

STUDENT ARTICLES

PUSHING NEPA'S BOUNDARIES: USING NEPA TO IMPROVE THE RELATIONSHIP BETWEEN ANIMAL LAW AND ENVIRONMENTAL LAW

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INTRODUCTION

A relatively recent addition to the legal world, animal law has grown rapidly during its thirty year existence. Originally a small field populated by lawyers somewhat on the profession's fringe, animal law has gradually expanded to reach new issues while it has gained credibility among practitioners and scholars. This note addresses the possibility of expanding animal law further, using existing environmental statutes.

Animal and environmental law are already closely related. Lawyers from both fields address culturally and politically similar areas of the law; many animal welfare lawyers begin their careers as environmental lawyers; and concerns in one field are often connected to concerns in the other. Lawyers and activists from the two fields do not coordinate as much as they could, however, and political and philosophical disagreements often actually pit lawyers from the two fields against each other. This lack of coordination limits and delegitimizes animal law; it also stifles possibilities for mutual gain through coordination between animal law and environmental law.

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Part I of this note gives a brief history of the development of animal law and discusses the philosophies underlying the discipline. Part II explores the relationship between animal law and environmental law, arguing that animal lawyers and environmental lawyers should increase their collaboration for the benefit of both fields and the protection of animal welfare. Part III provides background on farm animals and concentrated animal feeding operations, which offer a particularly valuable opportunity for collaboration. Part IV discusses in depth how the National Environmental Policy Act (NEPA) and similar state statutes may provide a way to directly address farmed animal welfare as well as the environmental impacts of large farms. Here, the note argues that animal law could sharpen its use of NEPA and equivalent state statutes by focusing not only on the collateral impacts on animal welfare from addressing farming pollution, but directly on the suffering of farmed animals. Part V provides a policy justification for environmental law to expand to include animal welfare issues. Ultimately, this note argues that environmental law should better incorporate animal law into its political and legal efforts because doing so will legitimize animal law and spur the creation of independent legal protections, as well as provide financial, legal, and political assistance to environmental law.

I. BACKGROUND ON ANIMAL LAW

Background knowledge of animal law is essential to understanding both how that field relates to environmental law and why animal law deserves respect and support. This section explores animal law's rapid growth; its divergent philosophical underpinnings, and how each informs different areas of animal welfare work; how animal law has grown out of and expanded on environmental law; and how animal law resonates with people's longstanding and powerful motivations to protect animals.

Animal law has grown at a furious pace. During the field's infancy in the 1980s, lawyers primarily defended activists arrested for various protests.¹ Lawyers expanded their role in animal law during the following twenty years, using anti-cruelty statutes to protect pets from abuse, challenging medical and scientific research, addressing the welfare of domestic farmed animals, and

¹ Clayton Gillette & Joyce Tischler, *Confronting Barriers to the Courtroom for Animal Advocates: Introduction*, 13 ANIMAL L. 13, 16 (2006).

critiquing the status of animals as property.² Scholarship in the field has grown too. In 2000, twelve law schools offered animal law courses.³ By 2006, that number had already grown to over seventy schools, including New York University.⁴

A variety of philosophical foundations support this growing interest in animal protection. Knowledge of the philosophical foundations on which different animal welfare activists rely is important to understanding the variety of approaches that lawyers and activists employ, as well as how those foundations define the resulting rights that activists demand. Because of these philosophical and practical differences, animal welfare activism, despite disagreements among individual activists, has come to embrace a broad range of tactics and arguments to address animal welfare.⁵

Animal rights activists, in contrast to animal welfare activists, argue that for ethical reasons at least some animals should enjoy legal rights similar to people, such as having standing in court. Animal rights activists do not all argue that animals and people are the same, though some make that claim. Peter Singer perhaps represents the animal rights position best, arguing that the principles of equality on which humans base their relationships should logically extend to animals.⁶ Others, like Steven Wise, base the same argument on an assessment of the cognitive abilities

² See *id.* at 16–20. These cases include *Animal Legal Def. Fund v. Provimi Veal Corp.*, 626 F. Supp. 278 (D. Mass. 1986), *Mt. Lion Coal. v. Fish & Game Comm'n.*, 263 Cal. Rptr. 104, 105 (Ct. App. 1989), and *Animal Legal Def. Fund v. Dep't of Envtl. Conservation*, No. 85-6670, slip op. (N.Y. Sup. Ct. Dec. 6, 1985).

³ Gillette & Tischler, *supra* note 1, at 21; Warren St. John, *New Breed of Lawyer Gives Every Dog His Day in Court*, N.Y. TIMES, Sept. 3, 2006, at H1.

⁴ Gillette & Tischler, *supra* note 1, at 21; St. John, *supra* note 3. In 2004, the American Bar Association formed a committee dedicated to animal law. American Bar Association, Animal Law Committee: Letter from the Chair, <http://www.abanet.org/tips/animal/chair.html> (last visited Apr. 29, 2009).

⁵ Discussed throughout this note, these efforts include critiques of animal's property status, attempts to broaden anti-cruelty statutes, see Gillette & Tischler, *supra* note 1, at 18; consumer protection challenges to egg and milk products falsely labeled humane, *infra* note 25; and ballot initiatives and legislative attempts to reform the treatment of animals, *infra* notes 28–35 and accompanying text, among others.

⁶ PETER SINGER, ANIMAL LIBERATION 1–23 (3d ed. 2002); see also TOM REGAN, THE CASE FOR ANIMAL RIGHTS (2d ed. 2004) (making a similar ethics based argument for protecting animals).

of different animals.⁷ Rights-based perspectives, focusing on moral and legal equality between people and animals, demand legal rights for animals similar to those of people, though few advocate that animals should have all of the same rights, such as the right to vote.

Animal welfare activists, based on an ethical commitment against suffering, demand only that people avoid causing suffering of animals, rather than concerning themselves with ensuring comparable rights between animals and people.⁸ The goal of animal welfare activists has been to enforce existing legal protections, enhance protections to include more types of practices that cause suffering, and broaden protections to cover more animals, farmed animals in particular.⁹

Neither rights-based nor welfare-based arguments dominate the field of animal law or animal welfare, though differences in opinion have led to clashes.¹⁰ Advocates of more legal rights for animals sometimes criticize less comprehensive reform efforts, claiming that they make people complacent without actually addressing the underlying causes of animal suffering. Conversely, many animal welfare activists believe that animal rights advocates

⁷ Steven M. Wise, *Animal Rights, One Step at a Time*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 19, 33–41 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (creating a scale on which to assess animals' cognitive abilities for the purpose of establishing their autonomy and hence their deserved legal status).

⁸ See, e.g., MATTHEW SCULLY, DOMINION: THE POWER OF MAN, THE SUFFERING OF ANIMALS, AND THE CALL TO MERCY 26 (2002) (arguing that equality between people and animals is not necessary, rather that people only have to consider the welfare of animals).

⁹ Cf. Robert Garner, *Animal Welfare: A Political Defense*, 1 J. ANIMAL L. & ETHICS 161, 162–63 (2006) (describing animal welfare arguments and strategies).

¹⁰ For example, along with criticizing animal rights activists, Matthew Scully criticizes Peter Singer extensively. SCULLY, *supra* note 8, at 20–24. In *The Omnivore's Dilemma*, despite expounding at length about the inhumane treatment of animals on industrialized farms and extolling the comparative virtues of free range practices, Michael Pollan firmly rejects an animal rights position, directly challenging Scully and Singer. MICHAEL POLLAN, THE OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEALS 304–13, 319–25 (2006). Animal welfare groups have also disagreed over how best to handle rescued fighting dogs. People for the Ethical Treatment of Animals recommends euthanizing rescued dogs because they are unsafe, while other groups, such as the Best Friends Animal Society, counter that a brutal past should not lead to a death sentence for dogs. See William C. Rhoden, *Vick Case Exposes Rift Among Animal-Rights Advocates*, N.Y. TIMES, Mar. 12, 2008, at D2.

undermine overall efforts because their unrealistic expectations discourage the wider public from getting involved to improve animal welfare.¹¹ It is impossible to draw precise distinctions between animal rights activists and animal welfare activists, but the rough classification serves the purposes of this note.

The different bases of animal welfare arguments can also lead to particular kinds of opposition. Arguments that animals deserve the same ethical status as people, or that animals deserve legal autonomy, often provoke negative responses from the public and other lawyers because of the perception that this denigrates the status of humans rather than improving the status of animals.¹² Environmentalists and commentators often react particularly negatively to those who argue that animals are the same as people, while moderate claims, such as the need for more humane treatment, find more common ground and can lead to more cooperation with animal welfare activists.

Despite its rapid growth from a fringe legal field to an established, albeit still small, practice area, animal law continues to confuse some members of the legal world and the public. For many activists and lawyers in traditional legal fields, animal law is a foreign concept because the idea that the law should concern itself with the welfare of animals, even grant them legal rights, is a novel legal concept. Many commentators and practitioners, including judges, react with surprise and even disdain when addressing animal law.¹³ To many, animal law seems to be a

¹¹ For example, a website criticizing animal rights activists and supporting animal welfare activists features quotations from various animal rights advocates. Why Cat Fanciers Support Animal Welfare, Not Animal Rights, <http://www.fatpet.com/elvessa/rights.html> (last visited Apr. 29, 2009). The site quotes Gary Francione, the Director of Rutgers' Animal Rights Law Clinic, as saying, "[t]he theory of animal rights is simply not consistent with the theory of animal welfare or other approaches that reject the rights view and, more importantly, embrace animal exploitation." *Id.*

¹² See, e.g., Richard A. Epstein, *Animals as Objects, or Subjects, of Rights*, in ANIMAL RIGHTS, *supra* note 7, at 143, 149–52 (challenging connections made between animals, women, and slaves); Richard Posner, *Animal Rights: Legal, Philosophical, and Pragmatic Perspectives*, in ANIMAL RIGHTS, *supra* note 7, at 51, 59–66 (criticizing the arguments of Steven Wise and Peter Singer); see also Laura Ireland Moore, *A Review of Animal Rights: Current Debates and New Directions*, 11 ANIMAL L. 311, 314–19 (2005) (book review) (summarizing Posner's and Epstein's arguments).

¹³ See, e.g., Epstein, *supra* note 12, at 152; Posner, *supra* note 12, at 60; Michael Pollan, *An Animal's Place*, N.Y. TIMES, Nov. 10, 2002, § 6 (Magazine), at 58, 60–62 (criticizing Peter Singer's work, among others, for the idea that

radical concept with no basis in existing practice or arguments.¹⁴

However, in many ways animal law is an outgrowth of the already established and accepted environmental law movement.

people and animals are fundamentally moral equals). In a New York Times article, Epstein caricatures the push for animal rights with the question, "Would even bacteria have rights?" William Glaberson, *Legal Pioneers Seek to Raise Lowly Status of Animals*, N.Y. TIMES, Aug. 18, 1999, at A1. Other commentators have been equally brusque in dismissing the idea of animal rights. See Carl Cohen, *The Case for the Use of Animals in Biomedical Research*, 315 NEW ENG. J. MED. 865, 866 (1986) (dismissing idea that animals can have rights because they lack the requisite moral character). Many courts have ignored or rejected animal welfare arguments. See, e.g., *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 158 (S.D.N.Y. 1994) (rejecting mental anguish damages for death of a dog because of the animal's property status); *State v. Jones*, 625 P.2d 503 (Kan. 1981) (upholding defendant's defense that he killed a dog for damaging his property because it was eating Easter baskets he had purchased for his children); *Lewis v. DiDonna*, 294 A.D.2d 799, 800–01 (N.Y. App. Div. 2002) (affirming pet's property status and refusing to allow pet owner to introduce evidence of loss of companionship during damages hearing); *Rabideau v. City of Racine*, 627 N.W.2d 795, 798–802 (Wis. 2001) (applying property rule to pets, despite court's misgivings about such a characterization of pets and human companions, due to concerns about the broader consequences that could follow from recognizing emotional damages from the killing of animals. "Were we to recognize a claim for damages for the negligent loss of a dog, we can find little basis for rationally distinguishing other categories of animal companion."). In some courts, however, judges have accepted animal welfare arguments, in particular regarding the emotional value of pets, for example. Granting that animals can carry emotional value at least moves them from their traditional property status to a quasi-property status, as harm to property cannot lead to emotional harm. For many activists, modifying animals' property status is a critical aspect of advancing animal welfare or rights. See, e.g., *LaPorte v. Associated Indeps., Inc.*, 163 So. 2d 267 (Fla. 1964) (remanding lower court decision to require consideration of owner's emotional suffering over killing of her pet dog); *Campbell v. Animal Quarantine Station*, 632 P.2d 1066 (Haw. 1981) (upholding decision granting emotional damages for death of family's dog, despite maintaining the dog's property status); *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285, 286–87 (N.Y. City Civ. Ct. 1980) (awarding damages based on loss of companionship for death of a dog); *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (N.Y. City Civ. Ct. 1979) (overruling relegation of pets to property status in order to allow mental anguish damages when a pet dog was replaced with a dead cat for its funeral). Enhancing the status of any animals will bolster efforts to protect farm animals. Obviously though, activists still have a long way to go considering the negative response of many courts as well as the fact that even courts that grant animals more protection do so only because of their benefit to people. This will be a similar concern for addressing farm animal welfare under NEPA.

¹⁴ See Epstein, *supra* note 12, at 150–52 (critiquing animal rights positions and claiming that the most people can do for animals is to protect them from people).

The enactment of the Endangered Species Act (ESA) in 1973¹⁵ heralded an era in which environmental groups spearheaded efforts to protect wildlife and preserve their habitats. In addition to pursuing traditional environmental claims under the ESA, animal welfare lawyers have made creative use of the statute in litigation over hunting, trapping, fishing, and the protection of circus animals.¹⁶ Lawyers have also sued under other statutes to halt cruel farming practices, such as confining veal calves to crates,¹⁷ and to limit bear hunting.¹⁸ Many of these issues would traditionally fall under the umbrella of environmental law because of their focus on protecting wild animals, one of environmental law's traditional focuses. By relying on traditionally environmental statutes to protect animal welfare, lawyers broadened the reach of those statutes, as well as the boundaries of what people consider environmental law.

However, there are few laws explicitly designed to protect animal welfare. State anti-cruelty codes do protect animals to a certain extent, with criminal sanctions for violators. However, generally only District Attorneys can enforce anti-cruelty laws, and animal activists have long criticized them for not consistently doing so.¹⁹ Also, farmed animals have virtually no protection

¹⁵ 16 U.S.C. §§ 1531–1544 (2006).

¹⁶ See Gillette & Tischler, *supra* note 1, at 16–19. Animal lawyers themselves articulate the similarity between animal law and environmental law. Glaberson, *supra* note 13, at A18 (“In interviews, several [animal lawyers] noted parallels with those who began the fights for integration and clean air.”). Lawyers have targeted Ringling Brothers for its animal care practices many times. Andy Geller, *Circus Beasts of Hurtin’: Elephant ‘Abusers’ Sued*, N.Y. POST, Oct. 24, 2008, at 23; Press Release, Humane Society of the United States, Ringling Brothers Will Stand Trial for Elephant Abuse (Aug. 23, 2007), available at http://www.hsus.org/press_and_publications/press_releases/ringling_brothers_stand_trial_082307.html.

¹⁷ See *Animal Legal Def. Fund v. Provimi Veal Corp.*, 626 F. Supp. 278, 278–80 (D. Mass. 1986) (arguing that veal crates constituted cruelty under Massachusetts’s anti-cruelty statute and that the practice produced tainted meat).

¹⁸ Gillette & Tischler, *supra* note 1, at 19 & n.40 (citing *Fund for Animals v. Fish & Game Comm’n*, No. 361662 (Cal. Super. Aug. 20, 1990)); *Animal Legal Def. Fund v. Dep’t of Env’tl. Conservation*, No. 85-6670, slip op. (N.Y. Sup. Ct. Dec. 6, 1985). A coalition of animal welfare and conservation groups, including Animal Legal Defense Fund, the Humane Society of the United States (HSUS), the American Society for the Prevention of Cruelty to Animals, Defenders of Wildlife, and the Rockland Audubon Society, worked together in bringing this suit.

