

Food Law

The newsletter of the Illinois State Bar Association's Section on Food Law

Disaster Planning for Food Crisis Response

BY JESSICA GUARINO & A. BRYAN ENDRES

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Introduction

Despite being of paramount concern in times of crisis, food system resilience is a topic regularly contemplated and rarely implemented. Food security refers to a food system's ability to provide "for all people at all times . . . access to sufficient, safe, nutritious food [and] to maintain a healthy and active life."¹ Without resiliency, however, food security cannot thrive. A food system must be able to "cope

with, and adapt to, changes."² Rather than capitalizing on the resiliency of the U.S. food system during this current pandemic, our food system choked due to the collective lack of planning and implementing an effective, timely response. Our food system could not rely on robust resilience mechanisms because that resilience simply does not yet exist.

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Illinois Food Law & Regulations to Know

BY ANGELA PETERS

From the Illinois Department of Agriculture Rules and Regulations: <https://www2.illinois.gov/sites/agr/Consumers/FarmersMarkets/Pages/Rules-and-Regulations.aspx>.

Included sections:

- A Guide to Illinois Laws Governing Direct Farm Marketing
- Common Farmers Market Food Items and Who Regulates Them
- State Public Health Role in Food Safety Inspections
- IDPH - Technical Information

Bulletin / Food #30

- Weights and Measures Regulations
- IDOA General Standards for Eggs
- IDOA Application for Egg License

For as long as there have been farmers and people who eat, farmers have been selling products directly to customers. This guide seeks to inform farmers and growers about what they need to know to legally sell farm products directly to consumers. Organized by topic, it contains a checklist of issues to consider before selling your farm products directly.

The guide primarily focuses on sales that are made on the farm or at the farm gate to consumers because, in general, this option gives farmers the least restrictive mechanism of selling directly. The growing interest in eating locally and in local food systems makes knowledge of these rules and issues particularly important to anyone who wishes to develop a direct marketing enterprise on their farm. The guide can also serve as a road map for those who are interested in selling farm

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Disaster Planning for Food Crisis Response

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The disruptions witnessed during the COVID-19 pandemic were preventable and warned of. Few government actors over the past decade have been receptive to the pleas to ignite government action in food crisis planning. The risks and weaknesses of the U.S. food supply chain are well documented, and we have long known the risks.³ In their place, efficiency concerns play the paramount role in crisis planning, reflecting a policy that neglects the critical role local and regional food systems have in bolstering resilience of the greater food supply chain. This neglect was largely ignored in non-crisis times, despite preexisting and persisting issues of food insecurity nation-wide, driven by socioeconomic factors. The COVID-19 pandemic forced a reckoning with these deficiencies and the country was put face-to-face with them for the first time in this generation's lifetime. Just as underlying social and political tensions bubbled to the forefront of society, the pandemic also placed a national spotlight on the fragility of an efficient and extractionist approach to managing the food supply chain.

Empty grocery store shelves, rotting produce in the fields, and gallons of milk dumped rather than sold manifested as symptoms of the fragile nature of the U.S. food system. COVID-19 upended channels of distribution and rendered the national food supply chain paralyzed, unable to match supply to demand because of the broader food supply's inherent inflexibility. Food is security, and consumers did what was necessary in the time of a global pandemic to obtain sustenance—for those with the financial means and access, attention turned from large retailers to local farmers down the road. Consumer reliance on local and regional food systems to supplement the failures of the national one demonstrated a reality widely ignored that these systems are integral to stable, consistent access to nutrients for all people.

The COVID-19 pandemic and resulting food supply chain disruptions

brings disaster planning and food crisis response to a head. At the federal level, three primary agencies—the Department of Homeland Security (DHS), the Food and Drug Administration (FDA), and the United States Department of Agriculture (USDA)—hold responsibility for ensuring the food supply chain remains intact during a disaster. Aimed at preventing and reacting to future terrorist attacks, the post-9/11 federal government implemented a series of binding statutes and regulations, along with other guiding documents, some of which specifically address food security while others establish procedures for intergovernmental coordination that could be useful in a food-related incident. These measures proved ineffective. The most robust food crisis responses, to the extent they are enacted and implemented, came from the state level. This piece reviews the limited progress governments have made to update and modernize food crisis planning.⁴

Federal Agencies and Food Crisis Response Measures

DHS

The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (2002 Bioterrorism Act) “is the cornerstone post-9/11 federal statute related to increasing food security.”⁵ The Act directs the Secretary of DHS to “develop and implement a coordinated strategy . . . for carrying out health-related activities to prepare for and respond effectively to bioterrorism and other public health emergencies.”⁶ Although the title of the 2002 Bioterrorism Act indicates a limited scope, it encompasses more public health emergencies than just bioterrorism attacks. The Act also aims to coordinate efforts to bolster emergency preparedness for any other public health emergency, which includes pandemics like COVID-19.⁷

The Act further tasks the Secretary with ensuring coordination of activities with those of state and local governments.⁸ The strategy implemented must ensure effective

Food Law

This is the newsletter of the ISBA's Section on Food Law. Section newsletters are free to section members and published at least four times per year. Section membership dues are \$30 per year. To subscribe, visit www.isba.org/sections or call 217-525-1760.

