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An Agricultural Law Research Article

**Right-to-Farm Laws Reconsidered: Ten  
Reasons Why Legislative Efforts to Resolve  
Agricultural Nuisances May Be Ineffective**

by

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# RIGHT-TO-FARM LAWS RECONSIDERED: TEN REASONS WHY LEGISLATIVE EFFORTS TO RESOLVE AGRICULTURAL NUISANCES MAY BE INEFFECTIVE

*Neil D. Hamilton\**

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## I. INTRODUCTION: THINKING ABOUT RIGHT-TO-FARM LAWS

In recent decades right-to-farm laws have been one of the most popular forms of pro-agriculture legislation at the state level. All fifty states have enacted some version of the laws and some states, such as my home state of Iowa, have enacted

multiple versions.<sup>1</sup> Right-to-farm laws have been the subject of numerous and frequent commentaries in agricultural law literature. Most lawyers and farmers have more than a passing familiarity with the legal concept upon which the laws were originally based—existing farm operations should not become nuisances due to the later development of non-agricultural uses in the surrounding area. I have more than a passing association with right-to-farm laws, having authored several articles and a book describing their use around the country.<sup>2</sup>

At the outset, let me say that the basic premise of right-to-farm laws, which is in many ways a codification of the common law defense of “coming to the nuisance,” had and retains both an element of legal validity and equitable justification that cannot be denied. Right-to-farm laws remain legislatively popular with agricultural groups and can be an important legal protection for farmers. In recent years many states have continued to enact new variations or refine their legislative approaches to this idea.<sup>3</sup> It is difficult to accurately gauge the effectiveness of the laws in preventing nuisances suits against farmers because it is hard to estimate how many legal actions are not filed due to the existence of the laws. But even in light of the problems with quantifying results, most observers would agree the laws are a valuable protection for agriculture. The laws provide some sense of security for farmers making investments in improving and expanding their farming operations. The laws also alert and place on notice those non-farm owners who move into agricultural areas that use of their property may be subject to the rights of the nearby pre-existing farm operations.

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1. See, e.g., Neil Hamilton & David Bolte, *Nuisance Law and Livestock Production in the United States: A Fifty-State Analysis*, 10 J. AGRIC. TAX'N & L. 99, 101 (1988).

2. See *id.*; NEIL D. HAMILTON, *A LIVESTOCK PRODUCER'S LEGAL GUIDE TO: NUISANCE, LAND USE CONTROL, AND ENVIRONMENTAL LAW* (1992); NEIL D. HAMILTON & GREG ANDREWS, *DRAKE UNIV. AGRIC. LAW CENTER, EMPLOYING THE "SOUND AGRICULTURAL PRACTICES" APPROACH TO PROVIDING RIGHT-TO-FARM NUISANCE PROTECTIONS TO AGRICULTURE* (1993); Neil D. Hamilton, *Right to Farm Laws Revisited: Judicial Consideration of Agricultural Nuisance Protections*, 14 J. AGRIC. TAX'N & L. 195 (1992).

3. In 1997 Connecticut repealed section 19a-341 of the general statutes and replaced it with a new version of the right-to-farm law which specifically included a new protection for operations involving the collection of spring or well water. See Act of June 18, 1997, § 53, 1997 Conn. Legis. Serv. 1343 (West). In 1997, Michigan amended the state law concerning platting of subdivisions to require that deeds of all unplatted land in Michigan include a notice the land may be subject to the state's right-to-farm law. See Act of Aug. 21, 1997, § 109, 1997 Mich. Legis. Serv. 276 (West).

Having said all of this, it should come as no surprise that the "right-to-farm" concept has its critics, both in theory and in application.<sup>4</sup> Nor should it surprise observers to learn that attempts to use right-to-farm laws have not experienced wide-spread success in the courts.<sup>5</sup> The idea of right-to-farm protections has been the subject of criticisms and judicial limitations for many reasons. More significantly, it is possible to argue, both politically and equitably, that the right-to-farm approach, at least as now followed in some states, is neither an effective form of protection for farmers nor an appropriate use of the legislative power to allocate rights in society. At the risk of being labeled a heretic to agricultural dogma and a backslider as to my own earlier writings, this article is an attempt to identify and discuss candidly some of the reasons why right-to-farm laws are proving to not be such a good idea after all.

As noted above, the basic premise of right-to-farm legislation is grounded on a logical and supportable idea. Preventing non-farm operations from moving close to and then challenging the very existence of an indigenous agricultural operation can be a valid attempt to preserve farms and farmland and a way of insuring fundamental fairness. At the same time, it is necessary to acknowledge that to be effective right-to-farm laws require a reallocation of property rights (or at least of societal priorities). For the laws to work, some conduct that previously would have been actionable as a nuisance is now protected solely due to the legislative protection. As such, the laws naturally give rise to concerns on the part of individual property owners whose legal right to enjoy their property free from nuisance is now limited and by the courts that must implement and enforce the reallocation of social protections.

