

STATE OF INDIANA)
)
COUNTY OF HENDRICKS)

SS:

IN THE HENDRICKS SUPERIOR COURT
CAUSE NO. 32D04-1510-PL-000150

MARTIN RICHARD HIMSEL, JANET L.)
HIMSEL, ROBERT J. LANNON and)
SUSAN M. LANNON,)

Plaintiffs,)

vs.)

SAMMUEL T. HIMSEL, CORY M.)
HIMSEL, CLINTON S. HIMSEL,)
4/9 LIVESTOCK, LLC, and)
CO-ALLIANCE, LLP,)

Defendants.)

**PLAINTIFFS' FIRST AMENDED COMPLAINT FOR DECLARATORY, INJUNCTIVE
AND COMPENSATORY RELIEF AND ACTION FOR INVERSE CONDEMNATION**

NOTICE OF CLAIM THAT TWO INDIANA STATUTES ARE UNCONSTITUTIONAL

NOW COME Plaintiffs, MARTIN RICHARD HIMSEL, JANET L. HIMSEL (“Himsel Plaintiffs”), ROBERT J. LANNON and SUSAN M. LANNON (“Lannons”), by counsel Kim E. Ferraro with the Hoosier Environmental Council, and complaining of the Defendants, SAMMUEL T. HIMSEL, CORY M. HIMSEL and CLINT HIMSEL, 4/9 LIVESTOCK, LLC, and CO-ALLIANCE, LLP, hereby allege as follows:

NATURE OF THE ACTION

1. Like many of Indiana’s rural citizens, Plaintiffs are victims of the dramatic transformation of agriculture from farming to big industry. Within the last several decades, the United States went from producing food on traditional farms owned by farm families, to producing food from highly mechanized, industrial operations controlled by a handful of giant corporations.¹

¹ USDA, *The 20th Century Transformation of U.S. Agriculture and Farm Policy*, Economic Research Service, EIB-3, 2 (2005) available at http://www.ers.usda.gov/media/259572/eib3_1_.pdf.

Now, instead of raising animals for food in pastures, the standard method is to intensively confine animals, sometimes by the hundreds of thousands, in livestock production factories known as concentrated animal feeding operations or confined feeding operations (collectively "CAFOs").

2. CAFOs generate enormous quantities of biological waste including feces and urine, as well as a variety of dangerous air pollutants including ammonia, hydrogen sulfide, methane, nitrous oxide, volatile organic compounds and particulate matter.² These pollutants pose serious health threats to people who live near CAFOs, including bronchitis, pulmonary disease, asthma, and respiratory distress syndrome, irritation to the eyes, nose, and throat, anxiety and depression, memory loss, heart disease, and even death.³ In addition, CAFOs produce extremely noxious odors from a complex mixture of ammonia, hydrogen sulfide, and volatile and semi-volatile organic compounds – odorous compounds that smell much worse than odors associated with traditional farms.⁴ And, unlike traditional farm smells, the extreme odors from CAFOs greatly diminish quality of life, reduce property values, and alter the daily activities of people who live nearby⁵ -- people including the Plaintiffs.

3. Plaintiffs are among the growing number of rural citizens who are unjustly suffering from the pollution and life disrupting effects of CAFOs. Specifically, a CAFO with 8,000 hogs that on average produce the equivalent amount of raw sewage produced by a small town now operates on property very near Plaintiffs' homes. Every day, these 8,000 hogs generate thousands of gallons of manure along with emissions of ammonia, volatile fatty acids, amines, and reduced sulfur compounds that travel with the prevailing winds to Plaintiffs' homes and properties.

² Nat'l Assoc. of Local Bds. of Health, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities*, 5-7 (2010) available at http://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf.

³ *Id.*

⁴ *Id.* at 7.

⁵ Donham, et. al., *Community Health and Socioeconomic Issues Surrounding Concentrated Animal Feeding Operations*, *Environmental Health Perspectives*, 115(2), 318-319 (2007) available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1817697/pdf/ehp0115-000317.pdf>.

4. Despite the well-known harm of siting such a massive CAFO too close to where people live, the Defendants in this case decided to build their hog factory upwind and less than a quarter mile from the Himsel Plaintiffs' home, and less than a half mile from the Lannons' home. Due to the predictable and repeated invasion of noxious odors and air emissions released from the CAFO, the Plaintiffs' homes are now at times unlivable, their properties devalued, and their outdoor-oriented, rural way of life greatly diminished.

5. Also like other rural citizens harmed by odors and air emissions from CAFOs, Plaintiffs have nowhere to turn for help. Although there are approximately 2,000 CAFOs and CFOs in Indiana, federal and state regulations require only that these livestock operations restrict their water pollution discharges but not the dangerous air pollution and odors they produce.⁶

6. Making matters worse, Indiana has two "Right to Farm" laws that, despite the name, serve only to protect the interests of the corporate-controlled livestock industry, not traditional farmers. The Right to Farm Act ("RTFA") provides livestock operations that harm their neighbors with special legal immunity when the neighbors seek relief in court.⁷ In turn, Senate Enrolled Act 186 ("SEA 186") enacted in 2014 requires regulators and courts to "construe" state law so as not to interfere with the industry's "right" to use its preferred "livestock production practices," which include the use of CAFOs, regardless of the harm those practices cause.⁸

7. No other industry or economic sector enjoys the privilege of knowing state government agencies and courts must interpret the law to serve and protect that industry's special interests. Accordingly, Plaintiffs bring this action to challenge the constitutionality of Indiana's

⁶ Indiana Dept. of Environmental Mgmt., Confined Feeding Operations (describing "What IDEM Does Not Regulate") at <http://www.in.gov/idem/landquality/2349.htm#idem-no-regulate>; *see also*, Hoover, *Can't You Smell That Smell? Clean Air Act Fixes For Factory Farm Pollution*, Stanford Journal of Animal Law & Policy, Vol. 6 (2013) available at https://journals.law.stanford.edu/sites/default/files/print/issues/hoover_1.pdf

⁷ Ind. Code § 32-30-6-9.