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public health surveillance and reporting mechanisms, ensure laboratory and medical readiness, properly train and equip personnel, establish effective communication networks, and minimize the duplication of government response planning.⁹

Title III of the Act addresses the safety and security of the food and drug supply.¹⁰ It directs the President's Council on Food Safety in consultation with the Secretary of Transportation, Secretary of the Treasury, and other relevant agencies and stakeholders to develop a crisis communications and education strategy with respect to threats to the food supply.¹¹ The strategies "shall address threat assessments; technologies and procedures for securing food processing and manufacturing facilities and modes of transportation; response and notification procedures; and risk communications to the public."¹² The Act also highlights the importance of improving the safety of imported food, which includes increased inspections of food imports, improvements to information management systems and coordination between agencies and states, and increased testing for rapid detection of adulteration of food.¹³

In addition to legislation, the government aimed several Homeland Security Presidential Directives at increasing food resiliency and strengthening the agriculture sector in response to disaster incidents.¹⁴ Although the FDA and USDA are the two agencies with primary responsibility for carrying out mandates related to food, DHS participates with them in several cooperative initiatives with them.

Despite DHS creating multiple programs and policies to enhance disaster preparedness, mitigation, and response,¹⁵ the actual implementation actions taken by DHS have mostly overlooked the buildup of local and regional food systems as a solution to build resiliency in the food and agriculture sector, but do provide an avenue by which this can be thought of and implemented into future planning.

FDA

In 2011, the passage of the FDA Food Safety Modernization Act (FSMA) was thought to transform "the nation's food safety system by shifting focus from responding

to foodborne illness to preventing it."¹⁶ Congress acknowledged the dramatic changes in the global food system and wanted to ensure the safety of the global food supply. The FSMA also recognized the importance of giving the FDA authority to enforce compliance.¹⁷ To meet this end, FSMA further gave FDA power to respond via mandatory recalls, expanded administrative detention, suspension of registration, enhanced product tracking abilities, and additional recordkeeping for high risk foods.¹⁸ Built into the Act is a focus on building partnerships with agencies, state, local, and foreign governments to better implement strategies and enhance food safety throughout the nation. Innovations in the FSMA revitalized the FDA's authority in maintaining a safe national food supply.¹⁹

FDA issued a Food Protection Plan in November 2007, which aims to better prevent, intervene, and respond to food emergencies.²⁰ Although the FSMA provided a ready-made opportunity to update the Food Protection Plan, the rather dated 2007 version remains. The plan applies to food for people and animals, addresses domestic and imported products, and encompasses food safety domestically and food defense internationally.²¹ The Food Protection Plan stresses the importance of prevention through "close interaction with growers, manufacturers, distributors, retailers and good service providers, and importers."²² FDA further recognizes the importance of working with "industry, state, local, and foreign governments to further develop the tools and science needed to identify vulnerabilities and determine the most effective approaches."²³

USDA

The USDA's Incident Preparedness, Response, and Recovery Plan "describes the organizational structure, and establishes procedures for the implementation of these responsibilities at the national, regional, State, and county levels."²⁴ Taking guidance from the previous Homeland Security Presidential Directives listed in footnote 13, the plan codifies responsibilities of all levels of government, the private sector, and nongovernmental organizations (NGOs). While it emphasizes local planning, the plan

places much of the burden of response with State and county emergency boards. Federal agencies will intervene in accordance to the National Response Framework, when needed.

Included in the plan is a discussion about the Defense Production Act of 1950 (DPA), which allows the President to establish priority contracts to promote the national defense and to allocate materials, services, and facilities in such manner.²⁵ "USDA has jurisdiction for food, food resource facilities, distribution of farm equipment, and commercial fertilizer," which is delegated under the DPA and EO 12919.²⁶ The Agriculture Priorities and Allocation System (APAS) takes the authority granted by the DPA and established a procedure for the prioritization of contracts to ensure timely delivery of items that have been deemed necessary in times of emergency. The Secretary of Homeland Security has pre-approved programs that enable USDA to issue priority contracts without receiving concurrence from DHS, which include programs involving food and food resources, processing and storage, as well as programs to protect or restore the agriculture and food system from attacks, disasters, and other emergencies.²⁷ The plan also addresses the USDA's allocation authority, and discusses that it is limited and can be used only when there is insufficient supply of a material, service, or facility to establish national defense supply requirements.²⁸

