

# DADDY WON'T SELL THE FARM: DRAFTING RIGHT TO FARM STATUTES TO PROTECT SMALL FAMILY PRODUCERS

*“His cows get loose and run right through the fast food parking lots, and Daddy gets calls from the mini-malls when they're downwind from his hogs. When his tractor backs up traffic, the reception ain't too warm. The citys growing around him, but Daddy won't sell the farm.”<sup>1</sup>*

## INTRODUCTION

This country music song outlines a growing problem facing agriculturists in America. Today's producers must deal with concern over typical undesirable conditions created by agricultural production that did not face previous generations. The smells, dust, noise, and flies associated with agriculture did not upset residents on neighboring properties a generation ago because the neighbors were also involved in production agriculture.<sup>2</sup> In the early 1900's, approximately fifty percent of Americans were directly involved in production agriculture.<sup>3</sup> By 2007, that number fell to less than two percent.<sup>4</sup> Our society's understanding and tolerance for agricultural production methods has greatly declined because people are simply unfamiliar with agriculture.<sup>5</sup> At the same time, America faces staggering population growth and reverse population trends, where baby

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<sup>1</sup> MONTGOMERY GENTRY, *DADDY WON'T SELL THE FARM* (Columbia Records 1999).

<sup>2</sup> Harrison M. Pittman, Annotation, *Validity, Construction, and Application of Right-to-Farm Acts*, 8 A.L.R. 6th 465, §2 (2005).

<sup>3</sup> Ed Luttrell, *Grange Understands the Realities of Modern Agriculture*, <http://www.pagrange.org/advocate/0508modern.htm> (last visited Jan. 24, 2009).

<sup>4</sup> *Id.*; Terence J. Centner, *Agricultural nuisances: qualifying legislative “right-to-farm” protection through qualifying management practices*, 19 LAND USE POL'Y 259, 260 (2002).

<sup>5</sup> See Rick Marshall, *Agriculture Wars*, METROLAND ONLINE (Albany, N.Y.), Sept. 15, 2002, [http://www.metroland.net/back\\_issues/vol28\\_no37/features.html](http://www.metroland.net/back_issues/vol28_no37/features.html) (last visited Jan. 24, 2009). See also Land Stewardship Project, *LSP Myth Buster #2*, July 2005, available at [http://www.landstewardshipproject.org/pdf/myth\\_buster\\_2.pdf](http://www.landstewardshipproject.org/pdf/myth_buster_2.pdf).

boomers are migrating to rural America.<sup>6</sup> The lack of understanding and tolerance, coupled with the increasing rural populations could spell disaster for producers, who could face nuisance actions by new residents bothered by production methods. If successful, nuisance actions could force a producer to pay damages or to be enjoined from agricultural activities. Recognizing this potential threat, lawmakers enacted “right to farm” statutes to protect producers from nuisance suits.<sup>7</sup> If drafted correctly, these laws can protect small family operations that have been involved in production agriculture for generations.<sup>8</sup>

### I. BACKGROUND

Throughout history, Americans generally migrated from rural areas into urban cities.<sup>9</sup> However, in the 1950’s, Americans began moving from cities into suburban and rural areas.<sup>10</sup> By the end of the 1970’s, rural counties grew at faster rates than urban counties for the first time in a century.<sup>11</sup> Americans moved to rural areas seeking serenity, open spaces, and fresh air.<sup>12</sup> This population shift puts new rural residents closer to active agricultural operations.<sup>13</sup> In New Jersey, for example, farmers now find themselves literally surrounded by non-farming neighbors.<sup>14</sup> According to Bill Hoffay, a New York farmer, every piece of land he owns is now surrounded by houses.<sup>15</sup> This situation is not rare, in fact “[s]prawling development is a bigger threat to agriculture—no matter what its scale—than it has ever been.”<sup>16</sup> Although sheer loss of

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<sup>6</sup> Judith Lisansky, *Farming in an Urbanizing Environment: Agricultural Land Use Conflicts and Right to Farm*, 45 HUM. ORG. 363, 363 (1986). America’s population reached 300 million for the first time in September, 2006. CNN.com, *U.S. Population now 300 million and Growing*, (Oct. 17, 2006), <http://www.cnn.com/2006/US/10/17/300.million.over/index.html> (last visited April 25, 2009).

<sup>7</sup> Pittman, *supra* note 2.

<sup>8</sup> Although the justification and reasoning behind the importance of protecting family farms is beyond the scope of this article, for a discussion of this topic, see Steven C. Bahls, *Preservation of Family-Farms-The Way Ahead*, 45 DRAKE L. REV. 311 (1997).

<sup>9</sup> Lisansky, *supra* note 6.

<sup>10</sup> Centner, *supra* note 4 at 259; Lisansky, *supra* note 6.

<sup>11</sup> Nelson Bills, *Protecting Farmland: Right-To-Farm Laws in the Northeast States*, POLICY ISSUES IN RURAL LAND USE (Cornell University), July 1991, at 2.

<sup>12</sup> DAVID KAY ET AL., SUSTAINABLE AGRICULTURE RESEARCH AND EDUCATION PROGRAM OF USDA, FARMS, COMMUNITIES AND COLLABORATION: A GUIDE TO RESOLVING FARM-NEIGHBOR CONFLICT 4 (2003).

<sup>13</sup> Bills, *supra* note 11. The use of “agricultural” in this note includes both farming and ranching operations.

<sup>14</sup> Lisansky, *supra* note 6, at 364.

<sup>15</sup> Marshall, *supra* note 5.

<sup>16</sup> Land Stewardship Project, *supra* note 5.

agricultural production acres certainly poses a problem,<sup>17</sup> growing rural populations are threatening production agriculture in other ways as well.

While most Americans can trace their family trees back to rural America,<sup>18</sup> today the average American is three generations removed from the farm.<sup>19</sup> The percentage of the American population directly involved in production agriculture has fallen to a mere two percent.<sup>20</sup> Thus, when new residents, several generations removed from farming, move into agricultural areas, they are often unaware of the customs of a rural community and of common agricultural practices.<sup>21</sup> This lack of agricultural knowledge can cause new rural residents make requests of producers that are impossible to abide by. For example, some neighbors in Michigan insisted that a feedlot operator wash all of his cattle in order to prevent the smell.<sup>22</sup> In Kansas, one dairy farmer received a complaint from a new neighbor regarding the exposed “swollen” udders of his dairy cows.<sup>23</sup>

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<sup>17</sup> Another impact of this new population trend toward suburbanization is the conversion of farmland into suburban use. Rigoberto A. Lopez et al., *The Effects of Suburbanization on Agriculture*, 70 AM. J. AGRIC. ECON. 346, 347 (1988). From the late 1990's through 2007, the United States Department of Agriculture reported that 1.5 million acres of productive farmland was lost and converted into non-agricultural use each year. Bahls, *supra* note 8, at 316; U.S. DEP'T OF AGRIC., FARMS, LAND IN FARMS, AND LIVESTOCK OPERATIONS 2007 SUMMARY 2, (Feb. 2008), available at [http://usda.mannlib.cornell.edu/usda/nass/FarmLandIn//2000s/2008/FarmLandIn-02-01-2008\\_revision.pdf](http://usda.mannlib.cornell.edu/usda/nass/FarmLandIn//2000s/2008/FarmLandIn-02-01-2008_revision.pdf). In California alone, almost two-thirds of agricultural land was paved over between 1990 and 2004. AMERICAN FARMLAND TRUST, CALIFORNIA PAVING PARADISE: NEW REPORT DETAILS STATEWIDE FARMLAND LOSS, <http://www.farmland.org/programs/states/ca/Feature%20Stories/PavingParadise.asp> (last visited Jan. 24, 2009). This drastic loss in agricultural land has raised concerns about the base for continued food production in the United States. H.W. Hannah, *Farming in the Face of Progress*, 11 PROB. & PROP. 8, 9 (1997). Likewise, the number of farms in America is rapidly declining. There were five million more family farmers in 1930 than there are today. Laurie Hindman, *Berthould's Right to Farm*, THE BERTHOUD RECORDER (Berthould, C.O.), June 19, 2008, <http://www.berthoudrecorder.com/?p=882> (last visited Jan. 24, 2009). Over three hundred family farms are lost weekly in the United States. *Id.* However, it is important to recognize this statistic does not take into consideration the reason for the loss of family farms. Thus, these numbers include nuisance lawsuits, as well as any other reason a producer decided to cease an operation.

<sup>18</sup> Bahls, *supra* note 8, at 323.

<sup>19</sup> Chris Chinn, *Farmers must tell their story*, CLOVIS LIVESTOCK MARKET NEWS (Clovis, N.M.), Feb. 22, 2008, at 3.

<sup>20</sup> Centner, *supra* note 4.

<sup>21</sup> NELSON L. BILLS, FARMLAND PRESERVATION: AGRICULTURAL DISTRICTS, RIGHT-TO-FARM LAWS AND RELATED LEGISLATION 15, (1996); Land Stewardship Project, *supra* note 5; KAY, *supra* note 12, at 12.