A beginning premise for any discussion of right-to-farm laws then must be recognizing that once you try to carve out a type of economic behavior from the normal social contract and offer it special legal protections, you are already on somewhat dangerous ground. This is true due both to the need to justify the special protection and the need to draft the legislative protection as accurately and narrowly as possible. Undoubtedly, state statutes are full of special rules for various forms of economic activities important to the states, but for these special

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4. See, e.g., N. William Hines, *Iowa: No. 1 in Neighborliness or Hogs?*, DES MOINES REG., Feb. 9, 1997, at 2C. This article examines how the many right-to-farm laws enacted in Iowa have removed the ability of courts to use nuisance as a mediating factor within society, and in so doing have helped destroy the values of neighborliness that traditionally marked rural states.

5. For a discussion of the many cases in which courts have ruled right-to-farm laws did not apply to protect the operation in question, see Neil D. Hamilton, *Right-to-Farm Laws Revisited: Judicial Consideration of Agricultural Nuisance Protections*, 14 J. AGRIC. TAX'N & L. 195 (1992). For a recent state court ruling limiting the application of the Washington State right-to-farm law, see *Buchanan v. Simplot Feeders Ltd. Partnership*, No. 65298-8, 1998 Wash. LEXIS 201 (Wash. Mar. 19, 1998).

rules to exist several things are required: (a) a level of public support sufficient to pass and accept the rule, (b) a definition of the conduct being protected, and (c) a method to periodically readjust the rule or definition in light of changing industry practices or changing societal attitudes towards the activities protected. It is important to recognize that if the special protection only works by limiting the rights of others (as opposed to providing, for example, additional economic benefits), there will be a natural well of opposition constantly challenging the laws. Further, if the rules work primarily by limiting the equitable powers of the courts to resolve disputes between individuals, then the courts will be naturally hostile to such limitations on their inherent powers.

Many right-to-farm laws recognize the duality of interests involved in the determinations and impose various forms of limitations on the availability of the protection. The most common limitations are requirements that the farm operation be reasonably conducted, not be operated negligently, or have pre-existed for a required time before a change occurs in land use in the surrounding area. Recently, however, a number of states have taken the original idea of right-to-farm laws and tried to broaden or strengthen the protection available, for example, by removing any requirement that the agricultural operation exist prior to the complaining activity.

As a result, in some states, such as Iowa, the original equitable premise of right-to-farm laws has been released from its logical moorings and converted to a more widely available nuisance protection.<sup>6</sup> To the extent that right-to-farm protections are more widely available, or are subject to fewer limitations, resistance to the laws, both in the form of political opposition and judicial challenges, will predictably increase. The nature of the political and legal debate now raging in many states due to the increasing industrialization and scale of swine production illustrates the accuracy of this prediction.<sup>7</sup> In many states, the protections afforded to new livestock production facilities by right-to-farm laws are at the heart of the debate. It is for this reason, regardless of one's own position or politics on these matters, that it is worthwhile considering possible flaws associated with right-to-farm laws. That is the purpose of this article.

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6. See IOWA CODE § 657.11 (1997); discussion *infra* Part II. A-B and accompanying notes 16-18.

7. See Perry Beeman, *Furor Mounts on Waste Spills*, DES MOINES REG., Sept. 18, 1997, at 1A; Jerry Perkins, *State Documents Actions Against Water Polluters*, DES MOINES REG., Sept. 18, 1997, at 9S; Perry Beeman, *Iowa Environmental Panel Calls New Hearings Over Waste Lagoons*, DES MOINES REG., July 22, 1997, at 4M.

## II. TEN REASONS WHY RIGHT-TO-FARM LAWS MAY PROVE INEFFECTIVE, ILLEGAL, OR INEQUITABLE

If one uses as a starting point the premise that right-to-farm laws are problematic from a legal and societal perspective, it is possible to identify a series of reasons that bear out this premise. The following discussion identifies ten reasons why right-to-farm laws may be ineffective, may need to be re-examined, or both. This discussion does not attempt to identify or develop the countervailing arguments that provide the basis for the statutes. The legal and political support for the enactments has been reviewed in the many law review articles written about right-to-farm laws,<sup>8</sup> and in many instances can be found in the preambles to individual state laws.<sup>9</sup>

### A. Case Law Indicates the Laws Do Not Work As Planned

Although there are several cases in which right-to-farm laws have been interpreted by the courts to protect farming operations from nuisance actions,<sup>10</sup> the great majority of court cases interpreting right-to-farm laws have resulted in rulings in which the laws ultimately did not effectively protect the farm operation in question.<sup>11</sup> For recent examples of such rulings consider *Payne v. Skaar*,<sup>12</sup> in which the Idaho Supreme Court ruled the state's right-to-farm law<sup>13</sup> did not apply when the feedlot operation being challenged as a nuisance had changed the manner in which the animals were fed, while the nature of the surrounding area had stayed constant during the time in question.<sup>14</sup> Additionally, in *Weinhold v. Wolff*,<sup>15</sup> the Iowa Supreme Court ruled that one of the three Iowa right-to-farm laws<sup>16</sup> was not applicable when the farm operation in question had begun operation (and been a nuisance) before the owners applied for and obtained the "agricultural area" protection in question.<sup>17</sup> Granted, the reported cases do not adequately reveal the

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8. See *supra* note 2 and accompanying text.

