

## **Right to Farm History of Harm**

Americans have the constitutional right to petition their government for a redress of grievances or harms inflicted by individuals or entities. CAFOs can undeniably harm neighbors, entire communities, and watersheds. However, state right-to-farm laws often supersede the rights of individuals and communities to clean air and water, good health, and general well-being.

### **I. Nuisance legally defined**

“The common law of nuisance forbids individuals from using their property in a way that causes harm to others. A private nuisance refers to an activity that interferes with an individual’s reasonable use or enjoyment of his or her property. A public nuisance is an activity that threatens the public health, safety or welfare, or damages community resources, such as public roads, parks, and water supplies.”<sup>1</sup> Even though CAFOs harm individuals, communities, and public resources, a right-to-farm defense can offer a nearly impenetrable shield against successful litigation.

### **II. Original intent**

All fifty states have enacted right-to-farm laws since the early 1980s. The following excerpts describe the original intent behind right-to-farm laws, to protect farmers from nuisance lawsuits. State right-to-farm laws vary considerably from state to state.

“This legislation protects qualifying farmers and ranchers from nuisance lawsuits filed by individuals who move into rural areas where normal farming operations exist, and who later use nuisance actions to attempt to stop those ongoing operations. While the overall statutory schemes might be similar, each state has noticeably different content in the specific details of the laws.”<sup>2</sup>

“If a farmer is conducting her operation in a legal manner by following accepted agricultural practices, she should not be liable when a person “comes to the nuisance.” Iowa’s statute specifically states that the purpose of the law is to prevent farmers who properly operate their farm from defending themselves from nuisance lawsuits.”<sup>3</sup>

“Right-to-farm laws are intended to discourage neighbors from suing farmers. They help established farmers who use good management practices prevail in private nuisance lawsuits. They document the importance of farming to the state or locality and put non-farm rural residents on notice that generally accepted agricultural practices are reasonable activities to expect in farming areas.”<sup>4</sup>

### **III. State-specific information**

- National Agricultural Law Center: States’ Right-to-Farm Statutes provides the statutory text of each state’s laws, along with the date of its possible expiration: <https://nationalaglawcenter.org/state-compilations/right-to-farm/><sup>5</sup>
- The Iowa State University Center for Agricultural Law: Update on Right-to-Farm —Legislation, Cases, and Constitutional Amendments: <https://www.calt.iastate.edu/article/update-right-farm-legislation-cases-and-constitutional-amendments><sup>6</sup>

### **IV. The rise of CAFOs**

The transformation of the U.S. farm and food system began in the 1950s when the poultry sector pioneered the CAFO model, later adopted by swine and cattle producers in the 1970s—1980s.<sup>7, 8</sup> A relentless influx of CAFOs across the countryside ensued. CAFOs multiplied while smaller-scale livestock farms dwindled in numbers rationalized by economies of scale, with little regard to the significant externalized costs borne by local communities. Inventory has remained about the same or increased, depending on the species.<sup>9, 10</sup> CAFOs, which confine hundreds to millions of animals, took over. Now, most animal foods consumed by humans in the U.S. are produced in CAFOs.<sup>11, 12</sup>

CAFO pollution hotspots (public nuisance) result from the repeated land application of massive amounts of manure, regardless of method, especially in CAFO-dense areas. “If not properly managed, manure can pose environmental risks. Excess nutrients do not contribute to further crop growth, but instead may damage air and water resources. Manure also contains bacterial pathogens that can pose direct threats to animal and human health.”<sup>13</sup> Some states still allow CAFO operators to spray liquid manure on farm fields using irrigation systems (the easiest and cheapest way of broadcasting).<sup>14</sup> Neighbors are forced to contend with foul odors and aerosolized manure, which do not heed boundary lines (private nuisance).

## **V. Changing the rules in midstream**

In parallel to the exponential growth of industrial livestock production, right-to-farm laws were enacted and amended to favor the alleged rights of CAFOs over the constitutional rights of neighbors and communities and, as many would argue, the rights of nature,\* a growing movement. Many amendments were passed in response to citizen and community efforts to challenge CAFOs, closing off, one by one, potentially viable legal avenues.