Multi-Agency Cooperative and State Level Food Crisis Initiatives

Beyond federal-agency-specific planning, there have been inter-agency initiatives and state-level planning aimed at addressing food crisis response. The Strategic Partnership Program Agroterrorism Initiative (SPPA) is a joint effort of the FBI, DHS, USDA, and FDA, in partnerships with private industry and the states to help secure the nation's food supply. The SPPA aims to "collect the necessary data to identify sector-specific vulnerabilities, develop mitigation strategies, identify research gaps and needs, and increase awareness and coordination between the food and agriculture government and industry partners."²⁹ The initiative was first created

to meet the requirements of the NIPP, food and agriculture SSPs, and HSPD-9, and was reauthorized in the Securing Our Agriculture and Food Act in 2017. After an assessment of the various nodes of the food production and processing chain, the SPAA identified large scale food processing and crowded agriculture production as nodes of highest concern. The SPAA then issued several mitigation strategies to help combat the effects of a terror attack in the agricultural industry including encouraging industries to develop specific food defense plans. However, less robust federal food crisis response planning leaves much of the planning and execution to local and state governments.

The National Association of State Departments of Agriculture has developed a Food Emergency Response Plan (FERP) Template for states and localities to use in drafting their own FERPs for integration into their respective State Emergency Operations Plans. Most recently issues in 2011, the FERP template aims to protect public health by enhancing the protection of the United States agricultural industry and food security through “increased prevention, detection, response, and recovery planning.”³⁰ A food emergency as address by the plan involves the adulteration and/or contamination of food that impacts or may impact human health. The FERP contemplates “food emergencies that may involve a large number of people in a small area, or that are widespread, involving a number of localities or states.”³¹

Further enforcing the importance of mitigation, the FERP says that “a state should conduct hazard analysis regarding the food industry prior to the identification of ‘situations’ for emergency response planning.”³² The FERP directs states as part of the planning process to assess various aspects of their unique food systems to better plan for specific disruptions in their areas. These include unique physical or geographic features, where food distribution and processing centers are located within the state, cultural aspects of the state, and major population areas.

Federal-level planning on the whole is emblematic of the dearth of action taken

to bolster food system resiliency. Focused more on managing the risks of terrorism on the food supply than risks like a pandemic, federal policies—to the extent they address the lack of resiliency in the U.S. food system—rely on existing commodity distribution channels rather than the development or encouragement of non-traditional channels. DHS plans do nothing to assess local and regional capabilities and assets in broader response planning; and planners have yet to utilize the National Disaster Recovery Framework to assess local risks. FDA and USDA planning commits similar transgression and overlook effective resiliency implementation strategies, though these agencies do more to focus on at least acknowledging resiliency issues in the food supply—if only because of the food-related nature of these agencies. Much of the efforts made by the FDA and USDA’s programs represent mere desire for resiliency in place of its actual pursuit, a series of ad hoc efforts instead of formal, planned responses to the pandemic. Government planning requires far more responsive strategies for the inevitable consequences disasters and crises place on the U.S. food supply.

The country cannot rely on government efforts alone to bolster resiliency—this much is clear from the government’s unwillingness or inability to date to successfully incorporate local and regional food into crisis and disaster response planning. Rather, resiliency in the U.S. food system must come from the collaborative effort of private actors supported by state government funding and coordinating initiatives. It is often the smaller, private groups like food banks, farmers markets, and food policy councils, after all, that take concrete action to address issues of food insecurity caused by a lack of resiliency. Though the government may tangentially address food system resiliency, the actual bolstering of resilience will more likely to come from increased federal and state support for local and regional establishments that have the capability—but lack the resources—to effectively respond in times of crisis and disaster.

A Brief Look at Illinois

With much of the burden of crisis

planning and response falling on local and state governments, a discussion of Illinois emergency planning doctrine follows to illustrate a state-level approach to emergency planning in the agricultural sector.

Illinois Emergency Management Act

The Illinois Emergency Management Agency is responsible for the coordination of overall emergency planning management for the state. The Illinois Emergency Operations Plan (IEOP) establishes the structure by which the Illinois state government coordinates and manages disaster response and recovery.³³ The IEOP describes the Illinois Disaster Management System (IDMS), which is used by the state in conformance with National Incident Management System (NIMS) when the IEOP is implemented for response and recovery operations in the state.³⁴ While Annex 14 of the IEOP contemplates disease outbreaks, its focus solely is on the safety and security of the existing commercial food supply, to the exclusion of local and regional food supplies.³⁵

Illinois Natural Hazard Mitigation Plan (INHMP)

In addition to the IEOP and response actions, Illinois has also developed the Illinois Natural Hazard Mitigation Plan (INHMP), which establishes a process for identifying and mitigating the effects of natural hazards in Illinois.³⁶ Illinois elected to create the Illinois Pandemic Influenza Preparedness and Response Plan in 2014 that states that food and other basic necessities should be supplied and that they are to be safe and available in sufficient quantities. Despite this impressive rhetoric, the plan lacks concrete procedures to ensure these goals.³⁷

In sum, these response and mitigation measures at the state-level do little to augment an already lacking federal response that could ensure that local and regional food supplies are able to supplement consumer needs when traditional supply chains are failing during a pandemic like COVID-19. Rather than a reactive approach, planners should address these failures in future state and local planning efforts.