⁸ Ind. Code § 15-11-2-6(a)

unjust, "Right to Farm" laws, which violate Plaintiffs' equal protection and due process rights, and amount to inverse condemnation and an unconstitutional taking of their constitutionally protected property rights. Plaintiffs also bring this action to hold the Defendants accountable for the harm they have inflicted on Plaintiffs and to prevent the Defendants from causing further harm.

PARTIES

8. Plaintiffs MARTIN RICHARD HIMSEL and JANET L. HIMSEL ("the Himsel Plaintiffs") are citizens of the State of Indiana who, since 1994 to the present date, have owned and resided on certain real property in Hendricks County located at 3581 West 350 North, in Danville, Indiana ("Himsel property"). The Himsel property is a 26-acre farm where the Himsel Plaintiffs engaged in traditional farming including raising livestock and growing various crops until 2000, when they decided to retire. Plaintiff MARTIN RICHARD HIMSEL grew up on the Himsel property, which was previously owned and farmed by his parents. As farmers, the Himsel Plaintiffs are accustomed to the usual smells and odors associated with living in an agricultural area.

9. Plaintiffs ROBERT J. LANNON and SUSAN M. LANNON ("the Lannons") are citizens of the State of Indiana, owning and residing on certain real property in Hendricks County located at 3868 West 350 North in Danville, Indiana ("Lannon property") since 1971. The Lannon property is in a rural area and surrounded by farms. As such, the Lannons are accustomed to the usual smells and odors associated with living in an agricultural area, having done so for more than forty years.

10. Defendant 4/9 LIVESTOCK, LLC ("4/9") is a Domestic Limited Liability Company organized under the laws of the State of Indiana and located at 2965 North 425 West, Danville, Indiana. By and through its members, agents, servants and/or employees including but

not limited to the Defendants SAMMUEL T. HIMSEL, CORY M. HIMSEL, and CLINTON S. HIMSEL ("the Himsel Defendants"), 4/9 owns, controls, manages and/or operates a confined feeding operation located at 3042 North 425 West, in Danville, Indiana ("the CAFO") subject to the requirements of a "Hog Finishing Contract" with the Defendant CO-ALLIANCE, LLP ("the Contract"). The CAFO is located approximately 1,400 feet to the south and west of the Himsel Plaintiffs' property and approximately, 2,500 feet to the south of the Lannons' property.

11. Defendant SAMMUEL T. HIMSEL is a citizen of the State of Indiana who resides at 4230 North 200 West in Danville, Indiana and acting individually, and/or as member, agent, servant and/or employee of 4/9, owns, controls, manages and/or operates the CAFO and is responsible for day-to-day operations and management of the CAFO subject to the requirements of the Contract that 4/9 has with the Defendant CO-ALLIANCE, LLP.

12. Defendant CORY M. HIMSEL is a citizen of the State of Indiana who resides at 2965 North 425 West in Danville, Indiana and acting individually, and/or as member, agent, servant and/or employee of 4/9, owns, controls, manages and/or operates the CAFO and is responsible for day-to-day operations and management of the CAFO subject to the requirements of the Contract that 4/9 has with the Defendant CO-ALLIANCE, LLP.

13. Defendant CLINTON S. HIMSEL is a citizen of the State of Indiana who resides at 3202 West 200 North in Danville, Indiana and acting individually, and/or as member, agent, servant and/or employee of 4/9, owns, controls, manages and/or operates the CAFO and is responsible for day-to-day operations and management of the CAFO subject to the requirements of the Contract that 4/9 has with the Defendant CO-ALLIANCE, LLP.

14. Defendant CO-ALLIANCE, LLP ("CO-ALLIANCE") is a Domestic Limited Liability Partnership organized under the laws of the State of Indiana with its principle place of

business located at 5250 E. US Highway 36, Building 1000, Avon, Indiana. CO-ALLIANCE owns the hogs that are warehoused at the CAFO and exercises substantial oversight and operational control of the CAFO through the Contract with 4/9.

JURISDICTION AND VENUE

15. Jurisdiction and venue are proper in this Court as the Plaintiffs and the Himsel Defendants all reside in Hendricks County, the events and omissions giving rise to the claims alleged herein occurred within Hendricks County, and the property that is the subject of this action is situated in Hendricks County.

16. Plaintiffs' action for declaratory relief is authorized by Indiana Code § 34-14-1-1 and Indiana Trial Rule 57.

17. Plaintiffs' action for inverse condemnation is authorized by Indiana Code § 32-24-1-16.

GENERAL ALLEGATIONS

18. In 2008, Hendricks County enacted a new Zoning Ordinance ("the 2008 Ordinance") that established new zoning districts and eliminated others. Two new zoning districts that were established include the "agriculture/residential" (AGR) district and the "agriculture/intense" (AGI) district. The stated intent for establishing the AGR district is:

to permit the establishment of individual single-family dwellings while maintaining a primarily rural character. This can serve to protect land best suited for agricultural use from the encroachment of incompatible land uses.⁹

The stated intent for establishing the AGI district is:

to provide adequate and appropriate locations for intense agricultural uses such as CAFO's or agricultural businesses that may emit intense odors, vibrations, air pollution, or other disruptions. The intention is to protect both the agricultural use and residential or commercial property owners from nuisance claims.¹⁰

⁹ Ordinance Section 4.7(A), *AGR-District Intent*

¹⁰ Ordinance Section 4.6(A), *AGI-District Intent*

The AGR district replaced the previously established “Rural Residential” (R-A) district, which was eliminated by enactment of the 2008 Ordinance.¹¹

19. Furthering the stated purpose of establishing the new AGR and AGI districts, “High Intensity Uses” including CAFOs are not allowed in the AGR district, even by special exception.

