



CleanLaw 57: Hannah Perls Speaks with Naeema Muhammad and Elizabeth Haddix About North Carolina Hog Farm Pollution Impacts on EJ Communities and Legal Challenges to Them – April 22, 2021

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Robin Just: Welcome to Clean Law, from the Environmental and Energy Law Program at Harvard Law School. In this episode, EELP Fellow, Hannah Perls is speaking with Naeema Muhammad of the North Carolina Environmental Justice Network and Elizabeth Haddix of the Lawyers Committee for Civil Rights Under Law.

Robin: This is the second episode in a two-part series in which we look at environmental justice litigation in eastern North Carolina where communities are challenging pervasive air and water pollution from industrial hog operations. We hope you enjoy this podcast.

Hannah Perls: Welcome to another episode of Clean Law. I am Hannah Perls, a legal fellow with the Environmental and Energy Law Program at Harvard Law School. This is the second episode in our two-part series on environmental justice litigation in North Carolina.

Hannah: Today, I will be speaking with our returning guest, Naeema Muhammad. She is a lifelong activist and the organizing co-director of the North Carolina Environmental Justice Network where she's worked for the past two decades, leading statewide campaigns and supporting grassroots efforts for environmental and social justice.

Hannah: We're also joined by Elizabeth Haddix who is a managing attorney with the Lawyers Committee for Civil Rights Under Law. She previously was the senior staff attorney at the University of North Carolina Center for Civil Rights where she led the center's environmental justice docket from 2010 until 2017, when the UNC eliminated the center's ability to represent clients. After that, Elizabeth and the center's only other staff attorney, Mark Dorosin, formed the Julius Chamber Center for Civil Rights and continued to represent all of their clients. In 2019, the Chamber Center became the Lawyers Committee's only regional office.

Hannah: As a quick recap for our listeners, in our last episode we spoke with Naeema and Earth Justice Attorney Alexis Andiman about a complaint that they filed under EPA's Title Six regulations against the North Carolina Department of Environmental Quality after the department had reissued a general permit for the



continued operation of otherwise banned waste-management technologies at over 2000 industrial hog farms largely in eastern North Carolina.

Hannah: If you haven't listened to that episode yet, I first strongly encourage you to go back and check it out. In that episode, you'll get an excellent overview of these waste management systems called lagoon and spray field systems that are being used at these industrial hog facilities and the severe air and water pollution that is impacting nearby communities, which are majority Black, Latinx and Indigenous.

Hannah: You'll also get a great overview to the state constitutional lawsuit that we'll be discussing in today's episode which challenges two amendments to the North Carolina Farm Act that effectively shield agricultural and forestry operations in the state from almost all common law nuisance actions.

Hannah: Before we dig into that lawsuit, I should first mention that Elizabeth, you and your colleague Mark Dorosin also served as co-counsel on the Title Six case that we discussed in the last episode and you and Naeema have known each other now for several decades. How did you two first meet?

Elizabeth Haddix: Oh, wow. We probably met in Rocky Mountain at Black Workers For Justice at the worker's center back in the '90s.

Naeema Muhammad: Elizabeth, at the time we met, I've been trying to remember that, were you one of the Student Rural Health Coalition members?

Elizabeth: I sure was. Yeah. Yeah.

Naeema: Yeah. That's how we first met because we had these free clinics. There were five free clinics spread out throughout eastern North Carolina in five different communities. Elizabeth along with some other student body members from some of the universities here in North Carolina formed what was called the Student Rural Health Coalition. Under the Student Rural Health Coalition, they recruited doctors for the clinic and so they were recruiting in doctors and then doctors would come out and volunteer their time once a month at any one of the five clinics. The clinics were designed and setup in communities that had very little access to medical care and very little transportation. Even if they had the ability to have a doctor, they didn't have the transportation to get there.

Naeema: The clinics were formed in order to provide medical attention that community members needed. They were able to go into the clinics on whatever their designated Saturday was and they could get their blood pressure checked, their sugar checked, all the little things and then they could get prescriptions written there as well. Then we also had a relationship with one of the drug stores who had agreed to fill those prescriptions at a discount cost for the community



members and so that gave people the access that they were lacking otherwise to take care of their medical needs. If they had ongoing issues, they could still be seen there and they could be recommended out to where to go next and then we would provide a way for people to get there, somebody could help transport people.

Naeema: That's how Elizabeth and I first met. I always say we were both young then. I was just a step above a teenager and now I'm a great-grandmother. We've been knowing each other a long time.