Planning for Future Resiliency

Now forced to reckon with the consequences of a food system prioritizing industrialized agriculture and efficiency, “the pandemic indicates the urgency of rethinking the food system and its characteristics.”³⁸ The formalized integration of local and regional food systems into the larger food supply chain by government entities and agencies through their existing programs could provide necessary change. While federal government planning falls far short of ensuring a resilient and redundant food supply chain, a fundamental framework from which to build already exists in initiatives like that of the USDA’s efforts to develop urban agriculture. Ultimately, some form of food democracy that closes the gap between producer and consumer is the goal.

Integrating local and regional producers yields benefits beyond the strengthening and stabilizing of the U.S. food supply; integration allows consumers to “take charge of their consumption” as they are “buying fruit and vegetable boxes and going to their local butchers and bakers.”³⁹ It is these actions that turn consumers “into ‘active citizens’ who carefully choose what is on their plate.”⁴⁰ As consumers increasingly purchase locally and directly, their consumption generally includes more nutritious foods that consequently benefit public health. Both good for citizens and for the environment, the restructuring of our food system could also promote the use and spread of more sustainable farming practices and “construct alternative models of production, distribution, and retailing that offer choices and alternatives for people with various incomes.”⁴¹ The COVID-19 pandemic has “[created] a rare opportunity for radical change,” based on “a strong framework for multilevel food governance by putting the emphasis on local and regional production that encourages the consumption of seasonal and healthy produce (in combination with longer food supply chains and the provisioning of sustainable products), employing local agricultural workers and establishing better relationships between producers and retailers, whilst ensuring that the security and diversity of food are maintained.”⁴² Many promises were made and initiatives started regarding food security after the 9/11 attacks.

But complacency soon set in and progress stalled. With the fervent hope that the COVID-19 pandemic comes to a close soon, we should not revert back to past practices and then wait for the next crisis to react, but rather learn from today’s challenges and take this opportunity build true resilience in the food system that makes full use of the potential strength of our local and region food producers. ■

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7. *Id.* § 102.
8. *Id.*
9. *Id.*
10. *Id.* § 301.
11. *Id.*
12. *Id.*
13. *Id.* § 302.
14. A list of the HSPDs are available at <https://www.govinfo.gov/content/pkg/CPRT-110HPRT39618/pdf/CPRT-110HPRT39618.pdf>.
15. Homeland Security Presidential Directive-5 (HSPD-5) establishing the National Incident Management System (NIMS) and the National Response Framework (NRF), which houses Emergency Support Function annexes, including ESF-11 (requiring the USDA Food and Nutrition Service (FNS) to establish logistical links with long-term congregate meal services to ensure services are not disrupted); HSPD-7 establishing the National Infrastructure Protection Program (NIPP), Critical Infra-

structure and Key Resources (CIKR), and the Food and Agriculture Sector Specific Plan (FA SSP) (who conduct or facilitate vulnerability assessments of the sector and encourage risk management strategies); HSPD-8 establishing the National Preparedness Goal and the National Disaster Recovery Framework (NDRF); and HSPD-9 addressing the defense of United States agriculture and food and contemplating the effect of terror attacks in the food and agriculture sector

16. FDA, Food Safety Modernization Act (FSMA), <https://www.fda.gov/food/guidance-regulation-food-and-dietary-supplements/food-safety-modernization-act-fsma#:~:text=The%20FDA%20Food%20Safety%20Modernization,foodborne%20illness%20to%20preventing%20it.&text=The%20FSMA%20rules%20are%20designed,these%20points%20to%20pre-vent%20contamination>.

17. *Id.*

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21. *Id.* at 6.

22. *Id.* at 11.

23. *Id.*

24. *Id.* at 6.

25. *Id.* at 19.

26. *Id.*

27. *Id.* at 20.

28. *Id.* The DPA gained a lot of attention with its use during the COVID-19 pandemic, but a more in-depth discussion about the DPA and its implications on current food security planning follows later in the article.

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33. Illinois Emergency Management Agency (IEMA), *Illinois Emergency Operations Plan*, <https://www2.illinois.gov/iema/Preparedness/Pages/IEOP.aspx>.

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38. Alberto Alemanno, *The COVID-19 Crisis: An Opportunity to Integrate Food Democracy into Post-Pandemic Food Systems*, 11 *EUR. J. RISK REG.* 326, 332 (2020).

39. *Id.* at 333.

40. *Id.*

41. *Id.* at 334–35.

42. Ludivine Petetin, *The COVID-19 Crisis: An Opportunity to Integrate Food Democracy into Post-Pandemic Food Systems*, *EUR. J. RISK AND REG.* 11 (2020).

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products at a farmers market or processing locally grown foods. As with many legal and regulatory issues, especially when you are moving beyond on-farm sales to selling farm products at farmers markets or processing locally grown foods, you should check with your local county and city governments regarding any additional rules and regulations that may apply.