¹⁹ David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House*, in ANIMAL RIGHTS, *supra* note 7, at 205, 210.

whatsoever against cruelty. The vast majority of animals raised and killed in the United States are farm animals,²⁰ but virtually all anti-cruelty laws exempt routine farming practices, despite widespread evidence of the inhumanity of those practices.²¹ Although lawyers and activists have sued the federal government under the ESA to force action to protect animals,²² the ESA only reaches threatened or endangered species, leaving it inapplicable to pets or farm animals.²³

Because of the lack of laws directly protecting animals, lawyers have had to be creative in interpreting and applying existing laws to protect animals. Their efforts thus far have

²⁰ *Id.* at 206.

²¹ *Id.* at 212–19. See also DAVID J. WOLFSON, *BEYOND THE LAW: AGRIBUSINESS AND THE SYSTEMATIC ABUSE OF ANIMALS RAISED FOR FOOD OR FOOD PRODUCTION* 23–35 (1999) (detailing “common” farming practices that many would consider cruel, as well as plethora of state anti-cruelty statutes that exempt those practices from coverage). The exceptions for common farming practices did recently take a blow when the New Jersey Supreme Court found that the State’s Department of Agriculture, in exempting common farming practices from the state’s anti-cruelty code, had failed to comply with the legislative mandate to promulgate regulations requiring humane treatment of animals. *N. J. Soc’y for the Prevention of Cruelty to Animals v. N.J. Dep’t of Agric.*, 955 A.2d 886, 907 (N.J. 2008). Even farmers themselves have admitted to the cruelty of many farming practices. In one Pennsylvania case, a farmer testified about practices, such as castrating pigs and reliance upon veal pens and battery cages, that likely would be considered cruel but for the common farming exception. *Commonwealth v. Barnes*, 629 A.2d 123, 132 (Pa. Super. Ct. 1993).

²² See Ivan J. Lieben, Comment, *Political Influences on USFWS Listing Decisions Under the ESA: Time to Rethink Priorities*, 27 ENVTL. L. 1323, 1341–64 (1997) (discussing politics involved in ESA listing decisions and how environmental groups have used litigation to compel listing).

²³ The ESA, however, does not apply only to wildlife. See *Performing Animal Welfare Soc’y v. Ringling Bros.*, No. 1:00CV01541, 2001 U.S. Dist. LEXIS 12203 (D.D.C. June 29, 2001). There the District Court dismissed a suit against the operators of a circus for their treatment of performance elephants on the basis of standing, not because it held the ESA inapplicable to endangered species held in captivity. *Id.* Indeed, earlier in the same litigation, the District Court admonished the Circus for unnecessarily delaying the litigation, noting the “important ‘public policy in favor of protecting the animals from unlawful harassment or harm,’ [and] admonish[ing] that ‘promoting the public interest in the preservation of such species will remain an ever-present threat to those seeking to unlawfully harm such species.’” Press Release, Humane Society of the United States, *supra* note 16. The Court’s failure to reach the issue has permitted HSUS to renew its effort and again bring suit under the ESA to challenge Ringling Brothers’ treatment of its Asian elephants. See Press Release, Humane Society of the United States, Ringling Brothers: Courtroom Updates (Feb. 5, 2009), available at http://www.hsus.org/in_the_courts/news_press/ringling_brothers_courtroom.html.

included challenging the status of domestic animals as property;²⁴ using false advertising claims to challenge the packaging that appears on animal-based products such as eggs or milk;²⁵ and using environmental laws to challenge cruel farm practices.²⁶ Nonetheless, even more possibilities remain to use existing law to directly target animal welfare, including relying on NEPA, as discussed in Part IV.

Many animal welfare activists, frustrated with the slow pace of legal change, have turned to political tools instead, focusing particularly on ballot initiatives.²⁷ The successful California campaign to pass Proposition 2 during the 2008 election, banning gestation crates, veal crates, and battery cages, is the most recent example of this.²⁸ The Humane Society and Farm Sanctuary led a

²⁴ See Gary L. Francione, *Animals—Property or Persons?*, in ANIMAL RIGHTS, *supra* note 7, at 108, 108–42 (discussing animals' property status). For better or worse, the discussion of whether animals are property or not does not apply to this paper.

²⁵ See Carter Dillard, *False Advertising, Animals, and Ethical Consumption*, 10 ANIMAL L. 25, 26–28 (2004) (articulating a way for animal welfare lawyers to use false advertising claims to challenge egg and milk producers as well as raise awareness about animal welfare issues).

²⁶ See De Anna Hill, *Combating Animal Cruelty with Environmental Law Tactics*, 4 J. OF ANIMAL L. 19, 24–39 (2008) (strategizing ways animal welfare organizations can use various environmental laws to prevent animal cruelty).

²⁷ Activists have also focused on more traditional forms of political activity. See Press Release, Humane Society of the United States, HSUS Investigation Leads to Largest Beef Recall in U.S. History (Feb. 18, 2008), available at http://www.hsus.org/press_and_publications/press_releases/beef_recall_02182008.html. HSUS had sparked a recall based on an undercover investigation and promptly began a campaign to persuade the United States Department of Agriculture (USDA) to close a loophole in its animal slaughter policy.

²⁸ Press Release, Humane Society of the United States, Californians Deliver Decisive Victory to Prevent Factory Farm Cruelty by Passing Proposition 2 (Nov. 5, 2008), available at http://www.hsus.org/press_and_publications/press_releases/californians_deliver_decisive_victory_on_prop_2_110508.html; see California General Election Official Voter Information Guide 2008, Proposition 2, <http://voterguide.sos.ca.gov/past/2008/general/title-sum/prop2-title-sum.htm> (last visited Apr. 29, 2009). Gestation crates are narrow crates to house sows, where the animals cannot turn around and spend the majority of their lives. Veal crates house male calves in similar fashion. Battery cages house egg-laying hens in spaces so tight the birds cannot stretch their wings. See WOLFSON, *supra* note 21, at 23–26. Animal welfare organizations have used ballot initiatives in a number of states to address a wide variety of issues, including farm animal welfare. Aaron Lake, *1998 Legislative Review*, 5 ANIMAL L. 89 (1999) (describing strategic use of state ballot initiatives in the 1990s); Wayne Pacelle, *Law and Public Policy: Future Directions for the Animal Protection Movement*, 11 ANIMAL L. 1 (2005) (describing historical campaigns of animal law and discussing possible future campaigns).

coalition of animal welfare groups, environmental organizations, family farmers, and public figures in support of the Proposition, including the Union of Concerned Scientists, the Pew Commission on Industrial Farm Animal Production, Sierra Club California, and California Clean Water Action.²⁹ This coordination between environmental and animal welfare organizations heralds continued possibilities for future collaboration. Opposition came largely from industrial farming groups and some veterinary associations.³⁰ Ultimately, Proposition 2 passed with over 60 percent public support.³¹ Similar efforts have succeeded in other states. A 2002 ballot measure in Florida outlawed the use of gestation crates for pigs with 55 percent support,³² and a 2006 Arizona ballot measure to do the same passed with 62 percent of the vote.³³ In 2007, Oregon passed a bill outlawing gestation crates.³⁴ In 2008, Colorado instituted a measure banning gestation crates and veal crates.³⁵

Political efforts are clearly a valuable tool in addressing animal welfare issues, but the law also remains a significant avenue for change. Recent political successes may have convinced people that political change is more worthwhile to pursue than legal change, particularly given the law's slow progression. Judicial reluctance to expand the law, reflecting both general

²⁹ League of Women Voters of California Education Fund, Proposition 2, <http://www.smartvoter.org/2008/11/04/ca/state/prop/2> (last visited Apr. 29, 2009).

³⁰ *Id.*

³¹ See Press Release, Humane Society, *supra* note 28.

³² Christopher Marquis, *Ballot Initiatives: School and Animal Welfare Measures Prove Popular, but Health Care Falters*, N.Y. TIMES, Nov. 7, 2002, at B3; Humane Society of the United States, Voters Side with the Animals in Five Separate 2002 Ballot Measures, http://www.hsus.org/legislation_laws/ballot_initiatives/past_ballot_initiatives/take_the_initiative_for_animals_on_november_2/voters_side_2002_ballot_measures.html (last visited Apr. 29, 2009).

³³ Ariz. Sec'y of State, 2006 General Election (Unofficial Results): Proposition 204 Humane Treatment of Farm Animals Act, <http://www.azsos.gov/results/2006/general/BM204.htm> (last visited Apr. 29, 2009).

³⁴ Press Release, Humane Society of the United States, Oregon Makes History by Banning Gestation Crates (June 28, 2007), *available at* http://www.hsus.org/farm/news/ournews/oregon_gestation_crates.html.

³⁵ Press Release, Humane Society of the United States, Landmark Farm Animal Welfare Bill Approved in Colorado (May 14, 2008), *available at* http://www.hsus.org/farm/news/ournews/colo_gestation_crate_veal_crate_bill_051408.html.

judicial resistance to change and particularly strong resistance to changing private property rules related to animals, is a significant obstacle to overcome. However, activists should not ignore the law's potential. Steven Wise, for example, remains convinced that litigation will expand animal rights.³⁶

Legal action offers several unique advantages for animal welfare reform. First, legal challenges can motivate political action. The law can create change that remains politically difficult despite increased public interest in animal welfare. It is important to realize, however, that lawsuits contrary to public opinion may lead to negative legislation that overturns legal changes. Lawsuits are also part of the public relations campaigns that animal welfare organizations wage. Because of the relationship between political and legal reforms, it is difficult to actually separate their roles. Also, lawsuits can provide an immediate recourse against harmful developments, such as the creation of factory farms, that political organizing cannot address quickly enough. Activists should clearly continue to use political tools, but the law remains a powerful option for improving the lives of animals.

II. HISTORICAL RELATIONSHIP BETWEEN ENVIRONMENTAL LAW AND ANIMAL LAW

Despite sharing many commonalities, including lawyers and legal issues, and working on crosscutting campaigns, environmental law and animal law enjoy a sometimes contentious relationship that limits collaboration between the two fields. In some cases, environmental lawyers see animal law as a threat to environmental law. There are also areas where the two fields conflict instead of taking full advantage of opportunities to work together, such as in situations where interest in the welfare of individual animals may conflict with an ecosystem focus. This section explores that relationship, discussing the commonalities, the perceived threats, and divergences that threaten collaboration.

³⁶ Wise, *supra* note 7, at 27–33. The Great Ape Project, which Wise helped found, is an organization of lawyers, scientists, and others that is dedicated to removing the property status from apes and ensuring them legal rights. Great Ape Project, World Declaration on Great Primates, <http://www.greatapeproject.org/en-US/oprojetogap/Declaracao/declaracao-mundial-dos-grandes-primatas> (last visited Apr. 29, 2009).

A. Commonalities

Environmental law and animal law often share personnel and scholars. Several leaders of the Humane Society of the United States (HSUS) studied or previously worked in the environmental field.³⁷ Cass Sunstein, a professor widely known for his environmental work, has also authored several articles about animal law.³⁸ Environmental and animal welfare lawyers often know each other personally. For example, Jeff Odefey of Waterkeeper Alliance has worked closely with lawyers from the Animal Welfare Institute on a hog farm campaign.³⁹ These connections tend to create a familiarity and general awareness among environmental lawyers of the issues and concerns of animal law.

The two fields also share legal issues. Many animal welfare organizations focus on issues that environmental organizations also address. The most obvious of these are wildlife and habitat issues; animal lawyers and environmental lawyers both enforce the ESA. In recent ESA litigation, plaintiffs have included environmental organizations such as Waterkeeper Alliance, New York Coastal Partnership, Inc., Sierra Club, and the Center for Biological Diversity, as well as animal welfare organizations such

³⁷ Andrew Rowen, the organization's Executive Vice President for Operations, chaired the Department of Environmental Studies at Tufts University School of Veterinary Medicine prior to joining HSUS. John Grandy, HSUS's Senior Vice President of Wildlife, served as an executive at Defenders of Wildlife and as chief assistant to the senior scientist at the President's Council on Environmental Quality before working with HSUS. Connie Harriman-Whitfield, Senior Advisor on Presidential Initiatives with HSUS, worked as Associate Solicitor at the Department of Interior. Mark Glover, Director of the Humane Society International/UK, worked with Greenpeace previously. Humane Society of the United States, Executive Staff and Subject Experts, http://www.hsus.org/about_us/board_and_staff/experts (last visited Apr. 29, 2009). Jon Lovvorn, who leads HSUS's Animal Protection Litigation section, previously worked in environmental law with the public interest Washington D.C. firm Meyer & Glitzenstein. Press Release, Humane Society of the United States, The HSUS Launches Litigation Section (Dec. 1, 2004), available at http://www.hsus.org/press_and_publications/press_releases/the-hsus-launches-litigation-section.html.

³⁸ See Cass R. Sunstein, *Introduction: What Are Animal Rights?*, in ANIMAL RIGHTS, *supra* note 7, at 3. Richard Posner's contribution to Sunstein's and Nussbaum's book demonstrates a growing acceptance of animal law as a serious legal field. See Posner, *supra* note 12. Posner does not turn out to be an avid animal law advocate.

³⁹ Interview with Jeff Odefey, Staff Attorney, Waterkeeper Alliance (Apr. 14, 2008).

as the Animal Protection Institute, the National Wildlife Federation, Defenders of Wildlife, the Animal Protection Institute, and the Fund for Animals, Inc.⁴⁰ Although in most of the cases animal welfare groups or environmental groups brought suits separately from each other, in *Animal Protection Institute & Center for Biological Diversity v. Holsten*, an animal welfare organization—the Animal Protection Institute—worked alongside an environmental organization—the Center for Biological Diversity—in bringing a suit against the Commissioner of Minnesota's Department of Natural Resources for granting an Incidental Take Permit for Minnesota's Canadian Lynx.⁴¹ Environmental and animal welfare interests complement each other in these suits.

Environmental and animal welfare lawyers also share an interest in agriculture and farmed animals. Animal welfare lawyers have spent considerable time organizing political campaigns, such as California's Proposition 2, to end cruel farming practices like gestation crates for confining pregnant sows or battery cages for housing chickens.⁴² Environmental lawyers have addressed the size of dairy facilities, and the harmful effects of composting and pesticide use, among other farming practices.⁴³ In some cases, lawyers from both fields have worked together to

⁴⁰ See, e.g., *N.Y. Coastal P' ship, Inc. v. U.S. Dep't of the Interior*, 341 F.3d 112 (2d Cir. 2003); *Waterkeeper Alliance v. U.S. Dep't of Def.*, 271 F.3d 21 (1st Cir. 2001); *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434 (5th Cir. 2001); *Defenders of Wildlife v. Adm'r Env'tl. Prot. Agency*, 882 F.2d 1294 (8th Cir. 1989); *Animal Prot. Inst. v. Holsten*, No. 06-3776, 2008 U.S. Dist. LEXIS 53396 (D. Minn. July 13, 2008); *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073 (D. Minn. 2008); *Animal Prot. Inst. v. Martin*, 241 F.R.D. 66 (D. Me. 2007); *Nat'l Wildlife Fed'n v. Norton*, 386 F.Supp.2d 553 (D. Vt. 2005). Many of these groups are actually neither clearly environmental groups nor animal welfare groups. However, that merely reinforces the point that environmental and animal law work often overlaps.

⁴¹ 2008 U.S. Dist. LEXIS 53396 (D. Minn. July 13, 2008).

⁴² See *supra* note 28 and accompanying text.