Elizabeth: Yeah. I was a college student at Duke. I had grown up in Mississippi and then went to Duke and that's where I got connected with the Student Rural Health Coalition and spending time out in eastern North Carolina reminded me a lot of where I grew up but it also galvanized my political consciousness and my understanding of racial injustice and white privilege.

Elizabeth: Naeema and her husband Saladin were two of my most important teachers out there. Naeema was busy raising children so she and I didn't get that much time together but Saladin really was the person who convinced me to go to law school. These are two very important people for me.

Naeema: I would say this, the one important thing that most people missed in these relationships is the only way Saladin was able to do what he was doing was because I took on the role of making sure our family was taken care of. Without me agreeing, he would not have been able to do all the stuff that he did. I always put that in because that's something that gets overlooked but it's a key role to any movement because our families have to be taken care of in whatever kind of battle we're waging.

Hannah: I love that story because I think it highlights, one, that both of y'all have been working at this really crucial intersection of health, environmental health, civil rights, social justice, but also very grounded, workers rights, racial justice for sure, and also none of that work could exist without understanding the relationships that exist and need to be fostered simultaneously.

Hannah: There's obviously a huge history between when y'all first met and the case that we're going to talk about today but before we get to that case, I wanted to provide a little extra background and we're now getting into these industrial hog farms and the impacts that Naeema, you, and Alexis and I talked about in our last episode.

Hannah: There was a series of nuisance lawsuits and, again, these were suits that were run through the Environmental Justice Network, Naeema, the organization that you help run, and they provided sort of a key predictor of these amendments. Before



we get into what those amendments actually are and what they do, I was wondering if you could give a little background on what these nuisance lawsuits were and why they matter.

Naeema: Okay. The nuisance lawsuit is called for anybody that might want to look it up, it's called the Hog Nuisance Lawsuit. Hog like H-O-G. Hog Nuisance Lawsuits. Those lawsuits were filed by 500 citizens in eastern North Carolina that were living near these industrialized hogs. They were able to file the lawsuit because of all of the exposure they had experienced over nearly two decades of exposure to industrialized agriculture, as they call it.

Naeema: Some of the things that people were experiencing, they had been repeating over and over and over into the state. When I say the state, to the Department of Environmental Quality, to the elected officials in our general assembly, to the industry itself, who was constantly denying what people were saying and saying that people were lying and making this stuff up when they said they were getting headaches, having runny nose and burning eyes, nausea, literally throwing up, not able to open their doors and windows any time they wanted to, not able to sit out on their porches at any time they chose to sit out there, not being able to use their clotheslines anymore because they'd put the clothes out and then odor would get into their clothes and they'd have to redo their laundry, being forced as a result of that to either buy a washer and dryer or go to a laundry mat, and then being forced off of their wells where they could have just walked outside and got water and now they're having to buy bottled water and to do the things that they need to do.

Naeema: One lady got a certified letter telling her not to drink her water, not to wash with it, not to bathe with it, not to cook with it and then she had animals - even don't let her animals drink the water. It was all of these things that created nuisances for the community members and loss of use of their property and devaluing of their quality of life, people just being made to feel like prisoners in their own home, not being able to just freely walk outside but being forced to feel like they had to negotiate with the air. As they put it, they said, "I feel like I have to negotiate with the air. I got to crack my door open just a little bit to see whether or not it's stinking outside. If it's not then I rush out to do what I have to do so I can get back in before the odor comes because when the odor comes, you do not want to be outside."

Naeema: Children getting off school buses running home versus walking because of the odors. High rates of asthma amongst children, higher rates than children living further out, like maybe five miles out, and children being on more asthma medication, missing more time out of school. We found a lot of elevated blood pressures in people living near these operations, as well as a lot of stress and anger from having to live like that.



Naeema: These were all nuisances that were documented through research and health studies that looked at the health impacts of living near industrialized hog operations. These things were documented and this information was given to the community members so they could use it to talk about what was happening to them and to have the scientific evidence that they needed to keep these people from continuing to calling them liars, even with the research they still tried to call them liars.

Naeema: The documentation was there and you couldn't change that documentation. Those were the things that created the nuisance lawsuit.

Elizabeth: Yeah. The nuisance lawsuits, interestingly, were filed around the same time that we filed the Title Six complaint. The timing of all this is critical to the story I think.

Hannah: Absolutely. Naeema, what you were saying too and we'll touch on this later, but when we're talking about what's covered under these nuisance claims, it wasn't just the depreciation of the value of these homes but it was also the severe reductions in quality of life, the deprivation of the opportunity to develop these properties, the physical and mental discomfort, the fear of disease, adverse health effects, and then, of course, just the odors and the buzzards and the traffic. There's a whole host of impacts that are being captured in these suits.

