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HATCHING A PLAN FOR LOCAL COMMUNITIES: ENVIRONMENTAL JUSTICE IN POULTRY SITING DECISIONS

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ABSTRACT

One of the implementation problems for environmental justice is reconciling the need to protect public health with the economic realities of struggling communities. This article explores that tension through the lens of siting decisions for large scale poultry operations in rural communities. Poultry siting decisions have major economic and environmental impacts and have been underdiscussed in the environmental justice literature. This article focuses on the role of law and policy in concentrated animal feeding operation (CAFO) siting—from community benefit agreements to Right to Farm legislation. It uses a Kansas CAFO siting and the wider Kansas experience as a case study.

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INTRODUCTION

Imagine you are a commissioner of a rural county. You grew up in your county, listening to farmers grumble about the going price of sorghum and about the good old days before the local copper wire factory closed up shop. And while you love your hometown, you also recognize the challenges it faces. Year after year, the local high school graduates an ever-shrinking class of seniors—many of whom go off to college and never return. Last year, the county hospital closed its doors—not from lack of patients, but from lack of doctors. The perennially high poverty and addiction rates only make matters worse. As it stands, the county’s economy is a listing ship, and only a drastic measure will right it before disaster occurs. Amidst these problems, a potential solution arises. A large poultry producer wishes to site a multi-million-dollar operation in the county. It would mean jobs and tax revenue but would also pose tremendous environmental concerns. Knowing this—do you vote to accept the project?

Similar questions are posed to local elected officials in rural areas across the country. Bringing concentrated animal feeding and slaughtering sites into rural counties is a gamble—one that comes with great risk and great reward. On the one hand, these sites allow counties to diversify their local economies and revitalize their communities. On the other hand, they also pose pollution risks, particularly to local watersheds.

One underappreciated factor in poultry siting decisions is environmental justice. Environmental justice is broadly defined as the belief that lower income and minority communities should not be disproportionately impacted by environmental burdens.¹ Historically, siting decisions often correlate to rural counties with higher minority populations and lower income and education levels.² The site placement within the county, local setback requirements, and community benefit agreement discussions can all have profound environmental justice implications for the local community.³

This Article focuses on a Kansas controversy over the siting of a Tyson poultry plant. Unlike many of its Southern or Midwestern sister

¹ BARRY E. HILL, ENVIRONMENTAL JUSTICE: LEGAL THEORY AND PRACTICE 4 (Env’tl. Law Inst. ed., 4th ed. 2018).

² See *infra* Section C.

³ See discussion *infra* Sections III, IV.

states, Kansas has never developed a significant poultry industry.⁴ In large part, this is because much of Kansas does not have enough water to support poultry Concentrated Animal Feeding Operations (CAFOs).⁵ But after the Kansas Department of Agriculture identified the sector as a potential area for agricultural growth for the state's annual agricultural summit in 2016, the agency started cultivating ties with industry leaders to encourage them to bring Big Poultry to the state.⁶

Likely in response to these lobbying efforts, Tyson Foods (a longtime player in the Kansas agricultural sector) became interested in setting up a poultry operation in Kansas.⁷ The company eventually settled on two finalists for the location of the processing plant: Leavenworth and Montgomery Counties.⁸ While both of these counties have more water than other parts of Kansas, a comparison of their demographic and economic profiles reveals stark differences.⁹

⁴ For the purposes of this Article, the term “poultry” is defined as chicken production. Although poultry generally encompasses chicken, turkey, duck, geese, and other bird production, unless specifically noted, this Article uses the word “poultry” to refer solely to chicken production.

⁵ Telephone Interview with Trisha Purdon, Exec. Dir., Montgomery Cty. Action Council (Feb. 6, 2019).

⁶ Kan. Dep't. Agric., Poultry (2016) (working draft presented at the 2016 Kansas Ag Summit) (available at <https://agriculture.ks.gov/docs/default-source/ag-growth-summit/poultry.pdf>).

⁷ See Press Release, Kan. Dep't. Agric., KDA Welcomes Tyson Food's Investment in Kansas (Sept. 6, 2017), <https://agriculture.ks.gov/AllNewsItems/2017/09/06/kda-welcomes-tyson-foods-investment-in-kansas> (“Tyson Foods, Inc. will soon build a \$320 million, state-of-the-art poultry complex in eastern Kansas was the result of a tremendous collaboration of local leaders, the agriculture industry, and state and federal government.”). Tyson currently has five major operations in Kansas: Emporia, Holcomb, Kansas City, and two locations in Hutchinson. See *Tyson Foods Major Locations*, TYSONFOODS.COM, <https://www.tysonfoods.com/sites/default/files/2018-07/Tyson%20Foods%20Major%20Locations.pdf> (last visited Jan. 27, 2020).

⁸ John Green, *Sedgwick, Montgomery, Cloud counties finalists for Tyson plant*, THE HUTCHINSON NEWS (Oct. 19, 2017, 12:57 PM), <https://www.hutchnews.com/news/20171019/sedgwick-montgomery-cloud-counties-finalists-for-tyson-plant>.

⁹ James K. Koelliker, *Effects of Agriculture on Water Yield in Kansas*, KAN. GEOLOGICAL SURVEY BULL. reprinted in PERSPECTIVES ON SUSTAINABLE DEVELOPMENT OF WATER RESOURCES IN KANSAS 170, 171 (Marios Sophocleous ed., 1998). Figure 7.7 shows the moisture deficiency (MD) for each Kansas county. *Id.* at 176. Eastern Kansas has considerably more water resources than Western Kansas, which relies heavily on aquifers. See Cathy Evans, *Groundwater Levels Down in Western Kansas, Hold or Increase in Central Kansas*, KAN. GEOLOGICAL SURVEY: NEWS RELEASE, (Feb. 10, 2017), <http://www.kgs.ku.edu/General/News/2017/2017groundwaterlevels.html>.

Montgomery is one of the poorest counties in Kansas.¹⁰ The county has higher rates of child poverty and unemployment and lower high school graduation rates than Leavenworth.¹¹

The Leavenworth community came out against the Tyson plan with protests and negative news coverage.¹² The group “No Tyson in Tongie”¹³ fought the plant because they believed Tyson had a “poor history of unethical treatment of it’s [sic] employees, inhumane treatment of animals, water and air pollution, over-stressing school and city/county resources, and decreasing home values.”¹⁴ Eventually, the company announced it would halt its Kansas expansion until it finished a Kentucky CAFO facility.¹⁵

The reaction from Montgomery County residents was in stark contrast to Leavenworth County residents in the face of a potential poultry processing plant. In fact, after the protests in Leavenworth, local Montgomery officials lobbied the state legislature to pass a law making it easier to develop a CAFO facility once Tyson finishes its Kentucky plant.¹⁶ Given the general enthusiasm for potential poultry sites on both the state and local level, Tyson’s eventual expansion into Montgomery or one of its neighboring counties seems inevitable.

Section II of this Article provides an overview of the poultry industry. Section II begins by discussing the poultry production process. It then examines the related environmental impacts, and concludes with a discussion of how environmental justice has played an implicit role in poultry siting decisions. Section III examines the general framework for how poultry sites reach rural communities, using Montgomery County—

¹⁰ U. KAN. INST. FOR POL’Y & SOC. RES., MONTGOMERY COUNTY 14 (2017)
<http://www.ipsr.ku.edu/ksdata/kcced/profiles/pdf/20125.pdf> (ranking Montgomery County fourth highest in the state for estimated percentage of people in poverty).

¹¹ *Compare* U. KAN. INST. FOR POL’Y & SOC. RES., MONTGOMERY COUNTY 10, 15, 43 (2017), <http://www.ipsr.ku.edu/ksdata/kcced/profiles/pdf/20125.pdf>; *with* U. KAN. INST. FOR POL’Y & SOC. RES., LEAVENWORTH COUNTY 10, 15, 43 (2017), <http://www.ipsr.ku.edu/ksdata/kcced/profiles/pdf/20103.pdf>.

¹² Dion Lefler, *Tyson Plant Opponents Organize; Business Group to Evaluate Project*, THE WICHITA EAGLE (Oct. 27, 2017, 8:43 AM), <https://www.kansas.com/news/local/article180767061.html>.

¹³ “Tongie” is the local nickname for Tonganoxie, Kansas.

¹⁴ *About Us*, NO TYSON IN TONGIE (2017), <http://nototyson.com/>.

¹⁵ Rob Roberts, *Tyson Foods Puts Tonganoxie Plans on Hold*, KAN. CITY BUS. JOURNAL (Sept. 19, 2017, 4:38 PM), <https://www.bizjournals.com/kansascity/news/2017/09/19/tyson-foods-puts-tonganoxie-plans-on-hold.html>.

¹⁶ KAN. LEGIS. RES. DEP’T., SUPPLEMENTAL NOTE ON SENATE BILL 405, S. 405, 2018 Sess. (Kan. 2018), http://www.kslegislature.org/li_2018/b2017_18/measure/documents/supp_note_sb405_01_0000.pdf (summary of support and testimony by Montgomery officials).

and the wider Kansas experience—as a case study. Section III.a situates poultry plants in the context of the decline of rural infrastructure and rural flight. Section III.b discusses the siting process. It also considers the public’s role and opportunities for local officials to negotiate community benefit agreements. Finally, Section IV considers the role of two types of policy decisions in the environmental justice context: (1) right to farm laws and (2) permitting requirements.

I. HISTORY OF POULTRY, CAFOS, AND ENVIRONMENTAL JUSTICE HARMS

A. *How Stuff Works: The Poultry Industry*

To understand the environmental and societal effects of the poultry industry, it is necessary to understand how the poultry industry works. Modern America is inundated with chicken. From KFC to Lean Cuisine, industry magnates tout chicken as a better, cheaper alternative to other animal proteins such as beef.¹⁷ Americans consume chicken more than any other meat¹⁸ and at a much higher rate than previous generations.¹⁹ Moreover, the United States is the biggest poultry producer in the world, accounting for a quarter of the world’s production.²⁰ But despite its popularity, few Americans know how drumsticks end up in their Church’s Chicken bucket.

Poultry is a vertically integrated industry.²¹ Vertical integration means that virtually all steps of the production cycle are located in one place and under the control of a larger parent company such as Tyson or Pilgrim’s Pride.²² Companies began integrating the poultry industry

¹⁷ Tomislav Vukina, *Vertical Integration and Contracting in the U.S. Poultry Sector*, J. FOOD DISTRIBUTION RES. 29, 34 (2001). See also Felicity Lawrence, *Meat Packers United: Labour Renaissance in the UK Food Industry*, THE GUARDIAN (May 27, 2010, 9:50 AM), <https://www.theguardian.com/environment/2010/may/27/chicken-factories-labour-rights-movement> (“Cheap factory chicken is one of the defining commodities of our era.”) (discussing the problems within the United Kingdom’s poultry market and industry).

¹⁸ MARIN WEAVER, OFFICE OF INDUS., U.S. INT’L TRADE COMM’N, POULTRY INDUSTRY & TRADE SUMMARY 3 (2014) [hereinafter 2014 SUMMARY].

¹⁹ Compare *id.* at 21 (indicating U.S. poultry consumption at over 80 pounds per capita) with DOUGLAS E. NEWMAN & ELIZABETH N. LEE, OFFICE OF INDUS., U.S. INT’L TRADE COMM’N, POULTRY INDUSTRY & TRADE SUMMARY 12 (1992) [hereinafter 1992 SUMMARY] (chart showing rise of consumption per capita from 15.5 kgs (about 34 pounds) per capita in 1960).

²⁰ 2014 SUMMARY, *supra* note 18, at 1–2.

²¹ *Id.* Some companies, such as Tyson or Cargill, also engage in horizontal integration by producing various agricultural products in addition to poultry. *Id.* at 10.

²² 1992 SUMMARY, *supra* note 19, at 4–5.

during the post-World War II boom.²³ In many ways, concentrating production benefitted consumers.²⁴ Like Henry Ford's assembly line process, integration makes poultry more efficient to produce.²⁵ As a result, egg and meat real prices fell dramatically.²⁶ On the other hand, concentrating production also means concentrating industry waste.²⁷ While chicken may be healthier than its red meat cousins,²⁸ it also plays a role in the U.S. obesity crisis.²⁹

²³ *Id.* at 2–3.