⁴³ For example, the Center on Race, Poverty & the Environment, an environmental justice organization based in California's Central Valley, has combated the spread of so-called mega-dairies that house up to 45,000 cows. Center on Race, Poverty & the Environment, *The Dairy Project: Protecting Valley Residents from Mega-dairy Pollution*, <http://www.crpej.org/campaigns/dairy> (last visited Apr. 29, 2009). Waterkeeper Alliance runs the Pure Farms, Pure Waters campaign to address pollution from factory farms. Waterkeeper Alliance, *Pure Farms, Pure Waters: Waterkeeper's Factory Farm Campaign*, <http://www.waterkeeper.org/mainarticledetails.aspx?articleid=87> (last visited June 12, 2009).

address farming issues, such as pollution and animal welfare.⁴⁴

B. *Animal Law as a Threat to Traditional Environmental Law*

Despite sharing personnel, issues, and even cases, environmental law and animal law often have a contentious, sometimes even antagonistic, relationship. Some environmentalists oppose animal law in general. This opposition seems to come from disagreement with animal law's underlying tenets, its attempts at legal reform, and the perception that animal activists are politically risky. Opposition arises, in part, from the political positions of specific animal law groups, such as those advocating some legal equality between animals and people. Often, it is misleading characterizations of these opinions, rather than the actual opinions, that environmentalists react to, but the end result is the same. In other cases, some environmental lawyers oppose animal welfare activists on specific issues, such as wind energy.

Despite its recent growth, animal welfare remains a somewhat fringe field. It remains small relative to other fields, scholarship in the field remains somewhat limited in spite of the prominent names of some contributors,⁴⁵ and animal welfare advocates often find themselves criticized for any suggestion that U.S. society should give greater credence to animal independence or the argument for eliminating animals' property status.⁴⁶ The often virulent reactions to attempts to ban foie gras demonstrate how severely some people can react to efforts to protect animal

⁴⁴ For example, the Animal Welfare Institute has worked with Waterkeeper Alliance and family farm organizations to oppose the growth of factory hog farming. ANIMAL WELFARE INSTITUTE, FIFTY-FIRST ANNUAL REPORT 2-3 (2002), available at http://www.awionline.org/pubs/online_pub/02_ar.pdf. For another example, the HSUS and Citizens Against Factory Farms joined several environmental groups in opposing a proposed exemption of CAFO waste releases from CERCLA reporting and clean-up requirements. See Letter from Michele Merkel et al. to Congress (Nov. 15, 2006), available at <http://sustainableagriculturecoalition.org/pdf/Defeat%20CAFO%20Waste%20Amendment.pdf> (opposing amendment to burden communities with cleanup costs by exempting livestock waste from health and environmental laws).

⁴⁵ See *supra* note 38 and accompanying text.

⁴⁶ See sources cited *supra* note 13. This reaction seems to arise, in part at least, because of the entrenched status property rights hold in the United States: "There would be nothing left of human society if we treated animals not as property but as independent holders of rights," Richard Epstein commented. Glaberson, *supra* note 13, at A1.

welfare.⁴⁷

Given animal law's fringe status, many environmental organizations are reluctant to work with animal welfare organizations because of the political risks in doing so, particularly loss of political legitimacy and potentially reduced membership.⁴⁸ This arises in relation to both moderate and more radical animal welfare groups. However, it is largely more extreme animal rights organizations whose strategies produce a general hesitation among environmental organizations to work with animal welfare groups. Their reputations can spill over to all animal organizations and cause environmental groups to hesitate to work with any animal welfare organizations. One environmental lawyer described working with People for the Ethical Treatment of Animals (PETA) as too much of a political risk.⁴⁹ At times, the tactics of animal welfare organizations can upset the mainstream audiences to whom environmental law often tries to appeal. PETA, for one, has garnered negative publicity for its anti-fur campaign featuring naked women and bearing the slogan, "I'd Rather Go Naked Than

⁴⁷ See Posting of Jennifer 8. Lee to The New York Times City Room Blog, <http://cityroom.blogs.nytimes.com/2008/06/11/forgo-the-foie-gras-hold-all-wise-quacks/> (June 11 2008, 16:25 EST) (in addition to the column's general negative attitude toward efforts to ban foie gras, the comments reveal a clear rejection of animal welfare arguments and efforts).

⁴⁸ Interview with Jeff Odefey, *supra* note 39. Mr. Odefey discussed the reluctance he felt at aligning his organization with a group like PETA because of the public image involved. Considering some of PETA's tactics, this is not surprising. In 2003, PETA ran a campaign entitled "Holocaust on Your Plate," which compared factory farm conditions with those of Nazi concentration camps, juxtaposing images of starving cows next to images of starving prisoners. Press Release, PETA, Grandson of Celebrated Jewish Author Brings Giant Graphic Display to Show How Today's Victims Languish in Nazi-Style Concentration Camps (Oct. 9, 2003), *available at* <http://www.peta.org/mc/NewsItem.asp?id=3021>. Unsurprisingly, the public and commentators reacted strongly. See, e.g., *Group Blasts PETA 'Holocaust' Project*, CNN, Feb. 28, 2003 (discussing the Anti-Defamation League's criticism of PETA's campaign). Other commentators have highlighted public reactions to animal welfare groups. See Adam Cohen, Editorial, *What's Next in the Law? The Unalienable Rights of Chimps*, N.Y. TIMES, July 14, 2008, at A16 ("In media accounts, [animal rights activists] usually come off as loopy—whether it is [a chimp's] supporters insisting that 'everyone is entitled to a fair trial, even chimps,' or Pedro Pozas, the secretary-general of the Spanish Great Ape Project, declaring 'I am an ape.'). Popular images of animal welfare organizations and their tactics make environmental organizations, as highlighted by Jeff Odefey's reactions to PETA, reluctant to align themselves with animal welfare groups.

⁴⁹ Interview with Jeff Odefey, *supra* note 39.

Wear Fur.”⁵⁰ Many people are also familiar with more extreme animal welfare activists, such as those who vandalize and burn research laboratories.⁵¹

In discussing the political status of animal welfare organizations, it is important to distinguish between wildlife protection and other animal welfare advocacy. Commentators, lawyers, politicians, and the public have long accorded wildlife protection high political and legal status, demonstrated best by the Endangered Species Act’s protections for endangered species. However, other animals have received less political and legal support. Despite the recent political shifts, farm animals have never received the same status as wildlife. Nor have other animals such as the mice and rats whose use in laboratories many activists criticize. Wildlife protection organizations are not the fringe animal welfare organizations discussed here. With the notable exception of a few undeniably politically powerful groups such as HSUS, it is the animal welfare organizations interested in issues outside of wildlife that form the fringe discussed here.

But even animal welfare groups that do not use extreme tactics like vandalizing research laboratories can present a political risk to environmental organizations. Because media commentators often conflate animal welfare groups with the sometimes violent activism of more extreme animal rights groups, such as the Animal Liberation Front, even some moderate animal welfare groups often have only tepid public support. There are exceptions, such as

⁵⁰ See Trip Gabriel, *Such a Nice Zealot*, N.Y. TIMES, May 1, 1994, § 9 at 1 (describing PETA’s campaign and criticism of it and the organization). More recently, NBC refused to show a proposed PETA Super Bowl commercial, finding it too racy. See Posting of Stephen J. Dubner & Steven D. Levitt to Freakonomics Blog, <http://freakonomics.blogs.nytimes.com/2009/02/01/are-superbowl-commercials-better-when-theyre-banned/> (Feb. 1, 2009, 13:15 EST). Commentators decried the advertisement, which features scantily clad women engaging in sexually suggestive behavior with vegetables and the claim that vegetarians have better sex, for debasing women. See, e.g., Steve Johnson, *Banned PETA Super Bowl Ad Makes Mockery of Group’s Own Cause*, CHICAGO TRIBUNE, Jan. 31, 2009, available at <http://www.chicagotribune.com/business/columnists/chi-talk-johnson-petajan31,0,4876562.column>. For a blogger’s analysis, and the associated comments that almost universally criticize PETA, see posting of Melissa McEwan to Shakesville blog, <http://shakespearessister.blogspot.com/2009/01/save-chickens-objectify-women.html> (January 29, 2009) (last visited Feb. 17, 2009) (including 138 Comments).

⁵¹ See, e.g., Lizette Alvarez, *Animal Welfare Advocates Win Victories in Britain With Violence and Intimidation*, N.Y. TIMES, Aug. 8, 2004, at N6.

HSUS, which has over ten million members and has enjoyed dramatic political success.⁵² However, many animal welfare groups lack significant support, and this may cause environmental organizations to fear they will lose public support by aligning themselves with mainstream animal welfare organizations.⁵³ Environmentalists may also fall victim to the same conflation, lumping all animal organizations with the most extreme animal rights activists.

Environmental organizations actively lobbying Congress may consider even moderate animal welfare organizations risky despite the widespread public support of some groups, such as HSUS. As evidenced by an annual HSUS 'Scorecard' on animal legislation, animal welfare has received significant interest and attention in Congress.⁵⁴ However, the Scorecard also highlights that many animal welfare bills do not even make it to full votes, much less through all of Congress. Despite HSUS' political and legal success, animal welfare remains a politically unpopular cause, and fewer Congressional representatives may want to align themselves with environmental interests if it means they must also align themselves with animal organizations. Ultimately, this perceived potential political fallout from working with animal welfare organizations may be too great for some environmentalists to take the risk.

⁵² HSUS provides a strong counterexample to the claim that animal welfare organizations are not politically influential. In addition to leading several successful public campaigns, including working with Farm Sanctuary on the Proposition 2 campaign in California, HSUS has over ten million members and a large operating budget. Humane Society of the United States, *Frequently Asked Question: What Does the HSUS Do?*, http://www.hsus.org/about_us/faqs/ (last visited Feb. 20, 2009). Though HSUS demonstrates the success that animal welfare groups can enjoy, smaller organizations receive less public and political support.

⁵³ Arguably, the swing votes that environmentalists have needed to pass legislation, especially in the House, are often from moderate Democrats in agricultural districts. Many of these members are not generally pro-environment, so environmental organizations may be especially sensitive about alienating them over animal welfare issues.

⁵⁴ Cf. HUMANE SOCIETY LEGISLATIVE FUND, *THE HUMANE SCORECARD: THE 110TH CONGRESS IN REVIEW* (2008), available at http://www.fund.org/pdfs/2008_humane_scorecard.pdf. The Scorecard tracks voting based on several animal welfare measures introduced in the House and Senate, many of which were enacted over the last year. *Id.* at 3.

C. Divergences

There are also instances where it is not politics, but competing interests, that prompt reluctance among environmentalists to work with animal welfare or animal rights organizations. This is clearest in the issue of wind farms and the welfare of birds and bats. Environmentalists have embraced wind technology as a source of green energy that can help wean the United States off polluting fossil fuel technologies.⁵⁵ But animal welfare activists have questioned the effect of windmills on birds and bats that migrate through the same corridors in which developers site windmills.⁵⁶ One animal welfare lawyer addressing the effect that wind turbines have on birds and bats says she has often felt that environmentalists expect animal welfare activists to subjugate their interest in animal welfare to green energy concerns.⁵⁷

In another specific example, environmental groups and animal welfare groups ended up on opposite ends of litigation over mute swans in Chesapeake Bay. With the backing of environmentalists, the Fish and Wildlife Service issued a plan to cull the Bay's mute swan population in order to preserve the Chesapeake Bay ecosystem. Animal welfare groups responded with a successful NEPA lawsuit, much to the chagrin of the environmentalists involved.⁵⁸ This case demonstrates the tension between

⁵⁵ See, e.g., Mark Svenvold, *Wind-Power Politics*, N.Y. TIMES, Sept. 12, 2008, § 6 (Magazine), at 77. Although many environmentalists strongly support wind energy development, there are environmentalists opposed to many projects because of their potential effect on landscapes. See, e.g., Felicity Barringer, *Environmentalists in a Clash of Goals*, N.Y. TIMES, Mar. 24, 2009, at A17 (discussing support for wind-power and opposition to it as well).

⁵⁶ Litigation and activism surrounding Altamont Pass is the best example of this. Because of the impact on raptors and other birds, animal welfare activists have questioned use of the pass for wind production. Other examples include opposition to wind-farms in Pennsylvania, Maryland, and West Virginia. Felicity Barringer, *Debate Over Wind Power Creates Environmental Rift*, N.Y. TIMES, June 6, 2006, at A18.

⁵⁷ Interview with Kim Ockeone, Counsel, Meyer Glitzenstein & Crystal (Apr. 18, 2008); see, e.g., Avi Brisman, *The Aesthetics of Wind Energy Systems*, 13 N.Y.U. ENVTL. L.J. 1, 66–67 (2005) (supporting the development of wind energy and describing opposition to wind developments based on concerns over the impact to birds as a “problem”). The article dismisses concerns over bird deaths due to wind farms. *Id.* at 70–73.

⁵⁸ See *Fund for Animals v. Norton*, 281 F. Supp. 2d 209 (D.D.C. 2003). For an analysis critical of the animal welfare activists involved, see Paul J. Cucuzzella, *The Mute Swan Case*, *The Fund for Animals, et al. v. Norton, et al.: National, Regional, and Local Environmental Policy Rendered Irrelevant by*

environmental groups' concerns over species and ecosystems and animal welfare groups' for individual animals, a tension that can prompt clashes on specific issues. Being able to negotiate that difference will be essential to successful future collaborations.

Another area of tension is the question of dietary decisions. Many environmental organizations do not seem interested in arguments about veganism and vegetarianism, despite the negative environmental implications of meat, poultry, and seafood production.⁵⁹ The contributions that meat and seafood production make to global warming, aside from other pollution associated with the industries, can be staggering. Not surprisingly, animal welfare organizations consider veganism and vegetarianism essential to supporting animal welfare. Many environmentalists are showing more interest in vegetarianism and veganism as the environmental consequences of a meat-based diet become more apparent, but tension remains because animal welfare groups continue to place more importance in dietary choices than environmentalists often do. This conflict will likely remain for the foreseeable future.

In specific cases where environmental and animal welfare groups disagree, neither field should have to capitulate to the other, although both fields seem to expect this at times. It may be difficult to negotiate around all conflicts, but activists and lawyers should try to find common ground rather than allow political differences to divide them.

Despite the general concerns about working with animal welfare organizations and specific instances of opposition between environmentalists and animal welfare groups, environmental and animal welfare organizations have increased collaborations in recent years, working together on specific campaigns when their interests have overlapped. However, the two fields have not coordinated their work as much as they could, to the detriment of both.

Animal Rights Activists, 11 U. BALT. J. ENVTL. L. 101, 109–13 (2004).

⁵⁹ While this paper explores the environmental consequences of meat and egg production, similar arguments may be made for reducing our consumption of seafood. A recent Special Report in *The Economist* highlights the rapid depletion of wild fisheries (some of which have been harvested nearly to collapse), and the destruction of near-shore, estuarine and riverine habitat for fish farms, all driven by the world's ever-growing demand for fish. *Come, Friends, and Plough the Sea*, *ECONOMIST*, Dec. 30, 2008, at 11; *Plenty More Fish in the Sea?*, *ECONOMIST*, Dec. 30, 2008, at 10.

This paper's next section focuses on one particularly promising area where the two fields could increase collaborations to the benefit of both: farmed animal welfare. After exploring how farms produce overlapping animal welfare and environmental concerns, Part IV discusses the feasibility of using NEPA as a tool to combine animal welfare and environmental concerns.

III. FARMED ANIMALS

Farms and farmed animals provide a prime opportunity for environmental and animal welfare lawyers to work together politically and legally. Farms, particularly large farms, pose extensive environmental concerns due to water, air, and ground pollution. For animal welfare activists, large farms also present significant concerns about the inhumane treatment of animals. These overlapping concerns create considerable room for collaboration that would benefit both animal law and environmental law.