<sup>22</sup> Telephone Interview with Wayne Whitman, Right to Farm Program Manager, Michigan Department of Agriculture (July 23, 2008).

<sup>23</sup> NEIL D. HAMILTON, A LIVESTOCK PRODUCER'S LEGAL GUIDE TO: NUISANCE, LAND USE CONTROL, AND ENVIRONMENTAL LAW 68 (1992).

The neighbor felt that this “swelling” must have indicated that the farmer was abusing his cows.<sup>24</sup> When new neighbors have had enough of these sights, sounds, and smells, they sometimes resort to nuisance law to attempt to end the offensive farming activities.<sup>25</sup> Urban residents who are freshly transplanted from their lives in the city often romanticize rural life, but “[w]hen they are offended by the sights, sounds, smells, and slow vehicles which typify rural America, they sue.”<sup>26</sup>

Statistics suggest that farmers and their neighbors are more frequently filing lawsuits to address land use controversies.<sup>27</sup> Conflicts between farmers and neighbors are increasing in both number and severity.<sup>28</sup> In Michigan alone, the Department of Agriculture fielded 1,300 complaints in a ten year period.<sup>29</sup> Perhaps one Virginia farmer put it best, “people moving into rural areas like the idea of farms, they don’t like the idea of farming.”<sup>30</sup> Some of the most common complaints include noise from farmers working in the field at night; the stench of spreading manure;

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<sup>24</sup> *Id.* In fact, the swollen udders on dairy cattle are not a sign of a problem at all. Instead, these full udders are a sign of a cow producing milk.

<sup>25</sup> Centner, *supra* note 4, at 259. Some of the most common complaints farmers receive are: odor, road spills, water pollution, farm traffic, chemical use, flies and insects, noise and dust. Lee Telega, *You Have A Right-to-Farm: Use It Wisely*, SMALL FARM QUARTERLY, Jan. 10, 2005, at 6, available at <http://www.smallfarms.cornell.edu/pages/quarterly/archive/winter05/winter05-06.pdf> (surveying dairy farmers in New York state). As explained by a coalition of farm groups in their amicus brief to the Iowa Supreme Court, without right to farm laws, many farmers will face nuisance lawsuits just because “they look and sound and smell like farms.” Mike Kroll, *Right to Farm*, <http://www.thezephyr.com/archives/rightfrm.htm> (last visited Jan. 24, 2009).

<sup>26</sup> Bahls, *supra* note 8, at 317. The Wisconsin Supreme Court explained the issue this way:

The raising of pigs is a perfectly lawful and respectable business. Doubtless it will remain so as long as the human palate craves a thin cut of juicy ham and the crisp slice of breakfast bacon. With all the marvelous advance in the science of animal husbandry which has taken place in recent years we have not yet produced the odorless pig. He may come at some future time in company of the voiceless cat and the flealess dog, but he is not yet in sight. Whenever he comes he will be welcome, but in the meantime pigs will be pigs, and we must put up at best we may with the odorous pig and his still more odorous pen. *Clark v. Wambold*, 160 N.W. 1039 (Wisc. 1917).

<sup>27</sup> BILLS, *supra* note 21; Marshall, *supra* note 5 (quoting Tom Kilcer, Cornell University Extension Service).

<sup>28</sup> Joshua M. Duke & Scott A. Malcolm, *Legal risk in agriculture: right-to-farm laws and institutional change*, 75 AGRIC. SYS. 295, 296 (2003).

<sup>29</sup> Sue Stuever Battel, *Stoneman family cattle farm wins landmark case*, MICH. FARM NEWS (Lansing) Apr. 15, 1999, available at <http://www.michiganfarmbureau.com/farm-news/transform.php?xml=19990415/cover.xml>.

<sup>30</sup> Email from Martha A. Walker, Community Viability Specialist, Virginia Cooperative Extension to author (May 9, 2008, 14:07 MST) (on file with author).

and slow moving equipment, such as tractors, driving down the highway.<sup>31</sup>

Small farms are not fortunate enough to avoid nuisance complaints. For example, twenty-five percent of small dairy farms in New York have received a nuisance complaint within the past five years.<sup>32</sup> The complaints were not limited to just dairies, as approximately thirty-three percent of all small farms in New York have received complaints from neighbors.<sup>33</sup>

## II. BASIC PURPOSE OF RIGHT TO FARM LAWS

Many agriculturists fear that new neighbors will be successful in nuisance suits against common agricultural practices that have existed for generations.<sup>34</sup> The Colorado legislature declared, “when non-[agricultural] 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.”<sup>35</sup> If the neighbors are successful, such lawsuits would likely put the producer out of business either because an injunction would issue against the producer or because of the high costs of litigation. Seeking to protect agriculturists from this type of nuisance suit, states began to develop right to farm legislation.<sup>36</sup> Right to farm laws are a response to the unfair out-

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<sup>31</sup> *Id.*; Land Stewardship Project, *supra* note 5.

<sup>32</sup> Small farms were those with fewer than seventy-five cows. Telega, *supra* note 25. Large operations certainly face similar issues. For example, a 2000 survey indicated that 1 out of every 8 large (greater than 10,000) swine operations had received an odor complaint within the last year. Dean Houghton, *Whiff of Success*, THE FURROW, Summer 2003, at 35, 35.

<sup>33</sup> Telephone Interview with Lee Telega, Senior Extension Associate, Cornell University (June 5, 2008).

<sup>34</sup> Samuel Krasnow, *Farm Wars*, NEXT AM. CITY, Jan. 1, 2005, available at <http://americancity.org/magazine/article/farm-wars-krasnow/>.

<sup>35</sup> COLO. REV. STAT. § 35-3.5-101 (2008).

<sup>36</sup> Other countries, including Canada, France and other nations in Western Europe, recognize the importance of family farms and have also developed similar laws. See Centner, *supra* note 4; Bahls, *supra* note 8, at 311; HAMILTON, *supra* note 23, at 22. Although the laws are titled right to farm, livestock producing ranchers are equally concerned over the increase of nuisance suits and the right to farm statutes apply equally to ranchers. Hannah, *supra* note 17. See also Non-Party Brief of “The Agricultural Coalition”, *Wisconsin v. Zawistowski*, 754 N.W.2d 849 (Wisc. 2008) (unpublished table decision) (Feb. 6, 2007). The brief was filed by a wide variety of producers consisting of Wisconsin Farm Bureau, Wisconsin Cattlemen’s Association, Wisconsin Corn Growers Association, Wisconsin Pork Association, Wisconsin Potato and Vegetable Growers Association, Inc., Wisconsin State Cranberry Grower’s Association, and the Dairy Busi-

come that nuisance law can create for producers when people unfamiliar with agriculture move into an agricultural area.<sup>37</sup> Right to farm laws are designed to provide producers with a legal defense that may be raised in response to a nuisance lawsuit filed against them.<sup>38</sup> These laws strengthen the position of producers who face nuisance suits stemming from the sights, sounds, and smells of agricultural production.<sup>39</sup>

The purpose underlying most right to farm laws is to affirm the importance of agriculture in the community.<sup>40</sup> More specifically, these laws are designed “to protect existing farm operations from nuisance suits filed by those who move into farming areas only to later decide certain agrarian characteristics, such as pungent aromas from livestock feeding facilities, are objectionable and actionable.”<sup>41</sup> At the core of right to farm laws is “the desire to protect innocent farmers from land use actions or restrictions that evolve around them, over which they have little or no control.”<sup>42</sup> In contrast to other preservation policies, which focus on the land itself, right to farm statutes focus on the farmers who live on the land.<sup>43</sup>

Farming and ranching are highly capital intensive professions, and right to farm laws seek to protect existing capital investments made by producers.<sup>44</sup> They provide producers with peace of mind that if they properly manage their operations, they will not lose their businesses and lifestyles because of a nuisance lawsuit.<sup>45</sup> Proponents of right to farm laws argue that by protecting a producer from being hauled into court to defend a nuisance suit, the agriculturist is more likely to make new investments and improvements.<sup>46</sup> In turn, the operation will be more technologically advanced and will likely receive fewer complaints from neighbors.

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ness Association. This is an excellent example of the variety of producers who are concerned with protections from nuisance suits offered by right to farm laws. *Id.*

<sup>37</sup> KAY, *supra* note 12, at 20.

<sup>38</sup> BILLS, *supra* note 21, at 12.

<sup>39</sup> Bills, *supra* note 11, at 1.

<sup>40</sup> BILLS, *supra* note 21, at 14.

<sup>41</sup> Neil D. Hamilton, *Right-to-Farm Laws Revisited: Judicial Consideration of Agricultural Nuisance Protections*, J. AGRIC. TAX. & L. 195, 195 (1992).

<sup>42</sup> Arthur C. Nelson, *Economic Critique of U.S. Prime Farmland Preservation Policies*, 6 J. RURAL STUD. 119, 131 (1990).

