No. 19-1019

IN THE

United States Court of Appeals for the Fourth Circuit

JOYCE MCKIVER; DELOIS LEWIS; DAPHNE MCKOY; ALEXANDRIA McKOY; ANTONIO KEVIN MCCOY; ARCHIE WRIGHT, JR.; TAMMY LLOYD; DEBORAH JOHNSON; ETHEL DAVIS; AND PRISCILLA DUNHAM,

Plaintiffs-Appellees,

and

DENNIS MCKIVER, JR.; LAJUNE JESSUP; DON LLOYD, Administrator of the Estate of Fred Lloyd; TERESA LLOYD; TANECHIA LLOYD; CARL LEWIS; ANNETTE MCKIVER; KAREN MCKIVER; BRIONNA MICKIVER; EDWARD OWENS; DAISY LLOYD;

Plaintiffs,

v.

MURPHY-BROWN, LLC, d/b/a Smithfield Hog Production Division.

Defendant-Appellant.

On Appeal from the United States District Court
For the Eastern District of North Carolina
Civil Case No. 7:14-cv-180-BR

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF FOR *AMICUS CURIAE* WATERKEEPER ALLIANCE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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May 3, 2019

Waterkeeper Alliance, Inc., hereby requests leave of this Court to file the attached *amicus curiae* brief in support of Plaintiffs-Appellees in this action. This Court's briefing order required Plaintiffs to file its principal brief by April 29, 2019. (Doc. 9) Plaintiffs did in fact file its principal brief on that date. (Doc. 46) This motion and brief are being filed within one week of that date and are therefore timely. *See* Fed. R. App. P. 29 (a)(6).

Waterkeeper Alliance is the largest nonprofit organization in the U.S. focused solely on clean water. The organization has fifteen licensed Waterkepeers housed at ten Waterkeeper organizations working throughout North Carolina, including in watersheds in eastern North Carolina where Defendant-Appellant's facilities are located. Waterkeeper's "Pure Farms, Pure Waters" campaign, which is active in North Carolina, addresses pollution from industrialized swine facilities. These facilities devastate rivers, lakes, and estuaries and are disproportionately located in low-income communities and communities of color.

Waterkeeper frequently takes legal action to hold polluters, including industrial swine operations, accountable for pollution and associated environmental injustices. To advance its goal of drinkable, fishable, swimmable water everywhere, Waterkeeper files *amicus* briefs in cases having a substantial impact on water quality. Waterkeeper files here because private nuisance claims are a long-standing feature of North Carolina law that protects North Carolinians and

waterways from pollution from industrial hog operations. The organization actively opposed legislative efforts to restrict the rights of private citizens to bring nuisance actions against industrial agricultural operations, such as the operations involved in the underlying matter.

Waterkeeper submits that this *amicus curiae* brief will aid the Court in offering an analysis of the historical and current state regulatory scheme within which Defendant-Appellant operates, as well as an overview of the State's efforts to enforce applicable regulations.

In preparing the proposed *amicus curiae* brief that accompanies this Motion as Exhibit A, Waterkeeper has reviewed the filings of the parties and other *amici* and have endeavored to address issues raised by the pleadings without making redundant arguments, as well as to offer a unique perspective on the issues raised by this case.

For the foregoing reasons, Waterkeeper Alliance respectfully requests that that Court grant leave to file the attached *amicus curiae* brief in support of Plaintiff-Appellees in this matter.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This Motion complies with the type-volume limitation in Federal Rule of Appellate Procedure 27(d)(2)of the Federal Rules of Appellate Procedure because this Motion contains 375 words, excluding the parts of the Motion exempted by Rule 27(a)(2)(b). This statement is based on the word count function of Microsoft Office Word 2010.

2. This Motion complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because this Motion has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman font for the main text.

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CERTIFICATE OF SERVICE

I certify that on May 3, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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EXHIBIT A

No. 19-1019

IN THE

United States Court of Appeals for the Fourth Circuit

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May 3, 2019

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 19-1019 Caption: McKiver, et al. v. Murphy-Brown, LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Waterkeeper Alliance, Inc.
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Chandra T. Taylor Date: May 3, 2019

Counsel for: Amicus Waterkeeper Alliance

CERTIFICATE OF SERVICE

****

I certify that on May 3, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Chandra Taylor
(signature)

May 3, 2019
(date)

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STATEMENT OF INTEREST OF AMICUS CURIAE

Waterkeeper Alliance, Inc. ("Waterkeeper") is the largest nonprofit focused solely on clean water. Founded in 1966, Waterkeeper now includes more than 300 organizations and affiliates around the world, whose volunteers and staff patrol and protect more than 2.5 million square miles of rivers, lakes and coastal waterways on six continents. There are fifteen licensed Waterkeepers housed at ten Waterkeeper organizations working in North Carolina. Waterkeeper promotes clean water through advocacy and education in public fora, classrooms, and communities. Waterkeeper also works to hold polluters accountable for their actions, including by taking legal action when necessary.