²⁴ STEVE MARTINEZ, U.S. DEP'T OF AGRIC., VERTICAL COORDINATION IN THE PORK AND BROILER INDUSTRIES: IMPLICATIONS FOR PORK AND CHICKEN PRODUCTS iii, 2 (1999) (“The industrialization of the broiler industry yielded gains in production and marketing efficiencies that lowered the costs of chicken products. At the same time, the industry achieved a level of control over production and processing that has enabled it to respond to consumer preferences for high-quality, uniform, value-added products.”) For a perhaps more hyperbolic look at the benefits of the poultry industry, see *New Book Misses its Mark, Does Nothing to Educate Consumers on Realities of Modern Poultry Production*, NAT'L CHICKEN COUNCIL (Feb. 18, 2014) <https://www.nationalchickencouncil.org/new-book-misses-mark-nothing-educate-consumers-realities-modern-poultry-production/> (“Still, as beneficial as it is for the farmers and partner companies, the real winners of this system are consumers. The integration of the chicken industry has saved consumers well over \$1 trillion since 1980 and has resulted in product innovation that has broadened consumer choice.... This system provides a level of traceability and accountability unparalleled by the majority of food production.”).

²⁵ 1992 SUMMARY, *supra* note 19, at 4–5.

²⁶ See William Boyd, *Making Meat: Science, Technology, and American Poultry Production*, 42 TECH. & CULTURE 631, 632–34 (2001) (“By any economic standard, the success of the U.S. broiler industry during the post-World War II period has been remarkable. Between 1950 and 1999... real prices declined by almost a third.”). The term “real prices” is defined as economic purchasing power adjusted for inflation. See also Hakan Unveren, *Comprehensive Poultry Supply Chain Model with Vertical and Horizontal Linkages: Implication of Domestic and International Shocks* 3 (May 2019) (unpublished M.S. thesis, University of Ark.) (on file with author) (“[T]hese developments resulted in faster, cheaper, and safer production of chicken meat.”) and CARRIE HRIBAR, NAT'L ASS'N OF LOCAL BDS. OF HEALTH, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES 2 (2010) (“When properly managed, located, and monitored, CAFOs can provide a low-cost source of meat, milk, and eggs, due to efficient feeding and housing of animals, increased facility size, and animal specialization.”).

²⁷ CLAUDIA COPELAND, CONG. RESEARCH SERV., RL31851, ANIMAL WASTE AND WATER QUALITY: EPA REGULATION OF CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFOs) 3 (2010) (“As livestock production has become denser and more spatially concentrated, the amount of manure nutrients relative to the assimilative capacity of land available on farms for application has grown. . .”).

²⁸ 2014 SUMMARY, *supra* note 18, at 3.

²⁹ Karin Davis, *Do Chickens Make People Chubbier? Antibiotics and Obesity*, CTR. FOR HEALTH JOURNALISM (Mar. 19, 2014), <https://www.centerforhealthjournalism.org/fellowships/projects/do-chickens-make-people-chubbier-antibiotics-and-obesity> (“For decades we've been told that chicken is lower in fat and cholesterol than red meat, so it's ironic that during this time, obesity has

Poultry production begins in the hatchery.³⁰ Companies like Tyson carefully control the breeding stock of their chickens.³¹ Starting with “foundation flocks” or DNA selected starter chickens, companies breed several generations of birds until they have “multiplier farms.”³² Once hatched, the birds are then contracted out to independent farmers to raise until ready for processing.³³ This process is often called broiler “growout.”³⁴ This stage is where Concentrated Animal Feeding Operations, or CAFOs, come into play. CAFOs allow farmers to house vast amounts of chickens in a relatively small amount of space.³⁵

In addition to hatching the chickens, the parent company also manages what the chickens eat.³⁶ “Feed mills” produce specialized food pellets for each stage of the chicken growth cycle.³⁷ Over time, this combination of selective breeding and dietary planning has modified the chicken growth cycle.³⁸ In the 1940s, it took farmers on average fourteen weeks to get a chicken from the hatchery to market.³⁹ By 1992 it took under eight.⁴⁰ Likewise, in 1925 the average weight of chickens was

risen dramatically in Americans, including young children. Chicken consumption isn’t the prime culprit, but it isn’t blameless either.”). *See also* Anne M. J. Gilsing et. al., *Longitudinal Changes in BMI in Older Adults Are Associated with Meat Consumption Differentially, by Type of Meat Consumed*, 142 J. NUTRITION 340, 344 (2012) (finding chicken and other meat consumption correlated to long term increase in weight and BMI); Jedediah Purdy, *The Long Environmental Justice Movement*, 44 ECOLOGY L.Q. 809, 860 (2018) (discussing the impact of subsidies for foods such as corn and soybeans on the obesity crisis).

³⁰ U.S. DEP’T OF AGRIC., POULTRY 2010: STRUCTURE OF THE POULTRY INDUSTRY iii (2011).

³¹ ANNE FANATICO & SKIP POLSON, NAT’L SUSTAINABLE AGRIC. INFO. SERV., NAT’L CTR. FOR APPROPRIATE TECH., POULTRY GENETICS FOR PASTURED PRODUCTION 2 (2005), <http://whatcom.wsu.edu/ag/documents/poultry/PoultryGeneticsPasturedProd.pdf>.

³² POULTRY 2010: STRUCTURE OF THE POULTRY INDUSTRY, *supra* note 31, at iii.

³³ 1992 SUMMARY, *supra* note 19 at 2, 4–5.

³⁴ JAMES M. MACDONALD, U.S. DEP’T OF AGRIC., THE ECONOMIC ORGANIZATION OF U.S. BROILER PRODUCTION iii (2008), https://www.ers.usda.gov/webdocs/publications/44254/12067_eib38_1_.pdf?v=0.

³⁵ EPA, NPDES PERMIT WRITERS’ MANUAL FOR CAFOs 2-6-2-7 (2012), https://www3.epa.gov/npdes/pubs/cafo_permitmanual_chapter2.pdf.

³⁶ *See* 1992 SUMMARY, *supra* note 19, at 4.

³⁷ *See generally* Danny Wade, *Tyson Feed Mill Progressing Upward*, MILAN MIRROR EXCHANGE (Feb. 26, 2019), <https://www.milanmirrorexchange.com/2019/02/26/tyson-feed-mill-progressing-upward/>.

³⁸ *See* 1992 SUMMARY, *supra* note 19, at 4.

³⁹ *Id.* *See also* POULTRY 2010: STRUCTURE OF THE POULTRY INDUSTRY, *supra* note 31, at iv.

⁴⁰ 1992 SUMMARY, *supra* note 19, at 4.

about 2.50 pounds, which has increased to reach a modern average of 6.26 pounds in 2018.⁴¹

Once the chickens are of a satisfactory size, the farmer sends them from the CAFO to the processing facility for “slaughter, evisceration, and cutup.”⁴² It is at this stage that the parent company can finally recoup its costs. At first glance, Big Poultry looks like a lucrative industry. In 2018 (the most recent survey of poultry production) the domestic broiler chicken-poultry industry made 31.7 billion dollars in sales.⁴³ Yet producing chicken is still so expensive even large companies have slim profit margins.⁴⁴ This is one of the contributing factors to the economic meltdown of poultry giant Pilgrim’s Pride during the 2008 recession.⁴⁵

There are two takeaways from this discussion going into the rest of the article. First, banish any mental images of a pastoral farmer tending a lone chicken coop. Modern poultry production is a Frankenstein creature—created by knitting together hard physical labor with the marvels of modern science. Second, from an environmental justice perspective, when a county accepts or courts a poultry complex it is not just inviting a simple factory building. A poultry operation requires a hatchery, a feed mill, and a processing complex. It also requires enough CAFOs in the area to raise the chicks. All of these components of the poultry industry combine for a severe environmental impact on the community around it.

B. Community and Environmental Harms posed by CAFOs

A comprehensive environmental justice analysis considers the impacts of siting decisions for a polluting facility. First, CAFOs require

⁴¹ *U.S. Broiler Performance, 1925 to Present*, NAT’L CHICKEN COUNCIL (last updated Mar. 22, 2019), <https://www.nationalchickencouncil.org/about-the-industry/statistics/u-s-broiler-performance/>.

⁴² See 1992 SUMMARY, *supra* note 19, at 2.

⁴³ NAT’L AGRIC. STAT. SERV., U.S. DEP’T AGRIC., POULTRY PRODUCTION AND VALUE 2018 SUMMARY 5 (2019), <https://downloads.usda.library.cornell.edu/usda-esmis/files/m039k491c/h989rc35c/pk02cm100/plva0519.pdf>.

⁴⁴ For example, over the last five years Tyson’s operating margin has hovered between three to seven percent. See *Tyson Foods Profit Margin 2006-2019*, MACROTRENDS.NET, <https://www.macrotrends.net/stocks/charts/TSN/tyson-foods/profit-margins> (last visited Jan. 17, 2020).

⁴⁵ Emily Chasan & Bob Burgdorfer, *Pilgrim’s Pride exits bankruptcy under JBS deal*, REUTERS (Dec. 28, 2009, 12:53 AM), <https://www.reuters.com/article/us-pilgrimspride-idUSTRE5BR2O820091228>. Pilgrim’s Pride overextended itself prior to the recession by buying out a rival. *Id.* As a result, the company’s slim profit margin could not absorb the recession’s corresponding tumble in chicken sales. The company sold to Brazilian meat company JBS and continues operations throughout the U.S. *Id.*

large amounts of water. One study estimated that it takes about 4325 liters of water to produce one kilogram of chicken meat.⁴⁶ That translates to about 500 gallons of water per pound. The United States Department of Agriculture estimated that producers sold 56,541,100,000 live weight pounds of broiler chickens in 2018.⁴⁷ Even after adjusting for the difference between live weight to meat rendering, multiplying those two rough numbers puts poultry water usage into billions of gallons—and it leaves out all the failed poultry flocks and miscellaneous water usage in CAFO barns. Although water is a renewable resource, it is a limited one.⁴⁸ Thus, high water consumption by CAFO operations is a troubling use of local water supplies.

The biggest environmental concern posed by CAFOs, however, is waste. Broiler litter is composed of chicken manure and bedding from the broiler houses.⁴⁹ Poultry CAFOs produce upwards of 70 million tons of manure per year.⁵⁰ This litter is high in nitrogen and phosphorus, which makes it a good fertilizer.⁵¹ When overused, however, the runoff leaches into groundwater and concentrates in the soil.⁵² For example, a

⁴⁶ *Product Gallery*, THE WATER FOOTPRINT NETWORK, <https://waterfootprint.org/en/resources/interactive-tools/product-gallery/> (last visited Aug. 24, 2019) (citing M.M. Mekonnen & A. Y. Hoekstra, *A global assessment of the water footprint of farm animal products*, 15 *ECOSYSTEMS* 401, 401–415 (2012)).

⁴⁷ U.S. DEP’T. AGRIC., NAT’L AGRIC. STATISTICS SERV., *POULTRY SLAUGHTER 2018 SUMMARY 5* (2019), https://www.nass.usda.gov/Publications/Todays_Reports/reports/pslaan19.pdf.

⁴⁸ Spiro Alexandratos et. al., *Sustaining Water Resources: Environmental and Economic Impact*, 7 *ACS SUSTAINABLE CHEM. & ENG.* 2879 (2019).

⁴⁹ *Big Chicken: Pollution and Industrial Poultry Production in American*, STATES NEWS SERVICES (Pew Charitable Trusts) (hereinafter “Pew Research”) (July 2011). The bedding is usually an absorbent organic material such as pine sawdust. MACDONALD, *supra* note 34, at 18.

⁵⁰ ROBERT L. KELLOGG, ET. AL., U.S. DEP’T OF AGRIC., *MANURE NUTRIENTS RELATIVE TO THE CAPACITY OF CROPLAND AND PASTURELAND TO ASSIMILATE NUTRIENTS: SPATIAL AND TEMPORAL TRENDS FOR THE UNITED STATES*, 49, 53 (2000) (calculated from agency estimates on manure nitrogen estimates and manure-to-nitrogen ratios). Tracking the amount of poultry waste can be a difficult task. A 2011 study done in Indiana estimated poultry producers under reported their waste output by 9.6%. See Jeffrey Lai, et. al., *Calculation of Poultry Manure Production in Indiana*, PURDUE U., (2011), available at <https://engineering.purdue.edu/adt/PoultryManure/PurduePoultryDayPoster8-28-12.pdf>. This calls to mind underreporting problems raised by environmental justice organizers against other industries such as GASP in Birmingham, Alabama. See *Environmental Justice*, GASP, INC., <https://gaspgroup.org/environmental-justice/> (last visited May 7, 2019). See also *Toxic City: Birmingham’s Dirty Secret*, GASP, INC. (2014), <https://gaspgroup.org/environmental-justice/>. (discussing self-reporting issues at 11:26).