A. *Animal Welfare and Environmental Impacts of Farms*

Although animal welfare activists have addressed farmed animal welfare since early in the history of animal law,⁶⁰ farming has recently drawn increasing attention from animal welfare and animal rights activists.⁶¹ Ninety-eight percent of animals killed in the United States each year are farmed animals, a total of 9.5 billion creatures.⁶² The vast majority of these animals are subjected to practices that animal welfare and animal rights activists consider extremely cruel. Farmers crowd egg-laying chickens into cages so small that the birds live with less than seventy square inches of space their entire lives (an area smaller than a piece of notebook paper); debeak the chickens without anesthesia to avoid the pecking and fighting that occurs as a result of the crowded conditions; and breed the animals to grow so quickly that their bones break because their bodies cannot support

⁶⁰ Gillette & Tischler, *supra* note 1, at 17 (discussing Animal Legal Def. Fund v. Provimi Veal Corp., 626 F. Supp. 278 (D. Mass. 1986) (seeking to stop veal production in Massachusetts)).

⁶¹ PETER SINGER & JIM MASON, THE WAY WE EAT: WHY OUR FOOD CHOICES MATTER v-vi (2006) (discussing the increase in focus on farmed animals since the 1975 publication of *Animal Liberation*).

⁶² Wolfson & Sullivan, *supra* note 19, at 206.

the weight.⁶³ Sows live in gestation crates so small that they can turn around only for brief periods of their lives, and farmers dock their tails, without anesthetic, to prevent the animals from biting each other.⁶⁴ Veal calves spend their brief lives living in cages barely larger than their bodies, eating a diet intentionally low in iron in order to produce the pink flesh that consumers want, regardless of the resulting anemia.⁶⁵ Dairy producers keep dairy cows constantly pregnant, taking their newborns from them immediately to become veal calves, beef cattle, or dairy cows in turn.⁶⁶ Farmers milk the cows multiple times a day until after an average of five years the cows can no longer produce milk and go to slaughter, usually to become hamburger.⁶⁷

Two recent reports, one by the Union of Concerned Scientists⁶⁸ and the other by the Pew Charitable Trusts,⁶⁹ highlight the environmental and animal welfare concerns of large scale farms, known as concentrated animal feeding operations (CAFOs).⁷⁰ Both reports stress the environmental impacts of 500

⁶³ SINGER, *supra* note 6, at 97–105. I cite to Peter Singer, known for his firm stance advocating for animals rights, because of his apt description of farming practices. Many commentators, even farming industry personnel, have also documented these practices. A recent Pew Charitable Trusts report discusses the plight of farmed animals: “When the animals are confined indoors, discomfort due to weather is reduced. The downside is that animals are kept in more crowded conditions, are subject to a number of chronic and production-related diseases, and are unable to exhibit natural behaviors. In addition, the animals are often physically altered or restrained to prevent injury to themselves or IFAP [Industrial Farm Animal Production] workers.” PEW COMM’N ON INDUS. FARM ANIMAL PROD., THE PEW CHARITABLE TRUSTS, PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA 33 (2008) [hereinafter PUTTING MEAT ON THE TABLE], *available at* http://www.pewtrusts.org/our_work_report_detail.aspx?id=38442.

⁶⁴ SINGER, *supra* note 6, at 121. The pigs bite each other only because of the severely crowded conditions.

⁶⁵ *Id.* at 129–34.

⁶⁶ *Id.* at 136–37. Cows often spend days bellowing in response to the absence of their calves.

⁶⁷ *Id.* Cows can naturally live up to twenty years and produce milk for most of that time. The stress of constant pregnancy wears down cows’ bodies, while the excessive milking causes their milk production to drop to the point where keeping them in production becomes uneconomical.

⁶⁸ DOUG GURIAN-SHERMAN, UNION OF CONCERNED SCIENTISTS, CAFOs UNCOVERED: THE UNTOLD COSTS OF CONFINED ANIMAL FEEDING OPERATIONS (2008) [hereinafter UNTOLD COSTS], *available at* http://www.ucsusa.org/assets/documents/food_and_agriculture/cafos-uncovered.pdf.

⁶⁹ PUTTING MEAT ON THE TABLE, *supra* note 63.

⁷⁰ Other authors have raised similar concerns. *See* SCULLY, *supra* note 8, at

million tons of animal manure generated annually, more than three times what people produce in the U.S.⁷¹ Water pollution from manure run-off, laden with chemicals from fertilizers and pesticides along with excess nutrients, may kill plants and animals in large stretches of U.S. waters, creating what are known as dead zones.⁷² Ammonia emissions from manure also cause eutrophication of water and soil.⁷³ Gasses generated by animal production and the breakdown of manure account for 7.4 percent of total U.S. greenhouse gas emissions.⁷⁴

As mentioned previously, environmental organizations have focused on addressing the environmental impacts of industrial farming. Sierra Club, Earthjustice and other organizations have organized and litigated to reduce or prevent the impacts of large-scale farming.⁷⁵ The Center on Race, Poverty & the Environment has brought suits against large dairies throughout California, challenging their size and the water and air pollution that they produce.⁷⁶ However, despite interest among environmental groups to address CAFOs, there has been less collaboration between the two fields than one might expect.

Perhaps most stunning about this lack of collaboration are the

253–86 (discussing environmental and animal welfare concerns of factory farming); J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 *ECOLOGY L.Q.* 263, 274–92 (2000) (discussing the varied environmental impacts of farms); Matthew Scully, *Fear Factories: The Case for Compassionate Conservatism—For Animals*, *THE AM. CONSERVATIVE*, May 23, 2005, at 7, available at <http://www.amconmag.com/article/2005/may/23/00007/> (criticizing “the distracting rhetoric of animal rights” but also challenging the idea that animals do not have moral status except for their usefulness to people).

⁷¹ PUTTING MEAT ON THE TABLE, *supra* note 63, at 23. See generally UNTOLD COSTS, *supra* note 68, at 13–14.

⁷² PUTTING MEAT ON THE TABLE, *supra* note 63, at 23–25.

⁷³ *Id.* at 25. Eutrophication is the accumulation of nutrients, caused by the ammonia emissions, which leads to oxygen depletion, harming other waterlife, including fish and other plants.

⁷⁴ *Id.* at 27.

⁷⁵ Earthjustice has led campaigns to force government agencies to adequately address water pollution from farm runoff. Press Release, Earthjustice, Florida Waters Polluted by Dairy Farms and Feedlots (Aug. 10, 2004), available at http://www.earthjustice.org/news/press/004/florida_waters_polluted_by_dairy_farms_feedlots.html (discussing a Florida case in which Earthjustice was part of a coalition that sued Florida’s Department of Environmental Protection to protect water quality). One of the Sierra Club’s campaigns addresses water pollution caused by factory farms. Sierra Club, Clean Water and Factory Farms, <http://www.sierraclub.org/factoryfarms/> (last visited Apr. 29, 2009).

⁷⁶ See Center on Race, Poverty & the Environment, *supra* note 43.

mutual benefits to both fields of addressing farmed animal welfare. Reducing crowded conditions on farms is a basic way to increase animal welfare. This would also benefit the environment by reducing the number of animals on farms and therefore the overall pollution of farms.⁷⁷ Efforts to give animals environments more suited to their natural behavior, such as the opportunity to forage, would also reduce farms' reliance on feed. Allowing animals to forage for themselves requires less energy than growing grain to feed those same animals, producing a decline in the energy use associated with farms, another environmental benefit. Finally, increased publicity of animal cruelty on farms would inherently also reveal more about the environmental impacts of farming, bolstering environmental campaigns to address farming's effects on the planet.

B. *Challenges to Collaboration*

In spite of the large expanse of common ground that animal law and environmental law groups can find in their opposition to industrial farming, environmental organizations have traditionally challenged farming operations without incorporating animal welfare concerns. This is likely because of the lack of interest in animal welfare issues among environmental organizations' client groups and the perceived political risks in working with some animal welfare organizations, discussed previously.⁷⁸ Funding issues limit how much environmental lawyers can do, but the addition of animal welfare concerns to existing environmental work does not appear to require a significant amount of funding given the legal overlap between the two fields.

Animal law does not matter to some of the client groups with whom environmental organizations work. Many established environmental organizations, such as the Sierra Club and Earthjustice, primarily work with urban and suburban citizens, while others, such as the Center on Race, Poverty & the Environment, work with rural communities.⁷⁹ While urban

⁷⁷ Given the downward trend in farmland available in the U.S., it is unlikely that an increased number of farms would counteract this.

⁷⁸ See *supra* Part II.B.

⁷⁹ Sierra Club and Earthjustice, along with other large organizations such as the Natural Resources Defense Council, are based in large cities such as Oakland, San Francisco, and New York, while the Center on Race, Poverty & the Environment has an office in San Francisco as well as one in Delano, California,

residents may feel some affinity for animals, rural communities, many of whom raise farm animals as commodities, usually do not consider animal welfare important, especially when balanced against their economic interests.⁸⁰ What pro-animal sentiment these groups feel does not appear to be significant enough for them to include animal welfare concerns in their work. Especially for rural communities dealing with health and poverty issues (though these issues overlap with animal welfare concerns in some situations), there is little reason to encourage environmental organizations to coordinate with animal welfare groups.⁸¹

The political limitations discussed above have reduced the number of environmental organizations that have worked with animal welfare organizations. Environmental organizations may

located in the heart of California's Central Valley.

⁸⁰ For example, voting on California's Proposition 2 varied depending on the rural character of the county at issue. Though the proposition passed with 63.5 percent of Californians voting yes, Humane Society, *supra* note 28, support declined, and at times became opposition in rural counties, whereas in urban areas support was often proportionally higher. This demonstrates only that support declined in rural counties, not that rural citizens have no interest in animal welfare. California Secretary of State, General Election: Proposition 2 – Standards for Confining Farm Animals, http://www.sos.ca.gov/elections/sov/2008_general/maps/returns/props/prop-2.htm (last visited Mar. 27, 2009). In Tulare County, a very rural area, 56 percent of residents voted against it. Nearby Kern County, also very rural, supported Proposition 2 but with 53.2 percent voting in favor, much less than the statewide total. San Francisco County, by contrast, supported Proposition 2 at an overwhelming 72.4 percent rate. *Id.* Although Proposition 2 passed by a wide margin, the voting disparities likely reflect the emphasis rural communities place on economics and other concerns over animal welfare issues. The fact that Proposition 2 will not go into effect until 2015 likely encouraged rural communities to accept it. A faster acting or more rigid statute might have met with less rural support than Proposition 2 did. In a 2006 Arizona campaign to pass a ballot proposition that would require more space for pigs and veal calves, supporters relied in part on the endorsement of Sheriff Joe Arpaio, considered one of the toughest sheriffs in the United States. Press Release, Humane Society of the United States, Animals Win Big at Ballot Box (Nov. 7, 2006), available at http://www.hsus.org/farm/news/pressrel/animals_win_arizona_proposition_204.html. On Arpaio's toughness, see *Arizona Criminals Find Jail Too in-tents'*, CNN.COM, July 27, 1999, <http://www.cnn.com/US/9907/27/tough.sheriff/>. Arpaio's support was valuable in part to counter the rural reluctance to support animal welfare issues.

⁸¹ This is not to blame either the organizations that work with rural communities or the communities themselves. Both deserve respect for the work they do and their efforts to overcome the challenges they face. However, their knowledge of how CAFOs work should make these organizations well aware of animal welfare concerns. Even if their clients are not immediately interested, these organizations should address animal welfare as the social justice issue for which it deserves recognition.

believe that the political risks of working with animal welfare groups may outweigh the perceived benefits. Although the perceptions of these risks vary depending on the animal welfare organization in question, they create significant impediments to cooperation. Environmental groups, concerned with gaining support from judges and legislators, are also unlikely to risk that support by including what they may consider unpopular animal welfare claims in their work. However, environmental organizations overestimate the risks of political and social dissension from working with animal organizations, while undervaluing what animal welfare can contribute to environmental efforts, such as a wider base of support and more legal strategies, not to mention the importance of animal welfare itself.⁸² The belief that some animal welfare groups are too radical for mainstream environmental supporters has held groups back in the past.⁸³ But this ignores the trend of increasing public support for animal welfare organizations and efforts, demonstrated partly by the success of recent ballot propositions to improve the conditions of farmed animals.⁸⁴

There are few existing animal welfare organizations in areas with heavy farming industry. Most animal welfare organizations are located in urban areas,⁸⁵ but heavy farming occurs primarily in rural locations. The lack of animal welfare organizations working near farming industry leaves those organizations unable to influence local politics in favor of addressing animal welfare

⁸² For more on the importance of animal welfare issues see *infra* Part V.

⁸³ Jeff Odefey's reluctance to work with PETA is one demonstration of this. Interview with Jeff Odefey, *supra* note 39.

⁸⁴ See sources cited *supra* note 28 and accompanying text. One interesting example of how animal welfare organizations encouraged support for California's Proposition 2 was a popular online video, a song called *Uncaged*, set to the tune of Stevie Wonder's *Superstition*, that featured a cartoon pig describing the proposition's benefits to animal welfare and family farming. *Uncaged*, posting of HumaneCalifornia to YouTube, <http://www.youtube.com/watch?v=kKu6ry0kj1Y> (Sept. 24, 2008).

⁸⁵ For example, HSUS has Regional Offices in Arlington, Texas; Billings, Montana; and Tallahassee, Florida: all urban areas. The Humane Society of the United States, Offices and Affiliates, http://www.hsus.org/about_us/offices_and_affiliates/ (last visited June 14, 2009). Farm Sanctuary provides a counter example, as it has rural locations. See Farm Sanctuary, The Farm, <http://www.farmsanctuary.org/farm/> (last visited May 16, 2009). However, given that it operates a farm and a rural location is necessary for Farm Sanctuary, this arguably demonstrates convenience more than success in establishing significant rural support for animal welfare.

concerns. While urban organizations may be addressing farm issues, they are doing so from a distance and therefore doing so less effectively because they lack political and social support of communities living near large farms. The dearth of animal welfare groups organizing rural support leaves many environmental organizations unwilling to address animal welfare issues, and animal welfare groups unable to work directly with local environmental organizations.

C. *Increased Possibilities for Collaboration*

The growing public awareness of and interest in animal welfare issues demonstrates that the political limitations of working with animal welfare groups are beginning to disappear.⁸⁶ Increased scholarship on animal welfare concerns has raised public awareness. This awareness has even seeped into primetime television, where a popular cooking show recently highlighted the welfare issues involved in raising animals for food.⁸⁷ Political victories, such as the overwhelming victory of Proposition 2 in California, the ballot measure successes in Florida and Arizona, and the legislative victories in Oregon and Colorado, also reveal an increase in public support for animal welfare.⁸⁸ This growing

⁸⁶ An interesting anecdotal example comes from the popular TV medical drama *House*. In one episode, in the course of treating a patient, *House's* medical staff, always ready to perform a non-medical task, visit a cockfighting ring. The brief scene includes shots of roosters grappling each other. The information gathered there of course allows Dr. Gregory House, the series' principal character, to diagnose a patient with an extremely rare endocarditis due to psittacosis, caused by inhaling dust from infected roosters. The episode ends with a black screen bearing the words: "The American Humane Association monitored the animal action. No animal was harmed in the making of this television program." *House: Humpty Dumpty* (Fox television broadcast Sept. 27, 2005). Fox clearly wanted to reassure audiences that the network did not actually allow roosters to battle to death for the sake of television. Other animal welfare organizations have criticized the American Humane Association as being in the pocket of studios, and have criticized the Humane Association for overlooking dangerous on-set conditions for animals. Ralph Frammolino & James Bates, *Questions Raised About Group That Watches Out for Animals in Movies*, L.A. TIMES, Feb. 9, 2001, at A1.

⁸⁷ Chef Jamie Oliver killed a chicken live on his cooking show last January as part of a discussion about the welfare of chickens raised for food. Other chefs have followed suit in highlighting animal welfare concerns through their cooking shows. Julia Moskin, *Chefs' New Goal: Looking Dinner in the Eye*, N.Y. TIMES, Jan. 16, 2008, at F1, available at <http://www.nytimes.com/2008/01/16/dining/16anim.html>.

⁸⁸ See *supra* notes 28–35 and accompanying text.

awareness demonstrates that concerns about public reactions to environmental groups allying themselves with animal welfare organizations are beginning to lose legitimacy. Awareness has not reached everyone, but it has arguably reached enough people to assuage the fears of environmental organizations.