9. See, e.g., KY. REV. STAT. ANN. § 413.072(1) (Michie 1992). This right-to-farm law was first enacted in 1980 and provides in part that "[i]t is the purpose of this section to reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance." *Id.*

10. See, *Shatto v. McNulty*, 509 N.E.2d 897 (Ind. Ct. App. 1987).

11. See Neil D. Hamilton, *Right-to-Farm Laws Revisited: Judicial Consideration of Agricultural Nuisance Protections*, 14 J. AGRIC. TAX'N & L. 195 (1992).

12. *Payne v. Skaar*, 900 P.2d 1352 (Idaho 1995).

13. IDAHO CODE §§ 22-4501 to 4504 (1995 & Supp. 1997).

14. See *Payne*, 900 P.2d at 1355.

15. *Weinhold v. Wolff*, 555 N.W.2d 454 (Iowa 1996).

16. IOWA CODE § 352.11 (1997).

17. See *Weinhold*, 555 N.W.2d at 462-64.

number of nuisance suits not filed or those won at the district court level. However, the limited record of success the laws have experienced when challenged in higher state courts signals the difficulties inherent in the approach.

*B. The Idea Has Been Legislatively Abused and Made Too Widely Available*

The right-to-farm concept retains its strongest equitable justification when connected with a requirement that the farming operations being protected were in existence prior to changes in the surrounding area that are now giving rise to the alleged nuisance.<sup>18</sup> This requirement is a common element in many state laws. While a pre-durational requirement does not make it any easier to resolve other important questions, such as the effect of changes in the farming operation or expansions, it serves to establish the premise that people who moved into the adjacent area knew that farming operations were in existence. Unfortunately, legislators in some states have followed the maxim that if one aspirin is good then perhaps two are better and have broadened the availability of right-to-farm protections to farming operations that would not have benefited if pre-existence were required.

One of the best examples of a right-to-farm law that has been amended to remove any pre-existence requirement is Iowa Code § 657.11 titled "Animal Feeding Operations."<sup>19</sup> This provision creates a "rebuttable presumption" that any animal feeding operation which has received all the necessary federal and state permits "is not a public or private nuisance under this chapter or under principles of common law, and that the animal feeding operation does not unreasonably and continuously interfere with another person's comfortable use and enjoyment of the person's life or property under any other cause of action."<sup>20</sup> On the issue of when an operation had to begin in order to receive such a broad and generous protection, the statute provides that "[t]he rebuttable presumption created by this section shall apply regardless of the established date of operation or expansion of the animal feeding operation."<sup>21</sup> In other words, under the Iowa law, as long as an animal feeding operation has the necessary permits (if any are required) and does not otherwise lose its protection, such as by being operated negligently, it is protected from nuisance actions even though it may have been initiated long after the property owners alleging the nuisance were in place, or arguably even after the nature of an area had changed to non-agricultural. Predictably, this effort to

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18. See, e.g., *Buchanan v. Simplot Feeders Ltd. Partnership*, No. 65298-8, 1998 Wash. LEXIS 201 (Wash. Mar. 19, 1998).

19. IOWA CODE § 657.11 (1997). This provision was added as part of the enactment of House File 519 in 1995. See 1995 Iowa Acts 195.

20. IOWA CODE § 657.11(2) (1997).

21. IOWA CODE § 657.11(5) (1997).

broaden the availability of nuisance protection has been heavily criticized by citizens who now feel threatened by the construction of new large-scale swine operations in their areas. One effect of these laws, as discussed in Section I *infra*, is to place additional pressure on the state to implement and enforce effective environmental laws.<sup>22</sup>

### C. *The Idea May Lead to the Increased Regulation of Agricultural Practices*

In recent years several states have adopted a new form of right-to-farm law that extends the protection only to operations which follow "sound agricultural practices." This approach, which often employs the concept of "generally accepted agricultural management practices," has been adopted in states such as Maine, Michigan, New York, and Ohio.<sup>23</sup> The premise behind this form of law is that by providing a more detailed standard of performance, the state can ensure that agricultural operations receiving protection are in fact operated reasonably. This approach to right-to-farm protections can be, if well-written and implemented, an improvement on the more general forms of blanket protection found in other states. However, one irony of using this approach is that while the agricultural community started with the goal of being free from judicial intrusion on its operation, the right-to-farm law means it has now accepted the administrative authority and potential for the state to regulate agricultural practices through "Codes of Good Practices." This does not necessarily mean the laws are not an improvement, either in determining who is protected or in increasing the standard of practices for agriculture. It does however mean that farmers may now have to worry not just about nuisance suits but about "farming by the book" for fear that if they do not, they will be subject to challenge for not following generally accepted practices.