⁵¹ Pew Research, *supra* note 49, at 11.

⁵² *Id.* Chicken manure also has higher levels of nitrogen and phosphorus in comparison to other meat animals such as pork or beef. *Id.*

study in Georgia found that thirteen counties had high soil phosphorus levels—ten of those counties had poultry CAFOs.⁵³ Moreover, the sheer density of chickens leads to a build-up of excess manure.⁵⁴ In many areas, CAFO farmers cannot offload manure faster than the chickens produce it, meaning that the broiler litter sits in troughs or lined pits, which can be exposed to the elements.⁵⁵

All this waste predictably leads to environmental harm. First, the excess manure's descent to groundwater contaminates the water with nitrates.⁵⁶ Nitrates oxidize hemoglobin in blood, making it harder for the human body to deliver oxygen to cells.⁵⁷ This is especially dangerous for infants as it can cause blue baby syndrome.⁵⁸ Despite being less dangerous to adults, nitrates can cause miscarriages and overall poor health.⁵⁹ While most people who live near farms expect some nitrates in their well water, areas around CAFOs can have much higher levels than the recommended Maximum Contaminant Level (MCL).⁶⁰ The EPA does not regulate or test private wells.⁶¹

⁵³ *Id.* at 13. (citing USDA NATURAL RES. CONSERVATION SERV. AND ECONOMIC RESEARCH SERV., MANURE NUTRIENTS RELATIVE TO THE CAPACITY OF CROPLAND AND PASTURELAND TO ASSIMILATE NUTRIENTS: SPATIAL AND TEMPORAL TRENDS FOR THE UNITED STATES (2000)).

⁵⁴ *Id.* at 12. The buildup of broiler litter and its environmental harm calls to mind the Great Horse Manure Crisis of 1894. Elizabeth Kolbert gives a thoughtful overview of the crisis from the perspective of climate change and changing technology. Elizabeth Kolbert, *Hosed: Is there a Quick Fix for Climate Change?*, THE NEW YORKER (Nov. 16, 2009), <https://www.newyorker.com/magazine/2009/11/16/hosed>.

⁵⁵ Poultry farmers often label the act of leaving manure in troughs as “field staging” and “outdoor stockpiling.” Amy L. Shoher, et al., *Temporary Field Storage of Poultry Litter*, UNIV. DELAWARE COOPERATIVE EXTENSION (Mar. 2015), <http://extension.udel.edu/factsheets/temporary-field-storage-of-poultry-litter/>. See also Lewis Carr, et al., *Structures for Broiler Litter Storage*, U. MD. COOPERATIVE EXTENSION (1990), https://www.enst.umd.edu/sites/enst.umd.edu/files/_docs/fs416.pdf. As environmental justice scholar Luke Cole noted, “Language is an important tool in the fight for environmental justice; one person's ‘sanitary landfill’ is another's ‘garbage dump.’” Luke W. Cole, *Legal Services, Public Participation, and Environmental Justice*, 29 CLEARINGHOUSE REV. 449, 452 n.15 (1995).

⁵⁶ HRIBAR, *supra* note 26, at 4.

⁵⁷ *Id.*

⁵⁸ *Id.* at 4. Blue baby syndrome can cause difficulty breathing and seizures. In extreme cases, it can cause death. *Id.*

⁵⁹ *Id.*

⁶⁰ PHILIP A. MOORE & DAVID BRAUER, ENVTL. PROT. AGENCY, METRICS FOR NITRATE CONTAMINATION OF GROUND WATER AT CAFO LAND APPLICATION SITES - ARKANSAS DAIRY STUDY 1 (2009).

⁶¹ *Private Well Owners*, ENVTL. PROT. AGENCY, https://www3.epa.gov/region1/eco/drinkwater/private_well_owners.html (last visited May 7, 2019).

Nitrates also affect surface waters. Typically, broiler litter gets into surface water through discharge events such as a storm flooding a lined waste pit.⁶² From there, it can cause algae blooms in lakes and rivers.⁶³ Surface waters can also be infected with fecal bacteria pathogens.⁶⁴ This type of contamination can be especially acute during natural disasters. For example, a string of hurricanes that hit the North Carolina coastline in the 1990s, along with the more recent Hurricane Matthew in 2016, flooded poultry and hog CAFOs.⁶⁵ As a result, billions of pounds of hog and chicken waste went into the water supply.⁶⁶

In addition to water contamination, CAFO waste poses problems for air quality. The Center for Disease Control found that poultry CAFOs produce considerable amounts of, “ammonia, hydrogen sulfide, methane, and particulate matter, all of which have varying human health risks.”⁶⁷ CAFOs emit these emissions in two ways: (1) when the waste is exposed to the outside and (2) by their ventilation systems.⁶⁸ These air pollutants harm both to farm workers and to people living nearby. For example, various studies have found that children who live near CAFOs suffer

⁶² HRIBAR, *supra* note 26, at 4.

⁶³ *Id.*

⁶⁴ *Id.* at 5.

⁶⁵ H. Claire Brown, *North Carolina’s hog and poultry farmers are directly in the path of Hurricane Florence. Are they ready?*, THE NEW FOOD ECON. (Sept. 11, 2018), <https://newfoodeconomy.org/north-carolina-hog-poultry-farms-cafos-hurricane-florence/>.

⁶⁶ See Catherine Clabby, *Post-Matthew Water: How Bad is It?*, N.C. HEALTH NEWS, (Oct. 25, 2016), <https://www.northcarolinahealthnews.org/2016/10/25/post-matthew-water-how-bad-is-it/> (“News reports during the worst of the flooding were crowded with dramatic aerial photos and videos of flood water inundating hog and poultry farms, indicators that waste laced with contaminants escaped into waterways that feed public drinking water systems...”); Rebecca Beitsch, *Few Wells Tested for Contamination After Major Flooding From Hurricanes*, PEW RESEARCH (Dec. 14, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/12/14/few-wells-tested-for-contamination-after-major-flooding-from-hurricanes> (discussing concerns over well contamination in the wake of hurricanes); Christina Ball-Blakely, *CAFOs: Plaguing North Carolina Communities of Color*, 18 SUSTAINABLE DEV. L. & POL’Y 4, 5 (2017) (“Contaminated groundwater leads to contaminated drinking water in rural areas like the Black Belt... Those that do rely on wells for drinking water are at higher risk for water contamination because the Black Belt is located on the North Carolina Coastal Plain, which has high water tables and wells that are unlined and shallow.”).

⁶⁷ HRIBRA, *supra* note 26, at 5.

⁶⁸ *Id.*

much higher rates of asthma.⁶⁹ Additionally, long term exposure to ammonium can lead to chronic lung disease and respiratory scarring.⁷⁰

Part of this air pollution story involves odor. One of the poultry industry's selling points is that chicken CAFOs are "cleaner" and emit less odor than other types of CAFOs.⁷¹ Despite this relatively untested claim, poultry CAFOs still smell.⁷² Some—but not all—states regulate odor by management plans or permitting requirements.⁷³ In some states such as North Carolina, lawmakers explicitly excluded "poultry CAFOs producing dry litter from state odor regulations" for other CAFO industries like pork.⁷⁴

One source of information occasionally overlooked in CAFO environmental analyses are the opinions of the people who live next to them. It is not enjoyable to live less than 300 yards from a broiler barn. As a North Carolina newspaper described, for one couple, living near a poultry CAFO meant the end of enjoying the outdoors:

From the start the Marshalls could not bear the stench. Terry stopped keeping the garage door open to signal neighbors they were home. No more grilling on the back porch, tending flowers and, some days, going outdoors at all. Both feared they were breathing something harmful after the chickens moved in,

⁶⁹ See generally Robin Dawson Estrada & Dennis R. Ownby, *Rural Asthma: Current Understanding of Prevalence, Patterns, and Interventions for Children and Adolescents*, 17 CURRENT ALLERGY AND ASTHMA REPORTS 6 (2017) (examining swine production and asthma symptoms); James A. Merchant et al., *Asthma and Farm Exposures in a Cohort of Rural Iowa Children*, 113 ENVTL. HEALTH PERSPECTIVES 350, 355 (2005) ("These high asthma estimates make clear...that swine production contributes to the higher prevalence of asthma outcomes in this livestock-intensive rural community."); Amy A. Shulz et al., *Residential Proximity to Concentrated Animal Feeding Operations and Allergic and Respiratory Disease*, 130 ENVT. INT'L 8 (2019) (finding connection between residential proximity and dairy CAFOs) ("[R]esidential proximity to a CAFO among individuals from a randomly sampled general population health survey was positively associated with self-reported nasal and lung allergies, asthmatic outcomes, and objectively measured lung function.").

⁷⁰ HRIBRA, *supra* note 26, at 6.

⁷¹ Telephone Interview with Trisha Purdon, Executive Director, Montgomery County Action Council (Feb. 6, 2019).

⁷² See Catherine Clabby, *Fight, Then Flight From Poultry Stench*, N.C. HEALTH NEWS, (Jan. 27, 2017), <https://www.northcarolinahealthnews.org/2017/01/27/fight-flight-poultry-stench/>.

⁷³ *Menu of State Laws Regarding Odors Produced by Concentrated Animal Feeding Operations*, CENTER FOR DISEASE CONTROL 2, Jan. 21, 2016, <https://www.cdc.gov/php/docs/menu-environmentalodors.pdf> (last visited May 8, 2019).

⁷⁴ Clabby, *supra* note 72.

especially after seeing particles floating in flashlight beams at night.⁷⁵

This discussion is not an exhaustive list of the environmental harms of CAFOs, but it illustrates the long-term health risks they cause, such as: (1) poor air and water quality; (2) higher rates of asthma and nitrate related medical conditions; (3) exposure to pathogens from water contamination; and (4) general dissatisfaction.

C. *Where Does Environmental Justice Fit In?*

The poultry industry did not vertically integrate in a vacuum. The chicken CAFO industry is concentrated in the South—particularly in Arkansas.⁷⁶ As a result, the CAFO industry started in a segregated society. The general ingredients to make a poultry producing area are (1) sufficient land and capital, (2) sufficient local labor, and (3) sufficient water.⁷⁷ Since some southern white farmers were more likely to have larger tracts of land, they were more likely to have sufficient land to build a CAFO.⁷⁸ Starting poultry operations typically also requires large

⁷⁵ *Id.*; See also Suzi Parker, *How Poultry Producers are Ravaging the Rural South*, GRIST MAG. (Feb. 22, 2016), <https://grist.org/article/parker1/>. Unsurprisingly, one study examining the effects of feeder cattle and hogs found people who live near CAFOs exhibit higher rates of depression. Susanna G. Von Essen & Brent W. Auvermann, *Health Effects from Breathing Air Near CAFOs for Feeder Cattle or Hogs*, 10 J. AGROMEDICINE 55, 58–59 (2005).

⁷⁶ *Arkansas Commercial Poultry*, UNIV. OF ARK., <https://www.uaex.edu/farm-ranch/animals-forages/poultry/commercial.aspx> (last visited May 8, 2019). There are poultry CAFOs in 53 out of Arkansas's 75 counties. *Id.*

⁷⁷ Telephone Interview with Trisha Purdon, Montgomery County Action Council (Feb. 6, 2019). See POULTRY *supra* note 6, at 2–3 (highlighting among other attributes that Kansas's main assets for poultry growth included land availability and water planning).

