Understanding and Interpreting Right to Farm Laws

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In 1956, James McNulty bought a 114-acre farm in rural Jennings County, in south-central Indiana, and continued a business his seller had conducted on it – raising hogs. In 1968, new neighbors, Fred and Opal Shatto, purchased land across the road, with full knowledge—indeed a direct view—of McNulty's hog operation. Two years later, the Shattos built a house. Several years after that, they filed suit against McNulty seeking damages and an injunction based on odors emanating from the McNulty farm that they claimed amounted to a common-law nuisance. Their litigation threatened a modest business conducted for decades by McNulty and his predecessors.

The trial court applied the Indiana "right to farm" law and found in favor of McNulty, holding that a plaintiff could not move to an agricultural area and then file suit against an established operation. "We must observe," the appellate court noted in its affirmance, "that pork production generates odors which cannot be prevented, and so long as the human race consumes pork, someone must tolerate the smell. [Indiana's right to farm law] addresses that fundamental fact and protects pork production when it is confined to its natural habitat, that is, rural farm communities such as Jennings County." *Shatto v. McNulty*, 509 N.E.2d 897, 900 (Ind. Ct. App. 1987).

Disputes like that between the McNultys and the Shattos are becoming more common as Americans become increasingly distanced from production agriculture. The average American is now more than three generations removed from the farm. At the same time, the percentage of the U.S. population directly involved in agriculture has dwindled from over 60 percent in the mid-1800s to 50 percent in the early 1900s to a mere 2 percent today. Lack of familiarity with modern agriculture is problematic for farmers and nonfarmers alike, as suburbs extend into rural areas, and suburbanites' expectations of peace, quiet, and serenity collide with the reality of agricultural production.

For many, this awakening to the sounds and smells of modern production agriculture comes after they have invested their life savings in their new home and cannot afford to leave. Their reaction, like that of the Shattos, may be to seek redress in court. As the Colorado legislature has recognized: "When nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result, a number of agricultural operations are forced to cease operations, and many others are discouraged from making investments in farm improvements." Colo. Rev. Stat. § 35-3.5.101.

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Such suits threaten the survival of many agricultural operations. Even unfounded claims are enough to put many farmers out of business, and the evidence of recent studies is that nuisance lawsuits against agricultural producers have increased in number over the past two decades. A study in New Jersey found that on average a nuisance suit reduces farm viability, in the form of annual farm income, in that state by $25,000. *See* Adesoji Adelajo & Kent Sullivan, *Agricultural Viability at the Urban Fringe* (New Jersey Agricultural Experiment Station 1998), *available at* http://njsustainingfarms.rutgers.edu/PDF/Agricultural_Viability_at_the_Urban_Fringe.pdf. At the time of this study, the cost of nuisance suits to agriculture in New Jersey alone was approximately $33.6 million per year. Critics of such litigation say it dissuades young would-be producers from pursuing their dreams of farming and causes current farmers to conclude the risk is simply not worth it and to sell their operations; both trends further diminish the number of people and properties devoted to production agriculture.

Right to farm laws are a legislative attempt to readjust the legal liability balance in favor of agriculture. Such laws originally appeared in the 1970s, when the number of farms and the amount of farm land in production were drastically declining but before the current environmental regulation of agricultural emissions to air and water came into effect. All fifty states now have some form of right to farm law. Their basic justification is to protect the United States' domestic food supply by keeping farmers farming.

In their most rudimentary form, right to farm laws codify the common law tort defense of "coming to the nuisance." This is a defense against persons like the Shattos who purchase or use land next to a preexisting use, which would otherwise constitute a nuisance. If a defendant's farm and its offsite impacts were in existence before the plaintiffs arrived, the plaintiffs are said to have "come to the nuisance." Under this doctrine, so long as an agricultural operation predates a change in the surrounding land use, and the operation is not negligently operated, the farmer has no liability.

How Right to Farm Laws Operate

Although all state right to farm statutes have the same purpose, they vary widely in their specific provisions. An attorney confronting litigation involving a right to farm statute must consider at least six critical issues in analyzing its application to the case: the definition of "farming"; the scope of the tort immunity it provides; the standard of conduct required for

protection under it; the required timeline for its application (i.e., whether or for how long the challenged operation must have preceded the plaintiff's nonfarming use); whether changes or expansions to an operation may impact the defense; and whether and under what circumstances a successful defendant may recover attorney fees.

Even in states where only nuisance is expressly mentioned in the statute, courts have construed right to farm laws to provide a legal defense to producers for claims beyond nuisance.

