Concentrated Animal Feeding Operations

CIVIL LITIGATION:
Common Law and Clean Water Act Claims

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Albany County Bar Association

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A. COMMON LAW

Like any other business, concentrated animal feeding operations ("CAFOs") are subject to the rules of the common law in addition to environmental laws and regulations. In many cases, common law remedies may be sufficient to ensure that CAFOs are good neighbors. However, exceptions that have developed under the common law, and by statute in New York, limit applicability of common law principles to farms. There are constitutional limits, however, on the statutory defenses for agricultural operations that burden their neighbors' property rights.

Over a century ago, the Court of Appeals held:

> It is a general rule that every person may exercise exclusive dominion over his own property, and subject it to such uses as will best subserve his private interests. Generally, no other person can say how he shall use or what he shall do with his property. But this general right of property has its exceptions and qualifications. *Sic utere tuo ut alienum non laedas* is an old maxim which has a broad application. It does not mean that one must never use his own so as to do any

> injury to his neighbor or his property. Such a rule could not be enforced in civilized society. Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other. For these they are compensated by all the advantages of civilized society.

Campbell v. Seaman, 63 N.Y. 568, 576-77 (1876). This rule is applicable today—the trick is to determine when the "exceptions and qualifications" apply.

1. Causes of Action

a. Trespass

Trespass is the intentional invasion of another's property. However, "it is not necessary that the foreign matter should be thrown directly and immediately upon the other's land. It is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter." *Restatement (Second) of Torts* §158. A trespasser is liable for property damages caused by his or her action. In *Phillips v. Sun Oil Co.*, 307 N.Y. 328, 331 (1954), the New York Court of Appeals held:

> [W]hile the trespasser, to be liable, need not intend or expect the damaging consequences of his intrusion, he must intend the act which amounts to or produces his unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or he does so negligently as to amount to willfulness.

However, trespass may include the unintentional (but inevitable) consequences of an intentional act. *Scribner v. Summers*, 84 F.3d 554 (2d Cir. 1996). For example, a landowner who dumps wastes on his or her own land has been held liable for the inevitable migration of the contamination to the adjacent property. *Scribner v. Summers*, 84 F.3d 554 (2d Cir. 1996). *See also State v. Fermenta ASC Corp.*, 238 A.D.2d 400, 656 N.Y.S.2d 342 (2d Dep't 1997), *mot. den'd* 90 N.Y.2d 810, 664 N.Y.S.2d 271 (1997) (use of pesticide resulted in trespass).

It is quite likely that a leak or spill will be unintentional, and thus not actionable as a trespass. *See, e.g., Phillips v. Sun Oil Co.*, 307 N.Y. 328, 331 (1954); *Snyder v. Jessie*, 164 A.D.2d 405, 565 N.Y.S.2d 924 (4th Dep't 1990), *mot. den'd* 77 N.Y.2d 940, 569 N.Y.S.2d 613 (1991); *Drouin v. Ridge Lumber, Inc.*, 209 A.D.2d 957, 619 N.Y.S.2d 433 (4th Dep't 1994). However, in *Hilltop Nyack Corp. v. TRMI Holdings*, 264 A.D.2d 503, 694 N.Y.S.2d 717 (2d Dep't 1999), a trespass claim was allowed to proceed where there was "'good reason to know or expect' that the contaminants would pass from the gasoline service station to the plaintiffs' property."

In *Concerned Area Residents for the Environment ("CARE") v. Southview Farm*, 834 F. Supp. 1410 (W.D.N.Y. 1998), the District Court refused to grant summary judgment dismissing

claims that overspreading of cow manure by a CAFO could result in trespass, holding that "there is some evidence that liquid manure, or chemicals therefrom, have entered plaintiffs' property as a result of defendants' willful activities." At trial, the jury found that the contamination of neighbors' wells was, in fact, a trespass. *CARE v. Southview Farm,* 834 F. Supp. 1422 (W.D.N.Y. 1993), *rev'd on other grounds* 34 F.3d 114 (2d Cir. 1994), *cert. den'd* 514 U.S. 1082, 115 S.Ct. 1793 (1995). However, the *Southview Farm* limited the trespass claim to water pollution, and not odors:

> It is not clear whether New York law recognizes a cause of action for trespass based on the entry of odors or gases onto another's property. The traditional common-law view is that, inasmuch as such intangible entries onto land do not interfere with the right of exclusive possession of real property, but only with the use and enjoyment of property, they do not give rise to a trespass, though they can support a nuisance claim. *Mock v. Potlatch Corp.*, 786 F. Supp. 1545 (D. Idaho 1992) (reviewing case law of various jurisdictions).