20. The Plaintiffs’ properties and the property on which the CAFO is now located (“the CAFO property”) were all zoned R-A prior to the 2008 Ordinance revision, and then became AGR zoned properties after the 2008 Ordinance revision.

21. Despite the stated purpose of establishing separate AGR and AGI districts, and knowing that Plaintiffs’ properties are zoned AGR, the Defendants sought and obtained approval in March of 2013 from the Hendricks County Commissioners to rezone the CAFO property from AGR to AGI so that the Defendant 4/9, by and through its agents, servants and/or employees including but not limited to the Himsel Defendants, acting individually and/or as agents, servants and/or employees of 4/9 could build and operate the CAFO subject to the Contract with CO-ALLIANCE. In their application submitted by Defendant Samuel T. Himsel, the Defendants represented that “the nearest neighbor to the CAFO property is approximately one-half mile away” despite the fact that there are several residential homes within a quarter-mile of the CAFO, including the Himsel Plaintiffs’ home.

22. During the rezoning process, Plaintiffs and other remonstrators expressed their concerns that the CAFO would greatly reduce their property values, produce noxious odors and air emissions for which there are no regulations, eliminate their ability to enjoy the outdoors, and interfere with their right to comfortable use and enjoyment of their own properties.

¹¹ Ordinance Section 4.2(A), Table 4.1: *Agricultural and Residential Transition Districts*.

23. The Defendants dismissed these concerns and represented to the Hendricks County Plan Commission that “there is not enough data to regulate air emissions from livestock operations,” that there are “no specific studies” about the nature of odors from hog CAFOs, and that there is “no direct correlation” between CAFOs and property value loss.¹²

24. Contrary to Defendants’ representations, there is significant data from numerous scientific and industry-funded studies conducted over decades showing that hog CAFOs generate noxious odors, produce dangerous air emissions, and significantly reduce property values for people who live nearby.¹³ Indeed, by enacting the 2008 Ordinance, Hendricks County recognizes that CAFOs “emit intense odors, vibrations, air pollution, or other disruptions” which is the very reason the AGI district was created. Nevertheless, based on the Defendants’ representations that the CAFO would be held to a “zero discharge standard” and required to have “state of the art environmental safeguards” by the Indiana Department of Environmental Management (“IDEM”), the County Commissioners approved the Defendants’ rezoning request.

25. Thereafter, on May 31, 2013, IDEM approved Defendant 4/9’s application for a “CFO Approval” (as opposed to a permit) under Indiana’s CFO Rule.¹⁴ Defendants’ misleading representations aside, the CFO rule offers no help to people impacted by odors and air emissions from CAFOs because the rule applies to water pollution discharges only and allows CAFOs,

¹² Hendricks County Plan Commission, Minutes of March 12, 2013 Public Hearing on ZA 418/13, zoning amendment application of Samuel T. Himsel, pp. 167-174 (quoting testimony of Josh Trenary, Attorney with the Indiana Pork Producers Association and Dan Kinker, Environmental Consultant with JBS United, Inc.)

¹³ See e.g., Wing, Horton, et. al., *Air pollution and odor in communities near industrial swine operations*, Environ Health Perspect, 116(10), 1362-1368 (2008); Wilson, S. M., & Serre, M. L., *Use of passive samplers to measure atmospheric ammonia levels in a high-density industrial hog farm area of eastern North Carolina*, Atmospheric Environment, 41(28), 6074-6086 (2007); Schiffman, Miller, et. al., *The effect of environmental odors emanating from commercial swine operations on the mood of nearby residents*, Brain Research Bulletin, 37(4), 369-375 (1995); Schiffman, Bennett, et. al., *Quantification of odors and odorants from swine operations in North Carolina*, Agricultural and Forest Meteorology, 108(3), 213-240 (2001); Herriges, Secchi, et. al., *Living with hogs in Iowa: The impact of livestock facilities on rural residential property values*, Land Economics, 81, 530-545 (2005).

¹⁴ 327 IAC 19.

regardless of the size or number of animals, to be built as close as 100 feet from property lines, and 400 feet from homes and schools.¹⁵

26. On July 1, 2013, the Himsel Defendants acting individually, and/or as agents, servants and/or employees of 4/9 entered into the Contract with CO-ALLIANCE for the housing, feeding, and raising of pigs owned, supplied and fed by CO-ALLIANCE. The Contract directs 4/9 by and through its agents, servants and employees including the Himsel Defendants to undertake activities and operations that CO-ALLIANCE and the Himsel Defendants knew or should have known would generate noxious odors, produce dangerous air emissions, and significantly reduce property values for people who live near the CAFO, including the Plaintiffs.

27. On September 19, 2013, the Himsel Defendants acting individually, and/or as agents, servants and/or employees of 4/9 completed construction of the CAFO in accordance with the terms of the Contract with CO-ALLIANCE. The CAFO includes two 33,500 square foot buildings with slatted floors and ventilation fans for confining 4,000 hogs from "wean to finish" in each building, and two concrete pits underneath the buildings to collect and store in excess of four million gallons of liquid hog waste. The CAFO also includes surrounding land parcels near Plaintiffs' homes that are owned by or in the control of the Himsel Defendants for spreading the CAFO's hog waste through the "drag line" or "hose" method.