State laws vary widely in their definition of "farming." Not surprisingly, a particular statute will likely focus on the type of agriculture most prominent in that state. For example, New Mexico law protects not only what a person would consider traditional agriculture (e.g., plowing, tilling, or preparation of soil, planting, growing, fertilizing, and harvesting crops, and breeding, hatching, raising, and producing livestock) but also extends to slaughtering of animals, keeping of honey bees, production and processing of honey bee products, processing and packaging of eggs, manufacturing of livestock feed, and operation of roadside markets. NMSA 1978, § 47-9-5. Conversely, Minnesota's protection is more limited, applying only to the production of crops, livestock, dairy, and poultry, but not to facilities primarily engaged in processing agricultural products. Minn. Stat. Ann. § 561.19(1)(a). Alaska's definition includes the operation of greenhouses; the feeding, keeping, slaughtering, or processing of livestock, including reindeer, elk, bison, and musk oxen; forestry and other timber harvesting, manufacturing, or processing; and aquatic farming. Alaska Stat. § 09.45.235(d). Hawaii law protects silviculture and farmers' markets, Haw. Rev. Stat. § 165-2, while in Nebraska, grain elevators and warehouses are included, Neb. Rev. Stat. § 2-4402(3).

The scope of the litigation protection afforded under right to farm statutes also varies widely. Many state laws expressly prohibit only nuisance suits, while others, like Oregon's, protect producers from both nuisance and trespass suits. *Compare, e.g.*, Kan. Stat. Ann. § 2.3202 ("Agricultural activities conducted on farmland, if consistent with good agricultural practices and established prior to surrounding nonagricultural activities, are presumed to be reasonable and do not constitute a nuisance, public or private, unless the activity has a substantial adverse effect on the public health and safety.") *with* Or. Rev. Stat. § 30.936(1) ("No farming or forest practice on lands zoned for farm or forest use shall give rise to any private right of action or claim for relief based on nuisance or trespass."). Although nuisance and trespass causes of action are similar, substantive differences between them, such as the required elements of each or different statutes of limitations, may impact the application of the state's right to farm law in a given situation.

Even in states where only nuisance is expressly mentioned in the statute, courts have construed right to farm laws to provide a legal defense to producers for claims beyond nuisance. In *Ehler v. LVDVD, L.C.*, 319 S.W. 3d 817 (Tex. Ct. App. 2010), the Texas Court of Appeals held that the Texas statute also acted as an affirmative defense to claims of trespass, despite there being no mention of trespass in the statute itself. The California Court of Appeals reached the same conclusion in *Rancho Viejo LLC v. Tres Amigos Viejos LLC*, 123 Cal. Rptr. 2d 479 (Cal. Ct. App. 2002), barring both nuisance and trespass claims. Perhaps the clearest and most comprehensive provision is found in the Hawaii statute, which provides that the protections apply to suits brought in nuisance, negligence, trespass, or any basis in law or equity. Haw. Rev. Stat. § 165-2.

Many right to farm statutes, in addition to barring private tort actions, also restrict the exercise of local governmental authority through zoning or other means. Such statutes override municipal efforts to zone out or otherwise regulate agricultural operations in a given area. Arkansas' right to farm law nullifies any municipal or county ordinance that seeks to abate an agricultural operation that is protected under the act. Ark. Code Ann. § 2-4-105. Similarly, North Carolina declares "null and void" any local ordinance that would make a farm a nuisance. N.C. Gen. Stat. § 106-701(d). While Colorado voids any ordinance or resolution of local government that makes an agricultural operation a nuisance or seeks to abate such nuisance, it also empowers local governments to adopt ordinances or resolutions providing additional protection for producers beyond the protections afforded in the statute itself. Colo. Rev. Stat. § 35-3.5-102(7). Statutes with these provisions may impact more than agricultural activities themselves. In *Northville Township v. Coyne*, 429 N.W.2d 185 (Mich. App. 1988), the Michigan Court of Appeals interpreted that state's right to farm law to bar a municipality's effort to demolish, as a public nuisance, a barn built without a zoning variance or building permit, while allowing possible prosecution of the builder for a building code violation.

On the other hand, right to farm laws may recognize, and defer to, state-level environmental regulation. For example, Mississippi's right to farm law provides that it cannot be construed to affect any provision of the Mississippi Air and Water Pollution Control Law. Miss. Code Ann. § 95-3-29(3). South Dakota's statute, S.D. Codified Laws § 21-10-25.2, applies only "if all county, municipal, state, and federal environmental codes, laws, or regulations are met by the agricultural opera-

tion," while Minnesota's, MINN. STAT. § 561.19, excepts from its operation an established operation that "complies with the provisions of all applicable federal, state, or county laws, regulations, rules, and ordinances and any permits issued for the agricultural operation."