834 F. Supp. 1410, 1420.

b. Negligence

A landowner is held to the standard of a "reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk." *Basso v. Miller*, 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564 (1976). Generally, a person has a duty to protect their neighbors from pollution from their facility. *N.Y. Telephone Co. v. Mobil Oil Corp.*, 99 A.D.2d 185, 473 N.Y.S.2d 172 (1st Dep't 1984); *Snyder v. Jessie*, 145 Misc.2d 293, 546 N.Y.S.2d 777 (Sup. Ct. Monroe Co. 1989), *mod.* 164 A.D.2d 405, 565 N.Y.S.2d 924 (4th Dep't 1990), *mot. den'd* 77 N.Y.2d 940, 569 N.Y.S.2d 613 (1991). "[F]or negligence liability to ensue in cases involving the pollution of underground waters, the plaintiff must demonstrate that the defendant failed to exercise due care in conducting the allegedly polluting activity or in installing the allegedly polluting device, and that he knew or should have known that such conduct could result in the contamination of the plaintiff's well." *Fetter v. DeCamp*, 195 A.D.2d 771, 773, 600 N.Y.S.2d 340 (3d Dep't 1993); *see also Murphy v Both*, 84 A.D.3d 761; 922 N.Y.S.2d 483 (2d Dep't 2011).

An environmental law or regulation may create a duty, so that violation of the law will constitute negligence. *Leone v. Leewood Service Station, Inc.*, 212 A.D.2d 669, 624 N.Y.S.2d 610 (2d Dep't 1995), *mot. den'd* 86 N.Y.2d 709, 634 N.Y.S.2d 443 (1995) (negligent failure to test gasoline tanks). Nonetheless, violation of a regulation is merely evidence of negligence, and does not automatically create tort liability. *Juarez v. Wavecrest Mgt. Team Ltd.*, 88 N.Y.2d 628, 649 N.Y.S.2d 115 (1996) (violation of New York City Administrative Code requirements to abate lead paint hazards did not result in absolute liability).

Thus, in *CARE v. Southview Farm*, 834 F. Supp. 1410 (W.D.N.Y. 1998), the plaintiffs went to trial on the claim that odors and water pollution from a CAFO constituted negligence. However, the jury did not find negligence. *See CARE v. Southview Farm*, 834 F. Supp. 1422 (W.D.N.Y. 1993), *rev'd on other grounds* 34 F.3d 114 (2d Cir. 1994), *cert. den'd* 514 U.S. 1082, 115 S.Ct. 1793 (1995).

c. Private Nuisance

"Every person is bound to make a reasonable use of his property so as to occasion no unnecessary damage or annoyance to his neighbor," so that "[i]f he make an unreasonable, unwarrantable or unlawful use of it, so as to produce material annoyance, inconvenience, discomfort or hurt to his neighbor, he will be guilty of a nuisance to his neighbor." *Campbell v. Seaman*, 63 N.Y. 568, 577 (1876). The Court of Appeals has explained that a private nuisance is "an interference with the use or enjoyment of land" due to negligent, intentional or ultrahazardous activities. *Copart Industries, Inc. v. Consolidated Edison Co. of New York, Inc.*, 41 N.Y.2d 564, 568-9, 394 N.Y.S.2d 169, 172-3 (1977). In order to bring their private nuisance claim, plaintiffs must show an interference with their property that is "substantial in nature" and "unreasonable in character." *Scribner v. Summers*, 84 F.3d 554, 559 (2d Cir. 1996); *Mehlenbacher v. Akzo Nobel Salt, Inc.*, 71 F.Supp.2d 179, 188 (W.D.N.Y. 1999), *vacated on other grounds* 216 F.3d 391 (2d Cir. 2000).

Pollution may be actionable as a private nuisance. *See, e.g., Scribner v. Summers*, 84 F.3d 554 (2d Cir. 1996) (neighboring property contaminated by hazardous waste); *Snyder v. Jessie*, 145 Misc.2d 293, 546 N.Y.S.2d 777 (Sup. Ct. Monroe Co. 1989), *mod.* 164 A.D.2d 405, 565 N.Y.S.2d 924 (4th Dep't 1990), *mot. den'd* 77 N.Y.2d 940, 569 N.Y.S.2d 613 (1991) (oil spill).