\*“The goal of conferring rights to nature is to secure the highest level of environmental protection under which an ecosystem can thrive and whose rights are not violated. These nature rights are very often associated with human rights, especially the right to a clean and healthy environment.”<sup>15</sup>

### **A. ‘Significant change in operation’ redefined by right-to-farm**

A CAFO is not what most people would consider your grandparents’ farm. Instead, they understand CAFOs as animal food factories, representing a “significant change in the type of operation” from traditional farming practices. However, right-to-farm laws declared otherwise, aiding and abetting CAFOs. An Indiana case (*Himsel v. Livestock, LLC*) is illustrative.<sup>16, 17</sup>

“Indiana law prohibits nuisance lawsuits against farms if (1) there is no significant change in the type of operation and (2) the operation would not have been a nuisance at the time the operation began. Ind. Code § 32-30-6-9 (2019). The Indiana Legislature specifically amended its Right-to-Farm law in 2005 to specify that the conversion from one type of agricultural operation to another was not a significant change in operation.”<sup>18</sup>

### **B. Right-to-farm preempts local control**

In most states, right-to-farms laws preempt local zoning ordinances designed to keep CAFOs in check and prevent and mitigate their adverse environmental, public health, and socioeconomic impacts.

A 1999 amendment to the Michigan Right to Farm Act (RTFA) preempts new zoning ordinances restricting CAFOs. A 2018 RTFA amendment was passed, preempting any zoning ordinances predating the 1999 amendment to sew up the RTFA more tightly. Superimposing a zoning court case (Belvidere Township v. Heinze (Montcalm County)) on a timeline of Michigan's RTFA reveals a disturbing sequence of events:<sup>19, 20</sup>

### *Michigan Right to Farm timeline*

- **1981: Michigan's Right to Farm Act (RTFA) was enacted.**
- 1997: Defendant (Heinze) purchased 35 acres for the purpose of hog farming, intending to raise 6,000-7,000 hogs at the site.
- April 1998: Belvidere Township passed a new zoning ordinance that required CAFOs to obtain a special use permit.
- The Appeals Court concluded that, at the time the case was filed, the RTFA was not a defense against enforcement of a zoning ordinance.
- **1999: Amendment passed: RTFA preempts NEW local zoning ordinances**

“State law preempts local zoning and land use control over many different types of land uses. One of the most important protections is for commercial agricultural operations under Michigan's Right to Farm Act (RTFA). Local governments often face difficult issues about whether they can enforce their ordinances with respect to farm animals, accessory buildings, and farm market sales.

In 2000, the RTFA was amended to provide that local zoning and other ordinances which extend, revise or conflict with the RTFA or Generally Accepted Agricultural and Management Practices (GAAMPs) would be preempted.”<sup>21</sup>

- 2000: Appeals Court remanded the case (Belvidere Township v. Heinze) for reconsideration given the 1999 amendment of the RTFA: Michigan Court of Appeals (241 Mich. App. 324; 615 N.W.2d 250 (2000))
- Belvidere Township gets a new swine CAFO

**C. CAFO expansions:** New large (by regulatory definition) CAFOs require a National Pollutant Discharge Elimination (NPDES) permit under the Clean Water Act, which entails a mandatory public comment period.<sup>22, 23</sup> However, once a state regulatory agency issues a permit, CAFO expansions (increases in herd sizes) are generally “reasonably” allowed and protected by right-to-farm laws, exemplified by a Kansas statute section:

“(c) An owner of farmland who conducts agricultural activity protected pursuant to the provisions of this section:

(1) May reasonably expand the scope of such agricultural activity, including, but not limited to, increasing the acreage or number of animal units or changing agricultural activities, without losing such protection so long as such agricultural activity complies with all applicable local, state, and federal environmental codes, resolutions, laws and rules and regulations;”<sup>24</sup>

## **VI. The evolution of CAFO immunity laws: From right to farm to right to harm**

Right-to-farm laws, also called CAFO immunity laws, have deviated from their original intent to protect farmers from litigation based on frivolous complaints (e.g., the occasional waft of manure, farm machinery noise, or roosters crowing at the break of dawn). Coincident with the shift from traditional farms to CAFOs, the right to farm morphed into the right to harm. The right to farm defense is now used to justify a pervasive stench, water quality degradation, toxic air emissions, health endangerment, declines in property values, and the loss of enjoyment of one’s backyard.