<sup>43</sup> Lisansky, *supra* note 6, at 365.

<sup>44</sup> Centner, *supra* note 4, at 261.

<sup>45</sup> Jennifer Vincent, *New York court decision mirrors Michigan's Right-to-Farm ruling*, MICHIGAN FARM NEWS (Lansing), July 15, 1999, available at <http://www.michigan-farmbureau.com/farmnews/transform.php?xml=19990715/court.xml>.

<sup>46</sup> BILLS, *supra* note 21, at 13.

However, the laws are not designed to completely shield producers from all nuisance lawsuits.<sup>47</sup> Every right to farm law contains limitations on protections afforded to agriculturists.<sup>48</sup> For example, all state laws deny protections of the law to farms or ranches operated in a negligent or unreasonable manner.<sup>49</sup> Right to farm statutes were not designed “to eliminate all nuisance cases and did not grant operators a license to engage in bad practices or to pollute.”<sup>50</sup> Thus, protection from nuisance suits is only available to qualifying producers, while neighbors maintain the right to file suit against producers using unreasonable practices.<sup>51</sup>

### III. IMPORTANT PROVISIONS

Although all fifty states enacted right to farm laws by 1992,<sup>52</sup> many of these laws operate in different manners. When reviewing all of the various provisions each state has adopted, it is clear certain provisions are more beneficial and important in order for the law to protect small, family operations. Among the most desirable provisions are those which include generally accepted agricultural practices; allow for attorney fee recovery for successful defendants in nuisance suits; provide protection notwithstanding changes and improvements to production methods; include limitations on the type of damages that can be awarded; require notification of the right to farm laws; and provide for education of non-agricultural neighbors about the laws.

#### A. Generally Accepted Agricultural Practices

Right to farm laws that include generally accepted practices state that producers cannot be sued for the noise, dust, odor, or any other undesirable event caused by their operations so long as the producers are acting in accordance with practices deemed proper for production.<sup>53</sup> This type of provision gives producers, who are following the proper production methods, peace of mind that they will not lose their operations due to

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<sup>47</sup> *Id.* at 12; KAY, *supra* note 12, at 20.

<sup>48</sup> Bills, *supra* note 11, at 2; Centner, *supra* note 4, at 259, 261.

<sup>49</sup> Centner, *supra* note 4, at 259, 261; BILLS, *supra* note 21, at 13; Bills, *supra* note 11, at 1.

<sup>50</sup> Centner, *supra* note 4, at 265.

<sup>51</sup> *Id.* at 259; BILLS, *supra* note 21, at 13.

<sup>52</sup> Hamilton, *supra* note 41.

<sup>53</sup> Michigan Policy Network, The Michigan Right to Farm Act, [http://www.michiganpolicy.com/index.php?option=com\\_content&view=article&id=125:jasnfierwnp&catid=2:agriculture-policy-briefs&Itemid=17](http://www.michiganpolicy.com/index.php?option=com_content&view=article&id=125:jasnfierwnp&catid=2:agriculture-policy-briefs&Itemid=17) (last visited Jan. 24, 2009).

unfounded nuisance suits filed by neighbors.<sup>54</sup> Most statutes that include this type of generally accepted practice language<sup>55</sup> work in one of two ways. If a producer is following generally accepted or sound practices, some statutes create a presumption that the farm is not a nuisance and the complaining party faces the burden of proving that a nuisance does exist.<sup>56</sup> In other statutes it is very simple, if a producer is following generally accepted or sound practices, then no nuisance exists.<sup>57</sup>

Both New York and Michigan have adopted provisions that address the concept of “sound agricultural practices”<sup>58</sup> or “generally accepted agricultural and management practices,” (“GAMMP”),<sup>59</sup> but each state develops these standards in a different way. In Michigan, a committee develops the generally accepted practices which producers must follow to be protected by their state right to farm statutes.<sup>60</sup> In New York, a

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<sup>54</sup> Vincent, *supra* note 45.

<sup>55</sup> Several states also have this type of provision, but the exact wording varies from statute to statute. *See e.g.* ARIZ. REV. STAT. ANN. § 3-112 (2008) (“good agricultural practices” meaning those which conform to state, federal, and local laws and regulations); ME. REV. STAT. ANN. tit. 7, §153(1) (2008) (“conforms to the best management practices”); N.J. STAT. ANN. § 4:1C-10 (West 2008) (“conforms to agricultural management practices recommended by the committee”); VA. CODE ANN. §. 3.2-302(A) (2008) (“conducted in accordance with existing best management practices and in compliance with existing laws and regulations of the Commonwealth.”).

<sup>56</sup> HAW. REV. STAT. § 165-4 (2008); UTAH CODE ANN. § 78B-6-1104 (2008).

<sup>57</sup> *See e.g.* MICH. COMP. LAWS § 286.473(3)(1) (2008) (“A farm or farm operation *shall not* be found to be a public or private nuisance if the farm operation alleged to be a nuisance conforms to the generally accepted agricultural and management practices according to policy determined by the Michigan commission of agriculture.”) (emphasis added); COLO. REV. STAT. § 35-3.5-102 (2008); N.J. STAT. ANN. § 4:1C-10 (West 2008) (creating an irrebuttable presumption that an operation following adopted practices shall not be deemed a nuisance); H.B. 229, 57th Leg. (Utah 2008), available at [http://www.farmlandinfo.org/documents/36969/UT\\_HB\\_229.pdf](http://www.farmlandinfo.org/documents/36969/UT_HB_229.pdf).

<sup>58</sup> N.Y. AGRIC & MKTS. LAW § 308 (McKinney 2008).

<sup>59</sup> MICH. COMP. LAWS § 286.472(2)(d) (2008); Michigan Policy Network, *supra* note 53; Telephone Interview with Wayne Whitman, *supra* note 33; BILLS, *supra* note 31, at 13.

<sup>60</sup> BILLS, *supra* note 21, at 13; Nelson Bills, *Protecting Farmland: New Proposals Under the 1991 Agricultural Protection Act*, POLICY ISSUES IN RURAL LAND USE (Cornell University), April 1991, at 1. To date, Michigan has developed GAAMPs with regard to manure management and utilization, pesticide utilization and pest control, nutrient utilization, care of farm animals, cranberry production, site selection and odor control for new and expanding livestock production facilities and irrigation water use. Michigan Policy Network, Generally Accepted Agricultural and Management Practices, [http://www.michiganpolicy.com/index.php?option=com\\_content&view=article&id=121:prac&catid=2:agriculture-policy-briefs&Itemid=17](http://www.michiganpolicy.com/index.php?option=com_content&view=article&id=121:prac&catid=2:agriculture-policy-briefs&Itemid=17) (last visited Jan. 24, 2009).

case-by-case evaluation is conducted by the New York State Department of Agriculture and Markets.<sup>61</sup>

These types of provisions assist all producers and, if designed correctly, can be especially protective of small operations. First, these provisions give clear standards of conduct, explaining what actions will be protected. This benefits both the producer who is seeking to comply with the required conduct to receive protection under the right to farm law, as well as the judge who needs to decide whether the farmer's actions were appropriate. Rather than a judge making a factual determination of whether the agricultural practice in question should be protected, these generally accepted practices provide clear guidelines. Under the Michigan approach, there are numerous generally accepted practices designed prospectively and published for producers to consider.<sup>62</sup>

Under both the New York and Michigan approaches, anyone can request a sound agricultural practice review, including a farmer, if he or she wants to prospectively have an evaluation done to ensure protection will exist.<sup>63</sup> In Michigan, approximately ten prospective queries from producers are considered each year.<sup>64</sup> Additionally, once a particular topic has been evaluated, other producers can ask to view that opinion to get an idea if their methods would comply with sound practices.<sup>65</sup>

This type of certainty is particularly important for small operations. For many producers in smaller family operations, the fear of legal costs necessary to defend a nuisance claim is a serious concern.<sup>66</sup> So serious, in fact, some young, aspiring agriculturists have decided not to pursue a dream of agricultural production because of the potential costs that could be required to defend their operations.<sup>67</sup> The fear of these legal costs and the uncertainty surrounding unclear guidelines as to what types of practices are protected can be alleviated by implementation of approved practices.

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<sup>61</sup> N.Y. AGRIC & MKTS. LAW § 308 (McKinney 2008); Telephone Interview with Matt Brower, New York State Department of Agriculture and Markets (Jan. 7, 2009).

<sup>62</sup> Telephone Interview with Wayne Whitman, *supra* note 22; Michigan Policy Network, *supra* note 60.

<sup>63</sup> Telephone Interview with Matt Brower, *supra* note 61.

<sup>64</sup> Telephone Interview with Wayne Whitman, Right to Farm Program Manager, Michigan Department of Agriculture (February 18, 2009).

<sup>65</sup> Email from Matt Brower, New York State Department of Agriculture and Markets (Jan. 8, 2009, 7:07 EST).