Elizabeth: Importantly, the diminution of value of the homes was not included in the suits. That was the one type of damages that all of those 500 plus, it was close to 600, and almost all of them Black, residents in eastern North Carolina that filed these suits against Smithfield, that's the one type of damages that they waived.

Elizabeth: The reason they did that, and Naeema knows this better than anybody, is that their homes had already been rendered pretty valueless in terms of money. They mean a lot to the people that live in them, right? They're old homesteads. They're old family land. Generations of African Americans been there since slavery, a lot of them. They have elders buried on their homeland but the value of their homes has been so greatly reduced over the last several decades because these swine operations are right in their backyards and the stench and all the things that Naeema just talked about make it so anybody with money is not going to buy that property, is not going to live in that.

Elizabeth: That was the one type of damages that they waived and then that was exactly the type, this legislation that we're challenging with this lawsuit, says that that is the only type of damages that you're entitled to, you can only get diminution of value of your property. You can't get all the damages that anybody else who succeeds in a nuisance claim gets, which is the loss of your use and enjoyment of your property.



- Naeema: Yeah. I remember one man telling us that he had two homes in the county and he wanted to sell so he got an appraiser to come in and they came in and at the end of their evaluation, they told him he might as well give it away because he would never be able to sell it because of all the things that we're talking about.
- Hannah: I wanted to pull out two things, Elizabeth, you had clarified that these nuisance suits were against Smithfield Foods, the hog conglomerate, and so I just wanted to clarify. These weren't against local farmers necessarily. This was against Smithfield, the corporation?
- Elizabeth: That's right.
- Naeema: Correct. Then Smithfield and Murphy Brown LLC and Murphy Brown was one of the largest hog growers in North Carolina prior to Smithfield coming to town. Then they all teamed up together. Smithfield has spent a lot of money and time convincing those contract growers that this lawsuits are against them and not against Smithfield. They've been able to pretty much convince them that the lawsuits were filed against them and even though the evidence is there showing otherwise, I just can't wrap my mind around how they fall for this stuff with all the evidence that's out there stating otherwise. I can guess it's probably about like the Willie Lynch Syndrome. You believe so much in what these folks say, or you want to believe that they're being honest with you, until you just buy anything, fall for anything.
- Hannah: This is an incredibly powerful and pervasive industry in North Carolina. For listeners who might not be from this area, I think having this picture painted is so helpful to understand who are the main actors and what are their influences and what are their roles in this case.
- Hannah: Elizabeth, you had also mentioned it's just important to understand the timeline leading up to the passage of these amendments and I wanted to flag one other thing that happened in 2017 around the time that the first of these two amendments was passed. Elizabeth, you had been working with the University of North Carolina Center for Civil Rights but then in September of that year, the UNC board of governors voted to ban the center from engaging in advocacy or acting as legal counsel to any third-party.
- Hannah: The argument was that the center had been illegally representing clients for 15 years but the state bar had never questioned the center's practice up until 2017. Can you talk just a little bit about what that decision meant for you and how you and your clients responded to this abrupt end of the center's practice?
- Elizabeth: Yeah. Naeema mentioned Murphy Brown. Murphy Brown is the pork production subsidiary of Smithfield Foods and the Murphy comes from Wendell Murphy, who



was the genesis of using these confined animal feeding operations, these large concrete, enclosed barns with crates to raise pork the way poultry was beginning to be raised in the early '90s, late '80s. That's to crowd them into these buildings and keep them in buildings for these segments of their lives and grow them to then be processed.

Elizabeth: Murphy Brown is in charge of this. Wendell Murphy's relative Wendy Murphy was on the UNC board of governors, which is the governing body for UNC. They began in 2013, actually around the same time that all of the Title Six complaint was filed with the EPA, and when we had already been representing a lot of communities in eastern North Carolina on these issues.

Elizabeth: They did start pursuing the Center for Civil Rights, Julius Chambers was our director, at UNC and he died in 2013 and soon after that, the board of governors began interrogating us about our work and recommending exerting scrutiny over our operations.

Elizabeth: That went on for several years and then culminated in 2017 with this resolution to end our ability to represent clients. We were representing a number of Black communities across eastern North Carolina but also in other parts of the state on issues of education, access to quality public schools, access to all of the benefits of being part of a municipality, so we represented communities that had been drawn out of the city limits so that they wouldn't be able to be on the town council or receive trash pickup or other benefits of being part of a municipality.