Selling farm products directly to consumers benefits both consumers and farmers. Direct farm sales let consumers purchase fresh local products ordinarily not available to them, while allowing growers and producers to capture more of the food dollar than they would by selling to distributors. Direct food marketing means selling food to the consumer who is going to eat the food or to a restaurant or retail food establishment that is located either in the same state as the person or business that sold the food, or not more than 275 miles from the person or business, and where the food is being purchased for sale directly to consumers at the restaurant or retail food establishment. Federal, state, and local government entities, however, regulate food sales from the perspective and focus of food safety and public health. All three levels of government have specific powers and areas of responsibility for enforcing health and public safety laws and regulations.

So it pays to know the rules before developing your farm and food enterprises that rely on direct sales. This guide is divided into four sections. The first section serves as an introduction and a general overview. The second section provides an overview of key regulatory points. The third section discusses regulations for specific products. The last section is a checklist of issues that farmers and growers should consider as they plan their activities, as well as a list of selected federal and state laws that control direct farm sales.

The biggest change in Illinois and U.S. food policy is the Food Safety Modernization Act (FSMA). The passage of this major food law should serve to caution Illinois

food and agricultural entrepreneurs of all sizes that now is the time to reengage and reevaluate risk management planning — regardless of whether they are exempt or not. Direct food sellers in Illinois should have active risk management plans that address the possibility of food borne illness and that detail their ability to recall their food products and document the steps they take to produce safe food. They should know and practice in a way that insures the goals of Good Agricultural Practices (GAP), Current Good Manufacturing Practices (CGMP) Standard Operating Procedures (SOP) and Hazard Analysis and Critical Control Points (HACCP) like planning are met. One of the key take away points of FSMA is that the law emphasizes preventing food borne illness.

Depending on where and what is sold, a particular product may be extensively regulated, minimally regulated, or fall somewhere in between. One general point to keep in mind is that a product sold in Illinois could be regulated by the state or local authorities as well as the federal government. The federal government may regulate any product sold across state lines because the federal government regulates commerce between the states.

As a general rule, state and local government entities such as county health departments control commerce within the state, and the federal government regulates commerce between states. In addition, someone selling food products can expect that the more potential his or her product has to harm people, the more intensively regulated the product will be. For example, whole raw vegetables were in the past exempted from many rules because they pose a comparatively low threat to human health; they are not as likely to harbor harmful bacteria and because many people will wash them. Raw milk, however, is highly restricted. As a product, it poses a greater potential threat from bacterial contamination and because the general public would presumably not be willing, able or likely to pasteurize it themselves.

In the aftermath of the events of September 11, 2001, the U.S. government enacted new legislation that impacted food processing and sales: Public Health Security and Bioterrorism Preparedness and Response Act of 2002. This act gave the Food and Drug Administration (FDA) increased powers to insure the safety of the American food system. Based on this act, the FDA required food industry players to keep records, register their facilities, and give prior notice of importing food into the United States. If food processing entities failed to meet these requirements, the FDA had the power to administratively detain their food products and prevent them from shipping their food products. These powers are carried forward and expanded under FSMA.

There have been two major changes since the first publication of this guide. The first is the passage and implementation of the Illinois Cottage Food Law, which makes possible the sale of many processed homemade food items at farmers markets. The second is the passage of the Food Safety Modernization Act (FSMA) which on a very broad level does several big things for the U.S. Food and Drug Administration and its regulation of the U.S. processed food and produce sector. It gives the FDA the authority to order mandatory food recalls, and it imposes food safety protocols that reflect Good Agricultural Practices (GAP) on produce and practices that resemble Hazard Analysis & Critical Control Points (HACCP) on processed food. GAP is a system of procedures and protocols designed to ensure farms practice good food safety techniques, and HACCP is a system designed to make sure food safety gets built into all the steps that go into making food. Both GAP and HACCP are designed to prevent food-borne illness. In addition, food providers should be aware of the importance of standard operating procedures and how they can increase food safety.

The authors of *A Guide to Illinois Laws Governing Direct Farm Marketing* acknowledge the kind assistance of the

many people who helped in this project. Illinois Stewardship Alliance also recognizes the many organizations and agencies that contributed either time or funds to make this guide a reality.

Additional information can be found at:

http://www.idph.state.il.us/pdf/IDPH_FDD_TIB_30_Farmers_Markets_051613.pdf (Illinois Department of Public Health Office of Health Protection Division of Food, Drugs and Dairies)
<https://dph.illinois.gov/sites/default/>

<files/publications/Farmers-Market-Food-Safety-Guide.pdf> (Illinois Farmers Market food safety. A Guide for Vendors, Market Managers and Consumers)
410 ILCS 625/3.3, Farmer's Markets. ■

New Book Provides More Expansive Exploration of Parallels and Synergies Between Animal Law and Environmental Law

BY PROF. RANDALL S. ABATE

Introduction: 'What Can Animal Law Learn From Environmental Law,' Second Edition

With its intricate layers of international, federal, and state protections, environmental law is more established than animal law. In this book, Prof. Randall S. Abate has assembled an experienced team of 36 academics, advocates, and legal professionals from the environmental and animal law fields to examine the experiences of these two fields. Drawing on lessons from history, politics, and law, the 29-chapter book examines how environmental law's successes and shortcomings can inform animal law, and how the two fields can work together to secure mutual gains in the future.