### D. *The Law: Contribute to a Growing Sense of Unfairness in the Countryside*

In many states across the country, from the traditional hog producing states of Iowa and Illinois, to the new swine powers of North Carolina and Oklahoma, one of the most emotionally charged issues to ever confront the farm community is the opposition by rural residents to efforts to construct new mega-scale livestock feeding operations. The issue is on the evening news, in the daily paper,<sup>24</sup> on the

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22. See *supra* note 7.

23. For an extended discussion of this form of right-to-farm law and the states that adopted it, see NEIL D. HAMILTON & GREG ANDREWS, DRAKE UNIV. AGRIC. LAW CENTER, EMPLOYING THE "SOUND AGRICULTURAL PRACTICES" APPROACH TO PROVIDING RIGHT TO FARM NUISANCE PROTECTIONS TO AGRICULTURE (1993).

24. See, e.g., *Opposition to Hog Farms Grows in Rural Areas, Too*, N.Y. TIMES, Sept. 22, 1997, at A14. When a social development makes the New York Times it is at least some indicator of

cover of farm magazines,<sup>25</sup> and increasingly in the courts. Presently in Iowa there are at least four major cases involving changes in the swine industry before the Iowa Supreme Court.<sup>26</sup> The growing debate over the future of the swine industry and how to resolve such intractable disputes as odor control, waste handling, potential water pollution,<sup>27</sup> and swine production's impact on the social structure are combining to make "the hog question" a political hot potato or can of worms (choose the metaphor) that many state politicians wish they could ignore. The hard reality is however, as state legislators are discovering, that the hog question is a social and political issue they can ignore only at the risk of their own political futures.<sup>28</sup> In some states, for example North Carolina and Oklahoma,<sup>29</sup> the level of controversy recently led the governors and state legislatures to pass new laws regulating livestock feeding facilities. Additionally, North Carolina implemented a moratorium on the construction of new facilities for a two year period.<sup>30</sup>

Many parties to the disputes recognize the need to provide a fair basis upon which swine production can continue, if the environment can be protected. But one

the national significance it reflects. The series *The Power of Pork*, which documented the growth of the swine industry in North Carolina, won the *Raleigh News and Observer* Pulitzer Prize for Public Service for 1996. See *North Carolina Becomes the Nation's No.2 Pork Producer, but Not Without Cost. Who Wins, and Who Loses, When a Major Industry Is Given Special Treatment?*, RALEIGH NEWS & OBSERVER, May 12, 1996, at 1.

25. See Des Keller & Dan Miller, *Neighbor Against Neighbor*, PROGRESSIVE FARMER, Oct. 1997, at 16 (concerning the current fight being waged near Williamsfield, Illinois over plans by a local farm family to build a 3,600 sow operation).

26. The cases before the Iowa Supreme Court include a constitutional challenge to a right-to-farm law, *Bormann v. Board of Supervisors*, No. 96-2276 (Iowa filed June 23, 1997); a challenge to county ordinances regulating certain aspects of animal feeding, *Goodell v. Humboldt County*, No. 97-790, 1998 Iowa Sup. LEXIS (Iowa Mar. 5, 1998); a series of enforcement actions against one of the state's largest "outside" investors in the hog business, *State ex rel. Miller v. A.J. DeCoster*, No. 97-666 (Iowa filed Apr. 4, 1997), and *State ex rel. Miller v. DeCoster Farms*, No. 98-294 (Iowa filed Feb. 14, 1998); and a challenge to a county's authority to deny "agricultural area" status which includes right-to-farm protection, *Petersen v. Board of Supervisors*, No. 96-1755 (Iowa filed Sept. 27, 1996). In early March, the court ruled in *Goodell* that the county regulations in question were preempted by state law. See, e.g., Frank Santiago, *County Hog-lot Rules Voided*, DES MOINES REG., Mar. 6, 1998, at 1A; Steve Marbery, *Iowa's Top Court Rejects County Livestock Ordinances*, FEEDSTUFFS, Mar. 9, 1998, at 3.

27. See, e.g., Rehka Basu, *Iowa: A Porcine Toilet?*, DES MOINES REG., Aug. 17, 1997, at 3C.

28. See *The GOP and Hog Lots*, DES MOINES REG., Oct. 5, 1997, at 6A; Jonathan Roos, *Legislators Vote to Tighten State's Grip on Hog Rules*, DES MOINES REG., Mar. 13, 1998, at 1M. The "hog lot" issue has become at least a minor factor in the 1998 governor's race in Iowa where one Republican candidate accused another of the heresy of supporting local control.

29. See Steve Marbery, *Hog Industry Insider: Governor Signs Oklahoma Bill*, FEEDSTUFFS, June 16, 1997, at 15; Steve Marbery, *Hog Industry Insider: Oklahoma Moratorium Okayed*, FEEDSTUFFS, Mar. 16, 1998, at 21.