Elizabeth: We had been successful, not so much ... A lot of our work wasn't actually litigation. It was supporting communities early on at these early decision points in front of planning boards and giving them materials and information to advocate for themselves and acting in a background capacity for them to help them fight back against systemic racism.

Elizabeth: All of that was working well for people and I think that's what motivated this faction of the board of governors to shut us down. They actually solicited a statement from the Pork Council about the situation that the Pork Council encountered when we would not allow them into the mediation in the Title Six complaint, which I'm sure Naeema mentioned to you on the podcast with Alexis.

Elizabeth: It was clear to us by 2017 that this part of our environmental justice docket had gotten the attention of very powerful people in the hog industry and we firmly believe that and have good reason to believe that that had a lot to do with why they shut us down.

Elizabeth: In answer to your question, it only emboldened us. It freed us to do this work in a way that is much more effective because we didn't have to keep a ... We had to



turn down a lot of cases when we were at UNC because the new dean, who was hired after Jack Boger retired in 2016, was very pro-business and pro-industry and felt that we were threatening the university's access to financial resources, both from the state and from pro-industry donors.

Elizabeth: You know, I think there was just a perfect storm of events that kept both our work from being as effective as it could have been while we were at UNC but then also resulted in us getting fired by the law school in 2017.

Elizabeth: No, all of our clients came with us, asked us, "Please keep working for us" and so we opened up the Julius Chamber Center and worked out of my living room for a year and had a lot of fun. Our clients are just so amazing. All of the other lawyers and law students that we work with ... We continue to work with law students from all of the area law schools, and now that we're with Lawyers Committee for Civil Rights, we have access to a whole big staff of brilliant lawyers, young and old, people of color, all the committees there, we're in the minority in terms of race as staff attorneys for Lawyers Committee for Civil Rights.

Elizabeth: We've wanted that for a long time because our clients are mostly people of color and being a white person representing low wealth communities of color, it's not ideal. You want to be able to really fully represent in every way that you can, the people that you serve. We're happy to be with Lawyers Committee. Our work has expanded. I think it's become much more effective. Yeah. All's well that ends well.

Hannah: In terms of where it's ended, this history brings us to these amendments that are the focus in many ways of this episode. It's so important to have the narrative history in terms of how we got to this point, both the nuisance lawsuits, Title Six, what you went through at UNC, and, of course, all this time, organizations like the Environmental Justice Network have been behind the scenes, as you said, at these administrative hearings.

Hannah: We talked a lot about that activity in our last episode. For our listeners, we're now up to 2017. In 2017 and 2018, the North Carolina legislature passed these two amendments to the state's Farm Act. This was House Bill 467, senate bill 711. Something noteworthy about these amendments is both were actually vetoed by North Carolina's Governor Roy Cooper and the legislature successfully overrode that veto in both cases.

Hannah: There was a quote from the governor when he vetoed SB711 that I thought was good encapsulation of what are the main issues in this case? The governor said, "While agriculture is vital to North Carolina's economy, so property rights are vital to people's homes and other businesses. North Carolina's nuisance laws can help allow generations of families to enjoy their homes and land without fear for their health and safety. Our laws must balance the needs of businesses versus property



rights. Giving one industry special treatment at the expense of its neighbors is unfair."

Hannah: Now we're going to really dig into the particulars of what these amendments actually do. We'd already mentioned that one of these bills, HB467, effectively, capped the amount of compensatory damages that residents can get out of nuisance lawsuits at the fair market value of their property, which at this point as a result of these industrial hog operations is extremely low and all those other health impacts, the use and enjoyment of that property, those can no longer be brought against these industrial agriculture and forestry operations.

Hannah: But then SB711 went further. That was the House bill passed in 2017. SB711 was passed in 2018. Elizabeth, can you spell out a little bit, Naeema too, what is in SB711? How did it add to that compensatory damages cap that was in the House bill?

Elizabeth: Yeah. Let me correct you too on House Bill 467 because it's not that it's a cap limited to the value of the property. It's that you cannot get any other type of damages other than the loss of market value to the property caused by the nuisance. You've got to show that ... The plaintiff, the resident, person who is suffering the nuisance, has to show that they've tried to sell their land or they've tried to rent their property and they have to show that they either have a lower value than the first time they tried to sell it before there was the nuisance and that diminution of value is what they're entitled to, if they can show it. Right?

Elizabeth: It's a much tighter gauntlet than just the value of their property. It's showing that difference in value, that change in value. That's not even a reality for Elsie Harry or Violet Branch. These are not people who are selling their property anyway. They grew up there. They want to die there.