⁷⁸ Cf. U.S. DEP'T OF AGRI., BLACK FARMERS 2 (2014), https://www.nass.usda.gov/Publications/Highlights/2014/Highlights_Black_Farmers.pdf (“Farms with black operators tend to be smaller than farms overall, with fewer acres and lower sales.”); Ball-Blakely, *supra* note 66, at 4–5. (“African American farmers in the Black Belt were systematically deprived of farmland, largely due to discrimination in land sales and lending.... Today, the communities in the Black Belt suffer from economic oppression....CAFOs descended on these vulnerable communities like a plague, beginning in the mid-1980s.”). See generally Thomas W. 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) (discussing historical losses of Black-owned land in the rural South) and Isaac Arnsdorf, *‘They’re Coming After You Next’ How Poultry Giant Put Black MS Farmers Out of Business*, CLARION LEDGER (June 26, 2019, 6:54 AM), <https://www.clarionledger.com/story/news/politics/2019/06/26/black-chicken-farmers-ms-koch-foods-put-them-out-business-usda-poultry-discrimination->

loans.⁷⁹ Black farmers have faced considerable discrimination in securing loans from entities like USDA.⁸⁰ In addition, *sufficient local labor* usually meant that CAFOs wanted cheap labor,⁸¹ which they could find in less economically prosperous counties.

These siting implications are especially ironic given that through start of the 1960s, many Southern poultry processors would not hire Black workers in their factories.⁸² Rural Black residents had to experience the negative impacts of these early poultry CAFOs but received none of the income benefits. In the 1960s, a federal agriculture policy of keeping some cotton fields fallow pushed independent Black farmers into these CAFO complexes just as the industry became increasingly dangerous and the pay rate dropped.⁸³ In the 1970s, partially

propublica/1552221001/ (discussing modern discrimination problems with poultry company Koch Foods and minority farmers in Mississippi).

⁷⁹ J. McHood, *How to Get Financing to Start a Poultry Farm*, U.S. DEP'T OF AGRIC. (Sept. 6, 2017) <http://usdaloan.org/how-to-get-financing-to-start-a-poultry-farm/> (“Starting a poultry farm is costly, but the USDA makes it easier to afford. As long as you have all supporting documentation you can work with a USDA lender who can help lead the way.”); *Contract Poultry Farming*, TYSON FOODS, <https://www.tysonfoods.com/who-we-are/our-partners/farmers/contract-poultry-farming>, (last visited Jan. 31, 2020)

(“Do chicken farmers need to take on debt to start or expand their business? [Answer:] Chicken farming is like any other business; people often have to borrow some money to start, improve or expand their operations. Each of our contract chicken farmers must decide on their own the size and scope of their operations and how much debt they are willing to take on.”)

CHRISTOPHER LEONARD, *THE MEAT RACKET: THE SECRET TAKEOVER OF AMERICA'S FOOD BUSINESS* 67–68 (2014) (discussing early Tyson discussions with the Farm Credit Administration over loans for contract growers).

⁸⁰ *Pigford v. Glickman*, 206 F.3d 1212, 1215 (D.C. Cir. 2000) (dealing with the disputes over the Pigford consent decree); *See generally* Tadlock Cowan & Jody Feder, CONG. RESEARCH SERV., RS20430, *THE PIGFORD CASE: USDA SETTLEMENT OF A DISCRIMINATION SUIT BY BLACK FARMERS* 1–3 (2006) (explaining the background leading up to the *Pigford* consent decree).

⁸¹ *Cf.* Angela Steusse & Laura Helton, *Low-Wage Legacies, Race, and the Golden Chicken in Mississippi: Where Contemporary Immigration Meets African American Labor History*, SOUTHERN LABOR STUDIES ASS'N., Dec. 31, 2013, <https://southernspaces.org/2013/low-wage-legacies-race-and-golden-chicken-mississippi-where-contemporary-immigration-meets> (discussing the controversy over terming poultry labor needs as a shortage) (“A black elected official echoed this sentiment: ‘[Immigrants] were brought in for cheap labor, not a shortage. The labor’s here but the jobs don’t want to pay.’”). LEONARD, *supra* note 79, at 83 (discussing Tyson’s labor disputes in the 1960s over unions and paying workers minimum wage).

⁸² Steusse, *supra* note 81.

⁸³ Leah Kirts, *The Exploitation of Factory Farms Doesn’t Stop at Animals*, MEDIUM (Aug. 12, 2019), <https://medium.com/tenderlymag/the-exploitation-of-factory-farms-doesnt-stop-at-animals-f40243c44a03> (“Poultry plants began hiring Black women to do the same work that white women did but for less pay, and as mechanization and line speeds

in response to Black organized union strikes, poultry CAFOs began heavily recruiting Hispanic immigrants to work the line,⁸⁴ as well—bringing them into the CAFO zone of danger.

Turning from the narrative to the numbers, one study from 2013 focused specifically on the environmental justice implications of poultry decisions. The study compared chicken CAFO locations with county demographics and income level.⁸⁵ The authors identified a significant correlation between race and poultry CAFO siting, finding “[t]he density of the chicken farms increases in the areas where there is a high percentage of minority population.”⁸⁶

This study is not perfect. One of the contentions with environmental justice demographics studies is the geographic scope of area included.⁸⁷ For example, if the scope size is too small, then the study might show the area around the CAFO as majority white. But when the physical scope expands, the demographic picture changes.⁸⁸ In this study, there is the potential for the opposite problem—namely, that the scope was too broad. The authors used counties as their scope or unit of analysis.⁸⁹ Using a geographic area that large can lead to some discrepancies. For example, the community surrounding the site may have a low minority rate even if the county as a whole may have statistically significant larger minority population.

The study’s author notes this problem in its conclusions. For example, the study found no correlation between race and siting decisions for hog CAFOs despite other studies finding such

increased, their shifts grew longer and the work became more dangerous.”); *cf.* Streusse, *supra* note 82, (“[T]he industrialization of agriculture and early efforts at vertical integration in the poultry industry led to the mechanizing, standardizing, deskilling, and speeding up of farming and factory work, creating ‘push’ and ‘pull’ factors that led black workers to chicken plants.”).

⁸⁴ *Id.*

⁸⁵ S.M. Rafael Harun & Yelena Ogneva-Himmelberger, *Distribution of Industrial Farms in the United States and Socioeconomic, Health, and Environmental Characteristics*, 2013 GEO. J., at 6–10. The study also examined county correlations for beef and hog CAFOs. [hereinafter *Distribution of Industrial Farms*].

⁸⁶ *Id.* at 9.

⁸⁷ B.M. Baden, Douglas S. Noonan, & Rama Mohana Turaga, *Scales of Justice: Is There a Geographic Bias in Environmental Equity Analysis?*, 50 J. OF ENVTL. PLANNING AND MGMT. 163, 164–66 (2007).

⁸⁸ This is a common complaint on environmental impact studies by environmental justice advocates. Namely, that the person conducting the study kept the physical scope too small and that if they had broadened it, they would find the potential site was in a majority minority community.

⁸⁹ *Distribution of Industrial Farms*, *supra* note 88, at 2 (“The unit of analysis was county.”).

correlations⁹⁰:

Considering the findings, the high percentage of African-American population, percentage of population below poverty level, and percentage of African-American population below poverty level demonstrate the prevalence of EJ issue only in case of chicken CAFOs. However, this contradicts the concern of EJ by other researchers as they have found EJ issue in the areas with hog farms. However, it should be noted that other studies were conducted at a smaller scale, and this research looks at the presence of industrial farms nationwide at the county level.⁹¹

The takeaway is that there are probably environmental justice concerns around chicken CAFO siting locations, but there are not yet definitive enough studies proving it.

In the absence of more studies on race and poultry siting decisions, there are parallel studies in another industrial agriculture sector—hog CAFOs. Several studies have found correlations between race, poverty, and hog CAFO siting.⁹² For example, one North Carolina based study found that there are “nine times more hog CAFOs in areas where there was more poverty and higher percentages of nonwhite people even after adjusting for population density as a measure of rural location and cheaper land.”⁹³ On the other hand, another competing theory is that siting for hog CAFOs is more correlated with education level than race.⁹⁴ This theory also makes sense to an extent because one of the main

⁹⁰ *Distribution of Industrial Farms* *supra* note 85, at 7–8.

⁹¹ *Id.*

⁹² S. Wing, *Environmental Injustice in North Carolina's Hog Industry*, 108 ENVTL. HEALTH PERSPECTIVES 225, 225 (2000); MC Mirabelli et. al., *Race, Poverty, and Potential Exposure of Middle-school Students to Air Emissions from Confined Swine Feeding Operations*, 114 ENVTL. HEALTH PERSPECTIVES 591, (2006); Sakoby Wilson et. al., *Environmental Injustice and the Mississippi Hog Industry*, 102 ENVTL. HEALTH PERSPECTIVE 195, (2002). *But see* M. Carrel et. al., *Pigs in Space: Determining the Environmental Justice Landscape of Swine Concentrated Animal Feeding Operations (CAFOs) in Iowa*, 13 INT'L J. ENVIRONMENTAL RES. & PUB. HEALTH 849 (2016).

⁹³ Wendee Nicole, *CAFOs and Environmental Justice: The Case of North Carolina*, 121 ENVTL. HEALTH PERSPECTIVES 182, 185 (2013) (citing S. Wing, *supra* note 92, at 225-31).

⁹⁴ *See Purdy, supra* note 29, at 858 n. 189 (citing Jen Horton, *The Siting of Industrial Hog Farming Operations in Eastern North Carolina: A Case of Environmental Injustice* 108–12 (Apr. 2012) (unpublished M.S. thesis, University. of Mich.) (on file with author) (“comparing areas within one-and three-mile radii of hog CAFOs to random areas in the same regions and finding little correlation with race, somewhat more with educational level, and growing disparities in home values between the two sample sets”).

considerations for meat producing parent companies is the local available work force.⁹⁵ Even as they mechanize, hog CAFOs—and poultry CAFOs as well—still require unskilled laborers.⁹⁶ Another consideration is that regardless of race, CAFOs still disproportionately hurt poor, less educated people.⁹⁷ The link between race and CAFO siting decisions may be ambiguous, but that does not make the siting decision any more environmentally just.

Even if there is a lower correlation to race and income when CAFOs move in, this disparity grows over time.⁹⁸ “[Research] suggests that people who can afford to move away from environmental hazards often do, increasing disparities.”⁹⁹ Since no one wants to buy a house a few hundred feet away from lagoons full of chicken manure, property values drop.¹⁰⁰ As a result, people with lower or fixed incomes stay—trapped in

⁹⁵ Telephone Interview with Trisha Purdon, Executive Director, Montgomery Cty. Action Council (Feb. 6, 2019).

⁹⁶ Cf. Emily A. Kolbe, “*Won’t You Be My Neighbor?*” *Living with Concentrated Animal Feeding Operations*, 99 IOWA L. REV. 415, 426 n. 70 (2013) (“CAFO workers face similar problems as other worker populations comprised mainly of immigrants: lack of access to healthcare, low income, low education levels, and high injury rates”); CAFO: THE TRAGEDY OF INDUSTRIAL ANIMAL FACTORIES 41 (Daniel Imhoff, ed. 2010) (“By design, a CAFO uses as little labor as possible. Those jobs that are created pay relatively low wages.”); Roman Keeney, *Community Impacts of CAFOs: Labor Markets, Concentrated Animal Feeding Operations*, PURDUE U. 1, 1-2 (2008), <https://extension.purdue.edu/extmedia/ID/ID-362-W.pdf> (finding average hourly wage for dairy, swine, and beef CAFO workers was \$13.88); see also Donald D. Stull, *Hay Trabajo: Poultry Processing, Rural Industrialization, and the Latinization of Low-Wage Labor*, in ANY WAY YOU CUT IT: MEAT PROCESSING AND SMALL-TOWN AMERICA, 129–51 (Michael J. Broadway & David Griffith eds. Lawrence, KS 1995).

⁹⁷ See M. Carrel, *supra* 92, at Introduction (discussing more nuanced approaches to environmental justice studies in northern states).

⁹⁸ See Nicole, *supra* note 93, at 183.