In order to bring their private nuisance claim, plaintiffs must show an interference with their property that is "substantial in nature" and "unreasonable in character." *Scribner v. Summers*, 84 F.3d 554, 559 (2d Cir. 1996); *Mehlenbacher v. Akzo Nobel Salt, Inc.*, 71 F.Supp.2d 179, 188 (W.D.N.Y. 1999), *vacated on other grounds* 216 F.3d 391 (2d Cir. 2000). This may require exceedance of an applicable regulatory or cleanup standard. *In re MTBE Products Liability Litigation*, 2007 U.S. Dist. LEXIS 40484 (S.D.N.Y. 2007); *State of New York v. Fermenta ASC Corp.*, 166 Misc.2d 524, 630 N.Y.S.2d 884 (Sup. Ct. Suffolk Co 1995), *aff'd* 238 A.D.2d 400, 656 N.Y.S.2d 342 (2d Dep't 1997), *app. den'd* 90 N.Y.2d 810, 664 N.Y.S.2d 271 (1997); *Suffolk Co. Water Authority v. Union Carbide Corp.*, N.Y.L.J., May 2, 1991, p. 28, col. 1 (Sup. Ct. Suffolk Co. 1991); *Lessord v. General Electric Co.*, 258 F. Supp. 2d 209 (W.D.N.Y. 2002). In *McCarty v. Natural Carbonic Gas Co.*, 189 N.Y. 40, 46 (1907), the Court of Appeals held:

> The law relating to private nuisances is a law of degree and usually turns on the question of fact whether the use is reasonable or not under all the circumstances. No hard and fast rule controls the subject, for a use that is reasonable under one set of facts would be unreasonable under another. Whether the use of property to carry on a lawful business, which creates smoke or noxious gases in excessive

> quantities, amounts to a nuisance depends on the facts of each particular case.

In *CARE v. Southview Farm*, 834 F.Supp.1410 (W.D.N.Y. 1993), the court held that neighboring property owners were entitled to a trial on the issue of whether cow manure generated by a factory-style dairy farm had caused a private nuisance, due to water pollution and odors. The court stated that "odors arising from farming operations can give rise to a private nuisance, even in a predominantly agricultural area." 834 F.Supp. at 1421. While the plaintiffs eventually succeeded at trial on a trespass claim, based on evidence showing that nitrate levels in private wells had exceeded the 10 mg/l nitrate standard for public drinking testimony, they did not prevail on their private nuisance claim. *See CARE v. Southview Farm*, 834 F. Supp. 1422 (W.D.N.Y. 1993), *rev'd on other grounds* 34 F.3d 114 (2d Cir. 1994), *cert. den'd* 514 U.S. 1082, 115 S.Ct. 1793 (1995).

d. Public Nuisance

The Restatement (Second) of Torts states that a public nuisance is "an unreasonable interference with a right common to the general public." §821B(1). In *Copart Industries, Inc. v. Consolidated Edison Co. of New York, Inc.*, 41 N.Y.2d 564, 568, 394 N.Y.S.2d 169, 172 (1977), the Court of Appeals also explained that a public nuisance:

> It consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all (*New York Trap Rock Corp. v. Town of Clarkston*, 299 N.Y. 77, 80, 85), in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons (*Melker v. City of New York*, 190 N.Y. 481, 488; *Restatement, Torts*, notes preceding § 822, p. 217).

For a public nuisance action to lie, there must be interference with a public right. *Graham Oil Co. v. BP Oil Co.*, 885 F.Supp. 716 (W.D. Pa.1994). Pollution of the soil, groundwater or surface waters is a violation of the rights common to all that can be actionable as a public nuisance. *Drouin v. Ridge Lumber, Inc.*, 209 A.D.2d 957, 619 N.Y.S.2d 433 (4th Dep't 1994); *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985).

While the state normally prosecutes a public nuisance, an individual "may maintain an action when he suffers special damage from a public nuisance." *Copart*, 41 N.Y.2d at 568, 394 N.Y.S.2d at 172, *citing* Restatement of Torts, notes preceding § 822, p. 217; *Wakeman v. Wilbur*, 147 N.Y. 657, 663-664. A plaintiff must show they have sustained special damages due to being "uniquely affected," in that the harm suffered is a different from the kind of harm suffered by the general public, and that the harm was suffered while exercising a right common to the general public. *Drouin v. Ridge Lumber, Inc.*, 209 A.D.2d 957, 619 N.Y.S.2d 433 (4th Dep't 1994).

In *Drouin*, the Fourth Department allowed a landowner to make a claim for public (as opposed to private) nuisance for leaking oil tanks maintained by a tenant on the plaintiff's property. Similarly, in *Nashua Corp. v. Norton Company*, 1997 U.S. Dist. LEXIS 5173 (N.D.N.Y. 1997), response costs were sufficient "special damages" to enable a landowner to sue the prior owner for hazardous waste contamination. In *Booth v. Hanson Aggregates of New York, Inc.*, 16 A.D.2d 1137, 791 N.Y.S.2d 766 (4th Dep't 2005), homeowners were entitled to proceed with a public nuisance claim against a quarry that allegedly pumped their wells dry.