Elizabeth: That happened ... At the end of 2016, the plaintiffs in those nuisance suits stipulated in federal court that they're waiving only that type of compensatory damages, the loss of market value. In early 2017, Smithfield managed to dismiss the claims and the court denies their motion. The court finds that they're entitled to all the damages that any other plaintiff in a nuisance action would be entitled to and that's the indirect or consequential damages, the natural and probably effect of the nuisance, like the loss of your ability to enjoy sitting on your front porch or hanging your laundry out on the line.

Elizabeth: The court said, "No. They get all these damages." The very next thing that happens, April 26th, 2017, the House Bill 467 bill passes and it makes it that those are the only types of damages you can get. May 5th, the governor vetoes it. The GOP majority legislature overrides the veto and that HB467 becomes law on May 11th.



- Naeema: Just before you move to the jury piece, on 467, I think it's important to say that when that bill was written, it was sponsored by a legislator that is the legislative representative to constituents that live in the top two hog-producing counties in the country. That's Duplin County and Sampson County. Duplin County, being number one, has more hogs than any other county in the country and then the neighboring county, Sampson County, is number two to hog production in the country I mean.
- Elizabeth: That's right. Then Jimmy Dixon was the sponsor and he's Smithfield's agent in the legislature.
- Naeema: Yes. Yes. The legislators called him out on that during his reading of the bill because we got community members up to Raleigh to be in the hearing of the bill and to give their own personal testimony on what was happening to them and their homes as a result of this industry being in their communities.
- Naeema: He also included or tried to include a retroactive statement in the passing of House Bill 467 that would have stated that the current nuisance cases would no longer be able to go forward in court because they were attached to 467, which was cutting off people's ability to sue for punitive damages. The legislators saw through that and they called him out on that and said, "You're doing the industry's dirty business. We're not going along with that."
- Elizabeth: Right. 467 didn't affect punitive damages. It was just restricting the compensatory damages. Naeema is right. Dixon and then Representative Davis, co-sponsors of this bill, and Davis says on the legislature floor, on the floor of the House judiciary committee where the bill is being debated, he says, what the judge did in those cases allowing them to go forward is the genesis of why we are here tonight. That is a direct quote. "These 26 cases represent 541 plaintiffs, a motion to dismiss was filed, and what Judge Britt did on that motion is the genesis of why we are here tonight."
- Elizabeth: This kind of testimony from legislators supporting this bill on the floor, the record is replete with it. I mean, there's just tons of quotes. You have the governor vetoing it on May 5th.
- Elizabeth: The next thing that happens is in 2018, in April, when the first jury comes back with a \$50.75 million verdict against Smithfield and three weeks later Senator Brent Jackson, again, another recipient of Smithfield campaign funds, introduces Senate Bill 711. He says, and this is a quote, "Our goal is to ensure that all farming operations are protected from frivolous lawsuits. Due to recent judicial rulings, it has become blatantly obvious that the legislature must take action to clarify our intentions and correct these misguided rulings."



- Elizabeth: What Senate Bill 711 does is it eliminates the ability to sue a hog operation for nuisance. There is no hog operation based on what that legislation does that can be a defendant in a nuisance suit and it greatly restricts the nuisance remedy as to all other agricultural and forestry operations.
- Elizabeth: Naeema is right. There were some legislators who spoke vehemently against these bills for that reason. They said Senator Blust was heard on the floor saying we can't do this, we can't make a decision for a judge with legislation, we can't protect one industry at the expense of all these people.
- Elizabeth: The interesting thing about Senate Bill 711 is that in the whereas clauses of the bill, right there in the bill, which Senator Jackson read into the record on June 11th on the Senate Floor, it states that the federal trial court incorrectly and narrowly interpreted North Carolina's Right to Farm Act in a way that contradicts the intent of the general assembly and effectively renders the act toothless in offering meaningful protection to long established North Carolina farms and forestry operations.
- Elizabeth: Once again, regrettably, the whereas clause says the general assembly is against forced to make plaintiff's intent that existing farms and forestry operations that are operating in good faith be shielded from nuisance lawsuits filed long after the operations become established.
- Elizabeth: It's plain in the text of the bill for Senate Bill 711 and in the legislative record of both bills, that these bills were absolutely targeted at the nuisance lawsuits filed against Smithfield that they are meant to shield Smithfield, which is synonymous with hog industry, from being held accountable for the burdens that they place on neighboring residents.
- Elizabeth: What the legislature knew or should have known at that time, what the state knew from the Title Six complaint, is that these hog operations have a racially discriminatory impact on Native Americans, Latinx people, and African Americans in our state. They disproportionately affect those populations who are already vulnerable to environmental injustice.
- Elizabeth: Although, our challenge to these amendments ... There's no race claim in our challenge. They're based on other provisions of North Carolina's constitution but certainly the effect of this industry is not felt equally among all of North Carolina's residents.
- Hannah: I definitely want to get into what is in this claim and sort of the strategy behind making a facial constitutional challenge, right? Title Six was about highlighting the disparate impacts that these activities have on the communities you mentioned



but this is a straightforward, what you've done violates the provisions of our state constitution.