This second edition contains three new chapters addressing how food law and policy can be a valuable mechanism for enhanced protection of animals, including consumer protection litigation involving false advertising claims, industry challenges to plant-based meats and mil, and emerging law and policy considerations for lab-grown meat. The book also expands its coverage of climate change and addresses cutting-edge

procedural topics in three new chapters on impact assessment, enforcement, and regulatory avoidance. New chapters also address a range of pressing themes at the intersection of animal and environmental law and policy including rights of nature, greenwashing and humane washing, animal testing and an emerging area known as "animal socioequality."

Published in July, the second edition of *What Can Animal Law Learn From Environmental Law?* (Environmental Law Institute Press, 2020) features significantly expanded coverage of what animal law can learn from environmental law in many contexts and how the two fields can work together to secure mutual gains. The book updates and builds on the existing coverage of topics from the 17 chapters in the first edition and adds 12 new chapters on cutting-edge topics including lab-grown meat, animal testing, "tag-gag" litigation, deceptive advertising, climate change, right of nature, impact assessments, enforcement, regulatory avoidance, and "animal socioequality."

The U.S. has a long history of exploiting animals for human advancement and

comfort in much the same way that natural resources have been exploited since the industrial revolution. The environmental movement in the United States in the 1960s and 1970s demanded that the use of natural resources be carefully managed to ensure a sustainable future for our nation and our planet. In the five decades, during which it has been recognized as a specialty area in U.S. law, environmental law in the United States has been highly successful in promoting this sustainable management objective. Drawing support from both legal and social developments in the late 1960s and early 1970s, environmental law quickly moved within its first decade from a marginal niche to a fully institutionalized field in the American legal system.

There are many reasons for this success. First, there was an urgent and visible pollution crisis in our air, water, and land. Second, economic stability in the 1960s and 1970s enabled the United States to regulate the environment in a manner that would have been economically challenging in previous decades. Third, scientific evidence had been collected to establish direct links between environmental contamination and

human health. Fourth, growing awareness of the importance of ecosystem integrity and biodiversity led to protection of the “unseen” and “overlooked” in our natural world, which gained national attention in the *Tennessee Valley Authority v. Hill* case in 1973 involving protection of the snail darter under the Endangered Species Act.

In addition to these reasons for the environmental law movement’s success, the most important reason that environmental law became mainstreamed as a legal specialty is because it worked within the system rather than against it. While there were, and still are, many radical environmental groups and objectives that challenge the status quo of the legal system, the vast majority of environmental law issues acquired legitimacy through victories in the courts and in Congress. Ultimately, environmental law succeeded because its message was understood that protecting the environment ensures a sustainable future for humans. Many environmental law regulations are premised on enforcing standards that seek to protect human health.

While animal law has enjoyed some important victories within the past three decades in the courts and in federal and state legislative initiatives, it has remained largely marginalized in the American legal system and has struggled for legitimacy. Much of this struggle is rooted in a false perception in the legal system and in society regarding what animal law represents—that enhancing legal protections for animals somehow requires a corresponding diminution of legal protections for humans.

To secure enhanced legitimacy and success, the animal law field needs to capitalize on the successful strategies of the environmental law field. In much the same way that the American public has accepted that economic growth does not require unsustainable depletion of natural resources, our increased demand for food, scientific research, and entertainment likewise should not require animal suffering. Moreover, animal law can work directly with environmental law on some issues for mutual benefit.

This book seeks to address several dimensions of this inquiry. It raises

important parallels between animal law and environmental law and proposes strategies for how animal law can benefit from the well-worn trail that environmental law has blazed in the legal system. Some key similarities include:

- Both fields involve defending those unable to defend themselves in the legal system (e.g., mountains, rivers, trees, and animals).
- Both fields involve the need for creative lawyering (e.g., drawing on a mix of statutory and common law theories) to develop new theories of protection under the law.
- Both fields must confront issues of federalism and avoid the pitfall of preemption as a limitation on the scope of available protections.
- Both fields benefit from cross-disciplinary engagement with other doctrinal areas (e.g., human rights) and with foreign domestic and international law principles to advance new theories of protection.
- Both fields must confront how best to define their focus and may benefit by defining goals for mutual gain. For example, environmental law is routinely paired with natural resources law, energy law, and land use law. Animal law is related to environmental law to a similar degree as these fields; however, it is rarely paired with environmental law as a joint enterprise.
- “Think globally, act locally” is an appropriate mantra for both fields, yet it has galvanized environmental law’s success much more so than it has for animal law. Environmental law issues are inherently international because of their transboundary nature, whereas animal law issues are intertwined with cultural and religious traditions that tend to make them more national and local in character.