⁹⁹ *Id.*

¹⁰⁰ Cf. Clabby, *supra* note 74 (detailing one couple’s expectations of lowered property values from poultry CAFOs.); Christine Ball-Blakely, *CAFOs: Plaguing North Carolina Communities of Color*, 18 SUSTAINABLE DEV. L. & POL’Y 4, 6 (2017) (discussing lowered property values and swine CAFOs). *But cf.* Annie Ropiek, *CAFOs’ Effect On Property Values Proves Challenging To Codify*, WBAA NPR (Mar. 24, 2017), <https://www.wbaa.org/post/cafos-effect-property-values-proves-challenging-codify#stream/0> (discussing the difficulties in assessing property value effects when people do not buy houses near CAFOs).

houses with diminishing property values¹⁰¹ and drinking from rural wells that may not have been inspected for nitrate and fecal coliform levels.¹⁰²

Another environmental justice concern is accessing and affording medical care.¹⁰³ People in rural areas already have significant problems accessing medical care because of lack of doctors and travel difficulties.¹⁰⁴ For example, 54% of rural counties do not have a hospital with obstetrics care—a concerning problem for most rural pregnant women.¹⁰⁵ This lack of medical care translates into worse healthcare outcomes for minorities. One study found higher cancer mortality rates for rural African Americans over their urban counterparts.¹⁰⁶ In addition,

¹⁰¹ Scott Weaver, *Cow Country: The Rise of the CAFO in Idaho*, BOISE WEEKLY (Sept. 1, 2010), https://www.idahopress.com/boiseweekly/news/features/cow-country-the-rise-of-the-cafo-in-idaho/article_4c395263-c5a4-50ed-8b33-207367f55d10.html (discussing cattle CAFOs) (“[M]oving away from a CAFO is a complicated and money-losing proposition. CAFOs and their smell, dust, noise and flies are hell on property values. Moving often means taking a huge financial hit, one many can’t afford....”). *See also* Christine Ball-Blakely, *supra* note 100, at 5.

¹⁰² “It is estimated that more than 13 million households rely on private wells for drinking water in the United States (US Census American Housing Survey 2017). EPA does not regulate private wells nor does it provide recommended criteria or standards for individual wells.” *Private Drinking Water Wells*, EPA, <https://www.epa.gov/privatewells> (last visited Jan. 22, 2020). Rianna Murray, et. al. *Prevalence of Microbiological and Chemical Contaminants in Private Drinking Water Wells in Maryland, USA*, 15 INT’L. J. ENVIRON. RES. PUB. HEALTH 1686 (2018):

Because private wells are largely unregulated, there is a general lack of data on their quality, prompting concerns over their maintenance and water quality. As this testing is voluntary, little is known about the level or frequency of testing that is performed by private well owners, or about their knowledge and literacy regarding proper well maintenance, testing, and test results.... Additionally, many homeowners who utilize private water wells may lack the educational and/or financial resources necessary to address water quality issues associated with private water systems. *Id.* at 2.

See also Brian Grimmett, *Kansans Who Drink From Private Wells Largely Blind to Contamination*, HAYS POST (Jan. 20, 2020, 8:56 AM), <https://hayspost.com/posts/5e25bfac7d7daa72b30eb4ee> (“[I]t’s not up to regulators from Washington or agencies in Topeka to test private well water quality. That falls to individual well owners. With little to no government oversight, some public health officials worry that’s creating a system where far too many people are left vulnerable to potential cancer-causing pollutants....”).

¹⁰³ *See* David Resnik & Gerard Roman, *Health, justice, and the environment*, 21 BIOETHICS 230, 230 (2007).

¹⁰⁴ Robin Warshaw, *Health Disparities Affect Millions in Rural U.S. Communities*, ASS’N OF AM. MED. COLLS., (Oct. 31, 2017), <https://news.aamc.org/patient-care/article/health-disparities-affect-millions-rural-us-commun/>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

out of the rural hospital closures from 2010-2017, many of them are in majority minority communities.¹⁰⁷

A final environmental justice concern is local food safety and supply. Rural residents of environmental justice communities are more likely to depend on supplementing their diet by local fishing.¹⁰⁸ When chicken litter contaminates surface water, it can spread chicken pathogens to the fish.¹⁰⁹ CAFO waste can also overload surface water with excess nutrients, leading to fish kills from eutrophication.¹¹⁰ Beyond fish kills, some have suggested that hormones from CAFO operations have decreased female fish fertility.¹¹¹ Thus, these less obvious considerations like medical access or local food supplies make the ultimate siting decision all the more critical to affected communities.

II. THE SITING PROCESS: WHERE AND HOW

A. *Poultry and the Decline of Rural America*

Given all the environmental risks, one might question why a community would ever welcome a poultry CAFO. It is perhaps more understandable in light of the reality of the rural American economy. Think of the economies of most rural counties like planes with three engines: (1) agriculture,¹¹² (2) mineral production, and (3) rural manufacturing.¹¹³ When all three of these industries are doing well (e.g. crop and oil prices are good, hiring numbers are up), rural counties are relatively prosperous.¹¹⁴ When one of the engines stalls—for example, a

¹⁰⁷ *Id.*

¹⁰⁸ David Harris Jr., *The Industrialization of Agriculture and Environmental Racism: A Deadly Combination Affecting Neighborhoods and the Dinner Table*, LAND LOSS PREVENTION PROJECT (July 30, 1997) (seminar paper delivered to the National Bar Association's 72nd convention).

¹⁰⁹ *Id.*

¹¹⁰ HRIBRA, *supra* note 26, at 4–5.

¹¹¹ *Id.* at 5.

¹¹² For the purposes of this note, agriculture encompasses traditional farming techniques, timber, and fishing industries.

¹¹³ U.S. DEP'T OF AGRIC., ECON. RES. SERV., RURAL ECONOMIES DEPEND ON DIFFERENT INDUSTRIES (2015), <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58290>.

¹¹⁴ See Adam Mayer et. al, *Fracking Fortunes: Economic Well-being and Oil and Gas Development along the Urban-Rural Continuum*, 83 RURAL SOCIOLOGY, 532, 567 (2017) (discussing the positive effects of oil production booms); Jesse Newman & Patrick McGroarty, *The Next American Farm Bust is Upon Us*, WALL ST. J. <https://www.wsj.com/articles/the-next-american-farm-bust-is-upon-us->

bust period in the oil sector—the other two industries can prop up the economy. Those economic planes are, however, harder to pilot. If all of the engines stall—the economic planes are going to crash.

Over the last fifty years, the engines have been stalling. Typically, when people speak about the automation of jobs, they are thinking about urban centers. But many factories in rural areas have closed and at a higher rate than their urban counterparts.¹¹⁵ Although there are fewer manufacturing jobs to go around, they still account for up to a third of all jobs in rural areas.¹¹⁶ While oil and gas work has picked up in certain shale formations, mineral formations are depleted in large parts of rural America.¹¹⁷ There are also fewer family farms than there used to be.¹¹⁸ Family farms went into steep decline in the 1980s due to a sustained period of high fuel costs and low agricultural commodity prices.¹¹⁹ Finally, the timber industry has increased production but employs fewer people than it previously did.¹²⁰

1486572488?mod=djmc_pkt_ff (last updated Feb. 8, 2017, 12:15 PM) (discussing the “boom and bust” nature of the farming economy).

¹¹⁵ See Eduardo Porter, *The Hard Truths About Trying to “Save” the Rural Economy*, N.Y. TIMES (Dec. 26, 2018),

<https://www.nytimes.com/interactive/2018/12/14/opinion/rural-america-trump-decline.html>; Sarah Lowe, *Manufacturing is Relatively More Important to the Rural Economy than the Urban Economy*, U.S. DEP’T OF AGRIC. ECON. RES. SERV.: RES. & SCI. BLOG (Sept. 12, 2017),

<https://www.usda.gov/media/blog/2017/09/12/manufacturing-relatively-more-important-rural-economy-urban-economy>.

¹¹⁶ *Id.*

¹¹⁷ Take for example, the oil and gas production of the Jefferson Sycamore Field which underlays much of Montgomery County. At the field’s production height in 1983, wells produced 262,752 barrels of oil. In 2019, it produced only 6,462 barrels. KAN. GEOLOGICAL SURVEY (2019),

<https://chasm.kgs.ku.edu/ords/oil.ogf4.IDProdQuery?FieldNumber=1000149909> [<https://perma.cc/7S39-7A7S>]. Declines in other types of mineral industries like coal are beyond the scope of this article.

¹¹⁸ In 1945, there were six million family farms in the U.S. Newman *supra* note 114. In the time since, the farming industry has gone through intense consolidation—meaning larger farms and fewer farmers. *Id.* According to the 2017 Agricultural Census, there are only about 1.75 million family farms today. U.S. DEP’T OF AGRIC., NAT’L AGRIC. STATS. SERV., AGRICULTURAL CENSUS 7 (2017). Farmers are also getting older—the Agricultural Census found the average age of farmers has climbed to 57.5. *Id.* at 65. For comparison, the average age of farmers in 1987 was 50.3. *Id.*

¹¹⁹ Ann Eisenberg, *Rural Blight*, 12 HARV. L. & POL’Y. REV. 188, 208 (2018). In the early 1980s, the U.S. entered free trade agreements which dropped the price of wheat and other commodities. *Id.*

¹²⁰ Nick Mott, *Technology in Timber Mills Drives Debate On Employment*, MONT. PUB. RADIO (Oct. 30, 2018), <https://www.mtpr.org/post/technology-timber-mills-drives-debate-employment-decline>. For example, the Bureau of Labor Statistics projects a 13% decline in logging worker positions from 2016 to 2026. U.S. DEP’T OF LAB., BUREAU OF

As a result of the confluence of these factors, the population of rural America is shrinking and aging. According to the USDA and the U.S. Census Bureau, the birth rate in rural counties no longer offsets the death rate.¹²¹ In other words, more people are dying in rural areas than are being born in them, resulting in negative population growth.¹²² Young people are moving to the cities where there are more jobs and more opportunities.¹²³

Among the most affected by this decline are rural minorities. As scholar Ann Eisenberg noted, rural is not “synonymous with ‘white.’”¹²⁴ The consequences of rural decline and blight—“vacancy, abandonment, and dilapidation”—often mean that minorities are overcrowded in substandard housing.¹²⁵ “Housing characteristics for minorities in rural areas are often worse than those for rural whites or all households nationally. Rural minorities are more likely to live in substandard and cost-burdened housing and are more likely to be poor.”¹²⁶ Rural minorities also face higher unemployment numbers than their urban counterparts.¹²⁷

Montgomery County, from the Tyson problem in the Introduction, illustrates how the economic factors in rural decline have played out in reality. Montgomery County is in Southeast Kansas, historically an area with rich farmland and mineral deposits.¹²⁸ From the 1890s through the 1940s, the region produced large amounts of coal,¹²⁹ oil, and natural

LAB. STATS, OCCUPATIONAL HANDBOOK: LOGGING WORKERS, <https://www.bls.gov/ooh/farming-fishing-and-forestry/logging-workers.htm> (last visited Sept. 28, 2019).

¹²¹ John Cromartie, *Rural Areas Show Overall Population Decline and Shifting Regional Patterns of Population Change*, U.S. DEP’T OF AGRIC., ECON. RES. SERV.: AMBER WAVES (Sept. 5, 2017), <https://www.ers.usda.gov/amber-waves/2017/september/rural-areas-show-overall-population-decline-and-shifting-regional-patterns-of-population-change/>.

¹²² *Id.*

¹²³ Patrick J. Carr & Mara J. Kefalas, *The Rural Brain Drain*, CHRON. REV. (Sept. 21, 2009), <https://www.chronicle.com/article/The-Rural-Brain-Drain/48425>.

¹²⁴ Eisenberg, *supra* note 119, at 193.

¹²⁵ *Id.*

¹²⁶ The Hous. Assistance Council, *Race & Ethnicity in Rural America*, 2 (2012), http://www.ruralhome.org/storage/research_notes/rm-race-and-ethnicity-web.pdf.

¹²⁷ See CTR. FOR RURAL PA., STUDIES ON UNEMPLOYMENT AND UNDEREMPLOYMENT IN RURAL PENNSYLVANIA 6, 9 (2009).

¹²⁸ See John Clark, TOWNS AND MINERALS IN SOUTHEASTERN KANSAS; A STUDY IN REGIONAL INDUSTRIALIZATION 1890–1930, 2 (State Geological Survey of Kan., Special Distrib. Publ’n 52, 1970).

¹²⁹ James N. Leiker, *The Klan in the Coal Mines: The End of Kansas’s Reform Era in the 1920s*, 48 WESTERN HISTORICAL Q., 277, 278–80 (2017) (charting the rise of coal production); K. David Newell, KAN. GEOLOGICAL SURVEY, KANSAS COAL, CBM, AND UNCONVENTIONALS PRODUCTION REPORT (2017),

gas.¹³⁰ It was also home to part of the largest zinc and lead deposit discoveries in the nation's history.¹³¹ Montgomery County towns like Cherryvale flourished from mineral-related industries such as smelters and gas processing plants.¹³² In addition to natural resources, Montgomery also had a significant industry presence including an oil

http://www.kgs.ku.edu/Publications/OFR/2017/OFR17_31/index.html (“Coal production is principally limited to eastern Kansas and production has erratically declined since WWII.”). See generally William Powell, *Former Mining Communities of the Cherokee-Crawford Coal Field*, 38 KAN. HISTORICAL Q. 187 (1972) (detailing early mining camps in Southwest Kansas).