Hannah: We talked a bit about the special nature that's evidenced by the legislative history that you talked about and so I was wondering if you could speak a little bit to some of the arguments that you make in this complaint and then we'll get into how the state and the intervening Farm Bureau have tried to respond. I wanted to quickly spell out for our listeners what these claims are and then hear more from you on how they relate to the state constitutional protections and the way you all argue they should be interpreted.

Hannah: First, pointing to the restrictions on what kinds of claims folks can bring, what kind of nuisance claims folks can bring against these industrial hog operations. You argue that they unlawfully restrict the fundamental right to property and that's in violation of the state's police power. You also point to the fact that by narrowing what kind of damages can be awarded in these nuisance cases, that this violates the constitutionally protected right to a jury to determine compensatory damages in these nuisance actions. Then, again, the special legislation idea that these laws, these amendments violate the constitutional limit on the legislature's power to pass special laws or laws created for the special benefit of a certain group or the detriment of a discrete class of people.

Hannah: I especially want to focus on the idea that these restrictions violate the fundamental right to property, exceeding the scope of the state's police power, and we can dig a little bit more into what's in Senate Bill 711 in terms of the half-mile radius, the one year limitation, the idea that you can't get punitive damages unless a farm operator has a criminal conviction or a civil violation. Can you talk a bit about how those violate fundamental property rights according to your complaint?

Elizabeth: Yeah. There's claims under three provisions of the constitution and the special laws claim is really about the test that applies to determine whether it's a special law, ie, that it's not a general law that affects everybody equally, but a special law meant to protect a particular industry or related to a particular case.

Elizabeth: The due process claim, which is really the one you're talking about when you say affecting the fundamental right to property, is the substantive due process claim under article one, section 19 of our constitution. That really requires the court to determine as a matter of law, and this is why we filed a motion for summary judgment with the court because since this is a facial challenge, there's no facts to dispute here. It can be decided on its face, on the plain language of the law and what it does and on the legislative history.



Elizabeth: It asks the court to determine whether these amendments are a reasonable exercise of the state's police power. Under North Carolina law, that reasonableness determination has two parts. The second part has two prongs. The court has to first ask whether the object of the legislation is within the scope of the police power, whether the purpose of this legislation is consistent with the police power of the general assembly.

Elizabeth: The second question is considering all the surrounding circumstances and the particular facts in this case, are the means by which the government chose to regulate reasonable? That's where you get into the specific terms of Senate Bill 711. You can't file a nuisance claim against an agricultural or forestry operation unless you live within a half mile of the source of the nuisance. You file your claim within a year, not of the beginning of the nuisance, but within a year of the establishment of the operation causing the nuisance. That establishment is not, again, when the operation started producing a nuisance, it's when that farm became a farm. Even if it was a farm growing row crops, not hogs or chickens.

Elizabeth: Many of these farms, all of the hog operations, were hog operations more than a year before this law was passed. They had to have been because they were all started before the ban on the lagoon and spray field system happened in the late '90s and it was made permanent in 2007. All hog operations are immune from suit because of that one year statute of repose is what it is in legal terms.

Elizabeth: There's other more weedy provisions of Senate Bill 711 but those two are really the ones that cut out the ability to sue hog operations. When a whole section of the industry is treated differently under this legislation compared to other ag and forestry operations, as the hog industry is, that is proof that you've violated the special laws section provisions that we talk about. The two are interrelated.

Elizabeth: I think the important thing about the due process claim is that even if the court could somehow find that completely immunizing all industrial hog operations from nuisance liability was somehow necessary to protect the public health safety or welfare, and remember that is under any due process consideration, that protection of the public health, safety or welfare is the legitimate exercise of the state's police power. To be legitimate exercise of the state's police power, it must protect the public health safety or welfare.

Elizabeth: There's established law for a long many number of years that if the state is going to infringe on your private property rights, it can only do so where it's necessary to protect the public health safety or welfare. Even if the court found that immunizing the hog industry from nuisance was necessary to protect the public's health, safety, or welfare, it would still have to answer the second part of the test, which is considering all the circumstances and particular facts of this case, is the means reasonable?