Thus, in the *Southview Farm* case, the plaintiffs were allowed to go to trial on their public nuisance claim:

> the record in this case presents questions of fact concerning whether defendants have contaminated waterways in the area around Southview Farm, and, if so, whether they have endangered the health or comfort of the public at large. I am also not convinced at this stage that plaintiffs cannot show at trial that they have suffered some harm peculiar to themselves by virtue of their status as landowners and residents near Southview Farm.

CARE v. Southview Farm, 834 F.Supp. 1410, 1421 (W.D.N.Y. 1993).

2. Defenses

a. Agriculture and Markets Law §308

Agriculture and Markets Law §308, the "Right to Farm Law," empowers the Commissioner of Agriculture and Markets, after "consultation with the state advisory council on agriculture, [to] issue opinions upon request from any person as to whether particular agricultural practices are sound." Agriculture and Markets Law §308(1)(a). Subdivision 3 of the law then exempts agricultural practices on land within agricultural districts designated pursuant to Agriculture and Markets Law Article 24AA (or outside agricultural districts if owner has made individual commitment under Agriculture and Markets Law §306) from private nuisance actions, "provided such agricultural practice constitutes a sound agricultural practice pursuant to an opinion issued upon request by the commissioner." *See Matter of Pure Air and Water, Inc. of Chemung County v. Davidsen*, 246 A.D.2d 786, 668 N.Y.S.2d 248 (3d Dep't 1998), *app. dis'd* 91 N.Y.2d 955, 671 N.Y.S.2d 716 (1998), *lv. den'd* 92 N.Y.2d 807, 678 N.Y.S.2d 593 (1998), *app. dis'd* 93 N.Y.2d 1013, 697 N.Y.S.2d 567 (1999). In *CARE v. Southview Farm*, 834 F.Supp. 1410, 1422 (W.D.N.Y. 1993), the court held:

> The statute, however, does not indicate that the issuance of such an opinion was intended to be a prerequisite to suit. In fact, the language, by describing the particular circumstance in which an agricultural practice will not be considered a nuisance, suggests that the burden

is on the party pursuing the practice to show that it is sound.

The statute does not apply to personal injury or wrongful death actions. Agriculture and Markets Law §308(3). Nor does it bar tort claims other than private nuisance claims, so it is not a defense to public nuisance, trespass or negligence claims. Further, "the preclusive effect of an opinion continues only so long as the agricultural practice conforms to the description of the practice in the opinion." *Matter of Pure Air and Water, Inc. of Chemung County v. Davidsen*, 246 A.D.2d 786, 668 N.Y.S.2d 248 (3d Dep't 1998).

The statute defines "sound agricultural practices" as follows:

> Sound agricultural practices refer to those practices necessary for the on-farm production, preparation and marketing of agricultural commodities. Examples of activities which entail practices the commissioner may consider include, but are not limited to, operation of farm equipment; proper use of agricultural chemicals and other crop protection methods; direct sale to consumers of agricultural commodities or foods containing agricultural commodities produced on-farm; and construction and use of farm structures. The commissioner shall consult appropriate state agencies and any guidelines recommended by the advisory council on agriculture. The commissioner may consult as appropriate, the New York state college of agriculture and life sciences and the U.S.D.A. natural resources conservation service..... Such practices shall be evaluated on a case–by–case basis.

Agriculture and Markets Law §308(1)(b).

The Department of Agriculture and Markets has set the following guidelines for determination of what is "sound":

1. The practice should be legal.
2. The practice should not cause bodily harm or property damage off the farm.
3. The practice should achieve the results intended in a reasonable and supportable way.
4. The practice should be necessary.

http://www.agriculture.ny.gov/AP/agservices/sapo.html.

After an opinion is issued, a public notice must be published in a newspaper of general circulation and notice must be given to the farm owner and owners of adjoining properties. Agriculture and Markets Law §308(2). The opinion is then subject to challenge in a CPLR Article 78 proceeding, but the statute of limitations is only 30 days after publication. Agriculture and Markets Law §308(2). In *Matter of Pure Air and Water, Inc. of Chemung County v. Davidsen*, 246

A.D.2d 786, 668 N.Y.S.2d 248 (3d Dep't 1998), the court refused to set aside a sound agricultural practice opinion as arbitrary capricious, and also held that the process was exempt from the State Environmental Quality Review Act.

Further, Agriculture and Markets Law §308-a creates a penalty for a plaintiff who loses a private nuisance action against a farm in an agricultural district that is determined to be utilizing a sound agricultural practice:

> a court shall award to a prevailing party, other than the plaintiff, fees and other expenses incurred by such party in connection with the defense of any cause of action for private nuisance alleged to be due to an agricultural practice, provided such agricultural practice constitutes a sound agricultural practice pursuant to an opinion issued by the commissioner under section three hundred eight of this article, prior to the start of any trial of the action or settlement of such action, unless the court finds that the position of the plaintiff was substantially justified or that special circumstances make an award unjust.