CAFOs might now be the predominant model of animal food production, but despite industry claims otherwise, most people do not view them as traditional farms. They represent a significant change in agricultural operations, and many of their harms fit the legal definition of private and public nuisances. They are polluting industries and, as such, should be regulated accordingly.

In an analysis of statutes in all fifty U.S. states, Ashwood et al. found that “right-to-farm laws, while largely purported to defend family farmers, reduce rural people’s capacity to protect their land through nuisance actions in defense of their environmental, health, and community rights.”<sup>25</sup>

Most people would not choose to live near a CAFO. “CAFOs are locally unwanted because of their emissions of malodor, nutrients, and toxicants that negatively affect community health and quality of life.”<sup>26</sup>

Right-to-farms laws seriously hamper the ability of citizens and communities to fight the multitude of public health, environmental, and socioeconomic harms imposed by CAFOs. Generally, there are no CAFO size or density restrictions, even in watersheds impacted by agricultural pollution and declared impaired under the Clean Water Act. For many, living conditions are simply untenable, thanks to the unfettered proliferation of CAFOs facilitated by robust right-to-farm legislation.

Challenging CAFOs can be daunting. However, sometimes citizens and communities score big wins, as evidenced by a recent (July 8, 2021) Wisconsin Supreme Court ruling in favor of a group of Kewaunee County citizens (Kewaunee County Clean Water Advocates) represented by Midwest Environmental Advocates. The court affirmed “the authority of the Wisconsin Department of Natural Resources to do what is necessary to protect Wisconsin’s waters from agricultural pollution” and, thus, the fundamental human right to clean water.<sup>27</sup>

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- <sup>1</sup> American Farmland Trust. (n.d.). Chapter 6: Right-to-Farm Legislation. In *Saving American Farmland: What Works* (p. 169). [https://www.farmlandinfo.org/wp-content/uploads/sites/2/2020/02/8\\_SavingAmericanFarmland-WhatWorks\\_Chapter6.pdf](https://www.farmlandinfo.org/wp-content/uploads/sites/2/2020/02/8_SavingAmericanFarmland-WhatWorks_Chapter6.pdf)
- <sup>2</sup> *Right-To-Farm - National Agricultural Law Center*. (n.d.). Retrieved September 30, 2022, from <https://nationalaglawcenter.org/state-compilations/right-to-farm/>
- <sup>3</sup> *Update on Right-to-Farm Legislation, Cases, and Constitutional Amendments*. (n.d.). Center for Agricultural Law and Taxation. Retrieved September 30, 2022, from <https://www.calt.iastate.edu/article/update-right-farm-legislation-cases-and-constitutional-amendments>
- <sup>4</sup> American Farmland Trust. (n.d.). Chapter 6: Right-to-Farm Legislation. In *Saving American Farmland: What Works* (p. 169). [https://www.farmlandinfo.org/wp-content/uploads/sites/2/2020/02/8\\_SavingAmericanFarmland-WhatWorks\\_Chapter6.pdf](https://www.farmlandinfo.org/wp-content/uploads/sites/2/2020/02/8_SavingAmericanFarmland-WhatWorks_Chapter6.pdf)
- <sup>5</sup> *Right-To-Farm - National Agricultural Law Center*, op. cit.
- <sup>6</sup> *Update on Right-to-Farm Legislation, Cases, and Constitutional Amendments*, op. cit.
- <sup>7</sup> Montefiore, L. R., Nelson, N. G., Dean, A., & Sharara, M. (2022). Reconstructing the historical expansion of industrial swine production from Landsat imagery. *Scientific Reports*, 12(1), 1736. <https://doi.org/10.1038/s41598-022-05789-5>
- <sup>8</sup> Burkholder, J., Libra, B., Weyer, P., Heathcote, S., Kolpin, D., Thorne, P. S., & Wichman, M. (2007). Impacts of Waste from Concentrated Animal Feeding Operations on Water Quality. *Environmental Health Perspectives*, 115(2), 308–312. <https://doi.org/10.1289/ehp.8839>
- <sup>9</sup> *USDA ERS - Sector at a Glance*. (n.d.). Retrieved October 2, 2022, from <https://www.ers.usda.gov/topics/animal-products/cattle-beef/sector-at-a-glance/>

