RECOMMENDATION

Large companies dominating the meat production industry are avoiding the true cost of doing business at the expense of the owners of many smaller farming practices. Something needs to be done to establish integrator liability for environmental harm when a discharge occurs, but what states have been doing at the front end of the establishment of these production contracts—redundant "good faith" requirements and transparency specifications[110]—is simply not effective enough to solve the issue properly. The best course of action would be the passage of a standalone bill addressing the issue, but if this is infeasible, the FFA should be amended to include narrower language.

The spirit behind the FFA emphatically seeks to solve the issue and ensure integrators will be held responsible for environmental damage.[111] However, the language may be overzealous with its overinclusive language defining "substantial operational control."[112] Integrators will be deterred from contracting with medium-to-large-sized growers if it seems they will be held liable for something they truly have little to no control over. Therefore, its effects may go so far as to harm some growers exercising enough control over their operations to justify bearing environmental liability.

The FFA should be altered to bring its goals into effect without risking the sacrifice of the aforementioned growers. The definition of "substantial operational control" needs to be changed to include only the relationships requiring integrators to bear liability. These relationships should be considered on a case-by-case basis, but the reality is the agencies and employees enforcing the statute would be overwhelmed by the task of combing through each of these. So, while it may be tempting to establish a balancing test with indicia of control by the integrator, leaving the definition too open-ended and discretionary may be too much of a burden on the industry and the bureaucracy.

In Section IV.B, this Note recommends changing the FFA's definition of "substantial operational control" to be less inclusive, which will extend liability only to the contractual relationships requiring it. This will prevent some of these relationships from being damaged by an unreasonable extension of liability to the integrator. Section IV.C will then acknowledge several remaining issues with this approach and consider possible solutions. Finally, section IV.D will address another approach that may be more straightforward and effective: a standalone bill.

A. CERCLA and Its Similarities to Integrator Liability

There is an existing statute confronting a similar issue which contains language that solves the issue appropriately.[113] The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) outlines liability in the case of hazardous substances.[114] The statute deals with the specific issue of environmental liability when an environmental violation occurs during the handling of hazardous substances.[115]

110. *See supra* Section III.A.1 (discussing the authority of the EPA under the Clean Water Act).

111. *See generally* Farmer Fairness Act, H.R. 3844, 116th Cong. § 2(t)(1) (2019) (discussing concentrated animal feeding operation discharges).

112. *Id.*

113. *See generally* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2018).

114. *Id.*

115. *Id.*

Similar to integrator liability, CERCLA outlines the circumstances in which a company with a security interest in a facility reaches the point of liability for environmental damage and cleanup.[116] If a facility defaults on payments, a bank may choose to work out an agreement in which the bank takes a certain amount of control of the facility's assets to improve profitability.

It is easy to see the similarities between this situation and a situation in which an integrator exercises a certain amount of control over the management of a grower's AFO. Both are concerned with a company potentially, but not certainly, exercising considerable control over another company in a contractual agreement. But at what point, if at all, should that control amount to liability for the consequences of hazardous substance violations? Section 101 of CERCLA[117] answers this question in a way that can be transferred to solve integrator liability.

CERCLA places liability on a company with a security interest (usually the bank) in another company's waste disposal activities in three situations: (1) when the company exercises decision-making control over the environmental compliance of the waste to the point of taking responsibility for the waste, (2) when the company exercises control comparable to a manager by controlling day-to-day activities of the facility, and (3) exercises control comparable to a manager over all operational functions of the facility other than those related to environmental compliance.[118] Without exercising management control over the facility in any of these ways, the company with a security interest in the other company is not considered an owner or operator and is not liable for environmental violations.[119]

B. Amendment to the FFA

CERCLA, which deals with an issue very similar to waste management for AFOs, provides a reasonable and inclusive definition of ownership and control of waste that—if adapted to the FFA—would establish a fair, statutory solution to the issue of integrator liability on a national scale. The FFA's definition of the term "substantial operational control" needs to be defined in the same terms used in CERCLA for lenders that "participate in management." The new language would read:

> (2) SUBSTANTIAL OPERATIONAL CONTROL.—For purposes of this subsection, a person exercises substantial operational control over a concentrated animal feeding operation if the person—
>
> > (A) has an ownership interest in the livestock, land, or other capital of the animal feeding operation at a percentage which the Administrator shall determine;
> >
> > (B) exercises decision-making control over the environmental compliance related to the concentrated animal feeding operation, such that the person has undertaken responsibility for the waste management practices related to the operation; or

116. *Id.* §§ 9601(20)(G)(ii), 9607(a).
117. *Id.* § 9601.
118. 42 U.S.C. §§ 9601(20)(G)(ii), 9607(a).
119. § 9601(20)(F).

> (C) exercises control at a level comparable to that of a manager of the concentrated animal feeding operation, such that the person has assumed or manifested responsibility—
>
> > (i) for the overall management of the operation encompassing day-to-day decision-making with respect to environmental compliance; or
> >
> > (ii) over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the operation other than the function of environmental compliance.[120]

This language resolves many of the issues considered in this Note. Instead of using a balancing test with various indicia of control and an enormous amount of discretion,[121] the definition only includes relationships in which the company with a security interest is acting in a managerial function and controls nearly all aspects of the operation. This more defined approach, as opposed to a total balancing test, makes it easier for companies to know what to expect from the change because the parties will be given actual criteria to assess and decide whether they fit within. Therefore, from the standpoint of expectations, an approach with defined criteria should not damage the existing contractual relationships.