Right to farm statutes also regulate conduct by specifically addressing the manner in which particular farmers operate. Statutory standards or criteria for conduct protected under right to farm statutes run the gamut, from nonexistent to extremely detailed. In Hawaii, for example, a farm operated in a manner consistent with "generally accepted agricultural and management practices" is protected. Haw. REV. STAT. § 165-4. Such a vague definition, of course, invites litigation as to what is a "generally accepted agricultural and management practice" for a particular area and agricultural commodity. Conversely, under Wisconsin law, the standard is simply that the farming operation does not pose a threat to public safety. WIS. STAT. ANN. § 823.08(3)(a). Statutory standards elsewhere fall somewhere between those extremes. In Colorado, for example, an operation is protected if it employs methods or practices "commonly or reasonably associated with agricultural production." COLO. REV. STAT. § 35-3.5-102(1)(a). Washington requires conformity with "good" agricultural and forest practices. WASH. REV. CODE § 7.48.309. California requires observance of "proper and accepted customs and standards as established by similar agricultural operations in the same locality." CAL. CIV. CODE § 3482.5. Kentucky requires "normal and accepted practices." KY. REV. STAT. § 413.072(2). New York permits a farmer to proactively obtain a prior administrative ruling regarding a particular practice. Under New York statute, an agricultural practice "shall not constitute a private nuisance . . . provided such agricultural practice constitutes a sound agricultural practice pursuant to an opinion issued upon request by the commissioner [of Agriculture]." N.Y. AGRIC. & MKTS. L. § 308.

Some statutes deny right to farm protection for regulatory noncompliance. Such compliance may be framed in general terms, such as whether the farm poses a danger to public health and safety, under standards similar to state public nuisance law. Typical of this kind of statute are those from Arizona and New Hampshire. *See, e.g.*, ARIZ. REV. STAT. § 13-2917(A)(1). Other statutes go farther and require broader regulatory compliance. Minnesota's right to farm defense requires compliance with "the provisions of all applicable federal, state, or county laws, regulations, rules, and ordinances and any permits issued for the agricultural operation." MINN. STAT. § 561.19(2). Statutes requiring regulatory compliance pose potentially complex issues regarding the necessary elements of proof and of determining which party has the burden of proof. While establishing a claim or a defense under a classic "coming to the nuisance" formulation will be comparatively straightforward, proving regulatory compliance or noncompliance may be considerably more complicated.

Many, but not all, right to farm statutes include a duration requirement, following the common law chronology of "coming to the nuisance." These statutes fix the length of time the agricultural operation must preexist the changing neighborhood and the complaining neighbor. Generally, there are three classes of statutory "duration" requirements. One simply codifies the common-law "coming to the nuisance" defense, requiring only that the agricultural operation be there a prescribed length of time before the use of the plaintiff neighbor. Washington, Alaska, Arizona, Montana, Wyoming, and Nebraska adopt this approach. A second type of statute, more closely resembling a statute of repose, specifies the length of time an operation must exist prior to the lawsuit for the protection to apply and takes no account of whose use was "first." Using this approach, New Mexico, Alabama, Idaho, and South Dakota set a one-year requirement; Minnesota and Oklahoma require two years; and California and Alaska require three. A third, least common, approach contains no durational limit. Under Hawaii and Rhode Island law, no agricultural operation may be considered a nuisance so long as it conforms to generally accepted practices, regardless of how long it has been in operation and regardless of whether the neighboring landowner was present first.

As the amount of farm land in the United States has decreased and populations have grown, farming operations have become larger and more intensive. In 1940, one farmer fed nineteen people. In 2010, the same farmer fed 155 people.

A critically important and related issue is whether modification of a farm operation may fall outside of right to farm protection. Farming methods change with time, technology, and markets, and a farmer may need to expand the scale of an operation or alter the farming methods used or the types of crops or livestock produced. As farm land has decreased and populations have grown, farming operations have become larger and more intensive. In 1940, one farmer fed nineteen people. In 2010, the same farmer fed 155 people. *See Thank a Farmer*, HIGH PLAINS JOURNAL (Mar. 11, 2011), *available at* www.hpj.com/archives/2011/mar11/mar28/0321FisforFarmerssr.cfm.