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- <sup>10</sup> *USDA ERS - Sector at a Glance*. (n.d.). Retrieved October 2, 2022, from <https://www.ers.usda.gov/topics/animal-products/hogs-pork/sector-at-a-glance/>
- <sup>11</sup> Burkholder, op. cit.
- <sup>12</sup> Anthis, J. R. (2019). *US Factory Farming Estimates*. <https://sentienceinstitute.org/us-factory-farming-estimates>
- <sup>13</sup> James M. MacDonald and William D. McBride. (2009). *The Transformation of U.S. Livestock Agriculture Scale, Efficiency, and Risks* (Economic Information Bulletin Number 43). USDA, Economic Research Service. [https://www.ers.usda.gov/webdocs/publications/44292/10992\\_eib43.pdf?v=0](https://www.ers.usda.gov/webdocs/publications/44292/10992_eib43.pdf?v=0)
- <sup>14</sup> *Manure application methods and nitrogen losses*. (n.d.). Retrieved October 1, 2022, from <https://extension.umn.edu/manure-management/manure-application-methods-and-nitrogen-losses>
- <sup>15</sup> The Rights of Nature — Can an Ecosystem Bear Legal Rights? (2021, April 22). *State of the Planet*. <https://news.climate.columbia.edu/2021/04/22/rights-of-nature-lawsuits/>
- <sup>16</sup> *Docket for 20-72*. (n.d.). Retrieved October 1, 2022, from <https://www.supremecourt.gov/docket/docketfiles/html/public/20-72.html>
- <sup>17</sup> *Right to farm: Indiana families ask U.S. Supreme Court to weigh in on case over factory farm*. (2020, July 28). HLS Clinical and Pro Bono Programs. <https://clinics.law.harvard.edu/blog/2020/07/right-to-farm-indiana-families-ask-u-s-supreme-court-to-weigh-in-on-case-over-factory-farm/>
- <sup>18</sup> *Update on Right-to-Farm Legislation, Cases, and Constitutional Amendments, op cit.*, Indiana.

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- <sup>19</sup> Patricia Norris and Kurt H. Schindler. (2015). *Selected Zoning Court Cases Concerning the Michigan Right to Farm Act 1964-2015* (p. 7) [Public policy brief]. Michigan State University Extension. <https://www.canr.msu.edu/uploads/resources/pdfs/S9.pdf>
- <sup>20</sup> Personal communication; verifying documents available on request
- <sup>21</sup> Right to Farm Act: State Removes Local Zoning from Consideration in Livestock Site Selection GAAMP | Mika Meyers. (2019, July 16). *Mika Meyers | We Get You. We've Got You.* <https://www.mikameyers.com/right-to-farm-act-state-removes-local-zoning-from-consideration-in-livestock-site-selection-gaamp/>
- <sup>22</sup> US EPA, O. (2015, August 26). *NPDES AFOs Policy Documents* [Other Policies and Guidance]. <https://www.epa.gov/npdes/npdes-afos-policy-documents-0>
- <sup>23</sup> US EPA, O. (2013, May 3). *Clean Water Act (CWA) Compliance Monitoring* [Overviews and Factsheets]. <https://www.epa.gov/compliance/clean-water-act-cwa-compliance-monitoring>
- <sup>24</sup> *States' Right-To-Farm Statutes: Kansas*. 2-3202. Certain agricultural activities not a nuisance. The National Agricultural Law Center. <https://nationalaglawcenter.org/wp-content/uploads/assets/righttofarm/Kansas.pdf>
- <sup>25</sup> Ashwood, L., Diamond, D., & Walker, F. (2019). Property rights and rural justice: A study of U.S. right-to-farm laws. *Journal of Rural Studies*, 67, 120–129. <https://doi.org/10.1016/j.jrurstud.2019.02.025>
- <sup>26</sup> Donham, K. J., Wing, S., Osterberg, D., Flora, J. L., Hodne, C., Thu, K. M., & Thorne, P. S. (2007). Community Health and Socioeconomic Issues Surrounding Concentrated Animal Feeding Operations. *Environmental Health Perspectives*, 115(2), 317–320. <https://doi.org/10.1289/ehp.8836>

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<sup>27</sup> Midwest Environmental Advocates. (2021). [Press Release].

[https://midwestadvocates.org/assets/news/Press-Release-Kinnard-Supreme-Court-](https://midwestadvocates.org/assets/news/Press-Release-Kinnard-Supreme-Court-Decision.pdf)

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