Since the publication of the first edition in 2015, animal law advocates have secured landmark victories in three high-profile contexts. Longstanding traditions of captive breeding of orcas at SeaWorld¹

and training of elephants for performance in Ringling Bros. and Barnum and Bailey circus came to an end within the same year in 2016,² thanks to persistent and creative litigation, legislative, and public information campaigns. These developments did not intersect directly with environmental law on the surface, they built on a legacy of advocacy strategies that were successful in environmental law in previous decades: (1) the power of advocacy based on science and public information campaigns in the case of SeaWorld, and (2) the power of grassroots advocacy at the local level to secure a nationwide outcome in the case of the circus, which relied on a patchwork of local bans in multiple states on the use of the bullhooks used to train elephants³ In the companion animal context, California enacted a groundbreaking pet custody law in 2018 that authorizes judges to consider what is in the best interests of companion animals in custody disputes, which elevates animals’ status above their traditional recognition as property.⁴

In other animal law contexts since the release of the first edition, animal rights advocates continued the ambitious and important quest for recognition of legal personhood protections for animals. High-profile cases filed by three of the leading animal protection organizations in the nation used creative strategies to secure a common goal in the animal law and environmental law movements: legal personhood for these “voiceless” entities (i.e., animals and natural resources) to be recognized as rights holders to some degree under the law. One of these cases, *Naruto v. Slater*, also known as the “monkey selfie” case, involved People for the Ethical Treatment of Animals’ (PETA’s) suit on behalf of a crested macaque monkey in Indonesia, Naruto, to secure intellectual property rights to selfie photos that the monkey had taken with a photographer’s camera that was set up on a tripod in an Indonesian rainforest. The Copyright Act extends protections to any “person,” which is not limited by its terms to humans under the statute. The Court concluded that “person” should not be interpreted to include non-humans and that Naruto therefore lacked statutory standing under the Copyright Act.⁵

Second, the Nonhuman Rights Project (NhRP) also proceeded undaunted with its line of habeas corpus cases that began prior to the first edition and continued through to the publication of the second edition.⁶ These cases have sought to have chimpanzees and elephants released from captivity and placed in sanctuaries. The most recent of these cases involved Happy, a 49-year-old Asian elephant in captivity at the Bronx Zoo.⁷ Happy's case is the first in the world for a court to issue a habeas corpus order on behalf of an elephant.⁸ The "show cause" order required the Bronx Zoo to justify its ongoing confinement of Happy. In February 2020, the NhRP's case was dismissed,⁹ but NhRP continues to pursue litigation and legislative initiatives in the U.S. and abroad to secure legal personhood protections to recognize these animals' rights to be free from confinement.

In the last context of this trio of legal personhood cases on behalf of animals, the Animal Legal Defense Fund (ALDF) filed a high-profile case on behalf of Justice, a horse, in a suit against the horse's owner for abuse under Oregon's animal cruelty statute. The suit seeks to establish that animals have a legal right to sue their abusers in court. The case was dismissed in 2018 on the ground that non-human animals lack standing to sue on their own behalf.¹⁰ ALDF's appeal of the dismissal was pending at the time that the second edition was published.¹¹

Building on the momentum from these landmark victories and creative and ambitious litigation strategies in the animal law field since 2015, animal protection initiatives can be enhanced by learning valuable lessons from environmental law in certain contexts, and by seeking collaboration with environmental law on certain issues for mutual gain. New chapters in the second edition address how two contexts from the environmental law field—rights of nature and environmental justice—serve as foundations for potential future gains for animal law. One chapter presents an Australian perspective on how recent successes in rights of nature initiatives can provide an opportunity for animal law and environmental law to secure mutual gains through a "comprehensive

ecosystem personhood" approach. Another chapter coins a new term, "animal socioequality," as an innovative approach to enhance protection for animals through an environmental justice lens.

Developments at the intersection of animal law and environmental law have exploded since the publication of the first edition in 2015. The second edition addresses some of these developments to build on some of the existing content from the first edition and extend the book's coverage in new directions. One of these developments is food law and policy as a rapidly growing area of convergence between these two fields. In adding new chapters addressing how food law and policy can enhance protection of animals, the second edition builds on the first edition's coverage of one dimension of this topic addressed in the meat labeling chapter. New chapters in the second edition extend the coverage of food law and policy issues to include consumer protection litigation involving false advertising claims, potential synergies between greenwashing and humane washing contexts, and animal and environmental law and policy considerations concerning lab-grown meat.