¹³⁰ See Clark *supra* note 128, at 9. For example, in 1929—in large part because of Southeast Kansas production, Kansas ranked 2nd in zinc production, 4th in petroleum, and 9th in natural gas and cement production. *Id.*

¹³¹ Southwest Kansas is part of the former Tri-State Mining District (Kansas, Oklahoma, and Missouri). Liz Brosius & Robert S. Sawin, *Lead and Zinc Mining in Kansas*, KAN. GEOLOGICAL SURVEY, http://www.kgs.ku.edu/Publications/pic17/pic17_1.html [<https://perma.cc/J7JG-EVX2>] (last visited Jan. 27, 2020). A 1998 U.S. Geological Survey study found the Tri-State deposits ranked first in total zinc production and second total estimated deposits (produced and remaining). Keith R. Long, et. al. *Part A: Database Description & Analysis*, in DATABASE OF SIGNIFICANT DEPOSITS OF GOLD, SILVER, COPPER, LEAD, AND ZINC IN THE UNITED STATES, U.S. GEOLOGICAL SURVEY 15 (1998). Likewise, the Tri-State field ranked fifth in total estimated deposits. *Id.* at 14. The story of Montgomery and Southeast Kansas is a tragic story of industrialization at a time when the long-term environmental costs of production were not understood. Because Montgomery County had large amounts of cheap natural gas, towns enticed zinc foundries to build factories there by offering free land and capital to defray moving costs. Clark, *supra* note 128, at 37–39. In the zinc boom of 1900-1930, there were dozens of zinc foundries in Southeast Kansas, many of which were in Montgomery. These sites are still contaminated today with high levels of zinc, cadmium, and arsenic. KAN. DEPT. OF HEALTH & ENVIR. A SHORT HISTORY OF THE ZINC SMELTING INDUSTRY IN KANSAS (Dec. 28, 2006). In a 2006 report, the Kansas Bureau of Environmental Remediation commented on the site of a foundry in a neighboring county, “Vegetation has not grown in this area for 100 years because of high levels of heavy metal contamination.” *Id.* at 5. As recent as December 2018, the EPA conducted a remediation project in Montgomery for lead contamination from zinc foundries for residential yards. U.S. ENVTL. PROT. AGENCY, CANEY RESIDENTIAL YARDS SUPERFUND SITE, CANEY, MONTGOMERY COUNTY, KANSAS (2018), <https://www.epa.gov/ks/caney-residential-yards-superfund-site-caney-montgomery-county-kansas-fact-sheet-december-2018>.

¹³² For example, *Cf. Phase 2 Removal Site Evaluation Work Plan for National Zinc Site, Cherryvale, Kansas* 2–3 (2014), http://www.kdheks.gov/remedial/site_remediation/download/NatZinc_Ph2RSEWP.pdf (detailing on early Cherryvale as a smelting town). Foundries and natural gas were so important to Montgomery that in 1905, in response to fears that Kansas City power companies were trying to buy up gas contracts, Coffeyville townspeople marched through the streets shouting, “Coffeyville! Coffeyville!...Kansas soil! Leave the gas and pipe the oil!” Clark, *supra* note 128, at 69 (citing COFFEYVILLE DAILY J. (Dec. 12, 1904)).

refinery,¹³³ a copper wire plant, a brick manufacturer, an aviation factory, and a fertilizer plant.¹³⁴

Even at its peak, Montgomery County was home to environmental justice communities. During the zinc boom, foundries recruited Latino workers¹³⁵ and Black workers from Alabama to work in their factories as strike workers.¹³⁶ In response to racial labor unrest, foundries near Montgomery in towns such as Cherryvale and Iola set up segregated company housing for their Black workers contiguous with the smelting factories.¹³⁷

After the decline of the zinc and coal fields in the 1930s and 1940s, Montgomery County went into economic decline. A state report in the 1970s noted consistent losses in population going back decades.¹³⁸ The report also noted the start of the college “outmigration” trend.¹³⁹ This population and economic trend has only worsened over time, and the county lags behind other parts of Kansas:

Montgomery County’s population declined 5 percent between 2008 and 2016 . . . Over the same period, the population of the average Kansas county increased 4 percent . . . From 2008 to 2016, the county’s real, inflation-adjusted per capita personal

¹³³ In 2007, Coffeyville experienced the worst inland oil spill in Kansas history. Heavy rains flooded the oil refinery, releasing an estimated 80,000 gallons of oil. Tim Porter, *Coffeyville Resilient After Refinery Flood*, THE WICHITA EAGLE (Sept. 25, 2011, 12:00 AM), <https://www.kansas.com/news/article1070968.html>. The flood also swept out other contaminants such as petroleum coke and heavy metals into the floodwaters. *Id.* It damaged an estimated 300 homes. *Id.* The refinery subsequently paid around 50 million in compensation to homeowners and businesses. *See also* U.S. ENVTL. PROT. AGENCY, OPA90 REMOVAL PLAN 2 (2007), https://response.epa.gov/sites/3273/files/epa%20opa90%20removal%20project%20plan%20_coffeyville.pdf.

¹³⁴ *See* ASSOCIATED PRESS, *Southwire Plant in Coffeyville to Close, Lay Off 200 Workers*, TOPEKA CAP. J. (Mar. 27, 2014, 6:50 AM), <https://www.cjonline.com/article/20140327/NEWS/303279783> (noting the closure of Southwire’s copper wire plant and the continued existence of the oil refinery and fertilizer plant).

¹³⁵ Clark, *supra* note 128, at 103.

¹³⁶ *Id.*

¹³⁷ *See id.*

¹³⁸ GROWTH AND DEVELOPMENT IN THE SOUTHEAST KANSAS REGION VOL. II 54, 9 (Southeast Kansas Community Action Program, 1974) at 7–8 (population).

¹³⁹ *Id.* at 92.

income increased 1 percent, and the Kansas county average real per capita income increased 6 percent.....¹⁴⁰

Even adding businesses such as an Amazon warehouse (which closed in 2014, costing 800 jobs) or a PCB incinerator failed to do the trick.¹⁴¹ Montgomery—like a lot of rural counties—was desperate to diversify.

B. Siting Process: We've Got Ourselves a Barn Raising

The phrase 'barn raising' is an idiom referring to the need for communal action to raise a large structure like a barn. Like historical barn raisings, CAFO barns and chicken processing facilities require the support of many players in order to come into existence. While there are variations, there is a general pattern of siting decisions. Within this pattern, there are opportunities to consider environmental justice concerns.

Using Kansas as an example, the first step in siting starts long before there is a definitive project. First, the state's agriculture agency identifies poultry as an expansion area or a potential area of economic

¹⁴⁰ See Rebecca Bishop, et. al., KAN. STATE U., MONTGOMERY COUNTY 2018, 4 (2018), <http://www.ksu-olg.info/assets/docs/2018FC&T/MontgomeryFCT18.pdf>; Telephone Interview with Trisha Purdon, Montgomery Cty. Action Council, (Feb. 6, 2019).

¹⁴¹ Dan Voorhis, *A Year Later, Coffeyville Surviving Biggest-Employer Amazon's Exit*, WICHITA EAGLE (Nov. 23, 2015), <https://www.kansas.com/news/business/article46079540.html>. A PCB waste facility has operated near Coffeyville, Kansas, since around 1986. Records of this facility are difficult to track because the facility and its parent company have changed hands several times. While called Aptus, Inc. in the 1990s, the facility incinerated PCBs. Hazardous Waste Incinerators, Aug. 11, 1993 EPA, Attachment A, <https://rcrapublic.epa.gov/files/11764.pdf>; see also Letter from Ronald Garner, Vice Pres. Aptus Inc., to Art Spratlin, *Permit Request*, EPA (Mar. 5, 1996), <https://archive.epa.gov/projectxl/web/pdf/030596.pdf>. It is unclear when the facility stopped using incinerators or the quantity of PCBs incinerated. There was, however, a spill which resulted in a 2.7 million dollar fine. See *Clean Harbors, Inc. & Clean Harbors Coffeyville, LLC v. CBS Corp.*, No. C10-2017-JPO (D. Kan. Nov. 4, 2011), https://ecf.ksd.uscourts.gov/cgi-bin/show_public_doc?2010cv2017-111 (CERCLA liability lawsuit); *Hawks v. City of Coffeyville, KA, et al.*, No. C93-2555-KHV, 1994 WL 566945, at *1 (D. Kan. Sept. 8, 1994) (dismissing plaintiff's state law claims, including nuisance claim, with prejudice). In addition to PCBs, the facility also operated the nation's only dioxin incinerator until it closed when the EPA reduced shipments from Superfund sites. Steve Usdin, *US Dioxin Burner Shut-down Poses Problem*, INDEP. COMMODITY INTELLIGENCE SERVS. (Jan. 21, 1998), <https://www.icis.com/explore/resources/news/1998/01/21/51208/us-dioxin-burner-shut-down-poses-problem/> ("The incinerator is being closed because the US Environmental Protection Agency (EPA) has dramatically reduced shipments from Superfund cleanup sites.").

development within the agriculture industry.¹⁴² The job of a state agriculture agency is to promote growth in the agriculture sector,¹⁴³ though the agency might have other considerations for wanting in-state production, as well. For example, in Kansas, the Kansas Department of Agriculture (KDA) wanted more control over the nutrient levels in chicken litter spread over Kansas farms.¹⁴⁴ Once the state identifies poultry as an expansion area, it looks for potential host counties by either reaching out to county elected officials or from requests.¹⁴⁵ The KDA put Montgomery County on its poultry siting list after a request by a coalition of local business owners called the Montgomery County Action Committee.¹⁴⁶ After the KDA has enough potential sites, it reaches out to contacts in the poultry industry.¹⁴⁷ It is at this stage that the public becomes aware of the project.

At this point, it is necessary to make a short digression into public participation and environmental justice. Communities should have great interest in participating in siting discussions.¹⁴⁸ Polluting industries may be entering and operating as private companies, but they affect the health of the community as a whole.¹⁴⁹ As such, public participation such as testimony at permitting meetings or demonstrations are vital tools for environmental justice.¹⁵⁰ When the siting process lacks participation or transparency, there can be a disconnect between local elected officials

¹⁴² KAN. DEP'T. AGRIC., *supra* note 5.

¹⁴³ *Mission & Vision*, GA. DEP'T OF AGRIC., <http://agr.georgia.gov/mission-vision.aspx> (last visited May 8, 2019) (“The vision of the Georgia Department of Agriculture is to continue to be a globally recognized leader in agricultural excellence through a commitment to safety, quality, growth and innovation.”).

¹⁴⁴ Telephone Interview with Trisha Purdon, Montgomery Cty. Action Council, (Feb. 6, 2019). Currently, Kansas uses fertilizer from Arkansas chicken CAFOs. Kansas cannot regulate them because of federal rules on interstate travel. *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Luke W. Cole, *Legal Services, Public Participation, and Environmental Justice*, 29 CLEARINGHOUSE REV. 449, 458 (1995).

¹⁴⁹ *Id.*

¹⁵⁰ Hill, *supra* note 1, at 211 (“These grassroots groups incorporate various tactics in the fight against environmental injustice and to draw attention to their cases—among them, public protests, demonstrations, and community hearings.”). See Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L. J. 3, 72 (1998). Cf. John C. Duncan, Jr., *Multicultural Participation In the Public Hearing Process: Some Theoretical, Pragmatical, and Analeptical Considerations*, 24 COLUM. J. ENVTL. L. 169, 188 (arguing that decisionmakers such as agencies should move to more flexible formats for public hearings) (“Although holding a hearing where public testimony or comments are received is designed to facilitate communication between the public and administrative decision-makers, often little communication occurs.”).

and their constituents.¹⁵¹ That disconnect is what happened in Tonganoxie, Kansas—the community from the Introduction that opposed a Tyson plant.¹⁵² Tonganoxie officials badly miscalculated their community’s feelings about the project.¹⁵³

There is a public participation problem in the siting process for poultry CAFOs. By the time these projects make the news, local elected officials supporting the siting plan have been talking with the state agriculture agency and the company for a considerable time period.¹⁵⁴ As such, they have a wave of momentum to approve the project.¹⁵⁵ The easiest way to avoid miscalculating community feeling about an issue is to ask the community. In order to respect the concerns of lower income and minority residents, there needs to be more participation from the beginning.