- Elizabeth: The reasonableness inquiry asks is the statute in its application necessary to promote the accomplishment of a public good and is the interference with the owner's right to use his property reasonable in degree?
- Elizabeth: You would have to answer yes to both of those questions. The court would have to decide that completely insulating the hog industry from liability for nuisance, unlike any other industry in the state, every other industry and every other defendant in a nuisance action, is held accountable for the harm they've caused their neighbors through the common law nuisance remedy. Only the hog industry would be insulated completely from nuisance.
- Elizabeth: With an industry that is as wealthy and profitable ... I mean, the \$6 billion hog industry, and we agree, it's an important industry in North Carolina, it's a significant part of the economy, but how is that justification to insulate them from nuisance? They could have paid and this was established in the nuisance actions and the Fourth Circuit affirmed it, Fourth Circuit Court of Appeals affirmed it back in October, that Smithfield could have covered the cost of eliminating a large part of the nuisance, the stench, the buzzards, the flies, the trucks with the waste flowing off of them, they could have remedied all of that for relatively little money. It would cost them less to convert all of their lagoon and spray fields to a sustainable system of waste disposal, it would cost them much less to do that than what they've had to pay out in these nuisance actions.
- Elizabeth: Instead of doing that, instead of doing what they promised in 2000, in the Smithfield agreement to do, which is to phase out this archaic system of waste disposal, instead they get Dixon and Davis and Jackson in the legislature to eliminate people's ability to sue for nuisance. That is an abuse of the state's power. That is an abuse of the police power. They've gone too far and that's why we filed. That's why North Carolina Environmental Justice Network and its allied organizations filed this challenge to these laws.
- Hannah: I wanted to pull out too, Elizabeth, you pointed to this in terms of how the state has responded, both in the statute and then in their briefs, but there are these overarching arguments in terms of what is in the best interest of the state and why is the legislature justified in narrowing the nuisance remedy in this way.
- Hannah: The arguments that they make and I'm paraphrasing here, but the idea that North Carolina's hog farms are already heavily regulated and that these private nuisance lawsuits threaten to jeopardize the hog industry and I think really pulling out the state's small farmers, these arguments aren't just being made in court. They're being made in public. They were first tested in the public push to pass these amendments.



Hannah: Naeema, this is more a question for you but how do you see these arguments playing out, especially in the communities that the Environmental Justice Network represents? Is there consensus that these amendments are beneficial or harmful to residents? How are folks reacting both to the amendments and to this lawsuit?

Naeema: Well, I think those that are aware are definitely not finding it too friendly. There's still a lot of education to be done in these communities because as long as we've been fighting this battle, we still have a large number of people that's not fully aware of the concerns and issues that's going on. Through no fault of ours.

Naeema: At any rate, there's still a lot to be done but community members are really up in arms over this entire process from the Title Six to the nuisance cases because of the way our elected officials have voted, they've decided to take, and the fact that Elizabeth and Mark ... I'm still pissed off that they were terminated from the Civil Rights Law Center, even though they are better off now but they were doing a fantastic job representing communities and the pork industry got pissed off because we would not allow them to come sit in in the mediation, that they had no role in, because the mediation was about the lack of regulations and not about anything that the company and the industry ... Nothing that was tied to how they were operating their business as much as it was that the regulations were not doing what they needed to do to protect the people in North Carolina.

Naeema: The Title Six case, the pork industry were not a party to that Title Six. It was between the community members that filed the Title Six, and the Department of Environmental Quality who is the regulating agency in the state, and our concern was we felt their regulations were not strong enough and they lacked the will to rein in this industry to do it better than they were doing by the people in North Carolina.

Naeema: They want the city and on the mediation we had already told them they couldn't and they were going to show up anyway and we refused to let them in. Then when Elizabeth went out there and just told them to get out of the building, that really pissed them off. That's why they went to the board of governors to get them terminated. I call them the kick butt lawyers ... I'm trying to remember how that saying goes. They were kicking butt and taking names.

Hannah: That was actually going to be one of my last questions. I wanted to get back to this idea of what makes a kick butt lawyer. I love that you brought that up.

Naeema: They be kicking butts and taking names.

Hannah: Yeah.