Waterkeeper maintains a "Pure Farms, Pure Waters" campaign that addresses pollution from industrialized swine, poultry, and dairy facilities that is devastating rivers, lakes, and estuaries and lowering quality of life for downstream communities. The campaign is active in North Carolina, where Waterkeeper has developed a first-of-its-kind interactive map showing the locations of industrial animal operations. *Pure Farms, Pure Waters: North Carolina*, WATERKEEPER ALL., https://waterkeeper.org/campaign/pure-farms-pure-waters/north-carolina/ (last visited May 1, 2019). Facilities are disproportionately located in low-income communities and communities of color, exacerbating their impacts. Waterkeeper

has been forced in recent years to take legal action to address pollution from industrial swine facilities and associated environmental injustices.

Waterkeeper has an interest in the viability of private nuisance claims in North Carolina as a matter of justice for people harmed by industrial swine operations, and as a longstanding feature of North Carolina law that protects the State's citizens and waters from pollution. Waterkeeper actively opposed recent state legislation designed to limit access to legal remedies for private nuisance, and members of Waterkeeper organizations are impacted by nuisance conditions created by state-permitted swine operations.

SUMMARY OF ARGUMENT

Defendant Murphy-Brown is not insulated from nuisance liability or punitive damages merely because its contract grower was not cited for violating the *de minimis* laws and regulations that apply to industrial swine operations. These laws and regulations set forth only *minimum prerequisites* to operating a facility lawfully; they do not provide a shield against liability for violating neighbors' property rights. Industrial swine facilities in North Carolina, including Kinlaw Farms, utilize environmentally harmful lagoon and sprayfield waste management systems. These systems were grandfathered into current regulatory requirements that, since 1997, *would prohibit* construction of the same type of system today. Moreover, North Carolina's system for regulating swine

facilities is insufficient to protect North Carolinians from the harmful effects of industrial swine facilities, including the noxious odors and pervasive noise highlighted in this case.

The hog industry has actively prevented the passage and promulgation of meaningful laws and regulations that would protect the environment, communities, and nearby property owners since the nearly completely unregulated explosion of industrial swine facilities in the 1980s and 1990s. The industry also easily avoids the North Carolina Department of Environmental Quality's ("DEQ") inadequate efforts to ensure compliance with a weak general permit system, which is influenced by industry lobbying and premised on an erroneous assumption that the lagoon and sprayfield system does not pollute nearby waters.

Residents who complain about odor and other adverse impacts of nearby industrial facilities have faced inaction by the agency and intimidation by the industry. Contentions made by industry that industrial swine operations in North Carolina are strictly and comprehensively regulated are simply not true, nor does the existence of some minimal state regulation preclude nuisance claims or punitive damages.

This brief demonstrates the following: I) Defendants are not insulated from a nuisance action or punitive damages; II) industrial swine operations in North Carolina rely on outdated waste management systems that harm communities and

the environment; and III) the harmful effects of industrial swine facilities complained of by Plaintiffs, including odor, are neither thoughtfully nor comprehensively regulated by DEQ.

ARGUMENT

I. Murphy-Brown Hog Production is Not Absolved of Liability for Nuisance or Punitive Damages While Operating Within a Weak Regulatory Scheme that Does Not Preempt Private Claims.

A nuisance is a nuisance. *See, e.g.*, *BSK Enterprises, Inc. v. Beroth Oil Co.*, 793 S.E.2d 236, 252 (N.C. Ct. App. 2016) (recognizing that a plaintiff must show "unreasonable interference with the use and enjoyment of his property" to recover for nuisance). Under North Carolina law, an otherwise lawful business is unlikely to be a nuisance *per se*, but might nonetheless be a nuisance *in fact* depending on the circumstances. *Jones v. Queen City Speedways, Inc.*, 172 S.E.2d 42, 47 (N.C. 1970). If "a nuisance is established by the evidence, no private enterprise for the mere purpose of bringing gain to its owner can be allowed to destroy one's home or to impair his health." *Redd v. Edna Cotton Mills*, 48 S.E. 761, 762 (N.C. 1904). Furthermore, a finding that a business is not a nuisance *per se* affords "no license to operate . . . in the future so as to create a nuisance. The defendant is at all times subject to the law of the land." *Pake v. Morris*, 53 S.E.2d 300, 301 (N.C. 1949).

Our courts have long found that odor may constitute nuisance. *See, e.g.*, *Ivester v. City of Winston-Salem*, 1 S.E.2d 88, 90-91 (N.C. 1939) (finding that a

sewage plant and dump created "noxious and offensive odors" and constituted a nuisance); *King v. Ward*, 178 S.E. 577, 578 (N.C. 1935) (finding that a cotton gin "emit[ed] odors which impaired the comfortable occupancy of the plaintiff's home"); *Duffy v. E.H. & J.A. Meadows Co.*, 42 S.E. 460, 461 (N.C. 1902) (finding that odors may be actionable if they "work some substantial annoyance, some material physical discomfort, to those who live in the neighborhood"); *Dargan v. Waddill*, 31 N.C. 244, 247-48, 9 Ired. 244, 247-48 (1848) (noting that "filth and smells" from stables if they "destroy the comforts of persons owning and occupying adjoining premises" constitute nuisance); *see also Redd*, 48 S.E. at 762 ("Injury to health and destruction of the comforts of one's home can be accomplished by frightful noises just as well as by means of noxious and offensive odors."). In fact, "hog-pen[s]" are nuisances if not "put in remote and out-of-the-way places." *Dargan*, 31 N.C. at 247, 9 Ired. at 247.