Agriculture and Markets Law §308-a(2)(a).

b. Public Health Law §1300-c

This "Right to Farm Law" predates Agriculture and Markets Law §308. It provides the following defense to private nuisance actions when farming operations began prior to surrounding activities, and "have not increased substantially in magnitude or intensity":

> Notwithstanding any other provision of law, the agricultural activities conducted on a farm, as defined in section six hundred seventy-one of the labor law, shall not be considered a private nuisance, provided such agricultural activities were commenced prior to the surrounding activities, have not increased substantially in magnitude or intensity and have not been determined to be the cause of conditions dangerous to life or health as determined by the commissioner, the local health officer or local board of health pursuant to sections thirteen hundred, thirteen hundred-a, thirteen hundred three and thirteen hundred four of this chapter.

Like Agriculture and Markets Law §308, this law only applies to private nuisance actions, and not claims brought under other tort theories. The question whether the farm has increased in magnitude or intensity is likely to be an issue of fact, and for many CAFOs – which have greatly expanded—makes the defense useless. While the defendants in the *Southview Farm* case raised this defense, they did not prevail on it in light of the increase in the size of the farm, and the fact that

some complaining neighbors predated the CAFO operation. *See Concerned Area Residents for the Environment v. Southview Farm*, Civil Action No. 91-6031L (W.D.N.Y. 1991, Larimer, U.S.D.J.).

c. Coming to the Nuisance

The common law doctrine of "coming to the nuisance" may be raised as a defense to a private action when a neighbor complains about a pre-existing operation. For example, in *Nuzzo v. Lapan*, 7 A.D.2d 535, 537, 184 N.Y.S.2d 942, 944 (3d Dep't 1959), *aff'd* 7 N.Y.2d 826, 196 N.Y.S.2d 703 (1959), the court lifted a permanent injunction to stop operation of a chicken farm, since "the original facility ought not be restrained because it was in plain sight when plaintiffs bought their premises and they could have decided whether they wanted to take the risk, or not, of establishing a restaurant business at that place near a chicken farm facility." Further, the court refused to restrain a new building on a laches theory, since no protest was matter prior to erection of the structure.

However, "coming to the nuisance" is not an absolute defense, but rather "only a factor to be considered in the over-all picture." *Shearing v. Rochester*, 51 Misc. 2d 436, 439, 273 N.Y.S.2d 464, 468 (Sup. Ct. Monroe Co. 1966); *Graceland Corp. v. Consolidated Laundries Corp.*, 7 A.D.2d 89, 93, 180 N.Y.S.2d 644, 649 (1st Dep't 1958), *aff'd* 6 N.Y.2d 900, 190 N.Y.S.2d 708 (1959). "In determining whether one who "came to the nuisance" may obtain relief therefrom, it is proper to consider the nature of the area where the alleged nuisance and complainant property are located." *State v. Waterloo Stock Car Raceway, Inc.*, 96 Misc. 2d 350, 358, 409 N.Y.S.2d 40, 45 (Sup Ct. Seneca Co. 1978). Further, the defense is limited to private nuisance actions, and does not apply to bar a public nuisance claim. *Strunk v. Zoltanski*, 96 A.D.2d 1074, 466 N.Y.S.2d 716 (2d Dep't 1983); *Graceland Corp. v. Consolidated Laundries Corp.*, 7 A.D.2d 89, 93, 180 N.Y.S.2d 644, 649(1st Dep't 1958), *aff'd*. 6 N.Y.2d 900, 190 N.Y.S.2d 708 (1959).

Real Property Law §333-c requires written notice to purchasers of land in agricultural districts that agricultural operations may cause noise, dust and odors. This may provide proof that a neighbor knowingly came to a nuisance.

d. Statute of Limitations

Under CPLR §214, most actions for personal injury and property damage must be brought within three years of the date of the tort. New York also recognizes the doctrine of "continuing torts," so that the statute of limitations for a continuing trespass (*e.g.* seeping water) recommences each day the tort continues. *Jensen v. General Electric Co.*, 82 N.Y.2d 77, 603 N.Y.S.2d 420 (1993). However, damages would be limited to the those accrued within three years of filing suit. Further, a wrong that continues for more than 10 years may create a prescriptive easement. *See* Real Property Actions and Proceedings Law §501.