28. According to IDEM records, the Defendants populated the CAFO with CO-ALLIANCE's hogs on or about October 6, 2013. Since that time, the Himsel Defendants acting individually and/or as agents, servants and/or employees of 4/9, and subject to the requirements of the Contract with CO-ALLIANCE, have continued to confine up to 8,000 hogs at a time, collect

¹⁵ 327 IAC 19-12-3

and store millions of gallons of feces and urine generated by the hogs, and dispose of the collected feces and urine on fields near Plaintiffs' properties.

29. The Defendants' animal confinement and waste collection and disposal practices at the CAFO as described in the foregoing paragraph, cause noxious odors from emissions of ammonia, volatile fatty acids, amines, and reduced sulfur compounds that travel with the prevailing winds to regularly invade Plaintiffs' homes and properties.

30. Indeed, as a large CAFO with 8,000 hogs, the CAFO is subject to the emergency release notification requirements of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11001 *et. seq.* ("EPCRA"), 40 C.F.R. § 355.31(g). The responsibility for large CAFOs that release in excess of 100 pounds of ammonia per day to report those releases under section 304 of EPCRA was reaffirmed by the EPA in December of 2008. 73 Fed.Reg. 76948. 76952-53. Each 24-hour period constitutes a "day" of violation for failing to report.

31. Since at least 2006, the Defendants had and have knowledge, actual or constructive, that ammonia – an extremely hazardous substance under EPCRA -- is generated in the course of, or as a byproduct of, swine production, and is released from large hog CAFOs like the CAFO at issue.

32. The Defendants are members of the National Pork Producers Council ("NPPC"), a national swine industry lobbying and advocacy group. In January of 2009, the NPPC distributed to its members the "Koelsch and Stowell Ammonia Emissions Estimator," an ammonia-estimating methodology recommended by both the EPA and the NPPC along with an EPCRA reporting worksheet, and fact sheet containing detailed guidance. NPPC continues to make those documents, including the Koelsch and Stowell Ammonia Emissions Estimator available on its website.

33. The Koelsch and Stowell Ammonia Emissions Estimator provided to the Defendants indicates that the Defendants' animal confinement and waste collection and disposal practices at the CAFO regularly release greater than 100 pounds of ammonia into the air per day, with high-end projections estimating that the CAFO releases 320 pounds of ammonia per day – more than three times the daily EPCRA reporting threshold for ammonia.

34. The Agency for Toxic Substances and Disease Registry (ATSDR), a part of the Department of Health and Human Services, characterizes ammonia as a toxin. According to the ATSDR and the National Research Council's Acute Exposure Guideline Levels (AEGL) report for ammonia, exposure to airborne ammonia can, at lower concentrations, result in eye discomfort, odor irritation, headache, dizziness, upper respiratory and throat irritation, nasal dryness, and a "feeling of intoxication," while at higher concentrations it can cause moderate to severe respiratory effects, general discomfort, increased odor intensity, and increased irritation to the eyes, nose, throat, and chest. Eventually, as concentrations increase, health problems associated with ammonia exposure can progress to respiratory scarring, including tracheal and nasopharyngeal burns; bronchiolar/alveolar swelling; hyperventilation; reflex throat closure; and death.

35. Consistent with these known health effects, Plaintiffs are at times unable to go outdoors without gagging and having to cover their nose and mouth. The stench from ammonia and other odorous compounds released from the Defendants' animal confinement and waste collection and disposal practices at the CAFO is so obnoxious and intense that it burns their noses, throats and eyes and makes it difficult to breathe. Even with the windows and doors shut, the putrid smells and contaminants at times permeate the inside of Plaintiffs' homes often making it difficult for them to live, eat and sleep. Social and family gatherings have been disrupted because of the smell. At times, the smell inside their homes is so bad they are forced to leave for periods at a time

to escape. And, conditions have become so uncomfortable for Plaintiff Janet Himsel that she moved out of the Himsel Plaintiffs' home and now lives with her daughter.

36. The Plaintiffs have informed the Defendants of the intolerable living conditions created by the noxious air emissions from Defendants' animal confinement and waste collection and disposal practices at the CAFO. Nevertheless, the Defendants have refused to take any action other than using an ineffective pit additive, to reduce the noxious odors and air emissions generated by those practices, or implement any measures to abate the continuing harm to Plaintiffs caused by those practices.

37. Prior to the Defendant's construction of the CAFO, the CAFO property was historically used for raising crops such as corn and soybeans and did not in any way interfere with the Plaintiffs' use and enjoyment of their properties or cause odors and air emissions to invade Plaintiffs' properties.

COUNT I – NUISANCE

38. Plaintiffs repeat restate and reallege each and every allegation contained in paragraphs 1 through 37 above as though fully set forth in this Count I.

39. Defendants' past and ongoing animal confinement and waste collection and disposal practices at the CAFO have created conditions on the Plaintiffs' properties that: are injurious to the health of Plaintiffs; are indecent and offensive to the senses of Plaintiffs; obstruct the free use of properties owned by Plaintiffs; and interfere with Plaintiffs' comfortable enjoyment of life and property and, therefore, constitute a nuisance as defined in Ind. Code § 32-30-6-6.

40. The Defendants had and have a duty not to use the CAFO property to the detriment of neighboring landowners, including the Plaintiffs. Despite this duty, and in blatant disregard for Plaintiffs' health, safety, well-being, and property, Defendants decided to construct the CAFO and

conduct animal confinement and waste collection and disposal practices in close proximity and upwind of Plaintiffs' homes even though Defendants knew or should have known that doing so would predictably cause odors and harmful air emissions to invade Plaintiffs' homes and would significantly interfere with the Plaintiffs' right to free use and comfortable enjoyment of their properties.