Environmental justice concerns can also enter the dialogue when the company actually chooses a particular county as its production site. County negotiators can push for community benefit agreements (CBAs).¹⁵⁶ In these agreements, private developers negotiate with

¹⁵¹ B.S. Offenbacher, *Overcoming Barriers to Effective Public Participation*, BROWNFIELD SITES II 283 (A. Donati, et al. eds., 2004).

¹⁵² Joel Mathis, *Understanding the Reversal of Fortunes in Tonganoxie Chicken Plant Controversy*, KAN. LEADERSHIP CTR. J. (May 4, 2018), <https://klcjournal.com/understanding-the-reversal-of-fortunes-in-tonganoxie-chicken-plant-controversy/> (describing how Tyson had local officials sign nondisclosure agreements and weighing the need for transparency and business planning).

¹⁵³ *Id.* (“‘I think that in this instance, the state and local leadership was dazzled by the dollar figures that Tyson was throwing out, and they didn’t look at things they should have looked at,’ says Jen Peak, a Tonganoxie mother of two who emerged as one of the opposition leaders.”).

¹⁵⁴ Montgomery County started talks with the KDA in early 2016. Telephone Interview with Trisha Purdon, Montgomery Cty. Action Council, (Feb. 6, 2019). It was almost a year before the first public meeting. *Id.*; see also *Keeping it moving: Proactive public discussions*, KAN. ST. U. RES. & EXTENSION, <https://www.ksre.k-state.edu/reports/community/2018/08/meeting-facilitation.html> (last visited May 8, 2019) (detailing public meetings that Kansas State University’s College of Agriculture researchers assisted in regard to Montgomery County). Although, to be fair to Montgomery County, they also included environmental scientists from Coffeyville Resources—the local refinery plant—in the early discussions. Telephone Interview with Trisha Purdon, Executive Director, Montgomery Cty. Action Council, (Feb. 6, 2019). The community business bureau consulted them because of their experience in the Coffeyville oil spill of 2007. *Id.*

¹⁵⁵ See Julian Gross et al., *Community Benefits Agreements: Making Development Projects Accountable*, GOOD JOBS FIRST & THE CAL. P’SHIP FOR WORKING FAMS. 4 (2005) (discussing perspectives on general public-private partnerships).

¹⁵⁶ Patricia E. Salkin, *Understanding Community Benefit Agreements: Opportunities and Traps for Developers, Municipalities and Community Organizations*, in LAND USE INST.: PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION 1407, 1412

community groups and government actors.¹⁵⁷ In exchange for local government approval—e.g. zoning, development subsidies, etc.—the business agrees to certain conditions such as building parks or guaranteeing a living wage.¹⁵⁸ With these promises, CBAs aim “to bring measurable, permanent improvements to the lives of affected residents, particularly those in low-income neighborhoods.”¹⁵⁹

CBAs have the potential to help offset some of the harms caused by polluting industries.¹⁶⁰ They promote public participation, increase transparency in the siting process, and prevent costly delays in the development project later on from public disapproval.¹⁶¹ Finally, CBAs are contracts, meaning they are legally enforceable.¹⁶² If a business promises to build a park, it has to actually build it.

But CBAs are not a panacea for environmental justice CAFO woes. One obvious disadvantage is that rural communities like Montgomery have less bargaining power than the poultry industry. If a community asks for too much, companies can choose another county. Also, the benefits companies are willing to give in CBAs typically depend on what they have negotiated for in previous deals.¹⁶³ In other words, “[o]ne’s person’s floor is another person’s ceiling.”¹⁶⁴ Private industry looks at previous deals as “ceilings” for what they should offer in the future, whereas community groups may look at previous CBAs as the “floor” in their attempt to bargain for more.¹⁶⁵

In the midst of this thicket of negotiations, there is a historical note of encouragement—oddly enough—from Southeast Kansas. In the zinc age of Montgomery County, towns fiercely competed against each other for development in a style reminiscent of counties wooing poultry companies:

In the negotiations between town and industry, the latter sought to extract the most favorable conditions and preferments

(ALI-ABA 2007). See also Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5 (2010); Chade Severin, *We Built This City: The Legality of Community Benefit Agreements for Big Box Construction under Title VII and the Equal Protection Clause*, 3 COLUM. J. RACE & L. 215 (2013).

¹⁵⁷ Gross, *supra* note 155, at 10.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 21–22.

¹⁶² *Id.* at 22.

¹⁶³ *Id.* at 23.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

possible, while the towns, anxious to succeed and envious of one another's success, offered just enough to maintain competition and then countered with proposals as necessary.¹⁶⁶

Many settlements failed in the industrialization of the frontier. Successful towns—towns like Coffeyville or Independence in Montgomery County—survived not because of some trick of geography or sheer luck, but because they strategically planned and negotiated.¹⁶⁷ In their early days, rural towns in the Midwest marketed their communities to potential businesses with coalitions of elected officials, store owners, journalists, lawyers, and regular townspeople.¹⁶⁸ In other words, they treated marketing their town like a barn raising. Negotiating successful CBAs requires the same type of coordination. If rural towns could achieve that coordination in their infancy, there is hope they can do so in their maturity.

III. ROLE OF LAW AND POLICY: POULTRY FRIENDLY LEGISLATION

Unfortunately, existing state agricultural law tends to support and protect poultry industry interests. Many states passed right to farm laws

¹⁶⁶ Clark, *supra* note 128, at 36–37.

¹⁶⁷ See RICHARD WADE, *THE URBAN FRONTIER: THE RISE OF WESTERN CITIES* 336 (U. Ill. Press 1998) (1959)

“The struggle for primacy and power—and occasionally survival—was one of the most persistent and striking characteristics of the early urban history of the West...[C]ompetition also brought rapid expansion. The fear of failure was a dynamic force, pushing civic leaders into improvements long before they thought them necessary. The constant search for new markets furnished an invaluable stimulus to commercial and industrial enterprise.”)

and Zane Miller, *Introduction* to RICHARD WADE, *THE URBAN FRONTIER: THE RISE OF WESTERN CITIES* xviii (U. Ill. Press 1998) (1959)

“The key to Wade’s case rested in the spearhead discovery, the observation that cities came first, not last, in the settlement process...it allowed him to depict settlers as masters of their economic fate...Cultural and economic activity in the West, Wade emphasizes, focused on a major civic project, the ‘urban sweepstakes,’ races to build cities and civilization by expanding their economic, social, political, and cultural hinterlands.”)

But cf. JAMES R. SHORTRIDGE, *CITIES ON THE PLAINS: THE EVOLUTION OF URBAN KANSAS* 1–4 (2004) (emphasizing that there were a variety of strategies that helped cities’ success and that “[s]cholarly thinking about the historical aspects of regional urban growth is not as extensive as one might suppose”).

¹⁶⁸ *Cf.* Clark, *supra* note 128, at 38–39 (describing Coffeyville’s Commercial Club’s efforts to secure industries like a glass factory at the turn of the twentieth century).

in the 1970s in response to declining numbers of farms.¹⁶⁹ There are many variations,¹⁷⁰ but most right to farm laws share the same core characteristics. First, right to farm laws protect farmers from private nuisance claims so long as the disruption is from a preexisting use.¹⁷¹ Most of them protect both traditional forms of farming and industrial chicken production processes such as hatcheries or even slaughtering facilities.¹⁷²

Right to farm statutes severely hamper people living next to CAFOs from recovering damages or enjoining the nuisance. First, most plaintiffs only have one year to file a nuisance suit in response to a new CAFO or slaughtering facility.¹⁷³ Since rural plaintiffs may be initially reluctant to file a lawsuit against their neighbor, they can lose their window of opportunity. Also, if a plaintiff moves into an area where a CAFO is already operating, there is virtually nothing they can do from a nuisance perspective.¹⁷⁴ Not every person moving into a rural area realizes the risks of living next to a CAFO. By the time they do, it is often too late. There are efforts to modify or challenge right to farm statutes in several

¹⁶⁹ Tiffany Dowell, *Understanding and Interpreting Right to Farm Laws*, 26 NAT. RES. & ENV'T 39, 39 (2011).

¹⁷⁰ For a complete list: *see State Right to Farm Laws*, NAT'L AGRIC. L. CTR. (Alexandra Lizano & Elizabeth Rumley eds. 2019), <https://nationalaglawcenter.org/state-compilations/right-to-farm/> (last visited Mar. 14, 2020).

¹⁷¹ Dowell, *supra* note 169, at 42. *See also, e.g.*, Neb. Rev. Stat. §§ 2-4403 (West 2019). Nebraska's right to farm law reads:

A farm or farm operation or a public grain warehouse or public grain warehouse operation shall not be found to be a public or private nuisance if the farm or farm operation or public grain warehouse or public grain warehouse operation existed before a change in the land use or occupancy of land in and about the locality of such farm or farm operation or public grain warehouse or public grain warehouse operation and before such change in land use or occupancy of land the farm or farm operation or public grain warehouse or public grain warehouse operation would not have been a nuisance.

Neb. Rev. Stat. §§ 2-4403 (West 2019).

¹⁷² Dowell, *supra* note 169, at 40; Kolbe, *supra* note 100, at 428 (“Every state has a version of a right-to-farm statute on its books, which protects CAFO owners from nuisance actions related to odors, flies, or other infringements due to the proximity of CAFOs to other property.”); Terence J. Center, *Governments and Unconstitutional Takings: When Do Right-to-Farm Laws Go Too Far*, 33 B. C. ENVTL. AFF. L. REV. 87, 88 n. 6 (2006).

¹⁷³ Harris, *supra* note 108108 at IV; *Mayes v. Tabor*, 334 S.E.2d 489, 490 (N.C. Ct. App. 1985); Alexander A. Reinert, Note, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694, 1721 (1998) (discussing the difficulties in classifying an operation as “new” if it enlarges operations over time).

¹⁷⁴ *See* Dowell, *supra* note 16969, at 39.

states in response to such CAFO issues, but they have so far been unsuccessful.¹⁷⁵

In response to a wave of nuisance claims against industrial agriculture on the east coast, several state legislatures amended their right to farm laws to limit damages.¹⁷⁶ For example, North Carolina recently passed HB 467, which limits damages for nuisance against agricultural entities to depreciation in property or rental value.¹⁷⁷ The statute precludes recovery for health or emotional distress related claims.¹⁷⁸ Other tactics that states use include awarding attorneys' fees for frivolous nuisance claims (Indiana) or requiring mediation before any suit can be filed (Minnesota).¹⁷⁹

These changes to right to farm statutes are concerning to environmental justice advocates. Professor Sakoby Wilson, an environmental justice researcher at the University of Maryland, sees successful nuisance claims as “breakthroughs after decades of government failure to protect rural communities from negative impacts of CAFOs.”¹⁸⁰ If state regulators are slow to act against CAFOs, filing nuisance claims in the Court is perhaps the best, last hope to protect rural minority communities. Modifying right to farm laws, then, rips the safety

¹⁷⁵ Michael Elizabeth Sakas, *'Right To Farm' Laws Allow Ag To Be Stinky And Noisy, But Some Neighbors Cry 'Fowl,'* CO. PUB. RADIO (Oct. 8, 2018), <https://www.cpr.org/2018/10/08/right-to-farm-laws-allow-ag-to-be-stinky-and-noisy-but-some-neighbors-cry-fowl/>.

¹⁷⁶ Leah Douglas, *Big Ag Is Pushing Laws To Restrict Neighbors' Ability To Sue Farms,* NAT'L PUB. RADIO (Apr. 12, 2019, 7:00 AM), <https://www.npr.org/sections/thesalt/2019/04/12/712227537/big-ag-is-pushing-laws-to-restrict-neighbors-ability-to-sue-farms>.