A special statute of limitations, CPLR §214-c, applies a "discovery rule" to toxic torts. Under this statute, the three–year limitations period under CPLR §214, as well as the limitations periods for filing claims and suits against the state and municipalities, applies to a claim for personal

or property injuries caused by "latent effects of exposure to any substance," runs "from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier." This statute would normally apply to claims arising out of groundwater pollution. The issue of when a plaintiff "should have known" is generally a question of fact, and the statute is construed liberally in a plaintiff's favor. *Cochrane v. Owens Corning*, 219 A.D.2d 557, 631 N.Y.S.2d 358, 367 (1st Dep't 1995).

In *Jensen v. General Electric Co.*, 82 N.Y.2d 77, 603 N.Y.S.2d 420 (1993), the New York Court of Appeals held that the doctrine of "continuing trespass" for damage claims does not apply to damage claims governed by CPLR §214-c. However, the doctrine may apply to a plaintiff's request for an injunction. Thus, while a claim for damages arising out of odors from a CAFO may be able to utilize the "continuing tort" doctrine, a claim for pollution of a well probably cannot.

3. Remedies

Normally, a plaintiff sues for damages, *i.e.* an award of money paid by the defendant. In general, "the defendant is liable for 'reasonably anticipated' consequential damages which may flow later from that invasion although the invasion itself is 'an injury too slight to be noticed at the time it is inflicted.'" *Askey v. Occidental Chemical Corp.*, 102 A.D.2d 130, 136, 477 N.Y.S.2d 242, 247 (4th Dep't 1984).

a. Property Damages

The general rule is that "[a] person whose property is taken, damaged, or destroyed by the negligent or wrongful act or omission of another is entitled to compensation for the damage sustained in such a sum as will restore him as nearly as possible to his former position." 36 N.Y. Jur.2d *Damages* §72. "[T]he proper measure of damages for permanent injury to real property is the lesser of the decline in market value and the cost of restoration." *Jenkins v. Etlinger*, 55 N.Y.2d 35, 39, 447 N.Y.S.2d 696, 698 (1982); *Scribner v. Summers*, 138 F.3d 471 (2d Cir. 1998). Permanent property damages can include loss due to stigma that remains even after a property is cleaned up. *Nashua Corp. v. Norton Company*, 1997 U.S. Dist. LEXIS 5173 (N.D.N.Y. 1997); *see also Commerce Holding Corp. v. Board of Assessors of the Town of Babylon*, 88 N.Y.2d 724, 649 N.Y.S.2d 932 (1996).

Where injury to property is temporary, damages are measured by "the reduction of the rental or usable value of the property." *Guzzardi v. Perry's Boats, Inc.*, 92 A.D.2d 250, 460 N.Y.S.2d 78, 82 (2d Dep't 1983). Even if there is a partial restoration, property damages include both damages due to the temporary loss in rental value, as well as "further damage, if any, caused." *Mead v. State*, 24 A.D.2d 1043, 265 N.Y.S.2d 302, 303 (3d Dep't 1965).

b. Other Damages

Other economic damages may flow from property contamination or disasters. In *Syracuse Cablesystems, Inc. v. Niagara Mohawk Power Co.*, 173 A.D.2d 138, 578 N.Y.S.2d 770 (4th Dep't

1991), the plaintiffs (including cable companies and law firms) were forced to move their businesses out of a building for a month due to PCB contamination caused by an explosion of defendant's transformer. They were allowed to make claims for damages due to interruption of their businesses, including lost profits, and additional business expenses such as "rental expense, lost subscriber revenue, lost installation revenue, employee overtime, lost sales commission, employee wages and additional advertising expense." Under the doctrine of avoidable consequence, a plaintiff may be able to recover for the costs of such things as bottled water, testing water and installing filters in order to avoid damages from a contaminated water supply. *Leicht v. Town of Newburgh Water District*, 213 A.D.2d 604, 624 N.Y.S.2d 506 (2d Dep't 1995).

Exposure to a chemical may create a substantial enough risk of future disease that regular medical checkups would be warranted. In such a case, some courts in New York and other states have allowed a recovery for the cost of future "medical monitoring." This is not damages for increased risk, but merely to pay for the necessary cost of addressing the risk. Courts may allow such an award if the risk is sufficiently significant that it is reasonably necessary that a plaintiff obtain periodic medical examinations to monitor his or her health and facilitate early diagnosis and treatment of diseases which might be caused by the exposure. *See, e.g., Askey v. Occidental Chemical Corp.*, 102 A.D.2d 130, 477 N.Y.S.2d 242 (4th Dep't 1984); *Gibbs v. E.I. DuPont De Nemours & Co., Inc.*, 1995 W.L. 60788 (W.D.N.Y. 1995); *Patton v. General Signal*, 984 F.Supp. 666 (W.D.N.Y. 1997).