41. CO-ALLIANCE and the Himsel Defendants acting individually and/or as agents, servants and/or employees of 4/9 entered into the Contract which requires the performance of activities and operations at the CAFO property that CO-ALLIANCE and/or the Himsel Defendants knew or should have known would create a nuisance as defined by Ind. Code § 32-30-6-6 and/or would likely cause injury to others.

42. The Defendants are aware of the nuisance conditions created by their past and continuing animal confinement and waste collection and disposal activities yet they have allowed those activities to continue in blatant disregard for Plaintiffs' health, safety, well-being, property values, and ability to use and live comfortably in their homes.

43. The Defendants' unreasonable conduct constitutes "the negligent operation of an agricultural operation and its appurtenances" as defined by Indiana's Right to Farm Act, Ind. Code § 32-30-6-9 ("RTFA"), thereby removing the Defendants' animal confinement and waste collection and disposal activities at the CAFO from the RTFA's protection.

44. As a direct and proximate result of the nuisance created by the Defendants' unreasonable conduct, the Plaintiffs have been injured, their property rights invaded, and they have sustained personal, property and other pecuniary damages, and will in the future continue to suffer injury to their property and persons if Defendants' nuisance activities are not abated.

45. By reason of the foregoing, Plaintiffs respectfully request judgment against the Defendants for relief as set forth in paragraph 103.

COUNT II - NEGLIGENCE

46. Plaintiffs repeat restate and reallege each and every allegation contained in paragraphs 1 through 37 above as though fully set forth in this Count II.

47. At all times relevant herein, the Defendants had and have a duty to site, design, construct, maintain, manage, operate, direct and/or control the CAFO including but not limited to animal confinement and waste collection and disposal activities at the CAFO property in a reasonable manner and condition so as not to substantially injure the interests of neighboring landowners, including the Plaintiffs.

48. At all times relevant herein, the Defendants had and have a duty to exercise ordinary care in the siting, design, construction, maintenance, management, operation, direction and control of the CAFO including but not limited to animal confinement and waste collection and disposal activities at the CAFO property so as not to cause injury or harm to the personal and/or property interests of others including the Plaintiffs.

49. At all times relevant herein, the Defendant CO-ALLIANCE had and has a non-delegable duty to ensure that activities it contracts with others to perform on its behalf will not create a nuisance as defined by Ind. Code § 32-30-6-6 and/or likely cause injury to others, including the Plaintiffs.

50. At all times relevant herein, the Defendants had and have a duty to comply with the emergency release notification requirements of EPCRA.

51. Notwithstanding the aforesaid duties, the Defendants committed the following acts and/or omissions:

- a. decided to locate and construct the CAFO in a location that the Defendants knew or should have known would cause or allow noxious odors and air emissions from the CAFO to invade Plaintiffs' properties, diminish Plaintiffs' quality of life, and interfere with Plaintiffs' property rights;
- b. repeatedly and continually engaged and continue to engage in animal confinement, waste collection and disposal activities at the CAFO that the Defendants know or should know is causing noxious odors and air emissions to invade Plaintiffs' properties, diminish Plaintiffs' quality of life, and interfere with Plaintiffs' property rights;
- c. failed to site, design, construct, maintain, manage, operate, direct and/or control the CAFO including but not limited to animal confinement and waste collection and disposal activities at the CAFO property in a reasonable manner, location and condition so as not to substantially injure the interests of adjoining land owners including the Plaintiffs;
- d. failed to exercise ordinary care in the siting, design, construction, maintenance, operation, direction and/or control of the CAFO including but not limited to animal confinement and waste collection and disposal activities at the CAFO property so as not to cause injury or harm to the personal and/or property interests of others, including the Plaintiffs;
- e. CO-ALLIANCE contracted with the Himsel Defendants acting individually and/or as agents, servants or employees of 4/9 for the performance of activities at the CAFO property on CO-ALLIANCE'S behalf that CO-ALLIANCE knew or should have known would create a nuisance as defined by Ind. Code § 32-30-6-6 and/or likely cause injury to others, including the Plaintiffs;
- f. repeatedly and continually failed to report the CAFO's releases of ammonia in excess of 100 pounds per day to the state emergency planning commission and local emergency planning committee as required by EPCRA. 42 U.S.C. §§ 11004(b)(1)-(2) and 40 C.F.R. § 355.40.

52. As a direct and proximate result of the Defendants' negligent acts and/or omissions, the Plaintiffs have been injured, their property rights invaded, and they have sustained personal, property and other pecuniary damages, and will in the future continue to suffer injury to their property, property rights and persons.

53. By reason of the foregoing, Plaintiffs respectfully request judgment against the Defendants for relief as set forth in paragraph 104.

COUNT III - TRESPASS

54. Plaintiffs repeat restate and reallege each and every allegation contained in paragraphs 1 through 37 above as though fully set forth in this Count III.

55. From October 6, 2013 to the present date, the Defendants negligently and/or knowingly and intentionally caused or allowed animal waste, air pollutants, harmful gases, and noxious odors to regularly enter and invade properties owned and/or possessed by Plaintiffs thereby causing a continuing trespass on property owned and/or possessed by Plaintiffs.

56. As a direct and proximate result of the Defendants' continued trespass on Plaintiffs' properties, Plaintiffs have been injured, their property rights invaded, and they have sustained personal, property and other pecuniary damages, and will in the future continue to suffer injury to their property, property rights, and persons if Defendants' trespassing activities are not abated.

57. By reason of the foregoing, Plaintiffs respectfully request judgment against Defendants for relief as set forth in paragraph 105.

COUNT IV - DECLARATORY JUDGMENT

Indiana Code § 15-11-2-6(a) is Unconstitutional on its Face and as Applied to Plaintiffs

58. Plaintiffs repeat restate and reallege each and every allegation contained in paragraphs 1 through 57 above as though fully set forth in this Count IV.