Contrasting the original language of the FFA defining "substantial operational control," this new language should not be so harsh as to discourage integrators from contracting with growers that operate more independently. If integrators are not really operating to the extent a manager—or someone bearing responsibility—would, they will not have to co-permit for NPDES permits and will not be taking on liability in circumstances that do not warrant it.

At the same time, this language preserves the intent of the bill, which is to remedy relationships in which the integrator is escaping liability when it is really, in effect, operating the whole AFO.[122] Integrators operating in a managerial function, without actually owning the AFO, will be required to co-permit and will be liable for the operation's environmental harm.

C. Remaining Problems

There is, of course, the issue with the boundaries of this new statutory language. Although not as open-ended as the balancing test set forward by the North Carolina Attorney General,[123] this new language is not as defined as the original language. When has a company "manifested responsibility" for day-to-day management or waste management of the operation? What counts as "substantially all" of the operational functions? At some point, statutory definitions will devolve into a never-ending ladder downward if the meanings are not cut off at some point. The boundaries of these terms will be determined by administrative rule or, if need be, by the courts, but the new language is at least more defined than a balancing test.

---

120. Using language from 42 U.S.C. § 9601(20)(G)(ii) & Farmer Fairness Act, H.R. 3844, 116th Cong. (2019) as a template.

121. *See supra* Section III.D.2.

122. *See* Farmer Fairness Act, H.R. 3844, 116th Cong. (2019).

123. *See* Gulick, *supra* note 80.

The problem remains that there is at least some discretion in this bill that an administrative agency will be burdened with. The original language was so inclusive and clear-cut that an agency would have little trouble deciding when an integrator would have to co-permit. The new language outlining when co-permitting should occur is less inclusive and lessens the scope of potential contracts that would meet the criteria, making it more difficult to evaluate each situation. Thus, with less inclusive language, agencies may have to do more work to decide which integrators should be liable.

Implementation of environmental statutes is almost always complicated, though, and an agency will have several enforcement options. Agencies could require integrators to submit reports of AFOs over which they are exercising managerial control. They could do a case-by-case consideration immediately—which would be burdensome—but would at least be more straightforward than a balancing test.

In the alternative, they could evaluate violations *as they come* on a case-by-case basis and evaluate contractual relationships when a problem arises—as opposed to all at once. This approach seems relatively attractive because it would lessen the burden of evaluating each case by spreading it out over time. In addition, if an AFO never commits a violation, the agency would never have to take on the task of deciding whether it fits within the framework.

Another way to lighten the administrative burden would be to place the responsibility on the growers and the integrators to jointly apply for a permit the next time they are required to renew their NPDES permits. NPDES permits are supposed to be renewed after a certain amount of time; the CWA sets the maximum length at five years.[124] When the time comes to re-apply, the agency would have the opportunity to consider the contractual relationship. The agency would then be able to apply the "managerial control" test on a rolling basis, and it would give growers and integrators a reasonable amount of time to bring their contracts and working relationships into alignment with the provisions of the FFA.

In any case, the benefits considered above outweigh any issues stemming from implementation. Boundaries of "managerial control" will become more clearly defined over time, whether it be from agency rules or from the courts. Agencies will adapt and incorporate the new procedure for co-permitting as they deem appropriate and in their best judgment.

D. A Lingering Question

This Note considers ways in which integrators can be held liable for environmental damage from AFOs through the NPDES permit program. Given that the NPDES program already creates a pathway to solve a considerable part of the problem, legislators are familiar with using it to impose liability. At the end of the day, the goal is to make sure water quality is protected as much as possible, and the CWA squarely confronts this question.

However, it may be worth mentioning that the most efficient and reasonable alternative is an explicit, stand-alone bill to lay the issue to rest once and for all. Instead of jumping through hoops to make this idea of integrator liability fit within the structure we already have, why not enact legislation to clearly fix what needs fixing?

---

124. 33 U.S.C.A. § 1342 (b)(1)(B).

Could the soul of the FFA be lost as it is molded to fit the structure of the CWA? The NPDES program is already incredibly complicated and requires skilled environmental and administrative attorneys to make sense of it. Squeezing another provision in may achieve some progress toward fixing the problem, but some of its message may be lost as the language is subordinated to the other goals and intricacies of the CWA.

A stand-alone bill would have the virtues of simplicity, clarity, and straightforwardness. This Note ultimately recommends Congress pursue a bill stating that any entity owning the animals in an AFO will not be able to escape liability for environmental violations by contracting away the manure management. If we are really trying to solve this issue in an efficient manner, the best way to do so would be to bring the issue to the limelight and clearly state if an integrator owns the animals producing this waste—which can have potentially devastating effects on the environment—the law will not allow it. Without the shield of falling under the existing NPDES permit system, a straightforward approach like this may be more susceptible to attack and debate, and thus less likely to pass. However, if we are trying to solve this important problem, why not do so boldly and firmly?

V. CONCLUSION

Environmental statutes are often complicated, and industry structures are typically not so straightforward, either. The meat industry is no exception. Growers are susceptible to coercive, if not unfair, contractual obligations in their business relationships with integrators. Growers seem to be bearing more liability for animal waste than they should be, given the amount of control integrators exercise over their operations. The issue requires Congress to come up with a nationwide response to protect growers and create a consistent, predictable, and fair solution.

While the FFA would make progress towards this end, it may end up harming the growers it seeks to protect by being overinclusive. By changing the bill's definition of "substantial operational control" to one focusing on decision-making control of operations and managerial control of facilities by integrators, agencies will be able to attach liability only to the integrators that are so involved that they truly deserve to be held responsible for the pollution.