<sup>66</sup> Telephone Interview with Todd Bingham, Vice President of Public Policy, Utah Farm Bureau (Apr. 9, 2008); Dawn House, *As cities encroach on farms, sights, smells sure to irritate*, SALT LAKE CITY TRIBUNE, Feb. 29, 2008.

<sup>67</sup> Nelson, *supra* note 42; Telephone Interview with Senator Kim Benefield, Alabama State Senate (Apr. 3, 2008).

An example of the type of uncertainty which can lead to lawsuits in the absence of a generally accepted practice provision is illustrated in a recent Wisconsin case involving William Zawistowski, a second generation cranberry farmer.<sup>68</sup> His family had farmed the same land since 1939.<sup>69</sup> In June 2004, the state of Wisconsin, along with fourteen individual neighbors, filed a nuisance suit against Mr. Zawistowski alleging that his use of phosphorous fertilizer damaged Musky Bay, a nearby body of water.<sup>70</sup> Plaintiffs sought an injunction and monetary damages.<sup>71</sup> Evidence showed Mr. Zawistowski's use of fertilizer was consistent with accepted research and the recommended best management practices developed by the University of Wisconsin Extension Service.<sup>72</sup> According to an expert, the use of this type of fertilizer is typical and necessary for cranberry production, and Mr. Zawistowski applied the fertilizer at the recommended rate, which is less than the state average for cranberry marshes.<sup>73</sup> The fact that Mr. Zawistowski followed the recommended management practices was not disputed by the plaintiffs.<sup>74</sup> This case shows a disturbing situation: "Zawistowski was running his farm in line with all government regulations. And for this, the state was suing him."<sup>75</sup>

Had Mr. Zawistowski been in a state that had adopted a right to farm statute with the generally accepted practices provision, he would have had either the presumption of there being no nuisance and the burden of proof would have shifted to the plaintiff, or by law the court would have declared his farm not to be a nuisance as it was in compliance.<sup>76</sup> The Wisconsin statute does not have this type of provision. Instead, the statute requires two prongs be met: the practice must be conducted on land that was in agricultural use without interruption before the plaintiff began

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<sup>68</sup> *Learn from Misguided Lawsuit*, WISCONSIN STATE JOURNAL (Madison), Feb. 8, 2008, at A8.

<sup>69</sup> Defendant's Brief in Support of Motion for Summary Judgment at 4, *Wisconsin v. Zawistowski*, No. 04 CV 75 (Sawyer County Cir. Ct. Apr. 5, 2006).

<sup>70</sup> *Wisconsin v. Zawistowski*, 04 CV 75, 747 N.W.2d 527 (unreported table decision) (2008), *cert. denied*, 754 N.W.2d 849 (unreported table decision).

<sup>71</sup> Complaint at 1, *Wisconsin v. Zawistowski*, 747 N.W.2d 527 (unreported table decision) (Wis. 2008).

<sup>72</sup> Defendant's Brief in Support of Motion for Summary Judgment, *supra* note 69, at 2, 22-23.

<sup>73</sup> *Id.* at 22-23 (quoting Dr. Teryl Roper, Professor of Horticulture, University of Wisconsin Madison); Post-Trial Brief for Defendant Rural Mutual Insurance Co. at 10, *State v. Zawistowski*, 747 N.W.2d 527 (unreported table decision) (Wis. 2008).

<sup>74</sup> Defendant's Brief in Support of Motion for Summary Judgment, *supra* note 69, at 23.

<sup>75</sup> *Learn from Misguided Lawsuit*, *supra* note 68.

<sup>76</sup> This statement is based on how Michigan and Hawaii statutes would have likely applied in this case.

use of his currently owned property allegedly being interfered with, and the agricultural practice must not present a “substantial threat to public health or safety.”<sup>77</sup> Thus, the parties began a battle to determine what constituted this “substantial threat” under the law.<sup>78</sup> The court stated that the meaning of this terminology was a significant issue in the case.<sup>79</sup> The parties resorted to canons of statutory construction, dictionary definitions, and unrelated case law in an attempt to interpret the statutory language.<sup>80</sup>

Instead of a battle over semantics and statutory construction, the focus could have remained on the farmer and his practices if the state had adopted right to farm legislation including a generally accepted practice provision. This was the case when a nuisance suit was filed against a Michigan family’s cattle ranch that was operated by four brothers.<sup>81</sup> Neighbors filed suit complaining that flies, increased traffic, and odor constituted a nuisance and was an unconstitutional taking under the 5th Amendment.<sup>82</sup> The circuit court dismissed the suit after finding that the family had followed generally accepted agricultural and management practices and, thus, were protected from suit by Michigan’s right to farm law.<sup>83</sup> In reaching that decision, the court considered the following factors: the family considered the issue of odor when designing their facilities; kept extensive records; and followed a written manure-management plan.<sup>84</sup> This approach made the law more clear to other producers so that they knew exactly what actions they needed to take to be protected. Rather than launching into a battle over the meaning of words, the court was simply able to look at the generally accepted practices as adopted by the state and determine if this operation was in compliance.

However, in order for these generally accepted practices to provide effective protection for agriculturists, the committees that develop or evaluate the practices must include producers.<sup>85</sup> Having producers on the committees that develop the practices allows them to communicate di-

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<sup>77</sup> WIS. STAT. § 823.08(3)(a) (2008).

<sup>78</sup> Defendant’s Brief in support of Summary Judgment, *supra* note 69, at 29-31; Post-Trial Brief, *supra* note 73, at 15-16; Cross-Appellant Brief at 5-12, *Wisconsin v. Zawistowski*, 747 N.W.2d 527 (unreported table decision) (Wis. 2008); Non-Party Brief, *supra* note 36, at 8-14.

<sup>79</sup> Findings of Fact, Conclusions of Law and Decision at 26, *Wisconsin v. Zawistowski*, 04 CV 75 (Sawyer County Cir. Ct. Apr. 5, 2006).

<sup>80</sup> Cross-Appellant Brief, *supra* note 78; Non-Party Brief, *supra* note 36, at 8-14.

<sup>81</sup> Battel, *supra* note 29, at 1.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 2.

<sup>84</sup> *Id.* at 1; Telephone Interview with Wayne Whitman, *supra* note 22.

<sup>85</sup> HAMILTON, *supra* note 23, at 60.

rectly with policy makers to ensure that their voices are heard in setting these policies. Because most Americans are generations removed from the farm,<sup>86</sup> it is essential that producers make their voices heard. Recognizing this importance, the New Jersey legislature requires that at least four of the six citizen appointees to its Commission are actively engaged in farming.<sup>87</sup>

In addition to the importance of having producers on this committee, it is equally important to have producers of varying scale and commodities participate. Small producers may be able to voice the impracticality of a technique because the high cost, while acceptable for a large scale operation, might be impossible for a small producer to afford. This type of input from a producer, who faces this type of production decision daily, is invaluable and must be included for these generally accepted practices to protect all producers.

Michigan has created a diverse committee to develop its generally accepted practices that may be a desirable model for other states to follow. The members of the group are appointed by the governor of Michigan and are approved by the Senate.<sup>88</sup> By law, the commissioners serve four-year staggered terms.<sup>89</sup> In order to ensure a bi-partisan committee, no more than three of the five members may be from the same political party.<sup>90</sup> The 2008 Commission contained members with various backgrounds.<sup>91</sup> In addition to the experience and knowledge that the Commission members bring to the table, the commission also considers information from Michigan State University extension and experiment stations, the Natural Resources Conservation Service, the Farm Service Agency, and other professional industry organizations.<sup>92</sup> Further, the Commission holds regular meetings that are open to the public to provide

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<sup>86</sup> See *supra* notes 18-26 and accompanying text.

<sup>87</sup> N.J. STAT. ANN. § 4:1C-4(b) (West 2008). See also VA. CODE ANN. § 3.2-109 (2008) (requiring that the board consist of at least seven currently practicing farmers).

<sup>88</sup> MICH. COMP. LAWS § 16.279 (2008).

<sup>89</sup> *Id.*; MICHIGAN DEP'T OF AGRIC., THE 2008 MICHIGAN COMMISSION OF AGRICULTURE BROCHURE, available at [http://129.33.81.41/documents/mda/commissionbrochure\\_195054\\_7.pdf](http://129.33.81.41/documents/mda/commissionbrochure_195054_7.pdf).

<sup>90</sup> MICH. COMP. LAWS § 16.279 (2008).

<sup>91</sup> These members include a member of the Michigan Agri-business Association; a former regional representative for Michigan Farm Bureau; a fourth-generation family farmer who raises 2,500 acres of corn, soybeans, and wheat, and also produces cattle and swine; a farmer who owns vineyards and a winery; and a director of a meatpacking and food processing labor union. MICHIGAN DEP'T OF AGRIC., *supra* note 89.