59. Indiana Code § 15-11-2-6(a) provides in relevant part that, "[t]he Indiana Code shall be construed to protect the rights of farmers to choose among all generally accepted farming and livestock production practices, including the use of ever changing technology."

60. This law creates a legally protected, special "right" for the agriculture/livestock industry to engage in its preferred industry practices and technologies without government interference and without regard to the harm those practices may cause.

61. Under this law, all branches of State government, including the judiciary, any person with authority under the Indiana Code, and/or any person acting in an official government capacity on behalf of the State of Indiana with authority to interpret, enforce, apply and/or carry out the provisions of the Indiana Code, must do so in a way that "protects" the agricultural/livestock industry's use of its preferred practices and technologies.

62. Although all for-profit industries and businesses have financial and other proprietary interests in being able to use their preferred practices and technologies that maximize profits without regulatory interference, no other industry or business sector besides the agriculture/livestock industry enjoys a special right to engage in those practices or heightened legal protection to do so.

Equal Privileges & Immunities:

63. Article I, Section 23 of the Indiana Constitution prohibits the General Assembly from "grant[ing] to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." Ind. Code § 15-11-2-6(a) violates Section 23 because there is no inherent difference between the agriculture/livestock industry and all other industries, businesses and economic sectors that is rationally related to disparate treatment they receive under the challenged law.

64. Plaintiffs are uniquely burdened and have standing to challenge the constitutionality of Indiana Code § 15-11-2-6(a) under Art. I., Sec. 23, because the Defendants' use of a CAFO to confine 8,000 hogs and collect and dispose of millions of gallons of hog waste in close proximity to Plaintiffs' homes are "generally accepted livestock production practices" now afforded special legal protection under the challenged law regardless of the harm those practices are causing Plaintiffs.

Open Courts:

65. Article I, Section 12 of the Indiana Constitution provides that "[a]ll courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely and without denial; speedily, and without delay."

66. To the extent Ind. Code § 15-11-2-6(a) requires Indiana Courts to interpret and apply all state statutes to favor and protect the rights of agriculture/livestock industry parties over the rights of other parties, the law runs afoul of Art. I, Sec. 12 because the challenged law interferes with judicial discretion, the judicial duty of impartiality in deciding cases and determining the rights of parties before the courts, and the substantive and procedural due process rights of parties not engaged in agriculture/livestock production and not protected by the challenged law.

67. Plaintiffs' Art. I, Sec. 12 rights are uniquely burdened by Ind. Code § 15-11-2-6(a) because under the challenged law, the Court must construe Indiana's nuisance statute, the RTFA, the Indiana Rules of Civil Procedure, and all other Indiana Code provisions that apply to Plaintiffs' claims in favor of protecting the Defendants' special "right" to operate the CAFO and engage in the very conduct at issue in this case. Imposing such an inequitable, broad and undefined mandate that requires wholesale interpretation of state law in a biased manner, and against Plaintiffs' legal interests, ensures that the Plaintiffs will not receive fair and impartial consideration of their claims by the Court, as required by Art. I, Sec. 12.

Taking Without Just Compensation:

68. Article I, Section 21 of the Indiana Constitution provides: " No person's particular services shall be demanded, without just compensation. No person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first

assessed and tendered." Similarly the Fifth Amendment of the U.S. Constitution provides, in relevant part that: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fifth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment.

69. When Plaintiffs purchased their properties, they obtained title to those properties along with the traditional bundle of property rights that go along with owning title, including the right of exclusion, the right of use and enjoyment, and the right of disposition. These property rights are protected by Art. I, Sec. 21, and the Fifth and Fourteenth Amendments.

70. When Plaintiffs purchased their properties they had every reasonable investment backed expectation that they would be able to live, eat, sleep, entertain, enjoy their yards and otherwise use, enjoy, control, or sell their homes and properties in a usual and customary manner without unreasonable interference and limits imposed on their rights to do so.

71. The Defendants' past and continuing animal confinement and waste collection and disposal activities at the CAFO have and continue to unreasonably limit and infringe on Plaintiffs' constitutionally protected property rights to reasonably use, enjoy, control, and dispose of their properties.

72. Ind. Code § 15-11-2-6(a) requires the Court to construe Indiana's nuisance statute, the RTFA, the Indiana Rules of Civil Procedure and all other Indiana Code provisions that apply to Plaintiffs' claims to allow the Defendants to engage in animal confinement and waste collection disposal activities at the CAFO which have and continue to substantially limit and infringe on each of Plaintiffs' protected property rights and, therefore, the challenged law constitutes a government taking of Plaintiffs' properties under Art. I, Sec. 21 and the Fifth and Fourteenth Amendments.

73. Although the challenged law as applied to Plaintiffs constitutes a government taking of Plaintiffs' property for public use, the State of Indiana has not provided Plaintiffs with just compensation in violation of Art. I, Sec. 21, the Fifth and Fourteenth Amendments of the U.S. Constitution, and the requirements of Indiana's eminent domain law at Ind. Code § 32-24-1, *et. seq.*

Legislative Interference with Judicial Branch Authority:

74. Article 3, Section 1 of the Indiana Constitution provides in relevant part that "no person, charged with official duties under one of [the separate branches of government] shall exercise any of the functions of another." In turn, Article 7, Section 1 states that, "[t]he judicial power of the State shall be vested in a Supreme Court, in Circuit Courts and such other courts as the General Assembly may establish."

75. By enacting Ind. Code § 15-11-2-6(a), the Indiana General Assembly is attempting to interfere with one of the most fundamental of judicial functions which is to impartially interpret the law and "to say what the law is,"¹⁶ in violation of the separation of powers provisions in Articles 3 and 7.