30. See Steve Marbery, *North Carolina Gets Hog Law*, FEEDSTUFFS, Sept. 1, 1997, at 1.

commonly heard claim made by those who oppose the expansion of large-scale facilities is that existing right-to-farm laws, especially such broad-based laws as Iowa's, unfairly favor the owners and operators of swine facilities at the expense of long-time neighbors and residents who already lived there. The lament frequently heard is "we used to be able to sit outside on a summer evening and enjoy our property but now we can't because the air always stinks of manure." Many of those who oppose the construction of new facilities do not hesitate to contemplate taking legal action to protect their interests, but they must confront the reality of right-to-farm laws. Their options are four fold, as follows: to take no action, to challenge the operation and try to find an exception to the statute, to challenge the statute, or to find some other avenue or legal theory under which to proceed.

A feature of some right-to-farm laws that opponents often single out for criticism, and which contributes to the perception of unfairness, is the "fee-shifting" provision. For example, the 1995 Iowa law provides:

A person who brings a losing cause of action against a person for whom a rebuttable presumption created under this section is not rebutted, shall be liable to the person against whom the action was brought for all costs and expenses incurred in the defense of the action, if the court determines that a claim is frivolous.<sup>31</sup>

From a legal standpoint there are several reasons why this type of "soft" fee-shifting is not a significant threat to most people who would file a nuisance challenge. First, the standard for determining when a lawsuit is "frivolous" is very high. Second, no reported examples of such fee-shifting being employed in a right-to-farm case exist. However, at least in Iowa, there appears to be a great deal of confusion about this provision, with many people believing it requires hard fee-shifting whenever a party loses a suit.

In light of political and economic forces, the social debate about changes in swine production will not disappear any time soon. Due to the limited availability of political answers to citizen concerns, it may be that re-examining or limiting the protections found in right-to-farm laws will become a political response in some states. A significant shift in political and social attitudes toward large-scale swine facilities can be seen in the recent actions in Oklahoma and North Carolina.

The "new attitude" towards industrialized swine production is eloquently reflected in a recent Kentucky Attorney General's Opinion.<sup>32</sup> On August 21, 1997, Albert B. Chandler III issued an opinion responding to the concerns of a number of county officials from western Kentucky who wondered whether new

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31. IOWA CODE § 657.11(7) (1997).

32. 97 Ky. Op. Att'y Gen. 31 (Aug. 21, 1997).

“industrial-scale” hog operations were protected under the state’s right-to-farm law.<sup>33</sup> Under that law the definition of an agricultural operation includes the production of crops and livestock, but also sets out the following additional standards: “[A]ny generally accepted, reasonable, and prudent method for the operation of a farm to obtain a monetary profit that complies with applicable laws and administrative regulations, and is performed in a reasonable and prudent manner customary among farm operators.”<sup>34</sup> The Attorney General, in considering attempts to use former strip mines for swine production, ruled that for purposes of the application of the state’s right-to-farm law “[t]he experience of North Carolina persuades us that the practice of industrial-scale hog farming is neither reasonable nor prudent” and thus is not protected.<sup>35</sup> The opinion concludes:

Nor do we believe that such operations are, in this state, accepted and customary. We have observed a high level of community opposition to these massive hog operations. Already one altercation has resulted in bloodshed. The dispute is not between farmers and suburbanites; many farmers are as much opposed to industrial-scale hog operations as other residents.<sup>36</sup>

### E. *The Laws Generally Favor Larger Operations*

On their face, most right-to-farm laws are scale neutral. This means that at least conceptually they favor neither large nor small operations. However, in practice the laws do more to protect large operators than small for several reasons. The first is the practical issue of what size of operation is most likely to generate nuisance complaints. It is no doubt true that small farms can generate a tremendous odor and some nuisance suits have involved relatively few animals.<sup>37</sup> Logically, the larger a facility and the more animals involved, the more manure is generated and thus a greater potential for the type of odor and waste management problems that might result in wide-spread neighbor complaints. Therefore, at least facially, right-to-farm laws are more likely to benefit larger operations.

From a practical standpoint, most of the current controversy about changes in livestock production, particularly for swine, relate to the growth of large-scale or mega facilities that are much larger than those traditionally found in rural areas. This fact raises a number of important issues, such as whether the right-to-farm

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33. *See id.*

34. KY. REV. STAT. ANN. § 413.072(3) (Michie 1992).

35. 97 Ky. Op. Att’y Gen. 31, at 8 (Aug. 21, 1997).

36. *Id.* at 9.

37. *See, e.g.,* High v. Starr, 598 F. Supp. 323 (E.D. Ark. 1984).

protection, which may have been written into the state law twenty years ago when agriculture was of a different nature, should still be available. Most right-to-farm laws include no limitation on the size of the operations that can be protected. If for no other reason than visibility, larger facilities, especially if owned by outside investors or corporations, are more likely to be the target of citizen resistance.