<sup>92</sup> MICH. COMP. LAWS § 286.472(d) (2008); Michigan Policy Network, *supra* note 60.

producers an opportunity to attend and discuss any issues or concerns they have related to the Commission's decisions.<sup>93</sup>

Under the generally accepted practice model, in an instance where a complaint was brought but the commission had not yet developed generally accepted practices for that particular situation, states take different approaches. Under the Michigan law, if there is no generally accepted management practice already in place, the Commission has a policy in place to determine whether a practice meets the definition of generally accepted.<sup>94</sup> If, in the absence of a GAAMP, a producer is engaging in a traditional practice that does not cause detriment to the environment, nor pose a health to animal safety, it is presumed that the practice is traditionally accepted.<sup>95</sup> In New Jersey, in the event that the committee has not recommended a practice, the committee will be given the complaint and will hold a public hearing on the issue before considering the practice and issuing an opinion as to whether the activity constitutes a generally accepted practice.<sup>96</sup>

New York also ensures that producers have a voice in the evaluation of sound practices. After a representative of the Commissioner of Agriculture conducts a site visit to talk with the producer and see exactly what practices are being used, numerous other opinions are sought.<sup>97</sup> Experts in the particular area of agriculture are consulted for their input.<sup>98</sup> After a draft opinion is written, it is sent to the Cornell Extension Service, to the Natural Resources Conservation Service, and to the New York Advisory Council on Agriculture.<sup>99</sup> The Council is comprised of eleven members who are appointed by the governor.<sup>100</sup> At least five of the members must be commercial farm operators.<sup>101</sup> This Council reviews the proposed findings and drafts an opinion.<sup>102</sup> Once an opinion has been reviewed by all of these boards, it is filed by the Commis-

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<sup>93</sup> MICHIGAN DEP'T OF AGRIC., *supra* note 89.

<sup>94</sup> Telephone Interview with Wayne Whitman, *supra* note 64.

<sup>95</sup> *Id.*

<sup>96</sup> N.J. STAT. ANN. § 4:1C-10.1 (West 2008).

<sup>97</sup> Telephone Interview with Matt Brower, *supra* note 61.

<sup>98</sup> Generally these experts are at Cornell. However, in some cases, the Commissioner must turn outside the state in order to get an expert opinion on the practices being used. For example, an issue of aerial spraying of pesticides arose in New York. Because the practice is so uncommon in New York, the Commissioner consulted experts in Texas and California where the process is frequently used in order to obtain this valuable input. Telephone Interview with Matt Brower, *supra* note 61.

<sup>99</sup> *Id.*

<sup>100</sup> N.Y. AGRIC & MKTS. LAW § 309(2) (McKinney 2008).

<sup>101</sup> *Id.*

<sup>102</sup> Telephone Interview with Matt Brower, *supra* note 61.

sioner.<sup>103</sup> According to a representative for the Commissioner, although this type of model may require more effort on the part of the state to encourage the farmer to work with them in every case, it is a more fair and complete approach that ensures farmers do not face nuisance suits when they are using sound practices.<sup>104</sup> This is best explained as, “[n]ot every farm has the same resources. It is great to say, ‘Every farmer should do x,’ but all of the different conditions of a farm must be considered in order to determine if the practices are sound.”<sup>105</sup>

An additional benefit to the New York approach of case-by-case investigation may be its strength against a constitutional challenge. In *Bormann v. Board of Supervisors*,<sup>106</sup> Iowa’s right to farm law was found unconstitutional because it offered broad protection from any lawsuit to all farmers located in an agricultural district and failed to clearly define the due process available to neighbors seeking to sue.<sup>107</sup> However, the New York Supreme Court-Appellate Division held that the New York law, which requires case-by-case investigation of whether the defendant follows sound agricultural practices, was constitutional and did not violate procedural due process.<sup>108</sup> This case-by-case investigation, rather than a blanket protection for any operation in an agricultural district, is a key distinction made by the court in determining the New York statute was constitutional.<sup>109</sup>

Regardless of whether a state chooses to adopt a provision that follows the Michigan model or the New York model, the importance of having this type of provision is clear. The certainty and solace that a provision can bring to a producer who seeks to ensure he or she is complying with appropriate techniques and is consequently protected by right to farm laws cannot be overstated. Further, the chance for producers to be involved in determining the correct methods to be used, rather than letting a judge or jury of lay people make this determination during a trial, is vitally important.

### B. Attorney Fee Recovery

Because production agriculture is extremely capital intensive, any unforeseen expense can spell disaster for a producer. The cost of attorney

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998).

<sup>107</sup> *KAY*, *supra* note 12, at 20.

<sup>108</sup> *Id.* (citing *Pure Air & Water, Inc. v. Davidsen*, 246 A.D.2d 786, 668 N.Y.S.2d 248 (N.Y. App. Div. 1998)).

<sup>109</sup> *Vincent*, *supra* note 45, at 2.

fees incurred in defending against a nuisance lawsuit is exactly the type of expense that could easily put a producer out of business.<sup>110</sup> Protecting producers from these costs is essential because, “[w]e don’t want farmers and ranchers forced out of their livelihood because of the costs from a court battle.”<sup>111</sup> This is of particular concern to small producers, who have a substantial portion of their money invested in their operation, and who may not have the financial ability to hire an attorney to defend their farming practices.<sup>112</sup> Sometimes just the threat of a lawsuit alone may be enough to make a producer decide to stop his or her operation and move.<sup>113</sup> This was the case for one young farmer in Alabama.<sup>114</sup> He had spent every penny he had to build chicken houses and start farming on land that he purchased from his grandfather.<sup>115</sup> When a developer called the twenty-one year old farmer and threatened a lawsuit, which the farmer had no money to defend, he gave up his dream of farming altogether.<sup>116</sup>

To prevent this situation, many right to farm statutes include a provision whereby if a producer is sued and prevails in court, the producer may recover attorney fees and legal costs from the plaintiff. Some statutes, such as the New Mexico and Hawaii right to farm statutes, provide that if a producer is frivolously sued, the farmer may recover attorney fees and costs from the plaintiff.<sup>117</sup> Other states have taken it one step further, and allow for recovery of fees and expenses by the producer not only in frivolous suits, but in any suit where a nuisance is found not to exist.<sup>118</sup>

The details of exactly what fees and expenses may be recovered also vary by state. Wisconsin law states that a plaintiff must pay the defendant’s expenses if the court finds a nuisance did not exist.<sup>119</sup> “Litigation

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<sup>110</sup> See Bills, *supra* note 11, at 1.

<sup>111</sup> House, *supra* note 66 (quoting Randy Parker, Chief Executive Officer, Utah Farm Bureau).

<sup>112</sup> M.J. Ellington, *Farmers Debate Bill at Hearing*, THE DECATUR DAILY (Decatur, A.L.), Mar. 13, 2008; Marshall, *supra* note 5.

<sup>113</sup> House, *supra* note 66 (according to Todd Bingham, Vice President of Public Policy, Utah Farm Bureau).

<sup>114</sup> Telephone Interview with Senator Kim Benefield, *supra* note 67.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> NMSA, 1978 § 47-9-7 (2008); HAW. REV. STAT. § 165-5; 607-14.5 (2008) (may award reasonable fees); LA. REV. STAT. ANN. § 3:3605 (2008) (may award fees).

<sup>118</sup> WIS. STAT. § 823.08(4)(b) (2008) (shall award fees); MICH. COMP. LAWS § 286.473(b) (2008) (farm may recover); TEX AGRIC. CODE ANN. § 251.004(b) (Vernon 2008) (plaintiff is liable for costs).

<sup>119</sup> WIS. STAT. § 823.08(4)(b) (2008).

expenses” are defined as “the sum of the costs, disbursements and expenses, including reasonable attorney, expert witness, and engineering fees necessary to prepare for or participate in the nuisance action.”<sup>120</sup> In Texas, a person who brings a nuisance suit that is barred by the right to farm statute is liable to the producer for “all costs and expenses incurred in defense of the action, including but not limited to attorney’s fees, court costs, travel, and other related incidental expenses incurred in the defense.”<sup>121</sup>

Unfortunately, several states have no attorney fee provision in their right to farm laws,<sup>122</sup> and the results can be alarming. Consider Kevin Birrell, a producer in Utah who raises alfalfa and horses.<sup>123</sup> Mr. Birrell successfully defended a nuisance suit filed against him by his neighbors, who complained about hay and manure blowing into their swimming pool and about the smell of manure used as fertilizer.<sup>124</sup> The victory cost him over \$70,000.<sup>125</sup> As there was no attorney fee provision in the Utah right to farm statute at that time,<sup>126</sup> Mr. Birrell was forced to pay the attorney fees himself.<sup>127</sup> According to Mr. Birrell, if it were not for his off-farm employment, the lawsuit would have put him out of the farming business.<sup>128</sup>

Fortunately, the result was different for the Stoneman family in Michigan.<sup>129</sup> The Michigan law allows successful producers to recover the costs and expenses reasonably incurred in defending the case and their reasonable and actual attorney fees.<sup>130</sup> For the Stoneman family, this totaled over one hundred thousand dollars.<sup>131</sup> Similarly, the Wisconsin right to farm statute allowed Mr. Zawistowski to recover his litigation expenses as well.<sup>132</sup> Fees incurred by Mr. Zawistowski and his insurance company, which intervened as a defendant in the case, totaled about one

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<sup>120</sup> *Id.*

<sup>121</sup> TEX AGRIC. CODE ANN. § 251.004(b) (Vernon 2008).