- Elizabeth: Not literally. I don't think I've ever kicked anyone in the butt.
- Hannah: That might be grounds for disbarment. In terms of our audience at Clean Law and the students and the professionals who are largely engaged in environmental law issues, I think there's a renewed enthusiasm to engage or partner with communities on EJ issues and this is obviously an emblematic case of that.
- Hannah: As with any specialized field, EJ lawyering requires a unique set of skills and expertise that might not necessarily translate from one area to another and since you both are veterans in this field, you've been doing this work for decades, I was hoping you could talk a little bit about not just what makes a good attorney but what makes a good environmental justice or community-based attorney. That's all code for a kick butt lawyer. If you could talk a little bit about what qualities are essential if folks want to practice in this field.
- Naeema: Well, I'll start with that one because the thing that I always remember, that I always think about is that every time we've ever had to call them to a community, one of the first conversations we had with the community is these are the lawyers, they can go into the courts and do A, B, C, and D but nothing replaces community organizing.
- Naeema: The lawyers, it's important that they remember they can fight all the battles they want but if the community don't show up in the court room, in the board room, and wherever else they need to show up, the legal battles could be useless. We have to always put the community in the forefront of any kind of battle we wage with these industries. It's very important to remember that without the power of the people, some of these legal battles wouldn't be won either. Most of them wouldn't be won if the people didn't show up. It's critical that we always keep the community in the forefront of any work that we are doing.
- Naeema: That's just my opinion and somebody else might feel different about it but that's one conversation that I want to make sure we have with communities while the lawyers are present in the room is that the community is in the lead here and and so they will be directing and calling the shots and the lawyers job is to listen and help the community understand how to apply the law and why it would be necessary or reasonable to show up to try to take it into a court room somewhere or just to take it from a community-based struggle into a legal struggle.
- Elizabeth: Yeah. I would just add, the thing about environmental law is very different from environmental justice law. The strongest combination is to have civil rights lawyers like us, like me and Mark, working with environmental lawyers, which we do often, Southern Environmental Law Center, Earth Justice, we've worked with groups that have expertise in environmental law, expertise under the Clean Air Act, the Clean Water Act, but those acts and I know just about enough of them to



know that they don't go far enough, they don't protect our communities or anyone enough. Either because they don't have standards on certain contaminants or pollutants or the standards are such that they still leave people exposed to pollution.

Elizabeth: What the difference is is that as civil rights lawyers, we're used to pushing the rock up the hill. We don't make decisions about cases because we can't win this or it's going to be too hard to win this. A lot of the cases that Mark and I have taken on in the two decades we've been working on these things together is they're very difficult cases to win, very difficult to win, but what we have learned from our clients is that the victory doesn't always come from the judge. The victory can come from telling the story, the victory can come from shining a light on injustice and systemic racism and how the law can be complicit with all of that and perpetuating it.

Elizabeth: Of course, we thoroughly research and do our due diligence and we don't file anything without knowing all that we can about why we should win under precedent and the statutes and so forth. We don't do what I've witnessed a lot of our wonderful colleagues in the environmental realm do, which is to not take on a case because it's just too big a stretch.

Elizabeth: This is how Thurgood Marshall and Charles Hamilton Houston, this is how our mentors before us, Julius Chambers, this is how they changed the law, this is how they made the 14th Amendments speak and the 1st Amendment and the Fourth Amendment and the equal protection clause and the due process rights. They pushed where no one else had gone before.

Elizabeth: Mark and I are not afraid to do that. A big reason we're not afraid to do that is because we have clients like Naeema and North Carolina Environmental Justice Network and the communities that they represent with us and pushing us to think outside the box and to stand up where no one else will stand up. It's been a great joy and pleasure to do that and I look forward to many more years of doing it with Naeema.

Naeema: Yeah. We have a lot ... We've been having a lot of fun.. I always tell people I think I have more fun than anybody doing this work. It's just a real joy. The real joy is in seeing people change their minds. Having a community call us and you go and they thought there's nothing we can do, this is bigger than us, and these people got all this money and they can just do what they want to do and then we can get them the information that they need to see a different picture to see the picture that says, "Well, if I do A, B, C, and D I can make this look different."

Naeema: Then we get the information and we go through the educational process, we talk it out, we talk it through, we hear from them, they hear from us, and then we put



all that together and they come out saying, "Well, I can do this" and then they go to work and when they get done, when they win, that's when the joy is just overwhelming and people be feeling like, "I've made a difference. I've really made a difference." Then they don't feel so powerless anymore. Then they're ready for you when you come again.

Hannah: I think that's as good a note to end on. Is there anything that either of you want to mention before we wrap up?

Naeema: I just would like to thank everybody that may hear this for listening and taking the time to listen and to feel free to visit our website, the North Carolina Environmental Justice Network.org or the Lawyers Committee. If you feel like lending us some support, we don't mind you doing that either. Thank you. Thank you, Hannah and Robin for the help and for getting us on and being able to do this because I tell everybody I am technologically challenged. I really appreciate you all helping me to be able to get this done. Thanks so much.

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