Another issue related to the question of size is whether the operations in question are really agricultural at all or whether they are industrial in nature. This issue has been the subject of legal challenges in several states. The recent opinion of the Kentucky Attorney General on this issue as discussed above is one example.<sup>38</sup> His view of large facilities is not shared by all legal authorities. The Supreme Court of Missouri recently ruled the sewage lagoons and finishing buildings being constructed by one of the nation's largest swine feeding corporations were "farm structures" and thus not subject to regulation by the local township where they were located.<sup>39</sup> The Iowa Supreme Court recently reached a somewhat similar conclusion in several cases.<sup>40</sup>

#### F. *The Laws May Represent a Taking of the Neighbor's Private Property Rights*

One challenge to right-to-farm laws that has emerged slowly, but was predictable, concerns the issue of property rights. As discussed in the introduction, right-to-farm laws work by altering the allocation of property rights or at least social priorities. This allocation is experienced by landowners as limitations on their ability to bring a legal action protecting the right to enjoy their property. The legal question can be whether such adjustments are a legitimate exercise of the state's police power by the legislature or whether they are a taking. Given the recent political efforts by "property rights" advocates, some of the loudest of which are farm groups, it was only a matter of time until the takings aspect of right-to-farm laws was brought before the courts.

Such a case is now before the Iowa Supreme Court in *Bormann v. Kossuth County*,<sup>41</sup> which challenges the constitutionality of the right-to-farm protection in the agricultural area law.<sup>42</sup> Under the agricultural area law landowners can petition the county board of supervisors to grant "agricultural area" status, one benefit of

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38. See *supra* discussion accompanying notes 32-36.

39. See *Premium Standard Farms, Inc. v. Lincoln Township of Putnam County*, 946 S.W.2d 234, 238 (Mo. 1997).

40. See, *Kuehl v. Cass County*, 555 N.W.2d 686, 689 (Iowa 1996); *Thompson v. Hancock County*, 539 N.W.2d 181, 183 (Iowa 1995).

41. Appellants' Brief, *Bormann v. Board of Supervisors*, No. 96-2276 (Iowa filed June 23, 1997).

42. See IOWA CODE § 352.11 (1997).

which is a limited protection from nuisance suits.<sup>43</sup> The petitioners challenged the county board's action, but the Iowa district court ruled that no taking occurred.<sup>44</sup> The petitioners' theory is that the common law right to bring a nuisance suit is a constitutionally protected "inalienable right" under the Iowa Constitution, which can not be limited by the right-to-farm law.<sup>45</sup> A similar constitutional claim was added to a recent challenge to the New York law but the court rejected the argument because it was not raised in the petition.<sup>46</sup> It is likely that such challenges will be made in other states.

The irony of this situation should not be lost on agricultural and legal observers. The main proponents of right-to-farm laws have been farm groups. Many of these groups, in particular state farm bureaus, have been the most vocal proponents of efforts to protect property rights and limit the ability of the states to exercise the police power. Litigation that challenges the constitutionality of right-to-farm laws may place these groups in the uncomfortable position of having to reconcile what are irreconcilable political views.

#### G. *The Laws May Create Political Pressure for Restricting Agriculture*

The legal effect of a right-to-farm law is to deny plaintiffs one avenue of relief for their concerns. In this regard, nuisance suits can be seen as having the effect of a safety valve on a pressure cooker. The practical effect is that if the legislatures limit the ability of parties to go to court for relief, then the social pressure building up in the countryside will look for relief elsewhere, such as political or regulatory outlets. A perfect example of how right-to-farm laws may have unintended consequences is seen in the experience in Iowa in the early 1990s.

In 1993, the legislature amended the agricultural area law to make it easier for landowners to seek this status and to obtain a heightened right-to-farm nuisance protection.<sup>47</sup> In order to obtain such protection, however, landowners must petition the county board of supervisors, which first gives public notice and then holds a public hearing on the application.<sup>48</sup> Under the new law there was a sharp increase in petitions for such status, in particular, by farmers who were planning to build new confinement facilities for swine production. This created a problem.

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43. *See id.*

44. *See* Appellants' Brief at 9, *Bormann*, No. 96-2276.

45. *See id.* at 12-19.

46. *See* *Pure Air and Water Inc. of Chemung County v. Davidsen*, No. 80150 (N.Y. App. Div. Jan. 15, 1998) (memorandum and order).

47. *See* IOWA CODE § 352.11 (1997). The issue of whether or not Iowa counties have the authority to deny applications for "agricultural area" status is still before the courts. *See* *Petersen v. Board of Supervisors*, No. 96-1755 (Iowa filed Sept. 27, 1996).

48. *See* IOWA CODE § 352.6 (1997).