<sup>122</sup> UTAH CODE ANN. § 78B-6-1104 (2008); VA. CODE ANN. § 3.2-300-302 (2008).

<sup>123</sup> House, *supra* note 66.

<sup>124</sup> *Id.*

<sup>125</sup> Telephone Interview with Todd Bingham, *supra* note 66.

<sup>126</sup> UTAH CODE ANN. § 78B-6-1104 (2008).

<sup>127</sup> Telephone Interview with Todd Bingham, *supra* note 66.

<sup>128</sup> House, *supra* note 66.

<sup>129</sup> Battel, *supra* note 29.

<sup>130</sup> MICH. COMP. LAWS § 286.473(b) (2008).

<sup>131</sup> Telephone Interview with Wayne Whitman, *supra* note 22.

<sup>132</sup> See *supra* notes 68-75 and accompanying text.

million dollars.<sup>133</sup> Mr. Zawistowski was fortunate to have assistance and backing from his insurer, a luxury that many other producers do not have, that allowed him to keep fighting the lawsuit.<sup>134</sup> The trial court awarded the entire amount of Mr. Zawistowski's attorney fees, which totaled \$549,362.17, but denied recovery of fees to his insurer.<sup>135</sup> Although the insurer threatened to appeal this decision, the parties reached a settlement prior to any appeal.<sup>136</sup>

This attorney fee provision may be the most powerful provision in a right to farm statute. Not only is it a financial necessity for producers, but knowing they could face costs of at least tens of thousands of dollars can create a strong deterrent for a plaintiff not to file a lawsuit that is unfounded or frivolous.<sup>137</sup> Without this provision, a farmer could win all of the legal battles in court, but lose the war itself—the ability to continue farming—due to the expenses of the legal battles.

### C. Changes in Operations

Agricultural technology grows and advances at a rapid pace.<sup>138</sup> Farmers must be able to make changes to their production methods and business practices to be financially competitive with other operations.<sup>139</sup> Much of the new technology developed in agriculture focuses on being more cost effective and more environmentally friendly.<sup>140</sup> According to a Utah Farm Bureau representative, it is important to allow producers to make conscious decisions to change production so that they may more effectively manage their farms.<sup>141</sup> For example, farmers may need to practice crop rotation to maintain a soil high in nutrients, increase yields,

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<sup>133</sup> *Right-to-farm cases won't fade with time*, THE COUNTRY TODAY (Eau Claire, W.I.), Feb. 12, 2008, available at <http://www.thecountrytoday.com/story-opinions.asp?id=BFOO5F69AH7>.

<sup>134</sup> *Id.* (stating that the insurance company never considered settling the case and was willing to see it all the way through).

<sup>135</sup> Email from Mark Andrews, Member, Winner, Wixon & Pernitz (Jan. 5, 2009 10:02 MST).

<sup>136</sup> Email from Mark Andrews, Member, Winner, Wixon & Pernitz (Jan. 5, 2009 8:18 MST).

<sup>137</sup> Andrew C. Hanson, *Wisconsin's Right to Farm Law*, 75 WIS. LAWYER 10, 59 (2002).

<sup>138</sup> KEITH O. FUGLIE ET AL., PRODUCTIVITY GROWTH IN U.S. AGRICULTURE 1, UNITED STATES DEPARTMENT OF AGRICULTURE ECONOMIC RESEARCH SERVICE (Sept. 2007) available at <http://www.ers.usda.gov/publications/EB9/eb9.pdf>.

<sup>139</sup> Terence J. Centner, *Curbing the Right-to-Farm*, CHOICES, 2000, at 42; Centner, *supra* note 4, at 261.

<sup>140</sup> See e.g. SHIMSHON BEN YEOSHUA, ENVIRONMENTALLY FRIENDLY TECHNOLOGIES FOR AGRICULTURAL PRODUCE QUALITY (CRC Press 2005).

<sup>141</sup> Telephone Interview with Todd Bingham, *supra* note 66.

or eliminate weed or insect problems.<sup>142</sup> This may mean that a farmer goes from growing hay one season to wheat the next to fallow ground the following. An example of a need to upgrade and expand can be seen from the Stoneman family in Michigan.<sup>143</sup> Just prior to the nuisance suit being filed against the Stoneman's, the four brothers and their father were all working at the family operation.<sup>144</sup> The brothers decided that for all of their respective families to be able to make a living from the farming operation, they needed to upgrade and expand their facilities and their operation.<sup>145</sup>

Realizing this need for growth exists, several states have provisions in their right to farm laws that allow for growth and improvement.<sup>146</sup> In Georgia, expanding physical facilities or adopting new technology does not alter the established date of operation for right to farm protection.<sup>147</sup> In Pennsylvania, the right to farm law protects "new activities, practices, equipment and procedures consistent with technological development within the agricultural industry."<sup>148</sup> In Wisconsin, the limitation on nuisance actions applies regardless of whether a change in methods by the farmer contributed to the alleged nuisance.<sup>149</sup>

Conversely, many right to farm laws limit protection to only those farms with no material changes in the condition or nature of farming operations,<sup>150</sup> or fail to address the issue at all.<sup>151</sup> This type of law puts an unreasonable restriction on producers that could limit their ability to grow, improve, or even afford to continue farming. A producer in a state

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<sup>142</sup> Laura Skillman, University of Kentucky College of Agriculture, *Crop Rotation Important Part of Farming*, Jan. 17, 2001, <http://www.ca.uky.edu/agc/NEWS/2001/Jan/croprostate.htm> (last visited Jan. 24, 2009).

<sup>143</sup> See *supra* notes 129-30 and accompanying text; Telephone Interview with Wayne Whitman, *supra* note 22.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> "The legislature finds that development in rural areas and *changes in agriculture technology, practices and scale of operation* have increasingly tended to create conflicts between agricultural and other uses of land. The legislature believes that, to the extent possible consistent with good public policy, the law should not hamper agricultural production or the *use of modern agricultural technology.*" WIS. STAT. § 823.08(1) (2008) (emphasis added).

<sup>147</sup> GA. CODE ANN. § 41-1-7(d) (West 2008).

<sup>148</sup> 3 PA. CONS. STAT. § 952 (2008).

<sup>149</sup> WIS. STAT. § 823.08(3)(am) (2008).

<sup>150</sup> BILLS, *supra* note 21, at 13.

<sup>151</sup> See HAW. REV. STAT. §165-1-6 (2008). See also DEL. CODE ANN. tit. 3, § 1401 (2008); IDAHO CODE ANN. § 22-4501 (2008) (silent on the effect of any change in operation); *Payne v. Skaar*, 900 P.2d 1352, 1355 (Idaho 1995) (holding that the Idaho Right to Farm Act did not intend for a producer to be allowed to expand without hindrance and be immune from a nuisance suit).

where the law does not allow changes in an operation may have to choose between a larger or more efficient operation and the protection of a right to farm statute, although this was certainly not a consequence intended by right to farm statutes.<sup>152</sup> This could mean that a dairy farmer who maintained a constant herd size would be protected by the right to farm statute in the state, but a producer who expanded his herd size or adopted new technology would receive no protection.<sup>153</sup> For example, in Texas, if any “substantial change” occurs in the type of farming operation, right to farm protection will not be afforded to the operation.<sup>154</sup> According to the Texas Farm Bureau, this provision could pose a problem for a producer looking to diversify his crops or livestock.<sup>155</sup> Likewise, in Minnesota, if an operation is “subsequently expanded or significantly altered,” the established date of operation changes with each expansion or alteration.<sup>156</sup> The statute defines expansion as “expansion by at least 25 percent in the number of a particular kind of animal or livestock located on an agricultural operation.”<sup>157</sup>

Some states have found middle ground. Like Texas,<sup>158</sup> in Indiana there may be no significant change in the farming operation.<sup>159</sup> However, the Indiana provision lists several actions which are not considered significant changes.<sup>160</sup> A farmer does not lose his right to farm protection if he changes from one type of agricultural operation to another type of agricultural operation, if he changes the ownership or size of the operation, if his status in a government program changes, or if he adopts new technology.<sup>161</sup> In Missouri, the legislature also drafted an interesting provision regarding changes to farming operations and how they relate to right to

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<sup>152</sup> Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 128 (1983).

<sup>153</sup> BILLS, *supra* note 21, at 14.

<sup>154</sup> TEX. AGRIC. CODE ANN. § 251.004(a) (Vernon 2008). *See also e.g.* MISS. CODE ANN. § 95-3-29(2)(b) (2008); CONN. GEN. STAT. § 19A-341(a) (2008); CAL. CIV. CODE § 3482.5(a)(1) (West 2008).

<sup>155</sup> Telephone Interview with Edward Small, Partner, Jackson Walker, LLP (June 2, 2008).