Courts have long recognized that an element of damage for nuisance is compensation for discomfort or annoyance. In toxic tort cases, this principle has been extended to allow recovery for "loss of quality of life," including damages for "'inconveniences, aggravation, and unnecessary expenditures of time and effort... as well as other disruption in their lives.'" *Ayers v. Jackson Township*, 525 A.2d 287 (N.J. 1987); *see also* 42 *Proof of Facts 2d* 247 §7. This might involve, for example, compensation for the disruption of home life due to the necessity of using bottled water, or the inability to invite a guest to visit one's home. This may be considered an element of property damages. *Scribner v. Summers*, CIV No. 6094L (W.D.N.Y. 1996), *mod. Scribner v. Summers*, 138 F.3d 471 (2d Cir. 1998).

In *CARE v. Southview Farm*, 834 F. Supp. 1422 (W.D.N.Y. 1993), *rev'd on other grounds* 34 F.3d 114 (2d Cir. 1994), *cert. den'd* 514 U.S. 1082, 115 S.Ct. 1793 (1995), the jury made a nominal award of damages for loss of quality of life caused by a CAFO—$1,000 each for four families, $100 for a fifth family, and only $1 for a dairy farmer.

c. Injunction

A plaintiff may also be able to obtain the "equitable" remedy of injunction to stop a pollution operation, if he or she can show "irreparable harm." *Poughkeepsie Gas Co. v. Citizens' Gas Company*, 89 N.Y. 493, 497-8 (1882).

Since an injunction is an equitable remedy, the court must balance the equities of the situation, and take into consideration whether the plaintiff has an adequate remedy "at law" by obtaining damages. In *Campbell v. Seaman*, 63 N.Y. 568, 586 (1876), the Court of Appeals held:

> Where the damage to one complaining of a nuisance is small or trifling, and the damage to the one causing the nuisance will be large in case he be restrained, the courts will sometimes deny an injunction. But such is not this case; here the damage to the plaintiffs, as found by the referee, is large and substantial.

In contrast, in *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 309 N.Y.S.2d 312 (1970), the Court of Appeals allowed a factory to continue to emit air pollution which caused a private nuisance due to the public interest in maintaining the local economy, but still require the factory to pay damages to the injured neighbors

4. Constitutionality and Takings

Under the Fifth and Fourteenth Amendments to the U.S. Constitution, and Article I, Section 7 of the New York State Constitution, private property cannot be taken without just compensation. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164 (1982); *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987). A taking occurs "'without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.'" *Dawson v. Higgins*, 197 A.D.2d 127, 133, 610 N.Y.S.2d 200, 205 (1st Dep't 1994), *app. dis'd* 83 N.Y.2d 996, 616 N.Y.S.2d 476 (1994), *cert. den'd* 513 U.S. 1077, 115 S.Ct.. 724 (1995). Further, "[a]n administrative agency in proceedings which are final and conclusive and of a judicial nature may not deprive an individual of life, liberty or property without notice and hearing, and no such authority may be conferred by statute." 2 N.Y. Jur.2d *Administrative Law* §125 at 189; *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

In *Matter of Pure Air and Water, Inc. of Chemung County v. Davidsen*, 246 A.D.2d 786, 668 N.Y.S.2d 248 (3d Dep't 1998), neighbors of a hog farm launched a constitutional challenge to Agriculture and Markets Law §308, the "Right to Farm Law." The plaintiffs argued that issuance of a "sound agricultural practice" ruling, which created a defense to a private nuisance action, unconstitutionally denied them procedural due process by taking their right to sue for a private nuisance without a hearing.

The Appellate Division, Third Department held that neighbors impacted by a hog farm had no right to due process, because neighbors identified their property right as "the right to have a court determine the merits of a private nuisance suit," and "a person does not have a vested interest in any rule of the common law." 246 A.D.2d at 787, 668 N.Y.S.2d at 250.

After case was brought, the Legislature amended Agriculture and Markets Law §308 by Laws of 1997, Chapter 357 to add a new subdivision 2 to require that after a sound agricultural practice opinion was rendered, notice be given by publication, and that notice also be given directly to adjoining property owners. According to the State Senate, this was necessary because it "ensures due process in the issuance of sound agricultural practice opinions." However, the State Legislature did not require prior notice and a hearing. The Department of Agriculture and Markets has established a procedure for evaluating applications for sound agricultural practice opinions, which

includes letters to adjoining neighbors, and consultation with interested parties. http://www.agriculture.ny.gov/ap/agservices/sapreview.html.