Merely complying with the regulations for maintaining an industrial hog operation does not insulate a defendant from punitive damages, if the evidence supports such an award. Under North Carolina law, punitive damages may be awarded if "the defendant is liable for compensatory damages" and the plaintiff proves by clear and convincing evidence that at least one aggravating factor, such

as "[w]illful or wanton conduct,"[1] was present and was related to the plaintiff's injury. N.C. GEN. STAT. § 1D-15(a); *see Scarborough v. Dillard's, Inc.*, 693 S.E.2d 640, 648 (N.C. 2009). This is the full extent of the test. *See Taylor v. Bettis*, 976 F. Supp. 2d 721, 747 (E.D.N.C. 2013) (explaining that punitive damages is a form of relief, not an *independent claim*), *aff'd*, 693 F. App'x 190 (4th Cir. 2017); *Wyatt v. Sussex Surry, LLC*, 74 Va. Cir. 302, 2007 WL 5969399 at *5 (2007) (same); *see also* N.C. GEN. STAT. § 1D-35(2) (providing an exclusive list of evidence that may be considered in determining amount of punitive damages). As demonstrated below, the test for punitive damages does not require showing that the defendant violated a regulation.

Whether or not a defendant complied with regulatory requirements is simply one piece of evidence in the punitive damages analysis. *See Vandevender v. Blue Ridge of Raleigh, LLC*, 901 F.3d 231, 239-40 (4th Cir.), *amended* (Aug. 27, 2018) (listing evidence of willful or wanton conduct), *amended,* 756 F. App'x 230 (4th Cir. 2018); *Gen. Motors Corp. v. Moseley*, 447 S.E.2d 302, 311 (Ga. Ct. App. 1994) (explaining that "nothing . . . precludes an award of punitive damages where, notwithstanding the compliance with applicable safety regulations, there is

[1] "Willful or wanton conduct" is "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. 'Willful or wanton conduct' means more than gross negligence." N.C. GEN. STAT. § 1D-5(7).

other evidence showing culpable behavior"), *abrogated on other grounds by Webster v. Boyett*, 496 S.E.2d 459 (Ga. 1998). A legal violation is evidence that supports a finding that a defendant's conduct was willful or wanton. But absence of a violation is not dispositive; in the absence of a violation, other factors supporting a finding of "willful and wanton conduct" may be present.[2] Weighing the evidence for punitive damages is left to the trier of fact, so long as "more than a scintilla of evidence exists from which the jury could find that defendant's . . . conduct was accompanied by a reckless disregard for plaintiff's rights.'" *Clarke v. Mikhail*, 779 S.E.2d 150, 159 (N.C. Ct. App. 2015) (citation omitted).

Courts have consistently held that punitive damages do not depend on showing non-compliance. The U.S. Supreme Court has rejected the argument that compliance with federal regulations precludes an award of punitive damages, even in the context of the comprehensive federal nuclear regulatory system that preempts state regulation.[3] *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255-56 (1984) (citations omitted); *see Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 863 (9th Cir. 2012) (explaining holding in *Silkwood*); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 892-93 (2000) (Stevens, J., dissenting);

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[2] In fact, an otherwise lawful act, such as the construction of a fence, may become actionable if it willfully and wantonly causes damage to a neighbor. *Barger v. Barringer*, 66 S.E. 439, 441 (1909).

[3] The Fourth Circuit has found that the Clean Water Act, and a state regulatory regime enacted pursuant to it, do not preempt state common-law remedies. *Stoddard v. W. Carolina Reg'l Sewer Auth.*, 784 F.2d 1200, 1207 (4th Cir. 1986).

O'Gilvie v. Int'l Playtex, Inc., 821 F.2d 1438, 1446 (10th Cir. 1987) (observing that "compliance with the FDA regulations does not preclude punitive damages when there is evidence sufficient to support a finding of reckless indifference to consumer safety"); *Dorsey v. Honda Motor Co.*, 655 F. 2d 650, 656 (5th Cir. 1981); *Bandy v. Trigen-Biopower, Inc.*, No. 3:02-CV-459, 2006 WL 5321815 at *2 (E.D. Tenn. 2006) (noting that compliance with a Title V permit (industry standard) is merely a factor in the punitive damage analysis).

Many states apply the same rule. *See Morris v. Cessna Aircraft Co.*, 833 F. Supp. 2d 622, 640-41 (N.D. Tex. 2011) (explaining that under Texas law, "proof of regulatory compliance does not foreclose, as a matter of law, an award of punitive damages"); *Perrine v. E.I. du Pont de Nemours & Co.*, 694 S.E.2d 815, 884, 889 (W. Va. 2010); *Mascarenas v. Cooper Tire & Rubber Co.*, 643 F. Supp. 2d 1363, 1374 (S.D. Ga. 2009) (applying Georgia law); *Malcolm v. Evenflo Co.*, 217 P.3d 514, 531-32 (Mont. 2009); *Phillips v. Cricket Lighters*, 883 A.2d 439, 447 (Pa. 2005) (noting that compliance with safety standards does not automatically insulate a defendant from punitive damages but is rather a factor to be considered in determining whether punitive damages may be recovered); *Gonzales v. Surgidev Corp.*, 1995-NMSC-036, ¶ 49, 120 N.M. 133, 147, 899 P.2d 576, 590 (explaining that "compliance with federal regulations does not preclude a finding of recklessness or an award of punitive damages"); *Pfeiffer v. Eagle Mfg. Co.*, No.