<sup>156</sup> MINN. STAT. § 561.19(b) (2008).

<sup>157</sup> *Id.*

<sup>158</sup> TEX. AGRIC. CODE ANN. § 251.004(a) (Vernon 2008).

<sup>159</sup> IND. CODE § 32-30-6-9(d)(1) (2008).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* *See also* MICH. COMP. LAWS § 286.473(3) (2008) (stating that a farm shall not be found a nuisance as a result of a change in size or ownership, temporary cessation of farming, enrollment in a government program, adoption of new technology or changing the type of product that the farm produces).

farm protections.<sup>162</sup> The Missouri statute provides that an operation is allowed to “reasonably expand” its operations in terms of the number of animals or acres so long as all environmental laws and regulations are followed and the expansion does not create a substantially adverse hazard to public health or a significant difference in environmental pressures on neighbors.<sup>163</sup> In particular, if a poultry or livestock operation seeks to expand and still maintain the statutory protection, the producer must adopt waste handling procedures and facilities that meet the minimum recommendation made by the state extension service.<sup>164</sup>

This type of middle ground may be the best approach to finding a suitable provision that will balance the interests of new rural residents and those of long-time producers. Provisions like those in Indiana or Missouri will allow the growth, expansion, and new technology necessary for a farmer or rancher to remain involved in production agriculture. However, the statutes are not limitless so to allow any type of new operation to arise and to leave neighbors with no recourse. This type of limitless growth being allowed at the expense of any rights of the neighboring citizens was part of the reason the Iowa statute was found unconstitutional in *Bormann v. Board of Supervisors*.<sup>165</sup>

#### D. Relief

If a court determines a nuisance exists, the damages to be awarded should allow farmers to remain in production and should allow family farmers to remain on the land their families have farmed for generations. A permanent injunction issued against an operation requires that the activities completely cease.<sup>166</sup> This type of relief will cost the producer his livelihood, and very likely his home, while also causing the loss of another producer to the American food supply.<sup>167</sup>

In order to prevent the loss of agriculturists, Wisconsin has placed limits on what types of damages may be awarded in the event a nuisance is found.<sup>168</sup> The Wisconsin legislature found it necessary and in the best interest of the state to set limits on the remedies available in nuisance

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<sup>162</sup> MO. REV. STAT. § 537.295(1) (2008).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998). *See also* Centner, *supra* note 139, at 45 (discussing how lack of any limits on changes contributed to the unconstitutionality of the Iowa statute).

<sup>166</sup> Pittman, *supra* note 2, at § 2; BILLS, *supra* note 21, at 13.

<sup>167</sup> Telephone Interview with Jeff Webb, Deputy Attorney General, Alabama Dep’t of Agric. and Industries (April 9, 2008).

<sup>168</sup> WIS. STAT. ANN. § 823.08(1) (2008).

suits.<sup>169</sup> The Wisconsin right to farm statute prohibits the court from granting relief to a plaintiff that would “substantially restrict or regulate the agricultural use or agricultural practice,” unless the practice causes a substantial threat to public health or safety.<sup>170</sup> Further, if the court orders a producer to take action to mitigate the effects of the nuisance, assuming the nuisance is not a substantial threat to public health or safety, the court is required to take several steps.<sup>171</sup> First, it must provide suggestions from public agencies as to the type of practices that might mitigate the nuisance.<sup>172</sup> Second, it is required to provide the producer reasonable time of no less than one year to take the remedial action ordered by the court.<sup>173</sup> Finally, the court may not order the defendant to take any action that adversely affects the economic viability of the agricultural use of the land.<sup>174</sup> Thus, even if a court were to grant compensatory damages, the cost of these damages could not adversely affect the economic viability of the farmer’s operation.<sup>175</sup> In *Zawistowski*, it was argued by the defense that the court could not issue the plaintiff’s requested injunction, as it would have created a substantial restriction on Mr. Zawistowski’s farming practices, and would have also destroyed the economic viability of his cranberry farm.<sup>176</sup> The court did not rule on this contention.

Similarly, although not required by statute, Alabama courts frequently file an order, demanding that a defendant follow generally accepted farming practices to prevent or mitigate the nuisance activity, rather than issuing an injunction.<sup>177</sup> Additionally, in Michigan, if a producer is found not to be following generally accepted practices required for protection, the producer has 30 days to correct the violation of the practices and may be given more time where the 30 days is not a feasible length of time to implement the change.<sup>178</sup> This gives producers an opportunity to correct their mistakes, rather than issuing a permanent injunction that would cease their livelihood.

Although prior to the enactment of a right to farm statute in Arizona, it is important to consider the relief granted to plaintiffs in *Spur Industries*,

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.* § 823.08(3)(b)(1).

<sup>171</sup> *Id.* § 823.08(3)(b)(2)-(3).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> Hanson, *supra* note 137, at 60.

<sup>176</sup> Non-Party Brief, *supra* note 36, at 14.

<sup>177</sup> Telephone Interview with Jeff Webb, *supra* note 167.

<sup>178</sup> MICH. COMP. LAWS § 286.474(3); Michigan Policy Network, *supra* note 53.

*Inc. v. Del E. Webb Development Co.*<sup>179</sup> In this case, plaintiff was a retirement home seeking a permanent injunction against the defendant, a cattle feedlot located nearby.<sup>180</sup> The feedlot had been in operation for numerous years, well before the retirement home was developed nearby.<sup>181</sup> The trial court found a nuisance to exist due to flies and odor caused by the feedlot and issued a permanent injunction.<sup>182</sup> However, the court went a step further and fashioned a unique type of remedy. The court required the developer to indemnify the feedlot for a reasonable amount of the costs of moving the feedlot to another location or for the reasonable costs of shutting down.<sup>183</sup> The court reasoned that the feedlot was being forced to move, but not because of any wrongdoing on its part.<sup>184</sup> Further, the developer was entitled to an injunction, but not because he was blameless in causing the nuisance.<sup>185</sup> This decision has been praised as establishing a useful precedent to allow a court to force a producer to move his operation at the expense of the plaintiff who complains.<sup>186</sup> For example, some view the decision as a “win-win” for both plaintiff and defendant, as “the plaintiff realizes his goal of terminating the nuisance, while the defendant avoids liability and moving expenses.”<sup>187</sup> This type of approval may encourage other courts to apply this method of relief.<sup>188</sup>

However, in the case of a family operation, this praise and satisfaction would not exist. Unlike the feedlot in *Spur*, it is important for family farmers to be able to stay on their land. A family who has worked the land for many generations holds a different view; one of themselves as stewards of that land.<sup>189</sup> Family farmers have more than just a desire to farm; they have a connection to the land that their parents and grandpar-

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<sup>179</sup> *Spur Inds., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972). The Arizona right to farm statute was adopted in 1981. Under that current statute, the lawsuit may well have been unsuccessful if the feedlot complied with good agricultural practices, as it was established prior to surrounding nonagricultural uses. ARIZ. REV. STAT. ANN. § 3-112 (2008).

<sup>180</sup> 494 P.2d at 701.

<sup>181</sup> *Id.* at 703-04.

<sup>182</sup> *Id.* at 705-06.

<sup>183</sup> *Id.* at 708.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Osborne M. Reynolds, Jr., *Of Time and Feedlots: The Effect of Spur Industries on Nuisance Law*, 41 WASH. U. J. URB. & CONTEMP. L. 75, 92 (1992).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 94.

<sup>189</sup> Lawrence Ragonese, *Farmland May Dwindle, But Not Without a Fight*, STAR-LEDGER (Newark, N.J.), Mar. 23, 1997, at 51 (quoting Bill Cogger, Chester Township liaison to county agricultural board).

ents farmed. The farmland provides a connection to the roots of their family.<sup>190</sup> According to Maria Young, a third generation farmer from New Jersey, “I like to come out and pick up the dirt, feel it. It’s like my blood, my whole being. And I don’t like to see it hurt.”<sup>191</sup> According to her daughter, Marie, the family farm is a part of her that she holds onto, protects, and will not give up.<sup>192</sup> As farmers age and face the end of their lives, they want to see the land that they have worked and tilled for generations to continue to be used for agriculture.<sup>193</sup>

Offering family farmers, who possess this type of connection to the land and to their family’s roots, a solution that involves moving to a different area would hardly be seen as a successful outcome. It is imperative that this distinction be made when granting relief between family farmers who want to remain involved in production agriculture but also have this type of connection with, and desire to remain on, the land versus other producers or agribusinesses that merely want to remain in business.

#### *E. Education and Disclosure*

Right to farm statutes can only be effective if people in the community are aware of their existence and understand how the statutes operate. In fact, many people believe that having specific disclosure requirements regarding right to farm statutes is key to protect producers.<sup>194</sup> For a right to farm law to be successful in achieving its goal of protecting agriculture, the law must contain provisions which provide information about the law to neighbors, producers, and county officials. In addition to educating these people about the law, it is essential for the state to facilitate communication and education between the producer and the neighbors. This type of communication may prevent lawsuits from being filed.