In contrast, in *Bormann v. Board of Supervisors in and for Kossuth County, Iowa*, 584 N.W.2d 239 (Iowa 1998), *cert. den'd* 525 U.S. 1172, 119 S.Ct.1096 (1999), the Iowa Supreme Court held the private nuisance immunity provision of their state's Right–to–Farm Law unconstitutional, since the law effectively created an easement on a neighbor's property without compensation. More recently, in *Gacke v. Pork Xtra, LLC*, 684 N.W.2d 168, 175 (Iowa 2004), the same court held that a statute that immunized an animal feeding operation from public or private nuisance claims was unconstitutional, but "only insofar as it prevents property owners subjected to a nuisance from recovering damages for the diminution in value of their property" due to the easement. Further, the statutory defense was entirely unconstitutional as applied to the plaintiffs.

In *Matter of Pure Air and Water, Inc. of Chemung County v. Davidsen*, 246 A.D.2d 786, 668 N.Y.S.2d 248 (3d Dep't 1998), the Appellate Division ruled that the plaintiff failed to raise substantive due process challenge to the statute. Pure Air and Water later unsuccessfully waged a second challenge to the statute in Albany County Supreme Court, based on *Bormann. Pure Air and Water of Chemung County, Inc. v. Davidsen*, Albany County Index No. 2690-97 (May 25, 1999, Keegan, J.). Apparently no New York appellate court has addressed the issue.

B. CLEAN WATER ACT

Clean Water Act ("CWA") §505(a), 33 U.S.C. §1365(a), expressly authorizes citizens to bring suit in federal district court against violators of either an effluent standard or limitation, or an administrative order issued by EPA or a state. The court is authorized to award civil penalties under section 309(d) of the Act, 33 U.S.C. §1319(d), as well as costs of litigation (including attorney's fees), §505(d), 33 U.S.C. §1365(d), and order compliance with the Act. Environmental groups have effectively enforced the Act through use of this provision. *See, e.g., Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979 (9th Cir. 1995). Attorneys' fees may even be recovered if the polluter comes into compliance following commencement of suit. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 933 F.2d 124 (2d Cir.1991).

Case law has held that only citizens with sufficient nexus to the pollution have "standing" to bring such cases. *Sierra Club v. SCM Corp.*, 747 F.2d 99 (2d Cir. 1984). In order to proceed, the citizens must give 60 days' advance notice of intent to sue. CWA §505(b), 33 U.S.C. §1365(b). If a judicial government enforcement action is commenced and being diligently prosecuted, a citizen cannot file suit. CWA §505(b), 33 U.S.C. §1365(b). A similar bar applies if a prior administrative enforcement action is diligently prosecuted under CWA §309(g)(6), 33 U.S.C. §1319(g)(6). Citizens can only sue if the polluter is "in violation," CWA §501(a), 33 U.S.C. §1365(a), meaning that the violation must be continuing, or at least intermittent, and not wholly past. *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 108 S.Ct. 376 (1987).

In general, the Clean Water Act only requires a permit for discharges from a "point source," which is defined as:

> any discernable, confined and discrete conveyance, included but not limited to, any pipe, ditch channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

CWA §502(14), 33 U.S.C. §1362 (14). While industry needed permits under the National Pollution Discharge Elimination System ("NPDES") system to discharge from pipes or ditches, EPA and the New York State Department of Environmental Conservation had long taken the position that runoff from agriculture was not a point source regulated under the Clean Water Act. However, CWA §502(14), 33 U.S.C. §1362(14) includes "concentrated animal feeding operation" ("CAFO") within the definition of point source.

In *CARE v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994), *cert. den'd* 514 U.S. 1082, 115 S.Ct. 1793 (1995), the Second Circuit upheld a jury verdict holding that a Wyoming County dairy farm had violated the Clean Water Act by operating without a NPDES permit and discharging manure into tributaries of the Genesee River:

> Because there are no disputed material facts with respect to whether Southview's feed lot is a CAFO, this Court may determine as a matter of law that Southview operates a CAFO, which in turn may be defined as a point source and hence is not to be treated as an agricultural non-point source operation.

34 F.3d at 123. Accordingly, the plaintiffs were entitled to relief under the citizen's suit statute, including attorneys' fees and injunctive relief. The case later settled.

Subsequent to *Southview Farm*, New York and other states issued general permits for CAFOs, which has also resulted in some citizen's suits claiming noncompliance with the terms of the general permits. In *Community Association for Restoration of the Environment v. Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002), the Ninth Circuit upheld an award of attorneys' fees and penalties against a dairy that had violated the terms of the Washington General Dairy NPDES permit. However, in *Coon v. Willet Dairy, LP*, 536 F.3d 171 (2d Cir. 2008), a citizen's suit was dismissed because the dairy obtained a general permit, so that the prior failure to obtain a permit was a "wholly past" violation that could not be complained about in a citizen's suit. Further, a later general permit that extended compliance deadlines was a "permit shield" that barred claims for failure to meet deadlines in the prior permit.