89-2359-L, 1992 WL 26035 at *2 (D. Kan. 1992) (finding that following industry standards is probative of the wantonness, willfulness, and maliciousness of the manufacturer's conduct but does not necessarily insulate a manufacturer from punitive damages); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 734-35 (Minn. 1980) (explaining that complying with an industry friendly test does not preclude an award of punitive damages as a matter of law), *cert. denied*, 449 U.S. 921 (1980).

And the same rule applies in North Carolina. *See Ellison v. Gambill Oil Co.*, 650 S.E.2d 819, 827 (N.C. Ct. App. 2007) (Jackson, J., concurring in part and dissenting in part) (observing that where defendant argued that it "followed all State guidelines and regulations," nonetheless on the punitive damages claim it was for jury to evaluate the weight of the evidence), *aff'd*, 677 S.E.2d 452 (N.C. 2009); *see also Edwards v. ATRO SpA*, 891 F. Supp. 1074, 1081 (E.D.N.C.) *supplemented*, 891 F. Supp. 1085 (E.D.N.C. 1995).

Defendant cannot escape liability for punitive damages when it brazenly authorizes primitive storage and disposal for hog waste, in complete disregard of the harm caused to close neighbors from the same system, within a weak regulatory scheme, overseen by an under-resourced regulatory agency.

II. Industrial Hog Operations in North Carolina Rely on Primitive, Outdated Waste Management Systems That Harm Communities and the Environment.

A. The Primitive Practices Employed Create Devastating Health Effects for Surrounding Communities.

The North Carolina hog industry principally relies upon a primitive operational design to dispose of the tremendous amount of animal waste and gaseous byproduct produced by approximately 2,200 operations currently permitted by the State under the Swine Waste Management General Permit ("General Permit"). JA1673-87. Under this system, operations rely on ventilation fans, rather than scrubbers or other capture technology, to jettison noxious air pollution into the surrounding environment. They use open, often unlined, pits to store the hundreds of millions of gallons of hog urine and feces produced on-site each year. They rely on dangerous mortality management practices that allow for burial and other risky practices in an incredibly high water table. And they dispose of waste by spreading it, untreated, onto nearby cropland where it is subject to seepage into groundwater or runs off[4] into rivers and streams through above-ground ditches or through the underground tile-drain system that run underneath sprayfields.

[4] Agricultural stormwater runoff is not considered a discharge subject to the Clean Water Act. 40 C.F.R. § 122.23(e).

This waste disposal method has been roundly criticized for decades by experts, academics, scientists, health professionals, and regulators. JA1279-1284. Numerous studies show that the impact from hog operations can be felt well beyond the 100-foot, 1,500-foot, and 2,500-foot buffers established by statute in 1995 for new operations.[5] For example, within 1.5 miles of industrial hog operations residents do not have "beneficial use of [their] property" or "quiet enjoyment of life" including "working outside, growing vegetables, sitting outside, eating outside, gardening, playing, barbecuing, using well water, and open[ing] doors and windows as well as drying laundry." DAVID OSTERBERG, THE IOWA POLICY PROJECT, CAFOS AND THE DIMINISHED DEFENSE OF PUBLIC HEALTH 3 (2017) (discussing several studies in CAFO intensive eastern North Carolina).[6] Children attending schools as far away as three miles from an industrial hog operation have been shown to experience greater respiratory distress. *Id.*

Exposure to pollution from industrial animal operations can lead to devastating public health effects. JA1051-1093, 1279-1284. For example, according a recent study published in the North Carolina Medical Journal,

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[5] JA5061, JA5068; *see also* S. Wing, et al., *Air Pollution and Odor in Communities Near Industrial Swine Operations*, ENVT'L HEALTH PERSP., Oct. 2008, at 1362-1368 (assessing neighbors living within 1.5 miles of industrial swine operations in eastern North Carolina and concluding that "malodor from swine operations is commonly present in these communities and that the odors reported by neighbors are related to objective environmental measurements and interruption of activities of daily life").

[6] https://www.iowapolicyproject.org/2017docs/170322-nuisance.pdf.

residents who live near industrial hog operations have higher death rates from causes such as anemia, kidney disease, tuberculosis, and low birth weight than residents who live farther away from such operations. J. Kravchenko, et al., *Mortality and Health Outcomes in North Carolina Communities Located in Close Proximity to Hog Concentrated Animal Feeding Operations*, 79 N.C. MED. J. 278 (2018). The study also found higher rates of low birth weight and infant hospitalization among residents who live nearer to hog operations. *Id.* The study further determined the impacts to be distinct from any effects caused by other demographic, socioeconomic, or behavioral factors, finding that "[s]outheastern North Carolina communities located in close proximity to industrial swine facilities are characterized by poor indicators of health that are not solely due to the impact of converging demographic, socioeconomic, behavioral, and access-to-care factors, but are also due to the additional impact of multiple industrial hog facilities located in this area." *Id.*

B. Changes in the Hog Industry Led to Consolidation and Catastrophic Harm in the Face of Natural Disasters.

The hog industry in North Carolina changed dramatically in the 1980s and 1990s, as a sharp decrease in the number of producers coincided with an increase in statewide production of hogs. Smaller diversified animal operations gave way to massive ones primarily engaged in swine production. During this period of significant transformation, the industry also regionally concentrated production. In