The increased public awareness of animal welfare concerns means that environmental groups can take advantage of the legal and public support of animal welfare campaigns without worrying as much about the potential downsides. Collaborating with animal welfare groups would allow environmentalists and animal welfare activists to take advantage of each other's political capital with certain groups and the increased resources in personnel, time, and money to work on legal challenges. The range of animal welfare organizations that exist also allow environmental organizations to work with those groups that best fit their campaigns and political positions. Given the growing appeal of animal welfare, the potential gains for environmental organizations from working with animal welfare groups are worth the political risks of doing so. It is also important to note that environmentalists can choose with which animal groups they work. Some may opt for animal welfare groups over animal rights groups. Others may base collaboration on the public image animal groups portray. This is not an endorsement of blanket collaboration; increased collaboration does not mean environmentalists cannot make strategic decisions about who they choose to affiliate with. As groups begin trying to coordinate the work of environmental and animal welfare organizations, NEPA provides another possible tool to increase collaboration.

IV. USING NEPA TO COORDINATE BETWEEN ENVIRONMENTAL AND ANIMAL WELFARE ORGANIZATIONS

As previously discussed, there is little law that directly addresses animal welfare, and lawyers have had to turn to the law in other fields, in particular environmental law, to protect animals.⁸⁹ The National Environmental Policy Act⁹⁰ (NEPA) provides yet another tool that lawyers can use to protect animals, in particular farmed animals. While many environmental laws indirectly benefit animals in their implementation, this note argues

⁸⁹ See *supra* notes 19–35 and accompanying text.

⁹⁰ 42 U.S.C. §§ 4321–4370 (2000).

that NEPA holds the potential to directly address animal welfare. Prioritizing NEPA will further animal welfare concerns by forcing courts to seriously consider animal welfare issues. Because of its flexibility and ability to expand based on litigation to encompass new topics, NEPA is particularly suited to protecting farmed animals. Although lawyers will have to overcome several challenges to use NEPA, its background and structure should allow lawyers to succeed in broadening NEPA's coverage to include animal welfare concerns directly rather than as the collateral consequence to efforts to protect the environment.

A. *NEPA Background*

NEPA is designed to require agencies and developers to more carefully consider the environmental impacts of their actions. The statute requires that government agencies prepare an Environmental Impact Statement (EIS) for any "major Federal action[] significantly affecting the quality of the human environment."⁹¹ Preparing an EIS "is time-consuming and expensive,"⁹² and developers can avoid the requirement by mitigating their environmental impacts below significant levels and preparing a simpler document, an Environmental Assessment (EA).⁹³ NEPA challenges usually focus on either a decision not to prepare an EIS or the adequacy of a prepared EIS.

NEPA does not require agencies to alter their decisions even when they will cause significant, even drastic, environmental harm. Environmentalists have claimed that the statute's language requires substantive changes in environmental decision-making,⁹⁴ but the Supreme Court dismissed that argument early in NEPA's history, stating that NEPA is merely a procedural statute requiring agencies to consider environmental issues, not act on those considerations.⁹⁵ NEPA's procedural nature, however, may

⁹¹ § 4332(2)(C).

⁹² Lauren Giles Wishnie, *NEPA for a New Century: Climate Change & the Reform of the National Environmental Policy Act*, 16 N.Y.U. ENVTL. L.J. 628, 636 (2008); see also Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 924 (2002).

⁹³ 40 C.F.R. § 1508.9 (2008).

⁹⁴ See, e.g., LYNTON KEITH CALDWELL, *THE NATIONAL ENVIRONMENTAL POLICY ACT: AN AGENDA FOR THE FUTURE* (1998).

⁹⁵ *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (characterizing NEPA's substantive provisions as national "goals").

actually make it particularly suited for animal welfare because it makes NEPA so flexible.⁹⁶

Climate change litigation has shown that NEPA is a flexible statute capable of encompassing recently acknowledged categories of environmental harms. Four cases highlight a shift in the courts' analysis over the past two decades as the phenomenon of climate change has gained scientific and political traction. In 1990, in *City of Los Angeles v. National Highway Traffic Safety Administration*, environmental groups failed to force the National Highway Traffic Safety Administration to analyze how its new fuel standards impacted climate change, with the court finding that the standard's impact on climate change was too minimal to reach NEPA's significance threshold.⁹⁷ But by 2003 and 2005, respectively, the 8th Circuit⁹⁸ and the Northern District of California⁹⁹ accepted arguments that NEPA should require climate change analysis, although the plaintiffs had difficulty establishing causation and significance in both. In 2008, the Ninth Circuit directly repudiated *City of Los Angeles*, accepting plaintiffs' argument that the National Highway Traffic Safety Administration had violated NEPA because the agency had not adequately analyzed its proposed fuel economy rule's greenhouse gas impacts.¹⁰⁰ Ordering the agency to prepare an EIS, the majority actually cited Judge Wald's dissent from *City of Los Angeles*, where he argued that climate change was significant under NEPA, marking a clear shift in the court's position.¹⁰¹

⁹⁶ See *infra* Part IV.B.

⁹⁷ 912 F.2d 478 (D.C. Cir. 1990).

⁹⁸ *Mid-States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 550 (8th Cir. 2003).

⁹⁹ *Friends of the Earth v. Watson*, No. C 02-4106 JSW, 2005 WL 2035596, at *3 (N.D. Cal. Aug. 23, 2005).

¹⁰⁰ *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1219–27 (9th Cir. 2008).

¹⁰¹ *Id.* at 1224–25. For a more thorough analysis of the case law and judicial understanding of NEPA and climate change, see Wishnie, *supra* note 92, at 640–44. The role that livestock production plays in climate change, creating large amounts of greenhouse gases, is an added incentive to regulate farms under NEPA. Some states have statutorily required consideration of climate change under their equivalent state versions of NEPA. California now requires climate change analysis under the state's equivalent of NEPA, the California Environmental Quality Act (CEQA). CAL. PUB. RES. § 21083.05 (West 2008). CEQA is codified at CAL. PUB. RES. CODE §§ 21000-211178 (West 2008). California government has used CEQA to require greenhouse gas analysis. See State of California Office of the Attorney General, California Environmental

Litigation to include climate change analysis under NEPA took over a decade to succeed. This result suggests that, even if not immediately successful, persistent litigation could eventually broaden NEPA to cover animal welfare. Although climate change and animal welfare differ in critical respects, animal welfare would likewise benefit from a perception of legal and political legitimacy. Increasing public awareness of climate change bolstered litigation to include it under NEPA analysis, and increasing public awareness of animal welfare would likely do the same.¹⁰²

Congress may not clearly have intended for NEPA to protect farmed animals, but this interpretation does not contradict Congress' purpose. There is evidence in the statute's legislative history that Congress intended NEPA to have a broad enough meaning to include farmed animals. A report by Lynton Caldwell, who drafted NEPA, offers "reverence for life" as a guiding ethic for NEPA interpretation.¹⁰³ Reverence for life is a broad principle that should include farmed animal welfare.

B. *Making NEPA Work for Animal Law*

Commentators hotly debate NEPA's value. Detractors argue that NEPA causes unnecessary delay and expense, while proponents claim that NEPA, by forcing agencies to consider environmental issues in their decision-making, encourages more public participation in environmental issues while also raising awareness of environmental concerns.¹⁰⁴ In the case of animal

Quality Act, <http://ag.ca.gov/globalwarming/ceqa.php> (last visited Apr. 29, 2009). Even if animal welfare agencies struggle under NEPA, state versions of NEPA may provide an avenue to protect farmed animals.

¹⁰² Plaintiffs have even attempted to use NEPA to challenge the recently created Large Hadron Collider, a particle accelerator designed to smash high-energy beams of subatomic particles into each other for the purposes of scientific research, because they claimed it might create a black hole that would destroy the planet. *Sancho v. U.S. Dep't of Energy*, 578 F.Supp. 2d 1258, 1259 (D. Haw. 2008). They lost the case because they failed to establish a Federal action requiring NEPA analysis of the Collider's potential to create black holes. *Id.* at 1265–68. Regardless, the case demonstrates the wide range of subjects to which NEPA potentially applies.

¹⁰³ *National Environmental Policy: Hearing on S. 1075, S. 237, and S. 1752 Before the S. Comm. on Interior and Insular Affairs*, 91st Cong. 41 (1969). Sen. Henry "Scoop" Jackson introduced the report into the Congressional Record when he introduced NEPA. *Id.* at 25.

¹⁰⁴ For a thorough analysis of the debate surrounding NEPA's value, see Wishnie, *supra* note 92, at 632–38.

welfare law, getting federal agencies to consider animal welfare would be major step forward for the field.

Ironically, although environmentalists lament NEPA's purely procedural nature, this feature may make it particularly well suited for animal law. Despite its relatively rapid growth, animal law remains somewhat marginalized. While animal welfare activists continue to find social support and have had increasing political success,¹⁰⁵ legal efforts have struggled due to the previously mentioned dearth of applicable laws and the challenges in redefining animals' status through litigation.¹⁰⁶ Courts have been reluctant to redefine animals' status as property, holding that that consideration is better left to Congress.¹⁰⁷

This marginal status makes NEPA a potentially powerful statute for advancing animal welfare. Because it is only procedural, judges need not worry that they will inadvertently grant animals substantive rights in recognizing animal welfare claims under NEPA, something that seems to have limited past judicial decisions.¹⁰⁸ Decisions granted under NEPA would only require agencies to discuss animal welfare in environmental analyses; they would not require agencies to adjust actions depending on how they would affect animal welfare. In this sense, NEPA's lack of "teeth" makes it a safe law for judges to enforce.

¹⁰⁵ As discussed previously, *see* sources cited *supra* note 28 and accompanying text, animal welfare activists have succeeded in getting ballot measures to protect animals passed in several states, with California's Proposition 2 the most recent success. *See also* Maggie Jones, *The Barnyard Strategist*, N.Y. TIMES, Oct. 26, 2008, § 6 (Magazine), at 46, 48–50 (discussing HSUS's success in getting measures passed in Florida and Arizona, as well as the campaign to pass California's Proposition 2).

¹⁰⁶ *See, e.g.,* *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 158 (S.D.N.Y. 1994) (rejecting mental anguish damages for death of a dog because of the animal's property status); *Rabideau v. City of Racine*, 627 N.W.2d 795, 798–802 (Wis. 2001) (applying property rule to pets, despite court's misgivings about such a characterization of pets and other human companions); *Lewis v. DiDonna*, 294 A.D.2d 799, 800–01 (N.Y. App. Div. 2002) (affirming pet's property status and refusing to allow pet owner to introduce evidence of loss of companionship during damages hearing).

¹⁰⁷ *See, e.g.,* *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175–76 (9th Cir. 2004) (rejecting argument that cetaceans could have standing, but determining that Congress could confer standing on animals).

¹⁰⁸ Courts rejecting claims for damages to animals demonstrated reluctance to even allow that animals deserve some kind of quasi-property status that would recognize their emotional value to their owners. *See, e.g.,* sources cited *supra* note 106.

However, this does not mean that animal welfare arguments articulated under NEPA would have no effect. Many commentators argue that despite its procedural nature, NEPA has encouraged government agencies to reduce their environmental impacts.¹⁰⁹ Successfully bringing animal welfare arguments under NEPA could have a similar effect. Agencies and developers might mitigate their impacts on animal welfare to avoid being sued for producing inadequate EISs, or to ensure that an EA will suffice. Animal welfare arguments under NEPA should also bring increased public attention to animal welfare issues. As the discussion below suggests, there are a number of areas where animal welfare activists can use NEPA to increase protections for animals. Bringing successful legal arguments under any area of law would give animal law more legitimacy.

Environmental organizations intent on stopping the development of large farms stand to gain significantly from coordinating with and assisting animal welfare organizations because animal welfare arguments can help them to halt concentrated animal feeding operations (CAFO) development. As NEPA litigation addressing the environmental impacts of farming grows, developers will likely begin to mitigate their environmental impacts to avoid NEPA requirements, reducing the effectiveness of environmental NEPA claims. Animal welfare arguments, however, will be difficult for farms to counter because of their novelty and the inherent contradictions of large-scale animal production. It may be difficult to balance the economic efficiency of farming with animal welfare.¹¹⁰

In order to extend NEPA to protect farmed animals, lawyers will have to overcome several challenges. These hurdles include whether farms are even subject to NEPA, whether the phrase “human environment” includes the suffering of farmed animals, and whether the suffering of farmed animals has a significant environmental impact.

1. *Applying NEPA to Farms*

The first consideration in articulating a valid NEPA claim is

¹⁰⁹ See Wishnie, *supra* note 92, at 637–38.

¹¹⁰ Unfortunately, even if lawyers can articulate this argument effectively, they will run into NEPA’s procedural nature, undermining the substantive results of their efforts. However, they will force developers and government agencies to consider animal welfare impacts.

determining that a federal action is involved, given that NEPA applies only to “major Federal actions.”¹¹¹ Because of the broad definition of federal action, this is a comparatively easy hurdle to overcome. Under NEPA case law, any federal permitting of CAFOs, including permits to operate, will suffice.¹¹² Although this note addresses the federal statute, it is important to realize that state “Little NEPAs” employ different language and are governed by different judicial interpretations, so they may apply to CAFOs where NEPA would not.¹¹³

Although there is no NEPA case law addressing farms, the Environmental Protection Agency (EPA) has begun permitting CAFOs for operation under the Clean Water Act (CWA).¹¹⁴ Unfortunately, EPA does not appear to be permitting CAFOs

¹¹¹ 42 U.S.C. § 4332(2)(C) (2000).

¹¹² *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n.*, 481 F.2d 1079, 1088 (D.C. Cir. 1973) (construing NEPA's language as broad and determining that “there is ‘Federal action’ within the meaning of the statute not only when an agency proposes to build a facility itself, but also whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment”).

¹¹³ For California's version, CEQA, see *supra* note 101. See also State Environmental Quality Review Act (SEQRA), N.Y. COMP. CODES R. & REGS. tit. 6, § 617 (2008).

¹¹⁴ EPA promulgated final rules for permitting CAFOs under the Clean Water Act in 2003. 68 Fed. Reg. 7176 (Feb. 12, 2003). In 2005, the Second Circuit Court of Appeals ruled on consolidated challenges to the permit program made by environmental organizations on one side and agricultural industry groups on the other. *Waterkeeper Alliance, Inc. v. Env'tl. Prot. Agency*, 399 F.3d 486 (2d Cir. 2005). The court agreed with the environmental plaintiffs to find that provisions of the rule violated the CWA on several grounds, but principally because: (1) adoption of the rule was arbitrary and capricious because EPA provided no means of ensuring compliance by CAFOs with waste management standards before issuing a permit, *id.* at 498–502; and (2) EPA proposed to issue permits without specific waste management regulations in violation of the CWA's requirement that permits set out clear management standards, *id.* at 502–03. But the court's analysis of the CWA also cut against the environmental plaintiffs and in favor of the industry for other reasons: (1) EPA's rule cannot require affirmative action by *all* CAFOs, either to procure a permit or prove they contribute no pollutants to protected waters, because CWA authorizes rules reaching sources that *actually* discharge, *id.* at 504–06; (2) EPA's exemption of contaminated stormwater runoff from CAFOs was consistent with a statutory exemption in CWA's definition of “point source,” *id.* at 506–09; (3) the court generally deferred to EPA's authority to set various technological standards for pollutant discharge control at CAFOs, and agreed with the agency and the industry that many of the adopted standards were suitable, while finding that certain aspects of the proposed controls were unsupported in the record, *id.* at 511–24. EPA returned to the process of re-writing the rule, but has yet to issue it.

extensively.¹¹⁵ EPA itself estimated in 2001 that, while it should have permitted 13,000 CAFOs, it permitted only 2,520.¹¹⁶ It may be difficult to claim that there is a federal action if EPA does not increase its permitting through a more rigorous permit program. Additionally, the USDA practice of providing Environmental Quality Incentive Program grants to many CAFOs could be sufficient federal action for NEPA litigation, although it is not clear that would succeed.¹¹⁷ The Bush Administration appears to have directed EPA to require fewer permits than its legal authorization allows, something that may change as farm pollution becomes more apparent or as political dynamics shift under the Obama administration.¹¹⁸ Assuming EPA begins requiring more CAFOs to obtain permits, animal welfare advocates should be able to clear this initial hurdle in determining whether NEPA applies to CAFOs.