Notice to the Indiana Attorney General

76. In accordance with Ind. Code § 34-14-1-11, notice is hereby provided to Greg Zoeller in his official capacity as Attorney General for the State of Indiana that Ind. Code § 15-11-2-6(a) is unconstitutional on its face and as applied to Plaintiffs for the reasons stated above.

Indiana Code § 32-30-6-9 is Unconstitutional as Applied to Plaintiffs

77. Indiana Code § 32-30-6-9 commonly referred to as the Indiana Right to Farm Act ("RTFA") provides in relevant part as follows:

¹⁶ See *Marbury v. Madison*, 5 U.S. (1 Cranch), 137, 177 (1803); see also *Glossip v. Gross*, 135 S. Ct. 2726, 2776 (2015) (the "exercise of independent judgment is the Court's judicial duty").

An agricultural or industrial operation or any of its appurtenances is not and does not become a nuisance, private or public, by any changed conditions in the vicinity of the locality after the agricultural or industrial operation, as the case may be, has been in operation continuously on the locality for more than one (1) year if . . .

There is no significant change in the type of operation. A significant change in the type of agricultural operation does not include . . . the conversion from one type of agricultural operation to another type of agricultural operation [or] a change in the ownership or size of the agricultural operation.¹⁷

78. The RTFA provides immunity from nuisance suits to both agricultural and industrial operations that have been in operation for at least one year and have not undergone a “significant change.” However, an agricultural operation does not undergo a “significant change” by converting from “one type of agricultural operation to another” or by changing ownership or increasing in size.¹⁸ Conversely, an industrial operation that converts from one type of industrial operation to another, changes ownership or increases in size would be deemed to have undergone a significant change thereby removing RTFA protection for one year after such a change.

79. Plaintiffs purchased, resided and obtained protected interests in their properties long before the CAFO was constructed and did not “come to the nuisance” or cause a “change in conditions in the vicinity” of the CAFO property.

80. Nevertheless, because the Defendants’ conversion of the CAFO property to a CAFO with 8,000 hogs is not considered a “significant change” under the RTFA, Plaintiffs had no one-year period of time to obtain relief for the Defendants’ creation of an otherwise actionable nuisance because the CAFO was deemed to have been in continuous operation for decades before it was even built.

¹⁷ Ind. Code § 32-30-6-9(d).

¹⁸ Ind Code § 32-30-6-9(d)(1).

81. Thus, as applied to Plaintiffs, the RTFA allows the Defendants to substantially impair Plaintiffs' constitutionally protected property interest in the use and enjoyment of their properties without providing Plaintiffs any opportunity to obtain a remedy for that impairment.

Equal Privileges & Immunities:

82. Article I, Section 23 of the Indiana Constitution prohibits the General Assembly from "grant[ing] to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."

83. The RTFA violates Section 23 because there is no inherent difference between agricultural operations and industrial operations that is rationally related to the disparate treatment they receive under the RTFA. While providing uninterrupted protection to agricultural operations that change ownership, convert operations, or expand in size, but not to industrial operations, the law is not uniformly applicable and equally available to all similarly situated operations as expressly identified and selected for special treatment in the law itself.

84. Plaintiffs are uniquely burdened by this disparate treatment because they have no opportunity to obtain a remedy for the conversion of the CAFO property to a nuisance-producing CAFO unlike persons whose property interests are similarly impaired when an industrial operation becomes a nuisance after converting or expanding. Therefore, Plaintiffs have standing to challenge the constitutionality of the RTFA as applied to them under Art. I., Sec. 23.

Open Courts:

85. Article I, Section 12 of the Indiana Constitution provides that "[a]ll courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely and without denial; speedily, and without delay."

86. Under the common law and Indiana's nuisance statute at Ind. Code § 32-30-6-6, all Indiana citizens, including Plaintiffs, have a recognized and existing remedy to bring a cause of action for nuisance to protect their properties from anything that is "injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property so as essentially to interfere with the comfortable enjoyment of life or property" regardless of whether the nuisance is due to negligent conduct.

87. The "significant change" provision of the RTFA serves to bar Plaintiffs' otherwise actionable nuisance claim before the claim ever accrued thereby imposing an impossible condition on the Plaintiffs' access to the courts and pursuit of their recognized tort remedy in violation of Art. I, Sec. 12.

88. Plaintiffs' Art. I, Sec. 12 rights are also burdened by the RTFA because it allows Defendants' to violate Plaintiffs' vested and constitutionally protected right of use and enjoyment of property while foreclosing a remedy for that violation.

Taking Without Just Compensation:

89. Article I, Section 21 of the Indiana Constitution provides: "No person's particular services shall be demanded, without just compensation. No person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered." Similarly the Fifth Amendment of the U.S. Constitution provides, in relevant part that: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fifth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment.

90. When Plaintiffs purchased their properties, they obtained title to those properties along with the traditional bundle of property rights that go along with owning title, including the

right of exclusion, the right of use and enjoyment, and the right of disposition. These property rights are protected by Art. I, Sec. 21, and the Fifth and Fourteenth Amendments.

91. When Plaintiffs purchased their properties they had every reasonable investment backed expectation that they would be able to live, eat, sleep, entertain, enjoy their yards and otherwise use, enjoy, control, or sell their homes and properties in a usual and customary manner without unreasonable interference and limits imposed on their rights to do so.

92. The Defendants' past and continuing animal confinement and waste collection and disposal activities at the CAFO have and continue to unreasonably limit and infringe on Plaintiffs' constitutionally protected property rights to reasonably use, enjoy, control, and dispose of their properties.