Seeking to ensure that neighboring residents are aware of the right to farm laws, states have adopted several different methods of providing

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<sup>190</sup> *Id.* “For them, the value of the land is the land, and the family that’s part of it.” Beverly Corbell, *Family holds on to traditions – and ranching way of life*, THE DAILY SENTINEL (Grand Junction, Co.), Mar. 12, 2008, available at [http://www.gjsentinel.com/news/content/features/stories/2008/03/12/031608\\_vela\\_wwwpor.html?cxtype=rss&cxsvc=7&cxcat=5](http://www.gjsentinel.com/news/content/features/stories/2008/03/12/031608_vela_wwwpor.html?cxtype=rss&cxsvc=7&cxcat=5).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Terri P. Guess, *Farmers in Bethlehem Township Fight for Right-to-Farm Ordinance*, STAR-LEDGER (Newark, N.J.), May 5, 1996, at 45.

<sup>194</sup> Matthew Wacker et al., *County Right-to-Farm Ordinances in California: An Assessment of Impact and Effectiveness*, (Agricultural Issues Center Brief, University of California), May 2001, at 6.

such information. In California, the state legislature allows counties and cities to require realtors to disclose to buyers possible negative impacts caused by nearby farms.<sup>195</sup> Most local ordinances require that homebuyers moving onto land near a working farm or ranch be notified of the potential for negative effects caused by the production operation.<sup>196</sup> Many residents in California view the primary purpose of the right to farm laws as educating and informing residents about the importance of agriculture in the community.<sup>197</sup> Some states send notices in annual tax bills, some include the notice as part of any real estate transaction, and some communities have sheriff's deputies distribute pamphlets to residents.<sup>198</sup> In New York, real estate brokers are required by law to have buyers of land in agricultural areas sign disclosures informing them of the right to farm law.<sup>199</sup> Likewise, in Michigan, a person selling land within a mile of a farm may provide a prospective buyer with the following statement: "This notice is to inform prospective residents that the real property they are about to acquire lies within 1 mile of the property boundary of a farm or farm operation. Generally accepted agricultural and management practices may be utilized by the farm or farm operation and may generate usual and ordinary noise, dust, odors, and other associated conditions, and these practices are protected by the Michigan right to farm act."<sup>200</sup>

Likewise, county officials must understand the laws. Ensuring that these officials, like sheriffs deputies, for example, know how the right to farm statutes work is extremely important.<sup>201</sup> These officials are the first people who will respond when a complaint arises.<sup>202</sup> If they are properly

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<sup>195</sup> *Id.* at 2. In addition to providing information about right to farm laws to new rural residents, it is equally as important to inform producers about the protections they can receive under the laws. When laws exist that can provide such crucial protection to agriculturists, it is essential that these laws are known to the people who they intend to protect. In New Jersey, most farmers were aware of the right to farm law, but did not know how to utilize the law. Lisansky, *supra* note 6, at 366.

<sup>196</sup> Wacker, *supra* note 194, at 1. For example, a San Mateo County, California ordinance required neighbors be informed that they "should be prepared to accept... inconvenience or discomfort from normal, necessary agricultural operations." Shaun Bishop, *San Mateo supes approve farm ordinance*, INSIDE BAY AREA (Cal.), Oct. 17, 2007.

<sup>197</sup> Wacker, *supra* note 194, at 3; Telephone Interview with Karen Mills, Associate Counsel, Legal Services Division, California Farm Bureau Federation (July 14, 2008).

<sup>198</sup> Wacker, *supra* note 194, at 5.

<sup>199</sup> Marshall, *supra* note 5; N.Y. AGRIC & MKTS. LAW § 310 (McKinney 2008).

<sup>200</sup> Michigan Policy Network, *supra* note 53.

<sup>201</sup> Telephone Interview with John Gamper, Director, Taxation and Land Use, California Farm Bureau Federation (July 21, 2008).

<sup>202</sup> Wacker, *supra* note 194, at 3.

educated on how to respond to these complaints, the situation can often be handled immediately, thus preventing escalation into a lawsuit.

In addition to informing neighbors about right to farm laws, it is perhaps even more important to educate them about agriculture in general. Although this type of education is generally not statutorily mandated, it can be extremely important to prevent nuisance complaints and lawsuits. Legislatures should provide some type of method to notify adjacent land owners of the normal agricultural activities in the area.<sup>203</sup> The Virginia Cooperative Extension has undertaken an important project, funded by a state grant, to help provide for this type of communication and agricultural education for neighbors.<sup>204</sup> Virginia Cooperative Extension has done extensive interviews with both neighbors and farmers to determine what their views and opinions are on the issue of nuisance complaints.<sup>205</sup> After these interviews were completed, a resource guide was published to help producers and neighbors understand each other's point of view.<sup>206</sup> The publication will cover a wide variety of areas from manure application to slow-moving farm equipment.<sup>207</sup> According to Martha Walker, a Community Viability Specialist with the Virginia Cooperative Extension, "[i]t all comes down to respect. It seems like when each side knows more about the activities of the other, there is more respect and litigation does not come up nearly as often."<sup>208</sup>

Often, communication between the farmer and the neighbors can be key to preventing any type of dispute or lawsuit. Simply put, in addition to relying on policymakers or government agencies to educate the public, producers must become educators in order to ensure the future success

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<sup>203</sup> GOVERNMENTAL AFFAIRS & COMMODITIES DIVISION OF THE ILLINOIS FARM BUREAU, ILLINOIS NUISANCE SUITS AND THE RIGHT-TO-FARM 2 (2007).

<sup>204</sup> Telephone Interview with Martha Walker, Community Viability Specialist, Virginia Cooperative Extension (May 9, 2008). Funding was provided by the BallyShannon Fund in Charlottesville, Va. See also Christina Rogers, *The Reality of Rural Life*, THE ROANOKE TIMES, Apr. 1, 2007. Other states have implemented similar projects. For example, one county in Michigan provided new residents with a brochure containing a scratch-and-sniff area that gave readers a smell of manure. *Id.*

<sup>205</sup> Martha Walker, *Resource Guide for Rural Virginia* (Virginia Cooperative Extension, Virginia Tech University) (2009); Telephone Interview with Martha Walker, *supra* note 204.

<sup>206</sup> Telephone Interview with Martha Walker, *supra* note 204. Copies of the publication are now available through the Virginia Extension Distribution Center.

<sup>207</sup> Rogers, *supra* note 204.

<sup>208</sup> Telephone Interview with Martha Walker, *supra* note 204.

and prosperity of the American farmer.<sup>209</sup> Producers must be willing to help educate new rural residents about what they should expect to hear, smell, and see around a farming operation.<sup>210</sup> A California Agricultural Commissioner explained that “[o]ften the urban resident just wants to know what’s going on. When they hear a noise at night they will know what’s going on, or they will know to close their windows at certain times of the day to avoid sprays and dust.”<sup>211</sup> Cornell University Extension helps producers work on their neighbor relations in teaching them how to discuss this type of issue with their neighbors.<sup>212</sup> Compromise between the producer and neighbor is usually possible when the parties understand the needs of each other.<sup>213</sup> For example, some dairy producers send frequent mass mailings to neighbors seeking feedback from the neighbors on the farming practices used by the dairies.<sup>214</sup> In addition, the mailings include dates and information about specific practices that the dairy intends to use that could be offensive, such as pesticide applications or the spreading of manure, so that the neighbors have notice in advance of the practice taking place.<sup>215</sup>

#### IV. CONCLUSION

The importance of protecting farms from nuisance lawsuits cannot be overstated. The influx of urban residents moving into rural areas, combined with these residents lack of knowledge of agriculture could spell disaster for the American farmer. Right to farm statutes are an effective way to provide protection to producers in the face of these challenges. When drafted correctly, these statutes can be particularly effective in protecting the small, family farmer. The balance to be achieved between real estate developments and farms involves balancing food production against expansion of residential areas and should be a concern for all United States citizens.<sup>216</sup> Agriculture affects every person, every day.

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<sup>209</sup> Luttrell, *supra* note 3.

<sup>210</sup> *Right-to-farm cases won't fade with time*, *supra* note 133.

<sup>211</sup> Wacker, *supra* note 194, at 4.

<sup>212</sup> KAY, *supra* note 12.

<sup>213</sup> Marshall, *supra* note 5; *See also* KAY, *supra* note 12, at 6.

<sup>214</sup> BILLS, *supra* note 21.

<sup>215</sup> *Id.*

<sup>216</sup> Hannah, *supra* note 17, at 13.

It is imperative that we protect our producers from baseless nuisance suits that seek to punish them for doing their jobs.

*The farm just won't get tended, if the farmer isn't here  
And the 'Amber Waves Of Grain' may disappear.*<sup>217</sup>

TIFFANY DOWELL\*

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<sup>217</sup> MERLE HAGGARD, *AMBER WAVES OF GRAIN* (Epic 1990).

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