Under the state rules then in place for permitting livestock facilities, no requirement that neighboring landowners or local officials be notified existed.<sup>49</sup> Often the first time these people would learn about plans to locate a new facility in the neighborhood was when they saw the bulldozers leveling the site to pour concrete, long after the permits were obtained. But when the landowners applied for local agricultural area protection before construction, as advised by their bankers and lawyers, they were faced with hostile crowds of neighbors and packed county hearings. One reason the Iowa legislature passed the expanded right-to-farm protection found in the nuisance law,<sup>50</sup> different from the agricultural area law, was to avoid these local hearings.

The collective experience of neighbors complaining about agricultural area petitions helped galvanize and organize the opponents of large-scale hog feeding operations in the state. Common opposition to right-to-farm laws may be having the same effect in other states. One cannot assume this is what the leaders of the Iowa pork industry had in mind when they undertook to "improve" the agricultural area law. The unintended result was like going over and kicking the dog sleeping in the corner only to have it chase you around the room and ultimately bite your backside.

#### H. *The Laws Force Litigation Into Other Arenas*

One problem created by use of the right-to-farm idea is that limiting the protection to actions grounded in nuisance encourages plaintiffs and their attorneys to be inventive in constructing other tort or property based theories to avoid or challenge the conduct in question. Examples of such related claims might be for assault, trespass, or water pollution.<sup>51</sup> To the extent the plaintiff can avoid having the suit look like a nuisance claim, the right-to-farm law may not apply. In order to limit the incentives for legal engineering around the protections, some states have written the laws more broadly to protect agricultural operations from a range of actions.<sup>52</sup> The 1995 Iowa law provides a rebuttable presumption that the operation is not a nuisance and "that the animal feeding operation does not unreasonably and continuously interfere with another person's comfortable use and

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49. *See id.*

50. *See supra* discussion accompanying notes 16-17, 19.

51. *See, e.g.,* *Benton City v. Adrian*, 748 P.2d 679 (Wash. Ct. App. 1988) (ruling the state's right-to-farm law did not protect an apple orchard from what was essentially a claim for off-site trespass).

52. For example, the West Virginia right-to-farm law does not even use the word "nuisance," but instead is worded more generally to protect farms from any "complaints or right of action" if the statutory requirements are met. *See* W. VA. CODE § 19-19-4 (1993).

enjoyment of the person's life or property under any other cause of action."<sup>53</sup> To the extent that the common law for these other forms of torts does not reflect a "coming to the nuisance" defense, it is arguable that broadening right-to-farm protections to limit other legal remedies is a questionable use of the legislative power to reorder societal rights.

### I. *The Laws Increase Pressure for Enactment and Enforcement of Environmental Regulations*

As noted above, one effect of right-to-farm laws is that by shutting off the potential avenue of seeking equitable relief in the courts, parties who feel harmed by agricultural operations are often forced to seek other outlets for their grievances. This can take the form of trying to characterize the action as some other form of tort, as discussed previously, or it can take the form of alleging environmental violations by the operation in question. Though the reports may be only anecdotal, a general review of the coverage in the news media leaves one with the impression that state environmental officials are increasing the attention being paid to agriculture, in particular animal feeding facilities.<sup>54</sup> The recent public attention to a series of large manure spills, such as the one involving twenty-five million gallons of waste that poured in the Neuse River in North Carolina, have made it difficult for state officials not to take action. Federal officials are even becoming involved. The EPA recently leveled the first fine involving manure pollution under the Safe Drinking Water Act against a large Iowa producer.<sup>55</sup>

In some states the right-to-farm laws are contributing to this development. For example, in Iowa the enhanced nuisance protection makes it very difficult to bring a successful suit; however, one of the specific exceptions to the protection is if the facility in question is in violation of applicable environmental rules.<sup>56</sup> The law provides that "the rebuttable presumption shall not apply if the injury to a person or damage to property is proximately caused by a failure to comply with a federal statute or regulation or a state statute or rule which applies to the animal feeding operation."<sup>57</sup> Therefore, one of the approaches plaintiffs can take is to try to document and prove a breach of environmental laws.

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53. IOWA CODE § 657.11(2) (1997).

54. See, e.g., Jerry Perkins, *Judge Rules DeCoster Manure Spills Violated Iowa Law*, DES MOINES REG., Sept. 5, 1997, at 10S; *Another DeCoster Pollution Case Sent to State for Prosecution*, DES MOINES REG., Aug. 19, 1997, at 4M.