Recognizing the need for flexibility in agriculture production, several states have passed or amended right to farm statutes that permit changes to a farm or its operation without compromising its right to farm protection. State approaches to operational changes vary. Some states provide complete protection for changes in technology. Colorado expressly states that the "employment of new technology" cannot be considered a nuisance.

COLO. REV. STAT. ANN. § 35-3.5-102(1)(b)(IV). Likewise, Washington allows for the implementation of new practices and equipment consistent with the technological development occurring in the industry. WASH. REV. CODE § 7.48.310(1). Other states address this issue through a baseline date of commencement of the original farm operation. New Mexico and Oklahoma provide that the established date of operation for an agricultural operation is when the activity is first commenced and that any later expansions or adoptions of new technologies do not change the established date of operation. *See, e.g.*, N.M. STAT. ANN. § 47-9-3(C) 1978. Thus, so long as the operation was established at least a year prior to the lawsuit, subsequent changes in technology or operational expansion will not jeopardize protection under the state's right to farm act. Some states, by statute or court decision, provide complete protection for producers in all cases. For example, in *Souza v. Lauppe*, 59 Cal. App. 4th 865 (Cal. Ct. App. 1997), the California Court of Appeals found right to farm immunity applicable despite the farmer's having changed from rice production to row crop production. The Missouri right to farm statute by its terms allows a farmer to "reasonably expand" an operation, MO. REV. STAT. § 537.295(1), while in Washington, a conversion from one agricultural activity to another, including a complete change in the type of crop grown, is considered to be a protected agricultural activity, WASH. REV. CODE § 7.48.310(1). Some statutes contain specific statutory criteria as to what constitutes either a change in size or in the products raised on the farm. In Indiana, although right to farm protection is lost for a "significant change" in operation, by statutory definition, changing from one crop to another, or a change in size are not, by themselves, "significant" changes. IND. CODE § 32-30-6-9(d)(1).

Some states take a middle ground, protecting only limited change or expansion. Minnesota's approach is mathematical: if an operation is expanded or significantly altered, the established date of operation becomes that of the commencement of the expanded or altered operation. "Expansion" of a livestock operation means an increase by 25 percent of the type of livestock located on the operation. MINN. STAT. § 561.19(1)(b). Still other states make no provision for operational changes or expansions. Despite its sanctioning of new farm technology, as described above, Colorado is one of these. COLO. REV. STAT. § 35-3.5-102. In these states it is particularly critical that farmers understand the implications of their state statute for future expansion or change.

The financial burden of defending a nuisance lawsuit may be mitigated in some—but by no means all—states by an award of attorneys' fees to a successful defendant. Even in states with fee shifting statutes, the burden of obtaining a fee award varies.

The financial burden of defending a nuisance lawsuit may be mitigated in some—but by no means all—states by an award of attorneys' fees to a successful defendant. And even in states with fee shifting statutes, the burden of obtaining a fee award varies greatly. For example, in New Mexico, attorney fees may be awarded only if the court finds that the plaintiff brought a "frivolous" lawsuit—a difficult hurdle. Texas and Michigan award fees if a nuisance suit is unsuccessful, even if not deemed frivolous. *Compare*, N.M. STAT. ANN. § 47-9-7 1978 *with* TEX. AGRIC. CODE ANN. § 251.004(b). Other states, like Virginia, have no provision for attorney's fees.

Challenges to and Criticisms of Right to Farm Laws

Right to farm laws are not without criticism. The most frequent form of attack has been constitutional, under the "takings" clause of the Fifth Amendment to the United States Constitution or the equivalent state constitutional provision. Several right to farm statutes, including those in Texas, Minnesota, New York, and Idaho, have withstood these challenges. But in 1998, the Iowa Supreme Court found the Iowa right to farm act "flagrantly" unconstitutional. In *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998), landowners adjacent to a parcel of land that was declared to be an agricultural area and thereby immune to nuisance claims under the right to farm statute challenged the law as an unconstitutional "regulatory taking" of their property. The court held that the right of the producers to act in a way that would, in the absence of the right to farm statute, constitute a nuisance, created an easement. Thus, by granting the producer an uncompensated easement over the property of the plaintiffs, the statute on its face violated the Fifth Amendment. In a later case, *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168 (Iowa 2004), the Court refined its earlier holding to limit the remedy of a preexisting neighboring landowner to a damage award equal to the decrease in the fair market value of the property resulting from the taking of the easement.