¹⁷⁷ H.B. 467, 2017 Sess. (N.C. 2017). Kansas appears to be the first state to have drastically amended its right to farm law. In 2013, the Kansas Legislature quietly limited damages from successful nuisance claims against permanent agricultural activities to property value depreciation. S.B. 168, 2013 Sess. (Kan. 2013). It passed the Kansas House 110 votes to 12. Vote Count, Kan. Leg., http://www.kslegislature.org/li_2014/b2013_14/measures/documents/sb168_enrolled.pdf. The following year, a similar proposal in Missouri sparked the storm of controversy familiar with right to farm amendment proposals today. Julie Bosman, *Missouri Considers Adding Right to State Constitution,* N.Y. TIMES. (Aug. 2, 2014), <https://www.nytimes.com/2014/08/03/us/missouri-considers-adding-right-to-farm-to-state-constitution.html?searchResultPosition=79>.

¹⁷⁸ *Id.*

¹⁷⁹ Catherine Clabby, *North Carolina is Latest in State CAFO Battles,* N.C. HEALTH NEWS (Apr. 13, 2017), <https://www.northcarolinahealthnews.org/2017/04/13/north-carolina-latest-cafo-battles/>.

¹⁸⁰ Sacoby Wilson, *Rural Americans' Struggles Against Factory Farm Pollution Find Traction in Court,* THE CONVERSATION: ENV'T. & ENERGY (July 2, 2018, 6:42 AM), <https://theconversation.com/rural-americans-struggles-against-factory-farm-pollution-find-traction-in-court-98226>.

net of the court system away from this vulnerable population. Such changes in the law also implicate proponents of environmental justice’s underlying critique of industry, namely, that the “negative environmental consequences” of “industrial, municipal, and commercial operations” are disproportionately borne by minority and disadvantaged communities.¹⁸¹ Right to farm bills are yet another mechanism that distorts the balance of power in favor of industry.

In addition to existing right to farm statutes, states may enact additional legislation. There are many options for state lawmakers to protect or incentivize CAFO development. Two ways they can accomplish this are changing setback requirements and changing permitting requirements. One recent statute that relates to setback restrictions is Kansas Senate Bill 405. The Kansas Legislature passed it in the 2018 session.¹⁸² Lawmakers created the bill in response to the Tonganoxie incident.¹⁸³ It received considerable support from agricultural groups and members of the Montgomery County Economic Development Council¹⁸⁴ Senate Bill 405 reduced the state’s setback requirement for most poultry operations from 4000 feet to 1320 feet.¹⁸⁵ In other words, a CAFO owner can now build a barn—housing over

¹⁸¹ See Hill, *supra* note 1, at 4.

¹⁸² S.B. 405, 2018 Sess. (Kan. 2018).

¹⁸³ It should be noted, however, that the bill’s proponents framed it as a more general response to industry concerns. KS Legislature, *3/9/2018 House Session Live-Stream HD*, YOUTUBE (Mar. 9, 2018),

<https://www.youtube.com/watch?v=q70k8Rlw9q0&feature=youtu.be&app=desktop>. For example, Rep. Hoffman said when bringing the bill to the House floor for debate:

Several months ago after a poultry became—well, after a certain poultry company came in and wanted to make an investment in Kansas—leaders in agriculture and industry and KDHE looked at our statutes and realized that those standards that govern CAFOs, which is confined animal feeding operations, for poultry that use dry litter, which is now the standard for that industry, were either nonexistent or very unclear. *Id.* at 39:00.

This contrasts to opponents of the bill who referenced the Tonganoxie incident. *E.g.* KS Legislature, *3/12/2018 House Session Live-Stream HD*, YOUTUBE (Mar. 12, 2018) (beginning at 15:48), <https://www.youtube.com/watch?v=wPA9nyHZJ7s> (reading of Rep. Probst’s statement of explanation for his nay vote) (“Senate Bill 405 has been billed as an essential piece of legislation to create jobs and investment in the poultry industry in Kansas. Yet long before this legislation, Tyson Foods had eagerly laid out plans to build a poultry processing plant in Kansas, showing that the state is already attractive to such investments.”). See also Peter Hancock, *Colyer Signs Controversial Poultry Bill into Law*, LAWRENCE J. WORLD (Mar. 20, 2018, 1:21 PM),

<https://www2.ljworld.com/news/2018/mar/20/colyer-signs-controversial-poultry-bill/>.

¹⁸⁴ *Clarifying Animal Conversion Units for Poultry Facilities with Dry Manure Systems: Hearing on S.B. 405 Before the S. Comm. on Agric. and Nat. Res.*, 2018 Sess. (Kan. 2018) (Statement of Trisha Purdon [sic]).

¹⁸⁵ S.B. 405, 2018 Sess., (Kan. 2018) (Bill Text: (1)(3)(A)).

100,000 chickens—less than 450 yards from his neighbor’s property and there is nothing that the neighbor can do about it.

On the one hand, poultry advocates argue that the reason to have minimal setback restrictions is because otherwise it becomes difficult to find areas with enough land to site barns without increasing the risk of avian flu.¹⁸⁶ On the other hand, reducing the setback requirement once again shifts the externalities of daily CAFO operations from the people who benefit from them to their surrounding neighbors.

Kansas Senate Bill 405 also changed permitting requirements. Under the new system, if a farm has 300 “animal units” or less, then the Kansas Department of Health and Environment (KDHE) cannot require them to file for a permit under the Clean Water Act.¹⁸⁷ Facilities with over 1000 animal units must register for a permit.¹⁸⁸ If the facility has between 300 and 1000 animal units, the KDHE determines whether or not the site is a source of “significant water pollution.”¹⁸⁹ If KDHE determines that the site does pose a significant risk of water pollution, then KDHE has the discretion—but is not required to—make the site apply for a permit.¹⁹⁰ This system sounds innocuous until it is paired with the act’s definition of animal unit. Individual broiler chickens are counted as 0.003 animal units.¹⁹¹ In other words, Kansas farmers can own up to 100,000 broiler chickens without applying for a state permit. Should Kansas farmers choose to expand their operations or start with more ambitious goals, then—*according to the KDHE’s discretion*—they can own up to 333,000 broiler chickens without ever applying for a state permit.¹⁹² This

¹⁸⁶ Telephone Interview with Trisha Purdon, Montgomery County Action Committee, (Feb. 6, 2019). An alternative view is that the original law was drafted in an earlier phase of chicken farming technology. In the 1920s when the Kansas legislature was creating this law, large poultry sites had far less advanced methods of cleaning waste. Of course, the answering argument is that in the 1920s, industry practice did not put 100,000 chickens in a single barn.

¹⁸⁷ S.B. 405, 2018 Sess., (Kan. 2018) (Bill Text: (B)(3)(A)(ii)).

¹⁸⁸ *Id.*

¹⁸⁹ S.B. 405, 2018 Sess., (Kan. 2018) (Bill Text: (g)(3)(A)(ii)). The bill further defines pollution as:

Such contamination or other alteration of the physical, chemical or biological properties of any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to public health, safety or welfare, or to the plant, animal or aquatic life of the state or to other designated uses; or (B) such discharge as will or is likely to exceed state effluent standards predicated upon technologically based effluent limitations.

Id. (Bill Text: (c)(1)).

¹⁹⁰ *Id.*

¹⁹¹ S.B. 405, 2018 Sess., (Kan. 2018) (Bill Text: (A)(3)(A)).

¹⁹² The federal limit for permitting is 125,000 broiler chickens. The summary of the bill distributed to legislators actually mentions the number of chickens before the facility

contrasts with the statute's permitting requirements for beef CAFOs. Each head of cattle counts as one animal unit.¹⁹³ So, a facility with 1,000 steers has mandatory state permitting requirements, but an operation with 100,000 broiler chickens does not have the same obligation.

This process matters because permitting requires public notice and participation.¹⁹⁴ Public participation is at the heart of environmental justice.¹⁹⁵ It is one matter for a community to collectively decide to bring in a polluting industry. It is quite another to invite and privilege an industry in every conceivable way. Under Kansas law, poultry farmers can now start CAFOs with little to no state permitting and with reduced setback requirements.¹⁹⁶ Because there is limited state permitting, the people setting up CAFOs do not need to give their neighbors notice. Tellingly, the Kansas Senate and House of Representatives rejected amendments which would have mandated county officials put poultry processing site approvals to public vote upon petition by five percent of a county's electorate.¹⁹⁷

requires a federal permit in terms of per chicken numbers (125,000 broiler chickens), but still refers to the state permitting requirements in terms of "animal units." *Summary of Legislation*, KAN. LEG.,

http://kslegislature.org/li_2018/b2017_18/measures/documents/summary_sb_405_2018.pdf (last visited May 8, 2019). The complex relationship between state and federal regulators for water permit filing, however, is beyond the scope of this article. *See also* Stephen C. Robertson, *State Permitting: United States v. Smithfield Foods, Inc. and Federal Overfiling Under the Clean Water Act*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 593, 610–611 (1999) (explores conflicts between federal and state permits in context of a dispute with Smithfield Foods—a hog CAFO industry leader).

¹⁹³ S.B. 405, 2018 Sess., (Kan. 2018) (Bill Text: (B)(3)(A)(ii)).

¹⁹⁴ *Public Notice Concerning Kansas/Federal Water Pollution Control Permits and Applications*, 38 Kan. Reg. 245 (proposed Mar. 14, 2019).

¹⁹⁵ *See* footnotes 148 to 151.

¹⁹⁶ S.B. 405, 2018 Sess., (Kan. 2018),

¹⁹⁷ Committee of the Whole - Motion to Amend - Offered by Representative Karleskint, KAN. LEG.,

http://www.kslegislature.org/li_2018/b2017_18/measures/documents/fa_2018_sb405_h_3646.pdf (Rejected Mar. 9, 2018); Committee of the Whole - Motion to Amend - Offered by Senator Holland, KAN. LEG.,

http://www.kslegislature.org/li_2018/b2017_18/measures/documents/fa_2018_sb405_s_3490.pdf (Rejected Feb. 22, 2018); KS Legislature, *3/9/2018 House Session Live-Stream HD*, YOUTUBE (Mar. 9, 2018),

<https://www.youtube.com/watch?v=q70k8Rlw9q0&feature=youtu.be&app=desktop>.

Representative Hoffman, who introduced the bill to the floor the morning of March 9, 2018 has this to say about the amendment:

“Colleagues, I was going to challenge the germaneness of this, but I think we’ll just [hand gesture indicating he will discuss it]. This is not part of the underlining bill. This deals with a community holding up the process of allowing a facility to come in. I will contend that Tonganoxie held up the process without saying, ‘We’re not going to allow any facilities in this state

Even if they did need to give their neighbors notice, there is no official avenue for those neighbors to voice their grievances during the siting process. Once the CAFO is built, right to farm laws make it difficult for those same neighbors to recover compensatory damages. Furthermore, the people that are statistically the most likely to suffer harms like water and air pollution are poor, minority communities.

Environmental justice is about more than polluting industries contaminating minority and poor communities. There are also legal and economic structures that insulate these industries from the environmental consequences they generate. In a state with “pro-poultry” legislation, creating and reinforcing such power structures is the danger lurking at the door.

CONCLUSION

Returning to the opening question, if you are a commissioner in a rural county, do you bring in a poultry operation? Perhaps the response to this question is that it depends. One response is to be cautious and say no. Poultry operations can damage the water supply in ways that cannot be easily fixed. Regardless of where in the county the sites end up, there may be environmental justice issues that are not readily apparent.

If the answer is yes, then the local official needs to ask a series of questions. First, what is the state of the county economy and what other economic development has the community tried? Poultry operations are a gamble so there need to be severe economic straits to justify the risk. Second, who in the community supports it? To protect their interests, minorities and lower income individuals need to be at the table and participate in the siting decisions in a meaningful way. Third, what can local officials negotiate for? A community benefit agreement might help offset the potential environmental harm. Finally, what is the law? If the state’s right to farm statute prohibits nuisance claims, the lack of legal recourse for tenants and property holders should be weighed in the environmental justice impact. Likewise, the setback requirement is relevant. The community may not support a poultry operation if they find out farmers are building CAFO barns only 400 yards from surrounding

unless there is a vote.’...If you look through this, this will take months. Possibly a year for this to be resolved. In that amount of time, I can guarantee you, those companies are going to be looking at other areas. And they’ll have to start all over.” *Id.* (beginning at 1:01:00).

The general tenor seemed to be that if communities did not want a processing plant, they could pursue other avenues of protest.

homes. These are the kind of questions Montgomery County—and other rural counties—must consider when Big Poultry comes knocking.