55. See Perry Beeman, *DeCoster Hit With \$10,000 Fine*, DES MOINES REG., Oct. 4, 1997, at 1A.

56. IOWA CODE § 657.11(2) (1997).

57. IOWA CODE § 657.11(2) (1997).

Another way in which right-to-farm laws may contribute to the increase in environmental regulation of agriculture is by adding fuel to legislative efforts to "address" the social conflicts spreading in rural areas. For example, consider how the debate over the size of livestock facilities became an issue in Congress, with the new Environmental Quality Incentives Program (EQIP), a cost-sharing program.<sup>58</sup> The issue was whether there should be a cap on the size of livestock feeding facilities that were eligible for funding.<sup>59</sup> After a bitter political fight the issue was left to the USDA.<sup>60</sup> Following a period of its own uncertainty, the USDA ultimately issued rules that limit eligibility for EQIP funds to operations with fewer than 1,000 animal units.<sup>61</sup> A new approach being suggested by U.S. Senator Tom Harkin from Iowa is to implement enhanced national standards for animal feeding facilities.<sup>62</sup> The idea is to increase the level of environmental performance required by livestock facilities and remove the opportunity for competing states to attract new operations by being more lenient on enforcement.<sup>63</sup>

#### J. *The Laws Are Not Implemented as Part of a Comprehensive Effort to Protect Farmland*

As noted in the introduction, the right-to-farm law concept has an important value that can be used to protect both farming operations and farmland from the impact of changes in the surrounding area. As such, the laws function to protect farmland from conversion to other uses by reducing the likelihood of a nuisance suit that would force the owner to sell the land for non-farm uses. The laws can also protect an existing farming operation by removing the threat of a nuisance verdict or an injunction limiting the operation. However, for either aspect of a right-to-farm law, the farmland protection or farmer protection, to function most effectively the law must be part of a more comprehensive program, such as a system of planning, regulation, and economic incentives.

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58. See Heather C. Jones, *EQIP Rule Caps Large Operations at 1,000 au*, FEEDSTUFFS, May 26, 1997, at 1; Environmental Quality Incentives Program, 62 Fed. Reg. 28,258 (1997) (final rule on EQIP) (to be codified at 7 C.F.R. pt. 1466).

59. See Jones, *supra* note 58, at 1.

60. See *id.*

61. See *id.*

62. See George Anthan, *National Standards Sought for Livestock Waste*, DES MOINES REG., Sept. 26, 1997, at 10S.

63. See, e.g., *State vs. State*, DES MOINES REG., Oct. 2, 1997, at 10A (arguing that a federal standard would eliminate environmental bidding between states seeking to attract livestock feeding operations). The U.S. Environmental Protection Agency has recently announced a new program to increase the enforcement of water quality rules as applied to large livestock production facilities. See John H. Cushman, Jr., *Pollution Control Plan Views Factory Farms as Factories*, N.Y. TIMES, Mar. 6, 1998, at A1.

It does little good to provide right-to-farm protections for farms if they are not accompanied by effective land-use planning efforts that try to limit the ability of non-farm users to intrude into agricultural areas. Similarly, a right-to-farm law by itself will not keep a farm economically viable if the critical mass of other farms and related agricultural services are lacking or if a near-by market for the products is nonexistent. To the extent states have enacted right-to-farm laws and then concluded the work needed to provide for the future of farming is done, they have misled not only themselves but their farm constituencies. If right-to-farm laws are to work, or are to retain social viability, they need to be incorporated into more broad based programs that recognize the legitimate interests of farmers and the rights of neighbors, now and in the future.

### III. CONCLUSION

This has been a candid—perhaps too much so for some readers—discussion of some of the shortcomings of the right-to-farm approach. There is little reason to expect that this widely, even wildly, popular form of statutory protection will fall into disuse. However, there is equally no reason to expect that the opposition to increasing industrialized livestock production in rural areas will diminish in the near future.<sup>64</sup> Hopefully, one outcome or lesson from this period of social turmoil will be recognition of the need to be extremely careful when legislating special protections for certain types of economic activities, especially in times of rapidly shifting technologies and attitudes. Another lesson may be the need for vigilance in realizing that legal protections provided years ago are periodically re-examined to insure the protections being offered are compatible with social, political, and economic needs and the Constitution.<sup>65</sup>

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64. See, e.g., Steve Marbery, *County Votes Down Corporate Hog Farms*, FEEDSTUFFS, Sept. 29, 1997, at 5 (concerning the recent vote of citizens in Seward County, Kansas to rescind an earlier vote to allow corporate feeding of hogs, promoted in connection with the location of the Seaboard Corporation's new packing plant in nearby Guymon, Oklahoma. The vote was 3,070 for the limitation and 1,205 against, in a county with only 8,400 registered voters). See also Susan K. Davis, *When Neighbors Say No: From Idaho to Ohio Family Hog Farms Face Increased Opposition*, HOGS TODAY, Mar. 1998, at 24.

65. In mid-April 1998, the Iowa General Assembly passed and the governor was expected to sign into law House File 2494, which makes a series of significant changes to Iowa's laws which regulate livestock operations. Included in the law were several changes to one of Iowa's right-to-farm laws, § 657.11. These changes include the evidentiary standard for when conduct can be considered a nuisance (e.g., changing the standard of proof to "a preponderance of the evidence" rather than "clear and convincing" and changing the intensity of the interference from "unreasonable and continuous" to "for substantial periods of time"). H.F. 2494, 77th Gen. Ass., 2d Sess. § 38 (Iowa 1997). The law also changed one of the standards for finding a nuisance from "negligent operation" to "a failure to following existing prudent generally accepted management practices." *Id.*