Even if lawyers struggle to bring cases under NEPA, they can turn to state statutes instead. Several states have more thorough permitting programs, so lawyers can turn to Little NEPAs to do the same work if federal permitting lags. California, for example, has not only begun to require large farms to obtain permits, but has heard CEQA litigation over the environmental impacts of CAFOs.¹¹⁹

¹¹⁵ See Michele M. Merkel, EPA and State Failures to Regulate CAFOs Under Federal Environmental Laws, Remarks at the National Commission on Industrial Farm Animal Production Meeting 2 (Sep. 11, 2006) (outline available at <http://www.environmentalintegrity.org/pub401.cfm>). Indeed, EPA seems to have side-stepped several statutory obligations that arguably should apply to farms. See Ruhl, *supra* note 70, at 293–309 (discussing how EPA has avoided the logical conclusion that the CWA and the Clean Air Act should regulate farms).

¹¹⁶ National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 2968–69, 3080 (Jan. 12, 2001) (summarizing baseline compliance).

¹¹⁷ U.S. Dep't of Agric., Natural Resources Conservation Service, Environmental Quality Incentives Program, <http://www.nrcs.usda.gov/programs/eqip> (last visited Apr. 29, 2009).

¹¹⁸ Peter Singer posits just such a possibility. SINGER & MASON, *supra* note 61, at vi–vii (highlighting the Bush administration's decision to weaken EPA enforcement of the Clean Water Act).

¹¹⁹ See Center on Race, Poverty & the Environment, *supra* note 43. The Center successfully brought suit under CEQA to require preparation of an Environmental Impact Statement regarding the development of a large dairy.

2. *Broadening the "Human Environment"*

Animal welfare advocates' second challenge will be ensuring that farmed animals fall under the definition of "the human environment." In order to utilize NEPA to protect animals, lawyers will have to demonstrate that farmed animals and their welfare fall under NEPA's definition of "the human environment."¹²⁰

The term "human environment" has not been given the broad reading that its vague language seems to allow. Rather, the Supreme Court has defined the term narrowly to mean the "physical environment," citing legislative history to limit it to air, land, water, and terrestrial environments.¹²¹ Although one could define the "human environment" to include any situation, such as the design of a city street, the Court has limited it to a traditional conception of the natural environment as those things that are not manmade. Manmade structures require NEPA review only when they impact the natural environment. This neither clearly includes, nor clearly excludes, human created farmed environments, as discussed below.

Few people dispute that CAFOs generate large amounts of air and water pollution and so would be subject to NEPA reporting requirements where such impacts on environmental quality are significant.¹²² However, this note attempts to articulate a way to protect farmed animal welfare directly, not indirectly through protecting environmental quality. In order to use NEPA to protect the welfare of farmed animals directly, lawyers must focus on how harm to animals impacts people.¹²³ Analyzing how NEPA litigation has assessed wild animals sheds light on how it relates to

¹²⁰ 42 U.S.C. § 4332(2)(C) (2000).

¹²¹ *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772–773 (1983) (quoting Sen. Jackson discussing "air, land, and water" and Rep. Dingell discussing "air, aquatic and terrestrial environments"). *See also infra* notes 130–133 and accompanying text (discussing *Breckinridge v. Rumsfeld*, 537 F.2d 864 (6th Cir. 1976)).

¹²² *See PUTTING MEAT ON THE TABLE*, *supra* note 63, at 22–29 (highlighting the large amounts of water and air pollution arising from concentrated farming operations, including the equivalent of nearly 60,000 tons of CO₂ emissions from methane and nitrous oxide); *UNTOLD COSTS*, *supra* note 68, at 13–14 (stressing the impact of manure disposal on land and water).

¹²³ This is not intended as a comment on the value of animals, but rather an acknowledgement of how NEPA operates. NEPA requires lawyers to address impacts to people.

farmed animals.

a. *Harm to the Natural Environment*

In contrast with farmed animals, environmental advocates have relied on NEPA to directly protect the welfare of wild animals, which has formed the basis of much past NEPA litigation. In *Sierra Club v. U.S. Army Corps of Engineers*, the Second Circuit upheld a District Court decision to halt a project based on an inadequate EIS.¹²⁴ *Sierra Club's* argument hinged on impacts to several species of fish, including the white flounder, white perch, and striped bass, arguing that damage to these fish were impacts to the human environment.¹²⁵ Because people consider wild animals to be part of the natural environment and therefore clearly within the "human environment," lawyers had little trouble fitting the fish under NEPA.

Similar arguments should be extended directly to farmed animals. Successfully doing so would clearly fit farmed animal welfare into NEPA's EIS requirement for actions affecting the human environment. However, although NEPA clearly applies to wild animals, so far advocates have not applied these arguments to the welfare of cows, chickens, or pigs. Despite the different cultural status that domestic animals, particularly farmed animals, have compared to wild animals,¹²⁶ farm animals arguably form ecosystems the same way that wild animals do. Farm animals form a cohesive group that interacts with its environment just as wild animals do. Thus, just as the protection of wild animals preserves wider ecosystems and humans' enjoyment of those wild animals, protecting farmed animals preserves their value to the human environment. Likewise, animal welfare advocates can articulate arguments based on providing healthy environments for farmed animals in order to directly protect farmed animals under NEPA. Gestation crates, battery cages, and veal stalls create ecological harm by providing inadequate environments because they restrict the animals' natural behaviors. So, as the impacts on wild animals fall under the traditional category of ecological

¹²⁴ 701 F.2d 1011, 1049 (2d. Cir. 1983).

¹²⁵ *Id.* at 1023.

¹²⁶ This is best demonstrated by the reality that many organizations, such as Defenders of Wildlife, the Sierra Club, and others, exist only to conserve wild spaces and the animals that occupy them. Organizations protecting farmed animal welfare are comparatively few in number.

impacts, so should impacts on the welfare of farmed animals.

b. *Limits to the Human Environment*

Even if arguments that inhumane treatment of farm animals constitutes ecological harm prove too much of a stretch, lawyers may still be able to use NEPA to argue that impacts on farmed animal welfare directly impact the human environment. Understanding the limitations of this argument requires analyzing the lines courts have drawn around the human environment.

The Council on Environmental Quality (CEQ) regulations created to inform NEPA compliance can help lawyers fit animal welfare impacts into their definition of the human environment.¹²⁷ Section 1508.14 of the regulations instructs that “[h]uman environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment.”¹²⁸ CEQ’s definition of “effects” clarifies the definition of “human environment,” indicating that a wide variety of effects matter under NEPA. Section 1508.8 defines “effects” to include, in addition to ecological impacts, “aesthetic, historic, cultural, economic, social, or health” impacts.¹²⁹ Articulating how cruelty to farmed animals relates to any of the above ecological impacts will ensure that farmed animal welfare is included in the definition of human environment. The aesthetic and cultural impacts discussed below are examples of how to do this.

However, the human environment does not include impacts that only affect people. Unless lawyers can pair less traditional environmental concerns, such as social effects, with impacts to the physical environment, they may struggle to get courts to consider animal welfare concerns to be impacts on the human environment given narrow judicial interpretations. In *Breckinridge v. Rumsfeld*, the Sixth Circuit debated whether closure of a military base and the ensuing job loss necessitated preparation of an EIS.¹³⁰ The court disagreed with the assertion that human environment covers anything that impacts people, including social and economic

¹²⁷ These regulations enjoy significant deference from courts. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355 (1989) (citing *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979)).

¹²⁸ 40 C.F.R. § 1508.14 (2008).

¹²⁹ 40 C.F.R. § 1508.8.

¹³⁰ 537 F.2d 864 (6th Cir. 1976).

concerns.¹³¹ Other courts have reached the same conclusion.¹³² The *Breckinridge* court also points out that NEPA requires consideration of impacts on the non-physical environment only when there has also been a primary impact on the physical environment.¹³³ It would be more effective to establish that direct harm to animal welfare satisfies NEPA. However, even if lawyers struggle to demonstrate such a direct connection, they should have no difficulty finding cases to bring NEPA challenges where animal welfare can at least play an important indirect role, given the clear environmental impacts of large scale farming.¹³⁴ Such action could take NEPA one step further to considering directly the impact CAFOs have on animal welfare. Lawyers can do so by focusing on aesthetic and cultural/historical impacts, in particular a direct human interest in animal welfare and the cultural/historical role that family farms, in part because of their treatment of animals, play in society.

c. *Aesthetic Impacts*

Lawyers can argue that large farms present aesthetic injuries under NEPA, a recognized form of harm to the human environment, as long as they can demonstrate that people have a clear aesthetic interest in the welfare of farmed animals. In *Kootenai Tribe of Idaho v. Veneman*, the Ninth Circuit Court of Appeals heard a NEPA challenge to the Forest Service's Roadless Rule, which banned road construction in some forest areas.¹³⁵ The

¹³¹ *Id.* This is another case where state courts provide more opportunities for advocates. California courts have accepted that social and economic concerns may require preparation of an Environmental Impact Report under CEQA. *Bakersfield Citizens for Local Control v. City of Bakersfield*, 22 Cal. Rptr. 3d 203, 218–19 (Cal. Ct. App. 2004) (finding that developer had to analyze potential for urban decay arising from a new mall, despite those impacts being several steps removed).

¹³² See *Image of Greater San Antonio v. Brown*, 570 F.2d 517, 522 (5th Cir. 1978); *Citizens Comm. Against Interstate Route 675 v. Lewis*, 542 F. Supp. 496, 534–35 (S.D. Ohio 1982); *Metlakatla Indian Cmty. v. Adams*, 427 F. Supp. 871, 875 (D.D.C. 1977); *Nat'l Ass'n of Gov't Employees v. Rumsfeld*, 413 F. Supp. 1224, 1229 (D.D.C. 1976). *But see* *City of Shoreacres v. Waterworth*, 332 F. Supp. 2d 992, 1009 (S.D. Tex. 2004) (holding that NEPA does allow consideration of economic impacts that are related to environmental effects, but that such consideration of such factors is within an agency's discretion).

¹³³ *Breckinridge*, 537 F.2d at 866.

¹³⁴ See *PUTTING MEAT ON THE TABLE*, *supra* note 63. See generally *UNTOLD COSTS*, *supra* note 68, at 13–14.

¹³⁵ 313 F.3d 1094 (9th Cir. 2002).

Roadless Rule identified areas in which the Forest Service would not allow development.¹³⁶ Along with private developers and State and County parties, the Kootenai Tribe filed a lawsuit declaring that the adoption of the Rule violated NEPA.¹³⁷ In addressing a challenge to the Tribe's standing, the court accepted that the Tribe's interest in the wilderness areas at issue qualified as aesthetic injury under NEPA.¹³⁸ The Tribe alleged that implementation of the Roadless Rule would make it more difficult to fight forest fires, would reduce forest management and thereby increase disease in trees, and would lead to more insects, all aesthetic injuries to the Tribe's enjoyment of the wilderness.¹³⁹ The court appears to have focused on harm to the Tribe's use of the land, which may make articulating a similar argument for animals difficult because CAFOs arguably impact animals' use of the land, not peoples' use.¹⁴⁰ It is a little unusual that the Tribe wanted roads, as opposed to most NEPA suits in which plaintiffs oppose development, but that does not matter here. The issue here is only that the court accepted that the Tribe's interest in the wilderness qualified as an aesthetic injury.

Despite the challenge presented by *Kootenai Tribe*, animal advocates still may be able to persuasively articulate the aesthetic impact of CAFOs on the human environment. Just as a road cutting directly through a forest affects the aesthetic enjoyment people receive from hiking through that forest, the site of a 45,000 cow dairy farm or a massive chicken operation, where people can see animals suffering or know cruel practices occur at the sight of the large barns housing animals, is an aesthetic blight based on harm to those animals.¹⁴¹ There is a counter-argument that

¹³⁶ *Id.* at 1104–06.

¹³⁷ *Id.* at 1106. This is an interesting case to cite for a pro-environmental, pro-animal welfare paper, given that the NEPA challenge came from groups interested in land development, but its contribution to issues of aesthetic worth stands. Also interesting are the standing arguments that the environmental groups made against the Kootenai Tribe, given the possibility of a court using those arguments against environmental lawyers in the future. *Id.* at 1112.

¹³⁸ *Id.* at 1112–14 (Tribal members “allege that the Roadless Rule in these ways threatens aesthetic, recreational, and spiritual enjoyment of national forest land by the Tribe”). The Court ultimately dismissed the NEPA challenge, but the Kootenai Tribe still got its day in court. *Id.* at 1123.

¹³⁹ *Id.* at 1113.

¹⁴⁰ *Id.*

¹⁴¹ Several courts have supported findings of aesthetic injury based on harm to animals. See *Humane Soc’y of the United States v. Babbitt*, 46 F.3d 93, 99

because people may not be able to actually see the suffering of farmed animals, this cannot be an aesthetic injury. However, that gives aesthetic injury too narrow a definition.¹⁴²

d. *Cultural and Historical Impacts*

There is a strong argument that animal welfare affects the human environment based on the cultural and historical impacts of CAFOs. In *Middle Rio Grande Conservancy District v. Norton*, several conservancy groups brought a NEPA challenge against the Department of the Interior and the Fish and Wildlife Service for failure to prepare an EIS after proposing to designate part of the Rio Grande as critical habitat for the endangered minnow fish.¹⁴³ The court found that the designation would affect the human environment because mandatory changes to river flows would reduce available irrigated farmland and because decreased river maintenance would increase the chances of flooding, thus warranting an EIS.¹⁴⁴ The Court accepted that the loss of farmland qualified as an impact on the human environment under NEPA.¹⁴⁵ In a brief articulating the cultural importance of farming, appellants discussed the historical presence of farming and the important role it played in the lives of New Mexican citizens.¹⁴⁶

n.7 (D.C. Cir. 1995) (quoting *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002, 1007 (D.C. Cir. 1977)) (recognizing “the right to view animals free from . . . ‘inhumane treatment’”); *Animal Legal Def. Fund v. Espy*, 23 F.3d 496, 505 (D.C. Cir. 1994) (Williams, J., concurring in part and dissenting in part) (“Our own cases have indicated a recognition of people’s interest in seeing animals free from inhumane treatment.”); *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1396–97 (9th Cir. 1992) (recognizing standing based on the “psychological injury” the Fund’s members suffered from viewing the killing of bison—according to Federal plan to control bison populations outside of national parks—because the injury arose from a “direct sensory impact of a change in [the plaintiff’s] physical environment”).

¹⁴² For a more thorough discussion of this, see *infra* notes 155–158 and accompanying text.

¹⁴³ 294 F.3d 1220, 1223–24 (10th Cir. 2002). This case also differs from a farm animal case because it involves an endangered species of fish rather than farm animals. However, articulating a successful animal welfare claim under NEPA would require only demonstrating cultural interest in farm animals. It seems likely that there is more cultural interest in farm animals than in minnow fish.

¹⁴⁴ *Id.* at 1227.

¹⁴⁵ *Id.* at 1229 (“Given the aesthetic, economic, ecological, and cultural value of agriculture to the region, even a loss of 2,000 acres of irrigated farmland is significant.”).