1982, nearly every county in North Carolina had a commercial hog operation. That year, more than 11,000 swine operations raised around two million animals. JA7035. By 1997, ninety-five percent of hog operations were located in the eastern counties of the coastal plain. Wendee Nicole, *CAFOs and Environmental Justice: The Case of North Carolina*, 121 ENVT'L HEALTH PERSP., June 2013, at A 186.[7] By 1997, there were approximately 2,900 industrial hog operations raising almost ten million hogs. U.S. DEP'T OF AGRIC., 1997 CENSUS OF AGRICULTURE 10.[8] This explosive growth put North Carolina on the map as the second-leading hog producer in the United States. A limited number of producers, like Defendant, accounted for the lion's share of the increased production. *See* BLUE RIBBON STUDY COMMISSION ON AGRICULTURAL WASTE, REPORT TO THE 1995 GENERAL ASSEMBLY OF NORTH CAROLINA, 1996 REG. SESS. 1.[9]

In 1995, in the midst of this explosive growth in the industry, a lagoon at the Oceanview Farms facility failed, spilling 28.5 million gallons of untreated hog waste into a tributary of the New River. J. Burkholder, et al., *Impacts to a Coastal River and Estuary from Rupture of a Large Swine Waste Holding Lagoon*, 26 J. ENVT'L QUAL. 1451, 1452-53 (1997). In the following years, several strong hurricanes swept through coastal North Carolina, leading to numerous lagoon

[7] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3672924/pdf/ehp.121-a182.pdf.
[8] http://usda.mannlib.cornell.edu/usda/AgCensusImages/1997/01/33/1599/Table-01.pdf.
[9] https://ncleg.net/Library/studies/1996/st10736.pdf.

breaches and the spilling of hundreds of millions of gallons of hog waste into waterways throughout eastern North Carolina, devastating nearby communities and natural resources. *See, e.g.*, J.D. Bales, *Effects of Hurricane Floyd Inland Flooding, September-October 1999, on Tributaries to the Pamlico Sound, North Carolina*, ESTUARIES, Oct. 2003, at 1324.[10]

C. The North Carolina Legislature Responds Ineffectively to Changes in the Hog Industry.

Up until the mid-1990s, the North Carolina legislature paid little attention to the hog industry. The Oceanview Farms spill, among other developments, got the attention of the legislature and over the next five years, the legislature and environmental regulators attempted, but ultimately failed, to construct a regulatory scheme that would eliminate the harmful impacts of hog production.

At the time of construction, farms like Kinlaw had to meet minimal setback requirements under the "deemed permitted" regulatory scheme. The state environmental agency did not require permits for these facilities at the time Kinlaw was opened; rather, the facilities were "deemed permitted" by regulation and subject to minimal requirements. *See* BLUE RIBBON COMM'N, *supra*, at 2 ("Historically, animal waste management systems in North Carolina were 'deemed permitted' so long as they were operating without discharging pollutants to surface waters"), 24 ("Under the existing rules, animal waste management systems that

[10] https://www.jstor.org/stable/1353406.

meet the appropriate criteria are 'deemed permitted' and it is not necessary that owners of these systems apply for and obtain an individual permit."); *see also* John D. Burns, *The Eight Million Little Pigs—A Cautionary Tale: Statutory and Regulatory Responses to Concentrated Hog Farming*, 31 WAKE FOREST L. REV. 851, 872-73 (1996) (describing "deemed permitted" system as of 1996). Of those requirements, facilities only had to be 100 feet from waters of the State. *See id.* at 874 (noting that as of 1996, "storage facilities, such as anaerobic lagoons and ponds, must be maintained more than 100 feet from surface waters"). Land application fields needed only be twenty-five feet away from waterways. *See id.* (noting that as of 1996, "[l]and application of wastes must be done on sites having a 'vegetative buffer of at least 25 feet' from surface waters"). The "deemed permitted" rules did not establish any buffers for residences, schools, or other establishments. Tomislav Vukina, et al., *Swine Odor Nuisance: Voluntary Negotiation, Litigation, and Regulation: North Carolina's Experience*, CHOICES, First Quarter 1996, at 28 (explaining that the General Assembly considered a set-back bill to reduce odor concerns for neighbors, that industry argued that the costs from the bill would drive industry away from the State, and that the bill ultimately failed).[11]

[11] https://ageconsearch.umn.edu/bitstream/131956/2/SwinOdor.pdf.

By the end of July 1995, the General Assembly passed new bills which included the Swine Farm Siting Act. *Id.* at 29. But the Kinlaw operation was already under construction and then completed by 1995. *See* JA1987-88. The Swine Farm Siting Act prohibited *new* industrial swine operations from locating within 1,500 feet of an occupied residence; 2,500 feet of any school, hospital or church; or within 100 feet of any property boundary. N.C.S.L. 1995-420, § 106-803. The legislature explicitly recognized that these operations "interfere[d] with the use and enjoyment of adjoining property." *Id.* § 106-801. However, existing facilities were not subject to these new setback requirements. *Id.* § 106-803. These setback requirements thus were enacted too late to apply to the Kinlaw facility, and have since proven inadequate to prevent harm to neighbors, as is documented in numerous peer-reviewed studies showing negative effects on neighbors one mile or more away.