93. The RTFA allows the Defendants to engage in animal confinement and waste collection disposal activities at the CAFO which have and continue to substantially limit and infringe on each of Plaintiffs' protected property rights and, therefore, the challenged law constitutes a government taking of Plaintiffs' properties under Art. I, Sec. 21 and the Fifth and Fourteenth Amendments.

94. Although the RTFA as applied to Plaintiffs constitutes a government taking of Plaintiffs' property for public use, the State of Indiana has not provided Plaintiffs with just compensation in violation of Art. I, Sec. 21 of the Indiana Constitution, the Fifth and Fourteenth Amendments of the U.S. Constitution, and the requirements of Indiana's eminent domain law at Ind. Code § 32-24-1, *et. seq.*

Notice to the Indiana Attorney General

95. In accordance with Ind. Code § 34-14-1-11, notice is hereby provided to Greg Zoeller in his official capacity as Attorney General for the State of Indiana that the RTFA is unconstitutional as applied to Plaintiffs for the reasons stated above.

96. By reason of the foregoing, Plaintiffs respectfully request judgment against Defendants for relief as set forth in paragraph 106.

COUNT V – INVERSE CONDEMNATION

97. Plaintiffs repeat restate and reallege each and every allegation contained in paragraphs 1 through 57 above as though fully set forth in this Count V.

98. Plaintiffs are the “owners” of their real properties as that term is defined by Ind. Code § 32-24-1-2.

99. The RTFA and/or Ind. Code § 15-11-2-6(a) (“Right to Farm laws”) effectively authorized the Defendants to exercise the power of eminent domain to acquire the Plaintiffs’ real property interests including the right of exclusion and the right of use and enjoyment, which are protected by Art. I, Sec. 21, and the Fifth and Fourteenth Amendments. Therefore, the Defendants are “condemnors” as defined by Ind. Code § 32-24-1-1 and subject to the requirements of Ind. Code § 32-24-1, *et. seq.*

100. Although Defendants exercised the power of eminent domain under Indiana’s Right to Farm laws to acquire Plaintiffs’ property interests, the Defendants did not follow condemnation procedures as required by Ind. Code § 32-24-1, *et. seq.*, thereby depriving Plaintiffs of their property interests without due process and just compensation.

101. Accordingly, Plaintiffs are entitled to have their damages assessed in accordance with Ind. Code § 32-24-1-16.

102. By reason of the foregoing, Plaintiffs respectfully request judgment against Defendants for relief as set forth in paragraph 107.

PRAYER FOR RELIEF

103. As to the allegations contained in Court I for nuisance, Plaintiffs respectfully request the following relief:

- a. Compensatory damages against the Defendants, jointly and severally, for all damages incurred by Plaintiffs according to proof;
- b. Injunctive relief ordering the Defendants to take action as necessary to the abate the continuing nuisance on Plaintiffs' properties;
- c. All other relief as the Court deems just and proper.

104. As to the allegations contained in Count II for negligence, Plaintiffs respectfully request the following relief:

- a. Compensatory damages against the Defendants, jointly and severally, for all damages incurred by Plaintiffs according to proof;
- b. All other relief as the Court deems just and proper.

105. As to the allegations contained in Count III for trespass, Plaintiffs respectfully request the following relief:

- a. Compensatory damages against the Defendants, jointly and severally, for all damages incurred by Plaintiffs according to proof;
- b. Injunctive relief ordering the Defendants to take action as necessary to abate the continuing trespass on Plaintiffs' properties;
- c. All other relief as the Court deems just and proper.

106. As to the allegations contained in Count IV for declaratory judgment, Plaintiffs respectfully request the following relief:

- a. Declaratory judgment that Ind. Code § 15-11-2-6(a) is unconstitutional on its face and therefore void and/or unconstitutional as applied to Plaintiffs;

- b. Declaratory judgment that Indiana Code § 32-30-6-9 is unconstitutional as applied to Plaintiffs;
- c. Plaintiffs' costs and reasonable attorneys' fees;
- d. All other relief as the Court deems just and proper.


107. As to the allegations contained in Count V for inverse condemnation, Plaintiffs respectfully request the following relief:

- a. An order requiring the Defendants to follow condemnation procedures set forth in Ind. Code § 32-24-1, *et. seq.* including assessment and payment of Plaintiffs' assessed damages for the interests in Plaintiffs' properties acquired by Defendants;
- b. Plaintiffs' costs and reasonable attorney fees;
- c. All other relief as the Court deems just and proper.

Plaintiffs request a trial by jury on all issues so triable.

DATED: August 5, 2016

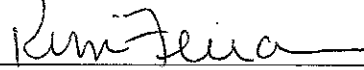
Respectfully submitted,



Kim E. Ferraro, Attorney No. 27102-64
Hoosier Environmental Council
407 E. Lincolnway, Suite A
Valparaiso, IN 46383
219/464-0104

CERTIFICATE OF SERVICE

I certify that on the 5th day of August, 2016 service of a true and complete copy of the foregoing pleading was made upon the parties listed below by depositing same in the U.S. Mail in envelopes properly addressed to them and with sufficient first-class postage affixed.



Kim E. Ferraro

Christopher J. Braun
Jonathan P. Emenhiser
Ann O. McCready
Plews Shadley Racher & Braun, LLP
1346 N. Delaware Street
Indianapolis, IN 46202

Kyle A. Lansberry
Brandon W. Ehrie
Laura M. Walker
Lewis Wagner, LLP
501 Indiana Avenue, Suite 200
Indianapolis, IN 46202

Brian L. Park
Office of Indiana Attorney General
Indiana Government Center South, 5th Fl.
302 West Washington Street
Indianapolis, IN 46204-2770