¹⁴⁶ Brief of Appellants at 35–36, *Middle Rio Grande Conservancy Dist. v.*

As evidenced in the previous case, plaintiffs must articulate a reasonable cultural interest to challenge a decision based on cultural impacts. In *Navajo Nation v. United States Forest Service*, the Forest Service proposed to expand a ski area in the Coconinos National Forest in Northern Arizona, in an area called the San Francisco Peaks.¹⁴⁷ The Court accepted that the Forest Service's EIS satisfied NEPA because it addressed the cultural and religious relationship that the Navajo and Hopi peoples had with the San Francisco Peaks.¹⁴⁸ In preparing the EIS, the Forest Service analyzed literature as well as interviewing Tribe members in order to understand the impact the project would have on their religious relationship with the Peaks.¹⁴⁹

Based on these precedents, animal welfare activists may be able to articulate a NEPA challenge based on a cultural interest in family farms and the welfare of animals raised there. Family farms have an established cultural value to society both because of their sustainability and because of the ideal of family farming.¹⁵⁰ Large farms could operate sustainably and treat animals well, but that is uncommon enough that the term family farm suffices to capture the cultural value family farms play in NEPA analysis. Part of this value is the idea of cows, chickens, and pigs enjoying idealized pastoral existences.¹⁵¹ Industrial farmers package their

Norton, Nos. 01-2057 & 01-2145 (10th Cir. Jun. 19, 2001).

¹⁴⁷ 479 F.3d 1024 (9th Cir. 2007), *rev'd en banc on other grounds*, 535 F.3d 1058 (9th Cir. 2008).

¹⁴⁸ *Id.* at 1059. The Court allowed the Forest Service to proceed with the project despite this, but that goes only to NEPA's procedural nature, not the ability of lawyers to bring particular claims under the statute.

¹⁴⁹ *Id.* As mentioned before, as long as an agency addresses an impact it can discount its significance, as the Forest Service did here.

¹⁵⁰ See Jim Chen, *The American Ideology*, 48 VAND. L. REV. 809, 818 (1995) ("The farm sector's economic, social, political, and cultural primacy is self-evident. This belief in farm life as a bellwether for the rest of society has endured throughout American history and has transcended numerous social barriers."); Ruhl, *supra* note 70, at 266 ("Farming in America is a deeply-rooted cultural institution with many noble qualities and important economic and social benefits."); Andrew Martin, *Factory Farm Foes Fed Up: Sick of the Foul Odors and Government Inaction, Critics of Huge Swine Operations are Taking Complaints to Court*, CHI. TRIB., Mar. 24, 2004, at C1 (describing community opposition to increase in Illinois factory-farms, with grass-roots organizations filing lawsuits to slow the growth of factory-farms, in part because of community interest in family-farms).

¹⁵¹ Michael Pollan writes extensively about a week that he spent on Polyface Farms, a Virginia farm that raises beef, pigs, and poultry based entirely on pasture grazing. POLLAN, *supra* note 10, at 185–273. Pollan spends chunks of

eggs, milk, and other products with images of animals in green fields for a reason. Of the few family farmers that remain,¹⁵² many continue operating small farms precisely because they are uncomfortable with how animals are raised on large, modern farms, and consumers pay a premium for humane products for the same reason.¹⁵³ Animal welfare activists can articulate a cultural challenge based on the value of family farms, and the integral role animal welfare plays in that value. Because CAFOs threaten the existence of family farms, lawyers can demand that an EIS discuss how a particular CAFO will impact the cultural interest people have in family farms, as well as the cultural interest in the humane treatment of farm animals. This argument will demand an analysis of how CAFOs' inhumane treatment of animals impacts people's interest in animal welfare. Even if CAFOs now dominate the

this account emphasizing how the animals get to enjoy their natural behaviors throughout their entire lives. *Id.* at 208–19. Interviews with some of the farm's customers reveal that they buy from Polyface partly because they know the animals were raised and slaughtered humanely. *Id.* at 241–42.

¹⁵² The 1997 U.S. Agricultural Census tallied 2,092,590 farms below 1,000 acres, but the 2002 Census counted 1,951,992, a decline of 140,598 farms in five years. U.S. DEP'T OF AGRIC., 2002 CENSUS OF AGRICULTURE, 16 tbl.9 (2004), available at <http://www.agcensus.usda.gov/Publications/2002/USVolume104.pdf>. Estimates place the number of pig farms in 1965 at over 1,000,000. That number dropped to 75,350 by 2002, but with a slight increase in pig production, indicating much larger, more concentrated farms. Martin, *supra* note 150.

¹⁵³ The ink spilled glorifying family farms, in part for their humane agricultural practices, is impressive. See, e.g., Taylor Holliday, *On the Trail of a Sustainable Feast*, N.Y. TIMES, June 1, 2008, at TR7, TR12 (discussing sustainable farms in Sonoma County, California, including Redwood Hill Farm, "where all 350 goats have names"); Michael Pollan, *Farmer in Chief*, N.Y. TIMES, Oct. 12, 2008, § 6 (Magazine), at 62 (discussing growth in markets for local, organic agricultural in part because of people's interest in humanely raised food); Jim Robbins, *Think Global, Eat Local*, L.A. TIMES, July 31, 2005, (Magazine), at 8 (describing the sustainable food movement, whose advocates claim that it "cuts down on oil consumption, puts money in the pockets of disappearing farmers, is more humane, helps protect soil and water and, best of all, usually delivers food that tastes better"); Christian L. Wright, *Many Little Piggies, Handled With Care*, N.Y. TIMES, May 17, 2006, at G10 (describing the Ozark Mountain Pork Cooperative, a coalition of 34 farmers, and its humane pig production). Bill Niman, who co-founded Niman Ranch, a large natural-meat supplier that markets humanely-raised beef, was forced to sell to Natural Food Holdings LLC to avoid bankruptcy after his production model proved unprofitable. Niman has denounced the new ownership, claiming that they have sacrificed humane standards to increase profits. Stacy Finz, *Bitter Feelings over Niman Ranch: Founder Says New Owners Changing Product Protocol*, S.F. CHRON., Feb. 22, 2009, at A1.

reality of farming, the idea of the pastoral family farm remains prevalent enough to legitimate the value of family farms and their role in NEPA analysis.

In articulating NEPA comments and challenges, whether to cultural or aesthetic interests, comment writers should focus on how harm to farmed animals impacts people. Addressing environmental concerns might reduce animal suffering in the short-term, but relying on environmental concerns will not prioritize animal welfare arguments over the long run, which this note argues is important to raise animal law's profile. Lawyers will have to demonstrate how cruel practices directly impact people's aesthetic or cultural interests in animal welfare. Lawyers had a similar challenge when they stopped the proposed 1972 Westway highway expansion in New York City, focusing on people's interest in the white flounder, white perch, and striped bass that the expansion would affect.¹⁵⁴ Animal welfare advocates may be able to articulate the sight of suffering as an aesthetic injury, as analogized to an aesthetic injury based on people's view of a landscape. Likewise, knowing that animals are suffering, even if plaintiffs cannot see the actual animals because of the farm buildings, can violate a cultural interest in animal welfare based on people's cultural attachment to humane family farms.

An argument based on exposing people to the sight of animals in inhumane conditions would be similar to the argument made in *Animal Legal Defense Fund v. Glickman*,¹⁵⁵ in which the Defense Fund challenged the United States Department of Agriculture for adopting inadequate regulations to implement the Animal Welfare Act. The Fund's challenge rested on the aesthetic injuries that Marc Jurnove suffered when he visited a game farm several times and witnessed the inhumane conditions in which animals there lived.¹⁵⁶ The court accepted that these injuries established standing, remanding for a decision on the merits.¹⁵⁷ In the NEPA context, animal welfare advocates could argue that people who see

¹⁵⁴ *Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1023 (2d Cir. 1983). If interest in the welfare of an assortment of non-endangered fish supports requiring a NEPA analysis, it is difficult to argue that the welfare of farmed animals does not.

¹⁵⁵ 154 F.3d 426 (D.C. Cir. 1998). On remand, the court upheld the regulations as valid. *Animal Legal Def. Fund, Inc. v. Glickman*, 204 F.3d 229, 230–31 (D.C. Cir. 2000).

¹⁵⁶ *Glickman*, 154 F.3d at 429–30.

¹⁵⁷ *Id.* at 431–32.

CAFOs will suffer an aesthetic injury because they see animals suffering.

This would be a slight extension of the *Glickman* decision, but it is one lawyers should be able to make. First, there are many realities of CAFOs that people can see. Because male chicks cannot produce eggs, producers routinely dump them into dumpsters to die, an opportunity for people to see animals suffering. Beef cattle are also sometimes raised in plain sight of passersby, another opportunity to see animals confined in cruel conditions. In addition, people can recognize the suffering of farmed animals without seeing inside farm buildings. Even those who see only the outside of a battery cage facility arguably suffer an aesthetic injury if they know about the suffering occurring inside the walls. The smell of a chicken facility or the sight of manure pits on a cattle farm, both aesthetic impacts, indicate the realities occurring inside the buildings. This may be a slight extension of the concept of aesthetic injury, but it would be a cruel reality if people, despite clear knowledge of the suffering occurring inside CAFOs, could not do anything about it simply because of the walls that CAFO owners have built in an attempt to hide what they do.

These will be difficult arguments to make. However, successfully making these arguments would directly protect animal welfare rather than relying on the collateral benefits of environmental protections. Even if these arguments do not succeed immediately, consistently raising these arguments may legitimize them and spur agencies into better protecting or considering animal welfare to avoid such challenges.¹⁵⁸

3. *Significant Impact*

The final hurdle for lawyers in applying NEPA to farms will be demonstrating that an activity is significant based on impacts to animal welfare. While CAFOs clearly have significant environmental impacts, lawyers will have some difficulty demonstrating the significance of the impacts on animal welfare. Lawyers may bring NEPA cases based primarily on the

¹⁵⁸ Lawyers will doubtless face standing challenges based on these novel claims. These will be similar to standing challenges faced in other animal welfare situations. Basically, lawyers will have to demonstrate that their plaintiffs regularly would view the distressed animals and that it would distress them. See *Glickman*, 154 F.3d at 431–32.

significance of the environmental impacts and argue the animal welfare impacts as a secondary matter. Although that would fail to further the goal of directly focusing on animal welfare claims, it may be the only way to ensure that animal welfare arguments are heard.

CEQ guidelines again illuminate how to successfully articulate significant effects under NEPA. The guidelines state that significance depends on context and intensity.¹⁵⁹ Context requires analyzing significance based on several different scales—local, regional, and national.¹⁶⁰ Intensity refers to the impact's severity.¹⁶¹ The regulations list several factors that go into the intensity analysis, including whether the action “may cause loss or destruction of significant scientific, cultural, or historical resources.”¹⁶² However, identifying these factors is not enough to warrant an EIS. They are only factors to consider in determining significance.¹⁶³

Given the distressed state of most farmed animals, if lawyers can establish that animal welfare deserves NEPA consideration, they should be able to articulate how animal welfare issues are significant under NEPA. Lawyers could demonstrate significance based on CAFOs' severe impacts to animal welfare. Regarding intensity, inhumane treatment of animals causes the loss of significant cultural resources in animal welfare. Because people value animal welfare culturally, inhumane treatment affects that value. Analyzing significance under the cultural value of family farms, discussed above, would depend on establishing that CAFOs force small farms out of the market.

However, non-physical impacts on the environment are unlikely to support a NEPA claim on their own. In *Friends of Ompompanoosuc v. Federal Energy Regulatory Commission*, the

¹⁵⁹ 40 C.F.R. § 1508.27 (2008).

¹⁶⁰ *Id.* at § 1508.27(a).

¹⁶¹ *Id.* at § 1508.27(b). Courts have relied on this definition to assess significance. See *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 n.20 (1989).

¹⁶² 40 C.F.R. § 1508.27(a) (8).

¹⁶³ *Advocates for Transp. Alternatives, Inc. v. U.S. Army Corps of Eng'rs*, 453 F. Supp. 2d 289, 300–01 (D. Mass. 2006) (“While some courts have held that the presence of one or more of these intensity factors *may be* sufficient to require an EIS . . . [t]he list of intensity factors does not serve as a ‘checklist.’”) (quoting *Friends of the Earth, Inc. v. U.S. Army Corps of Eng'rs*, 109 F. Supp. 2d 30, 42 (D.D.C. 2000)).

Second Circuit considered the impact of a proposed hydroelectric dam on the Ompompanoosuc River in Vermont at a drop known as the Great Falls, which would significantly affect the falls and destroy a popular swimming hole.¹⁶⁴ The developer proposed several mitigation measures to reduce the environmental impact below significance levels.¹⁶⁵ Based on these mitigation measures, the Federal Energy Regulatory Commission granted a permit to build the dam without requiring an EIS, determining that the project would not destroy cultural, historic, and recreational resources.¹⁶⁶ In rejecting the demand for an EIS, the court concluded that “[a]esthetic objections alone will rarely compel the preparation of an environmental impact statement.”¹⁶⁷

The cultural and historic impacts outlined earlier could avoid this problem because courts have accepted them as sufficient to compel production of an EIS. Qualifying animal welfare impacts under NEPA via aesthetic interests can succeed. However, if lawyers struggle to do so, combining animal welfare NEPA arguments with traditional environmental arguments, such as those about water or air pollution, can be a partial solution. This will ensure that courts do not ignore effective aesthetic impact arguments during NEPA review, and will bolster the chances of courts acknowledging direct aesthetic interests in animal welfare in the future.

4. *Benefit of NEPA Claims*

It is necessary to recognize that focusing directly on animal welfare will be difficult given the challenges discussed above¹⁶⁸ and the novelty of these arguments,¹⁶⁹ but that does not mean

¹⁶⁴ 968 F.2d 1549, 1551–52 (2d Cir. 1992).

¹⁶⁵ *Id.* at 1552.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1557 (quoting *River Rd. Alliance v. Corps of Eng’rs*, 764 F.2d 445, 451 (7th Cir. 1985)).

¹⁶⁸ Fortunately, when it is a close call regarding the significant impacts of a proposed project, courts expect decision-makers to err on the side of preparing an EIS. *See, e.g., Nat’l Audubon Soc’y v. Hoffman*, 132 F.3d 7, 18 (2d Cir. 1997).

¹⁶⁹ Novel legal arguments, generally difficult to make, seem to bear extra burdens in the area of animal law. Courts have been reluctant to break with common law principles regarding animals’ property status. *See, e.g., Gluckman v. Am. Airlines, Inc.*, 844 F. Supp 151, 158 (S.D.N.Y. 1994) (declining to follow prior New York state precedent recognizing “that a pet is something more than personal property”). *But see Corso v. Crawford Dog and Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (N.Y. City Civ. Ct. 1979) (overruling prior precedent and

attempts to use NEPA should be forgone. First, continued litigation in the face of initial failure may succeed, as it did with requiring climate change analysis under NEPA.¹⁷⁰ Also, if lawyers struggle to articulate arguments based solely on animal welfare impacts, lawyers should still be able to bring NEPA cases based on environmental impacts while also articulating animal welfare arguments. Despite this Note's stated goal of directly addressing animal welfare impacts, piggybacking animal welfare arguments onto environmental arguments may be necessary and does not mean courts will ignore animal issues. Even if courts focus on the environmental claims, they must also address animal welfare challenges.

If lawyers can successfully articulate animal welfare arguments under NEPA, it will benefit animal law in three ways: challenges might lead to mitigation measures, delay or halt CAFO development, and provide new avenues for bringing to light and ending harmful human practices.

First, lawyers can use NEPA to suggest mitigation measures and alternatives to reduce the suffering of farmed animals. Mitigation measures and alternatives are an important aspect of NEPA litigation and negotiations.¹⁷¹ Agencies can put particular requirements on projects to alleviate environmental impacts, developers can propose their own mitigation measures, or animal welfare activists can suggest their own mitigation.¹⁷² Just as mitigation has become common for environmental issues, in time it may become common for animal welfare issues.¹⁷³ These measures could include reducing the size of proposed projects, creating more space for farmed animals, and reducing the use of growth hormones.

Lawyers will have to address the most common, and very

recognizing "that a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property").

¹⁷⁰ See *supra* notes 97–101 and accompanying text.

¹⁷¹ See 40 C.F.R. § 1502.14 (2008) (requiring consideration of alternatives in NEPA analysis); 40 C.F.R. § 1508.20 (2008) (defining mitigation).