Also in 1995, the North Carolina legislature established the Blue Ribbon Study Commission on Agricultural Waste to study the effect of swine waste on water quality and air quality, and other environmental impacts of industrial animal operations. The Studies Act of 1995, N.C.S.L. 1995-542, Secs. 4.1(1), (3). The Commission was also charged with studying less harmful methods of waste disposal than the lagoon and sprayfield system. *Id.*

The Commission's report was unequivocal, stating that the "exclusive reliance" on the lagoon and sprayfield system "is not prudent." BLUE RIBBON COMM'N, *supra*, at 29. It highlighted complaints from the public related to insects and other troublesome impacts, recognizing then, that the "potential for nuisance conditions [do] exist" from inadequate insect control. *Id.* at 20. The Commission also emphasized the "significance of odor as a nuisance factor associated with intensive swine operations." *Id.* at 16. It recommended that the State require hog facilities to apply for permits to control waste. *Id.* at 25.

In 1996, the legislature directed the state environmental agency to develop a permitting scheme in an attempt to regulate industrial swine operations. Act To Implement the Recommendations of the Blue Ribbon Study Commission, N.C.S.L. 1995-626. DEQ began issuing certificates of coverage under the general permit on January 1, 1997. SENATE BILL 1217 INTERAGENCY GROUP, NINTH SENATE BILL (SB) 1217 INTERAGENCY GROUP GUIDANCE DOCUMENT 7-1 (2009).[12] The legislature made clear that the permitting program was to focus on protection of water quality—and *not* odor—while promoting the need for cleaner, more protective technology. N.C.S.L. 1995-626. In addition, the legislature was clear in its intent to cover industrial hog operations under a *general* permit rather than an *individual* permitting scheme. *Id.* A general permitting scheme allowed the vast

[12] http://www.ncagr.gov/SWC/tech/documents/9th_Guidance_Doc_100109.pdf.

majority of industrial hog operations to be covered under the *same* permit and subject to the *same* conditions; an individual permitting scheme, on the other hand, would have tailored each permit to the conditions at individual facilities.

The current general permit system formed against the backdrop of neighbors and environmental organizations requesting increased setbacks and odor control measures, in addition to groundwater and surface water quality monitoring. JA7500-59. Around the same time, researchers began publishing work documenting the negative effects of this primitive waste disposal method. JA5064. Defendant amici and Defendant participated in the public hearings and submitted comments opposing many of the same safeguards.

The North Carolina legislature adopted the ultimate recommendation of the Blue Ribbon Commission and instituted a moratorium on new and expanded industrial hog operations in 1997. Clean Water Responsibility Act, N.C.S.L. 1997-458, § 1.1.[13] In doing so, the legislature allowed all existing facilities to continue using the primitive lagoon and sprayfield system, including the Kinlaw facility at issue in this case. After extending the moratorium several times, in 2007 the General Assembly adopted a permanent moratorium on new facilities using the primitive lagoon and sprayfield system instead of cleaner technology that is available to the industry. N.C. GEN. STAT. § 143-215.10I(b).

[13] https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/1997-1998/SL1997-458.pdf.

The General Permit has done little to protect neighbors of industrial swine operations or the environment from the adverse impacts of this dirty industry because the standards set by regulation and statute either do not apply to the grandfathered hog farms like Kinlaw, or are so ineffective as to have the effect of no regulation at all.

D. The Hog Industry Fought to Evade Regulation.

While the North Carolina legislature attempted to put safeguards in place to protect communities and the environment from pollution from the hog industry, the industry itself was fighting common-sense safeguards designed to protect North Carolinians from the industry's harmful effects. Too often it has succeeded.

The hog industry successfully pushed to expand its protections under North Carolina's Right to Farm Act. First introduced in 1979, the purpose of the Act is to shield existing farms from nuisance liability when people move into rural areas, or "come to the nuisance." N.C. GEN. STAT. § 106-700. In 1994, a court held that the Act did not shield the owner of an existing turkey farm from liability for nuisance it newly caused *after* the farm "fundamentally change[d]" by converting into an industrial hog operation. *Durham v. Britt*, 451 S.E.2d 1, 3 (N.C. Ct. App. 1994). In response, in 1995 the General Assembly passed a law requiring pre-litigation mediation of all farm nuisance claims. N.C. GEN. STAT. § 7A-38.3. And in 2013, the General Assembly defined "fundamental change" to exclude a change

in the type of product produced. N.C.S.L. 2013-314; *see* N.C. GEN. STAT. § 106-701(a1). This legislative change was amended at the industry's behest expressly to abrogate and overrule *Britt*.

Relatedly, after the General Assembly created the ineffective general permit system, the hog industry sued and established that the State's permit system preempted all local public health regulation of swine facilities. *Craig v. Cty. of Chatham*, 565 S.E.2d 172, 179 (N.C. 2002).

In 2017, the swine industry lobbied for legislation narrowing the type of nuisance damages allowed in suits against agriculture and forestry operations, in direct response to the underlying district court holdings in this case. An Act to Clarify the Remedies Available in Private Nuisance Actions Against Agricultural and Forestry Operations, N.C.S.L. 2017-11.