Another criticism of right to farm statutes is that they have induced potential plaintiffs to turn their efforts from common law tort actions against their farming neighbors toward citizen suits or toward regulatory relief, either through lobbying for more stringent environmental regulation or by attempting to prove a regulatory violation by producers. *See* Neil D. Hamilton, *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective*,

3 Drake J. Agric. L. 103 (1998). Most right to farm laws were enacted in the 1970s and 1980s, before the enactment of the comprehensive regulation of air and water discharges in place today. Citizen suit provisions in some environmental statutes provide a broader class of plaintiffs beyond immediate neighbors and allow a lower burden of proof—a showing of regulatory violation—than state tort litigation. It may be that for some farms, particularly larger or "higher profile" operations like feedlots, right to farm statutes are no longer a sufficient first line of defense because the plaintiffs and the claims being brought have changed. But citizen suits entail procedural complexities and uncertainties, including issues of timing and standing. For that reason alone, the more immediate litigation threat for many farmers is, and will remain, the nuisance suit from the "Shattos" across the road.

But the increasing subjection of agriculture to environmental regulation under National Pollutant Discharge Elimination System (NPDES) permitting, for example, may begin impacting producers in right to farm cases as well. Violations of environmental regulations are often expressly excepted from the protection of right to farm statutes. Maryland and Minnesota both require compliance with all applicable federal, state, and local environmental requirements to entitle the farmer to raise a right to farm defense. Md. Code Ann. § 5-403; Minn. Stat. § 561.19(2). Unlike during the 1970s, a farmer today may well have various government-issued permits for herbicide or pesticide application or animal feeding operation permits, as examples. An enterprising and aggressive plaintiff's attorney could readily obtain, through public filings or discovery, records for the farm operation at issue, and from them craft an argument that right to farm protection is inapplicable because of an environmental regulatory violation.

Ultimately the larger issue is how to fairly and efficiently address the changing regulatory environment, while still preserving the important protection of right to farm laws. Because farmers face increased federal and state permitting of air and water discharges, one potential solution may be to supplement right to farm statutes by adding a right to farm liability shield explicitly tied to such permitting. To the extent such permits address issues traditionally resolved under common law tort concepts, like nuisance or trespass, permit compliance should result in *prima facie* immunity not only from agency enforcement but also from all private third-party liability related to such discharge. For example, instead of providing, as many statutes do, that right to farm protection is lost for operations not compliant with environmental regulations, statutes could provide that, to the extent a given discharge is compliant with its permit, no private action of any kind with respect to such discharge could be maintained, with the burden on the plaintiff to demonstrate noncompliance. Such an approach would effectively assure that a farmer's permit compliance efforts would insulate him from private third-party litigation as well.

Similarly, a balance must be struck between the rights of agriculturists against the needs of the police power. This imbalance is particularly problematic when local ordinances not directed at farm operations per se, are prevented from applying to such ancillary subjects as building codes or public safety. As noted above, in the *Northville Township v. Coyne* case from Michigan, some courts have found such local regulation preempted by the language of right to farm statutes. On the other hand, some right to farm statutes already accommodate such regulation. Maryland, for example, expressly provides that its right to farm statute does not prevent the application of local health, environmental, or zoning laws. Md. Code Ann., Cts. & Jud. Proc. § 5.403(b)(1)(i).

As potential protections to the farmer, comprehensive land use planning processes may hold more long-term promise and be far less costly than defending nuisance actions.

As the urban fringe continues to encroach on agricultural land, the issues addressed by right to farm statutes will only multiply in number and severity. A basic knowledge of the applicable right to farm statute and its working is essential for the attorney representing either the agricultural producer or the nonfarm landowner in any controversy involving the impact of agriculture on the surrounding community. At the same time, the attorney must be conversant with broader trends in land use, including emerging tools for preservation of agriculture through comprehensive land-use mechanisms. Like environmental law, comprehensive land-use planning at a multicounty or regional level has progressed since the 1970s and 1980s, when right to farm laws first appeared. Today's planning includes resource preservation, including long-term designation of areas for primarily agricultural or other nonresidential development and use. *See* E. Paster, *Preservation of Agricultural Lands through Land Use Planning Tools and Techniques*, 44 Nat. Resources J. 283 (2004). Such planning tools were in their infancy three decades ago.

Right to farm laws have been criticized as an obsolete and overly litigation-centric way of addressing what is, essentially, the social issue of the co-existence of nonfarm communities with production agriculture. As potential protections to the farmer, comprehensive land-use planning processes may hold more long-term promise and be far less costly than defending nuisance actions. Nevertheless, as long as there are "Shattos" moving in across the road, it is still important for landowners and attorneys to be aware of the continuing viability of right to farm statutes.