¹⁷² I am revealing my position on the question of whether animal welfare activists should attempt to minimize harm to animals or object to any harm at all. I believe it is more effective to use the law as much as possible to minimize harm, while simultaneously trying to push it to address animal welfare more widely.

¹⁷³ See Karkkainen, *supra* note 92, at 932–37 (discussing the value of mitigated FONSI's in improving environmental outcomes).

effective, counter-argument to many proposed mitigation measures—economic feasibility. Developers often counter proposals to minimize a project's size or modify its operations by claiming that doing so will make the project economically unfeasible.¹⁷⁴ This may be particularly effective in the farming context because of concerns about affecting the industry's welfare and the affordability of food. Environmental lawyers have struggled to respond to this, and animal lawyers will have to challenge these economic analyses, as well as challenge the premise that economic arguments should outweigh the impacts on animal welfare. Arguably, it is only because of the externalization of pollution costs and government subsidization of industrialized farming that CAFOs can be price competitive with more humane farming practices.¹⁷⁵ Lawyers can argue that in reality, more humane practices produce cheaper food than CAFOs ever could and that more humane, and sustainable, farming is the only way to ensure farming's long-term economic viability. Although environmentalists have yet to successfully use this argument, it might gain traction in the animal law context.

Second, environmental activists have long used NEPA as a delay tactic, and animal welfare activists can use it the same way. Delaying projects allows activists to increase political and social opposition, as well as increasing a project's economic costs, sometimes to the point where developers eliminate projects entirely.¹⁷⁶ This is not the ideal use of NEPA for animal law, but

¹⁷⁴ Cf. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978) (“[T]he concept of alternatives must be bounded by some notion of feasibility.”). See also *N. Ak. Envtl. Ctr. v. Norton*, 361 F. Supp. 2d 1069, 1075 (D. Alaska 2005) (“Nor must an agency consider alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area.”) (quoting *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1180 (9th Cir. 1990)). The emphasis on reasonable alternatives would extend to rejecting alternatives that are economically inefficient or untenable. See *La. Wildlife Fed'n v. York*, 761 F.2d 1044, 1047 (upholding the Army Corps of Engineers consideration of “economic feasibility” in its alternatives analysis).

¹⁷⁵ See POLLAN, *supra* note 10, at 242–46 (discussing how government subsidies and policies favor industrialized farming over small producers).

¹⁷⁶ See TASK FORCE ON IMPROVING THE NAT'L ENVTL. POLICY ACT AND TASK FORCE ON UPDATING THE NAT'L ENVTL. POLICY ACT, H. COMM. ON RES., 109TH CONG., RECOMMENDATIONS TO IMPROVE AND UPDATE THE NATIONAL ENVIRONMENTAL POLICY ACT 9–10 (Comm. Print 2006), available at <http://www.nwma.org/pdf/Final%20Task%20Force%20Report.pdf> (discussing comments deriding delay produced by NEPA litigation). A recent Department of

given the challenges that lawyers face in protecting animal welfare, they should be willing to use NEPA to delay the creation of CAFOs.

Finally, using NEPA will provide another legal forum for challenges to animal suffering. As mentioned before, animal law has struggled to succeed in court, and NEPA may provide another way for lawyers to litigate animal welfare issues. This will give the field increased legitimacy, as well as benefiting animal welfare through increased publicity.

Lawyers should not fear the challenges of articulating animal welfare cases under NEPA. Although these will be difficult to overcome, carefully crafted arguments should be able to surmount the obstacles. Regardless, the threat of NEPA litigation, even if not guaranteed to succeed, can force the farming industry to acknowledge and address animal welfare issues. NEPA's procedural nature may mean that it cannot change substantive decisions, but it can still force industrial farmers to consider animal suffering.

NEPA's biggest benefit in affecting CAFOs is hard to fit into any of the above categories. The most effective shield CAFOs have to protect themselves from regulation is both metaphorical and very real. It is the metaphorical distance between CAFOs and consumers, who are generally unaware of the pollution and cruelty on large farms, as well as the actual walls that hide the animal suffering that occur inside battery cage facilities or steer pens.¹⁷⁷ It is this shield that NEPA can so effectively penetrate, for both environmental and animal welfare impacts. As an informational tool, NEPA's entire point is to help the public understand the impact of proposed developments. As Michael Pollan articulates, putting up glass walls on CAFOs would do more to undermine their existence than many other efforts, and NEPA can create those glass walls, highlighting the realities of animal welfare in a way

Energy Report lists the average completion time of an EIS as over two years at a cost of over \$4 million dollars for Department of Energy projects completed during the twelve months prior. U.S. DEP'T OF ENERGY, QUARTERLY REPORT: NATIONAL ENVIRONMENTAL POLICY ACT: LESSONS LEARNED 25 (2008), available at http://www.gc.energy.gov/NEPA/documents/LLQR_Sep_08_Final.pdf. CAFO costs and timelines might not be as onerous, but having to complete an EIS is an unwanted burden for any developer, one that will factor into decisions about how, and if, to proceed.

¹⁷⁷ SINGER and MASON documented their challenges in gaining access to farms while researching *The Way We Eat*. SINGER & MASON, *supra* note 61, at 8–12.

that is critical to the animal welfare movement's ability protect farmed animals.¹⁷⁸ Animal welfare activists and environmentalists can both call on NEPA to reveal the realities of CAFOs.

V. POLICY ARGUMENT TO SUPPORT EXPANDING ENVIRONMENTAL LAW TO INCLUDE ANIMAL WELFARE

Environmental law organizations stand to gain strategically and economically from working with animal welfare groups through increased political support as well as increased legal and economic resources. Animal welfare arguments can also bolster NEPA claims against CAFOs. The increasing publicity and legal successes that animal law has enjoyed demonstrate that it is gaining political legitimacy.¹⁷⁹ Although it has not yet attained the same status as environmental law, animal law is likely to continue growing, so environmental law should take advantage of the possibilities of working with animal law now.

Environmentalists' support could also be a critical tipping point for animal welfare activism. Especially in a time where climate change has become a recognized crisis,¹⁸⁰ environmental law is an established legal field that has little reason to fear losing legitimacy. Environmental law could increase animal law's legitimacy, providing critical support at a time when animal law is approaching but has not quite reached the status of a mainstream legal field.¹⁸¹ Environmental law could and should help animal

¹⁷⁸ See POLLAN, *supra* note 10, at 332–33 (“Sometimes I think that all it would take to clarify our feelings about eating meat, and in the process begin to redeem animal agriculture, would be to simply pass a law requiring all the sheet metal walls of all the CAFOs, and even the concrete walls of the slaughterhouses, to be replaced with glass. If there’s any new right we need to establish, maybe this is the one: The right, I mean, to look.”).

¹⁷⁹ The public has demonstrated an increased interest in the welfare of farmed animals. Newspaper and magazine authors have dedicated increasing numbers of articles to the issue in recent years. See, e.g., sources cited *supra* note 153. The success of California’s Proposition 2 and similar ballot measures also indicate a high level of public support. See sources cited *supra* note 28.

¹⁸⁰ Even former President George W. Bush’s administration has recognized the threat of climate change. See Press Release, Office of the White House Press Secretary, Fact Sheet: Twenty in Ten: Strengthening Energy Security and Addressing Climate Change (May 14, 2007), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/05/20070514-2.html>.

¹⁸¹ Many people would likely disagree with my assessment that animal law is not yet a mainstream legal field. I make this point because animal law does not enjoy the same legal and political status as a field like environmental law. Despite the problems with them, environmental statutes do exist. Politicians

law reach that status, eliminating some of the concerns that limit collaboration between the two fields by increasing public support for animal law.

Coordination between the two fields will give environmental law increased political, legal, and economic support. Although most animal welfare activists recognize environmental issues as important and support environmental work, there remain some areas of political contention, such as wind energy, between the two fields. Increased coordination between the two would facilitate collaborative solutions to many of these issues,¹⁸² allowing each field to provide political support for the other. There may also be cases where coordinating with animal welfare groups can provide additional Congressional support. For example, Senator John Ensign, a Nevada Republican, rarely votes with environmentalists, but as a former veterinarian, he has been outspoken on animal welfare issues. HSUS endorsed him for re-election in 2006.¹⁸³ Collaborating with animal welfare organizations might help environmental organizations net additional votes on some issues, though it would be necessary to honestly assess the risk of losing some votes as well.

Animal welfare lawyers also offer extensive legal experience that environmental lawyers could utilize in their campaigns. Though the established environmental organizations may not have much need for legal assistance, many smaller organizations, such as the previously mentioned Center on Race, Poverty & the Environment, constantly need legal support. Given the creativity necessary in animal law work, animal welfare lawyers could provide valuable and unique experience for environmental lawyers.

Finally, animal welfare organizations could provide a valuable source of funding for coordinated campaigns. Where organizations can work together on campaigns they would normally lead on their own, combining the funding of multiple

give at least lip service to environmental issues. Animal law has very little law behind it, and, outside of the occasional outcry over the status of pet shelters, usually little political capital.

¹⁸² Depending on the interests of the groups involved, collaboration may reach an impasse and compromise may be the best environmental and animal welfare organizations can reach.

¹⁸³ Press Release, Humane Society Legislative Fund, Human Society Legislative Fund Endorses Senator Ensign in Nevada (Oct. 17, 2006), *available at* <http://www.2fund.org/press-releases/ensign101706.html>.

organizations will decrease costs for all of the groups involved.

Animal welfare is an issue that all environmental activists, particularly those working in environmental justice, should embrace because of its relationship with environmental concerns and its rightful status as a legitimate social justice movement. Many authors have equated animal welfare issues to the civil rights movement, the women's liberation movement, or other social justice campaigns.¹⁸⁴ Peter Singer equates his vegetarian "boycott" with acts of resistance against South African Apartheid.¹⁸⁵ Such comparisons between animal welfare and traditional social justice issues often produce a visceral response from people who find the comparison insulting.¹⁸⁶ The different movements have faced different challenges, campaigned for different issues, and achieved different levels of success. The actors and subjects involved in the different debates are also fundamentally distinct. However, this does not mean animal welfare is not a legitimate social justice movement. Many animal welfare philosophers focus on the idea that animal suffering should be alleviated or halted if possible, because, as they reason, if

¹⁸⁴ Authors who have done so extend back to philosophers like Jeremy Bentham and John Stuart Mill, who likened cruelty to animals to racism. *See, e.g.*, Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 387–88 (2003) (citing JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 310–11 n.1 (Prometheus 1988) and John Stuart Mill, *Whewell on Moral Philosophy*, in *UTILITARIANISM AND OTHER ESSAYS* 228, 252 (Alan Ryan ed., Penguin 1987)). *See also* Symposium, *Confronting Barriers to the Courtroom for Animal Advocates: Linking Cultural and Legal Traditions*, 13 ANIMAL L. 29, 30–31 (2006) (discussing Taimie Bryant's work drawing on disability rights and radical feminism); Taimie L. Bryant, *Animals Unmodified: Defining Animals/Defining Human Obligations to Animals*, 2006 U. CHI. LEGAL F. 137, 162–67 (2006) (comparing animal rights to other social justice movements); Catherine A. MacKinnon, *Of Mice and Men: A Feminist Fragment on Animal Rights*, in ANIMAL RIGHTS, *supra* note 7, at 263–276 (comparing and contrasting feminism to animal rights).

¹⁸⁵ SINGER, *supra* note 6, at 162.

¹⁸⁶ *See* sources cited *supra* note 13 (criticizing Singer's push for moral equivalency between people and animals); Naomi Schaefer, *Professor Pleasure—or Professor Death?*, WALL ST. J., Sept. 25, 1998, at A1 (describing Singer's arguments about abortion, infanticide, euthanasia and animal rights as "lunatic"). Singer may receive more of this criticism than other animal rights authors because of his public profile, but commentators criticize others as well. *See, e.g.*, POLLAN, *supra* note 10, at 309–13 (criticizing arguments to support vegetarianism); Epstein, *supra* note 12, at 149–52 (rejecting comparisons between animal rights and women's oppression or slavery). Epstein's arguments would extend to comparisons between animal rights and other social justice movements.

animals can feel pain then causing animals unnecessary pain is morally wrong.¹⁸⁷ The conclusions that different animal welfare activists draw from these positions vary,¹⁸⁸ but nearly all animal welfare philosophers argue that society should recognize the social justice nature of animal welfare activism. Although attempting to compare animal welfare to other social justice movements or trying to rank them in importance is not worthwhile, animal welfare does deserve the same status in the minds of activists.

Environmental justice activists in particular are in a unique position within environmental law to recognize the value of animal welfare activism as a social justice movement. Environmental justice occupies a similar position in relation to mainstream environmental law as animal welfare law occupies in relation to other legal fields. Although environmental justice is more established than animal law,¹⁸⁹ environmental justice remains somewhat of a fringe field itself. Many mainstream environmental organizations do not have full-fledged environmental justice programs or any environmental justice program at all.¹⁹⁰ Organizations dedicated to environmental justice remain few in number and small in size.¹⁹¹ For these organizations, their outsider status may make them reluctant to take on animal welfare issues because of their political riskiness. However, the environmental

¹⁸⁷ See SCULLY, *supra* note 8, at 293–99 (advocating reducing animal suffering because animals can feel pain and their suffering is therefore morally wrong).

¹⁸⁸ Many animal welfare activists consider advocating vegetarianism and veganism central to improving animal welfare. These arguments are worth considering, but I do not consider them necessary to supporting animal welfare activism.

¹⁸⁹ There is an Executive Order addressing environmental justice. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

¹⁹⁰ The Sierra Club states that it has environmental justice organizations throughout the country, but is not known for its environmental justice work. See Sierra Club, Environmental Justice, <http://www.sierraclub.org/ej/> (last visited Apr. 29, 2009). The Natural Resources Defense Council does run a blog site focusing on environmental justice, though the organization is likewise not known for its environmental justice work. The Natural Resources Defense Council, Issues: Environmental Justice, <http://www.nrdc.org/ej/default.asp> (last visited May 26, 2009).

¹⁹¹ Two of the best known are the Center on Race, Poverty & the Environment and West Harlem Environmental Action, both of which have small staffs and limited funding compared to national environmental groups. Center on Race, Poverty & the Environment, <http://www.crpe-ej.org/> (last visited Apr. 29, 2009); West Harlem Environmental Action, Inc., <http://www.weact.org/> (last visited Apr. 29, 2009).

justice movement is known for addressing unpopular issues and causes. Embracing animal welfare as a social justice issue is another way for environmental justice organizations to continue doing that.

Animal welfare concerns also coincide with the traditional mission of environmental justice organizations to focus on those who are unfairly saddled with the negative affects of social decisions. Rural communities, who suffer most from the air and water pollution of factory farms, should not continue to be burdened with the impacts of industrialized farming. Likewise, animals should not have to bear the brunt of our society's interest in large scale meat and dairy production. It simply may not be possible for people to continue eating vast quantities of meat and dairy products without sacrificing animal welfare. This requires only recognizing the detrimental impacts that industrial farming has on animal welfare. Animal welfare could become an additional issue that environmental justice groups address, particularly if more mainstream environmental organizations refuse to do so.

CONCLUSION

Farmed animal issues provide a crucial and untapped opportunity for environmental organizations and animal welfare organizations to coordinate their efforts to the benefit of both fields. Although using NEPA to protect animal welfare will be a difficult task, the statute provides a potentially effective way for animal welfare organizations and environmental groups to coordinate their work.

Animal welfare is an issue that has grown politically, legally, and socially in the last thirty years; environmental activists should recognize that it will become only more relevant to people. Rather than shy away from animal law, particularly where possibilities for simple overlap exist, environmental activists should work with animal welfare activists to the benefit of both fields. Not connecting environmental and animal law issues would be a failure of environmental law on strategic grounds because of the various advantages in organizing, litigation, and funding gained from cooperation between the two fields. It would also be a failure on moral grounds because it would ignore the suffering of billions of farmed animals.