The following year, the industry successfully lobbied for yet more protections under the Right to Farm Act. This most recent amendment to the Right to Farm Act was passed in direct response to this underlying litigation and overrules the 1985 holding in *Mayes v. Tabor*, 334 S.E.2d 489 (N.C. Ct. App. 1985), had allowed the filing of a nuisance claim more than one year after the establishment of an agricultural operation and more one year after the operation undergoing a fundamental change. *Id.* at 491. The legislation further insulates the industry from liability for harm to neighbors, providing that "[n]o nuisance action

may be filed against an agricultural . . . operation unless . . . [t]he action is filed *within one year* of the establishment of the agricultural . . . operation or *within one year* of the operation undergoing a fundamental change." N.C.S.L. 2018-113 § 106-701(a) (emphasis added).

When a court interprets a statute in a way that protects property rights for neighbors of industrial hog operations, or a locality acts to protect the public health of a community from the impacts of industrial hog operations, the swine industry uses its political influence to take away those protections. The industry has fought protective regulations at every turn. *See* JA7529-7531. Despite pleas from community members and conservation groups for more stringent requirements to protect neighbors of these operations and air and water quality, industry has successfully lobbied state regulators to maintain the status quo, and its influence remains formidable. *Id.*; *see* JA7427-29, 7442-54. Those regulations opposed by the industry are inadequate, as discussed below.

III. The State Does Not Adequately Regulate Industrial Swine Facilities under the General Permit.

A. The State Does Not Enforce Odor Regulations or Protect Air Quality Under the General Permit.

Defendant amici tout the effectiveness of odor minimization by the General Permit. Br. of the Am. Farm Bureau Fed'n, et al. 19, 21, ECF No. 28-1. While the General Permit could provide an effective enforcement mechanism for odor and air

quality, it does not. DEQ staff testified that the agency does not enforce odor regulations or air quality. *Artis v. Murphy-Brown, LLC*, 7:14-CV-00237-BR (E.D.N.C. jury verdict Aug. 3, 2018), Trial Tr. 85:7-86:9, ECF No. 249 [hereinafter "Lawson Testimony"], *appeal docketed*, No. 19-1375 (4th Cir. Apr. 10, 2019). While state law requires every animal waste management plan to include "[a] checklist of potential odor sources," N.C. GEN. STAT. § 143-215.10C(e)(1), the checklist has no legally actionable requirements. The Division of Water Resources—the DEQ division in charge of permitting and General Permit enforcement—would not cite Kinlaw or any other facility for non-compliance with odor regulations because the General Permit lacks any enforceable odor limits and, importantly, the Division does not enforce odor regulations.

B. The State Does Not Regularly Inspect Industrial Swine Facilities.

Defendant amici laud DEQ's cursory annual inspection of industrial swine facilities as evidence of a comprehensive regulatory system. Br. of the Am. Farm Bureau Fed'n, et al. 20, ECF No. 28-1; Br. Amicus Curiae of the N. Am. Meat Inst., et al. 11, ECF No. 30-1. The head of the Animal Feeding Operations program at DEQ, Christina Lawson, testified that facilities could be out of compliance 364 days out of the year and DEQ would never know. Lawson Testimony at 143:21-144:2. The only way the State would know if an industrial swine facility was out of compliance with the General Permit is if the inspector

noticed a violation while on-site, the facility self-reported a violation, or a citizen filed a complaint resulting in an inspection.[14] *Id.*

But DEQ lacks sufficient resources meaningfully to enforce the General Permit through inspections. Extreme budget cuts have reduced enforcement capability for the Department. Will Doran, *As NC Pollution Concerns Grow, So Do Environmental Budget Cuts*, NEWS & OBSERVER (Sept. 23, 2017).[15] For example, in one regional DEQ office three state inspectors are responsible for inspections of 700 to 800 facilities. Lawson Testimony at 104:18-105:21. There simply is not enough time to conduct thorough inspections at all permitted facilities in a given year. *Id.* at 107:7-11. Inspectors sometimes spend less than an hour,[16] and sometimes as little as half an hour at a facility, which is wholly

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[14] In December 2016, N.C. Environmental Justice Network, Waterkeeper, and Cape Fear River Watch filed a contested case in the North Carolina Office of Administrative Hearings challenging DEQ's failure to investigate their complaints regarding swine facilities' violations of the General Permit. *N.C. Envt'l Justice Network v. N.C. Dep't of Envt'l Quality*, 16 EHR 11720, Settlement Agreement, Dec. 15, 2017, https://waterkeeper.org/wp-content/uploads/2017/12/16-EHR-11720-Settlement-Agreement-and-Attachments.pdf. These public interest groups ultimately reached a settlement with DEQ that required the agency to adopt two internal management guidance policies. *Id.* at 2. Still, even with this guidance, DEQ has yet to comply with its terms.

[15] https://www.newsobserver.com/news/politics-government/state-politics/article174769781.html.

[16] *See also* N.C. DEP'T OF ENVT'L QUALITY, ANNUAL REPORT TO THE NORTH CAROLINA GENERAL ASSEMBLY: ANIMAL WASTE MANAGEMENT (2017-18), https://www.ncleg.gov/documentsites/committees/BCCI-6658/Reports/FY%202018-19/DEQ_DWR_Animal_Waste_Management_Annual_Report-2019-01-28.pdf.

insufficient to detect violations given facilities' size. *Id.* at 148:16-151:17. Thus, the annual inspection is hardly robust, "comprehensive, or thoughtful";[17] rather, it is yet another example of how the regulatory system for industrial animal operations fails communities and the environment.