Another area of convergence between animal law and environmental law is climate change regulation. The first edition addressed this topic with two chapters: one proposed strategy to address greenhouse gas emissions from concentrated animal feeding operations (CAFOs), whereas the other addressed how the listing of the polar bear as threatened under the Endangered Species Act can offer lessons for enhanced protection of wildlife. The second edition adds two new chapters that address climate change as common ground between these two movements. One of these chapters considers synergies between climate change mitigation and wildlife conservation and the other seeks to build on the environmental law movement's ambitious use of the public trust doctrine to leverage enhanced protections for wildlife.

The first edition's core theme regarding lessons that environmental law can offer animal law extends in new directions in the second edition. The second edition adds new chapters addressing procedural

contexts in which environmental law has enjoyed enduring success in enforcement of law generally, impact assessments, and accountability for regulatory avoidance. It also includes a chapter on what animal law can learn from environmental law to promote animal protection in the context of animal testing.

Successful demand reduction strategies are perhaps the most effective and most promising of all of the developments since the publication of the first edition. Demand reduction strategies can enhance animal protection more readily than litigation or legislative initiatives. Animal law and environmental law embrace demand reduction efforts through public information campaigns and science. In environmental law, this approach is reflected in efforts such as fossil fuel divestment, anti-fracking campaigns, and renewable energy initiatives to help move the public away from its addiction to fossil fuels. In animal law, demand reduction strategies take many forms because animals are considered property under the law and are abused in multiple contexts such as animals in agriculture and animals in entertainment. Examples of effective demand reduction advocacy occurred in the animals in entertainment context with recent victories against circuses and marine parks, in addition to previous victories against the dog fighting and dog racing industries.

The rapid expansion of the plant-based meat and dairy industries since 2015 promises significant gains in animal protection by threatening the stronghold of the meat and dairy industries. The walls of this fortress of secrecy and abuse in the meat and dairy industries have continued to crumble in the years since the second edition, and at a much faster rate. Plant-based meat and milk have caused massive economic impacts to the meat and dairy industries such that some major dairy producers have filed for bankruptcy. Feeling this pressure, the meat industry has fought back by transitioning from one unsuccessful form of bullying tactics ("ag-gag" laws¹² seeking to stifle public information access and dissemination) to a new form of bullying with a recent wave of new "tag-gag" laws.¹³

One example of these state tag-gag laws is the meat industry's attempt to limit the definition of the term "meat" to animal flesh for consumption in an effort to exclude the competitive threat from the plant-based meat industry's use of that term. These tag-gag laws have been challenged by animal protection advocates in a wave of pending litigation that offers a sense of déjà vu when one compares it to the ag-gag litigation that preceded it.

This book assembles the insights of 36 experts in the animal law and environmental law fields to promote legal protections for animals by drawing on U.S., foreign domestic, and international environmental law regulatory strategies and perspectives. The book is divided into four units. Unit I provides introductory context with seven chapters that thoroughly examine the historical, political, and legal foundations of environmental law as possible building blocks (and pitfalls to avoid) in seeking to advance the animal law field. Sub-topics within this unit address procedural mechanisms (standing, enforcement, damages, and impact assessments) and concepts and themes (politics of the environmental law movement, regulatory avoidance, and animal socioequality) to set the stage for book's coverage in the ensuing three units.

Unit II addresses several U.S. law contexts to illustrate these lessons from environmental law and possible opportunities for collaboration between the two movements. These contexts include chapters on animal agriculture, consumer protection and labeling, emerging issues in food law and policy, climate change, lead pollution, fisheries management, and animal testing. Unit III considers these issues from international and comparative law perspectives. It reviews international trade and environment treaties and jurisprudence, environmental and animal welfare regulation in Australia and the European Union, and the need for regional and global animal welfare and rights laws to emerge to capitalize on the success and avoid the failures of the international regulation of species under environmental law regimes. Unit IV offers reflections in

four chapters on how animal law can learn from environmental law in practical and theoretical contexts, and how the two fields can enhance their collaborative efforts for mutual gain.

A famous quote from Gandhi on the progression of social movements is particularly apt in reflecting on the future of animal law: "First they ignore you, then they laugh at you, then they fight you, then you win."¹⁴ With the help of lessons from environmental law, and drawing on opportunities for increased collaboration between animal law and environmental law, animal law can close in on a "win" that will hopefully be a "win-win" for these two fields. ■

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5. *Id.* at 426. Despite the loss in court, there was some good news for Naruto and the animal protection advocates in the wake of the litigation. After oral arguments before the ninth circuit, however, the parties agreed to a settlement that provided that 25 percent of the proceeds from the photographer's sales of the monkey selfies would be donated to charities that seek to protect the habitat of the crested macaques in Indonesia. See Nicole Pallotta, *En Banc Review Requested in "Monkey Selfie" Copyright Case*, Animal Legal Defense Fund Animal L. Update, Aug. 7, 2018, <https://aldf.org/article/en-banc-review-requested-in-monkey-selfie-copyright-case/> (last accessed Apr. 11, 2020).

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13. Tag-gag laws seek to prevent plant based products from using terms such as "meat" and "milk." For a detailed discussion of laws and pending litigation in this context, see Chapter 11.

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