C. The State Knows that the Industry Evades Enforcement Through Report Falsification

Defendant amici also highlight the General Permit's monitoring and reporting mandates as a part of DEQ's efforts to balance the benefits and risks of the lagoon and sprayfield system. Br. Amicus Curiae of the N. Am. Meat Inst., et al. 10, ECF No. 30-1. Again, Defendant amici's arguments fail. In fact, the General Permit relies heavily on self-reporting. *See, e.g.*, General Permit, *supra*, Condition III. Effective self-reporting systems require vigilant government oversight. *See* Avinash Kar, et al., NATURAL RES. DEF. COUNCIL, EFFECTIVE ENVIRONMENTAL COMPLIANCE AND GOVERNANCE: PERSPECTIVES FROM THE NATURAL RESOURCES DEFENSE COUNCIL 27 (2010).[18]

As noted above, DEQ is ill-equipped to conduct this oversight. North Carolina industrial swine operations can and do evade enforcement. Of the ways to evade enforcement, falsification of records is "number one." Lawson Testimony at 110:4-9. DEQ staff testified that falsification of records for lagoon levels and

[17] Br. Amicus Curiae of the N. Am. Meat Inst., et al. 5,6,13, ECF No. 30-1, Br. of the Am. Farm Bureau Fed'n, et al. 19,23, ECF No. 28-1.
[18] https://www.nrdc.org/sites/default/files/int_10051901a.pdf.

records concerning the timing, overall amount, and rate of application of hog has occurred. *Id.* at 110:15-19. Some records had numbers crossed out to make lagoon inflow and outflow look better. *Id.* at 120:1-121:25. Other records showed a decline in the depth of lagoon sludge—which is a cause of odor, *id.* at 123:6-8—year over year, even though no sludge had been removed. *Id.* at 127:25-132:6. Although sludge should always be covered by liquid in waste lagoons, photos of the site in question showed exposed sludge. *Id.* at 133:15-19. Because sludge removal is expensive and margins are slim, *id.* at 124:7-8, there is an incentive to falsify sludge records in particular.

In other cases, DEQ failed to take action despite knowing about missing and falsified spray field records at a facility in Pender County. Lisa Sorg, *Federal hog trial #3: New tactics, nauseating details highlight closing arguments*, NC POL'Y WATCH (Aug. 3, 2018).[19] The State's choice not to enforce the requirements of the General Permit in the face of falsified records further demonstrates the failure of the regulatory system to protect communities and the environment.

D. The State's Lack of Enforcement Forces Action by Citizen Groups

Inadequate freeboard, unpermitted discharges of waste from facilities, and evidence of over-application of waste were the most common violations and deficiencies found when infrequent inspections do occur. N.C. DEP'T OF ENVT'L

[19] http://www.ncpolicywatch.com/2018/08/03/federal-hog-trial-3-new-tactics-nauseating-details-highlight-closing-arguments/.

QUALITY, ANNUAL REPORT TO THE NORTH CAROLINA GENERAL ASSEMBLY: ANIMAL WASTE MANAGEMENT 3 (2017-18).[20] Still, the State brings few enforcement actions. *Id.* at 6. In response to DEQ's failure adequately to investigate and enforce minimal regulations, public interest organizations like Waterkeeper have had to step into the breach.

For instance, DEQ staff testified that the State does not test groundwater for contamination or inspect waste lagoon liners to check for leaks, which cannot be detected visually. Lawson Testimony at 156:21-158:21. To address this lack of enforcement, Waterkeeper filed suit almost two decades ago to address groundwater pollution at several of Smithfield's swine facilities. In 2006, the parties entered a consent decree under which Smithfield agreed to evaluate and mitigate the risks to groundwater from the lagoon and sprayfield system. More than ten years later, Waterkeeper was back in court with Smithfield to enforce to terms of the consent decree, after Smithfield refused to allow an agreed-upon independent groundwater expert to conduct the facility evaluations necessary to develop corrective action plans for pollution. *Waterkeeper Alliance, Inc., et al., v Smithfield Foods*, No. 4:01-CV-27-H (E.D.N.C. Dec. 4, 2017), Order, ECF No. 144. Waterkeeper prevailed and continues to monitor Smithfield's obligation to

[20] https://www.ncleg.gov/documentsites/committees/BCCI-6658/Reports/FY%202018-19/DEQ_DWR_Animal_Waste_Management_Annual_Report-2019-01-28.pdf.

comply with the 2006 consent decree. Without effective regulation and citizen group oversight, hog facilities would cause even greater harm.

CONCLUSION

Primitive lagoons and sprayfields operate so close to homes, churches, and schools that the facilities could not lawfully be built today. Operators easily avoid DEQ's lackluster efforts to ensure compliance with the inadequate General Permit. Currently, the State barely regulates water quality impacts of industrial swine facilities, and does significantly less to control the odors, noise, flies, and negative public health impacts associated with antiquated industry protocol. These largely unregulated practices have given rise to nuisance conditions. Defendants are not excused from nuisance liability or punitive damages, and the determination of each should be left to the jury.

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Dated: May 3, 2019

/s/Chandra Taylor
Chandra Taylor

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I hereby certify that on May 3, 2019, I caused the foregoing to be filed electronically with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/Chandra Taylor
Chandra Taylor

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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