



February 6, 2023

Senate Committee on Agriculture  
Vermont General Assembly  
115 State Street  
Montpelier, VT 05633

By email to: llechman@leg.state.vt.us

**Re: DR 23-0138, An act relating to protection from nuisance suits for agricultural activities.**

Conservation Law Foundation (“CLF”) is pleased to submit written testimony to the Senate Committee on Agriculture (“Committee”) summarizing oral testimony offered to the Committee on February 3, 2023. CLF opposes DR 23-0138, An act relating to protection from nuisance suits for agricultural activities (“Draft Bill”). The Draft Bill would curtail important property rights; deny Vermonters full recourse to the courts when they have no other option to protect their property, health, and welfare; and upset the careful balance already established by Vermont’s existing right-to-farm law.<sup>1</sup> For these reasons, Vermont should leave its existing right-to-farm law unchanged.

**I. The law of nuisance and trespass protects Vermonters’ property rights, health, and welfare by providing them recourse to the courts when neighbors ignore their rights and when the government fails to act.**

Nuisance and trespass lawsuits provide Vermonters a tool of last resort to protect their property, health, and welfare when neighbors ignore their property rights and when the government fails to intervene on their behalf.

The law of nuisance protects Vermonters’ right to use and enjoy their property. If one person does something on their property that unreasonably and substantially interferes with another person’s use and enjoyment of their property, then that person has caused a nuisance. For example, if one person causes toxic chemicals to float from their property to another person’s property, then they have caused a nuisance.

The law of trespass protects Vermonters’ right to exclusive possession of their property. If one person enters another person’s property without permission or causes something else to enter another person’s property without permission, then that person has caused a trespass. For example, if one person discharges sewage on another person’s property, then they have caused a trespass.

Right-to-farm laws offer policymakers an opportunity to refine the law of nuisance by protecting

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<sup>1</sup> See 12 V.S.A. §§ 5751–54.

farmers from unfair lawsuits while preserving their neighbors' recourse to the courts.

The best right-to-farm laws recognize that conflicts sometimes develop when nonagricultural land uses occur in traditionally agricultural areas. Farmers may face unwarranted nuisance lawsuits brought by neighbors who are unfamiliar or uncomfortable with what farming entails. Good right-to-farm laws also recognize power imbalances. In Vermont, it is sometimes the case that a farm's neighbors can commit more resources to pursuing a lawsuit than a farm can commit to defending one. In these circumstances, lawsuits that unfairly waste a farmer's limited time and resources might force a farmer who did nothing wrong to back down. This is especially true when farmers face difficult economic times, just like Vermont's farmers do today.

The best right-to-farm laws respond by protecting farmers from unfair nuisance lawsuits while preserving their neighbors' access to the courts when that access is justified, such as when health, safety, or welfare are in jeopardy. Good right-to-farm laws are a balancing act. They balance a farmer's right to farm free from harassment with a neighbor's right to use and enjoy their property in good health and safety. Good right-to-farm laws do not pick a side. Instead, they create the conditions that allow farm communities to thrive even as they welcome neighbors who may or may not be farmers.

## **II. Nuisance lawsuits against farms are rare in Vermont because courts apply a demanding standard to nuisance allegations, because Vermont's existing right-to-farm law already protects farmers from unfair nuisance lawsuits, and because farmers and their neighbors prefer to resolve disputes without resorting to court.**

Nuisance lawsuits against farms are rare in Vermont. To CLF's knowledge, *Aerie Point Holdings v. Vorsteveld Farm*<sup>2</sup> is the first nuisance case filed against a Vermont farm in years. These lawsuits are rare for several reasons.

First, Vermont courts apply a demanding standard when neighbors allege that a farm is causing a nuisance. This standard discourages neighbors from filing lawsuits without compelling evidence to substantiate their claims. A neighbor who asserts that a farm is causing a nuisance must bring evidence to demonstrate that the farm's interference with the neighbor's property is "unreasonable and substantial."<sup>3</sup> To be substantial, the interference must be more than "the customary interference a land user suffers in organized society," and it must be offensive "to the normal person in the community."<sup>4</sup>

A normal person in Vermont knows that living in a farm community means accommodating farms. It follows that the Vermont Supreme Court has explained that "the unsightliness of a thing, without more, does not render it a nuisance under the law."<sup>5</sup> In other words, a neighbor's preferences are not enough to make something a nuisance. Instead, an activity must cause real harm for the courts to find a nuisance.

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<sup>2</sup> See *Aerie Point Holdings, LLC v. Vorsteveld Farm, LLP*, Vt. Super. Ct., Docket No. 72-4-20 Ancv, Decision (Mar. 28, 2022).

<sup>3</sup> *Coty v. Ramsey Assocs., Inc.*, 149 Vt. 451, 457, 546 A.2d 196, 201 (1988); see also *Alberino v. Balch*, 2008 VT 130, ¶ 25, 185 Vt. 589, 596, 969 A.2d 61, 70 (Skoglund, J., dissenting).

<sup>4</sup> *Coty*, 149 Vt. at 457, 546 A.2d at 201 (internal quotation marks and citations omitted).

<sup>5</sup> *Id.*

Second, Vermont already has a well-balanced right-to-farm law that protects farmers from unfair lawsuits while preserving their neighbors' rights. Vermont's right-to-farm law achieves this by entitling farms "to a rebuttable presumption that [their agricultural activities do] not constitute a nuisance" if those activities (1) are consistent with the law; (2) are consistent with good agricultural practices; (3) existed before surrounding nonagricultural activities; and (4) have not changed significantly since the surrounding nonagricultural activities began.<sup>6</sup> A farm's neighbor can overcome the presumption only if they can show that the agricultural activity in question "has a substantial, adverse effect on health, safety, or welfare, or has a noxious and significant interference with the use and enjoyment" of the neighbor's property.<sup>7</sup> This is a much higher bar than the "substantial and unreasonable" standard that applies to nuisance absent the right-to-farm law.

Vermont's existing right-to-farm law demonstrates the balancing characteristic of good right-to-farm laws. A farm that established its activities first and follows the relevant regulations cannot be a nuisance just because a neighbor does not understand farming. But that neighbor's recourse to the courts is protected if the farm goes beyond what is reasonable and begins to threaten health, safety, or welfare.

Last, nuisance lawsuits against Vermont farms are rare because farmers and their neighbors care about each other. Farmers invest significant time educating their neighbors. Many welcome neighbors onto their farms. Neighbors, in turn, do their best to support farmers. So, when neighbors and farmers find themselves at odds, they prefer to resolve their problems in a neighborly way rather than fight about it in court.

### **III. Contrary to its intention, the Draft Bill would encourage neighbors to file nuisance and trespass lawsuits against farms rather than resolve problems amicably.**

The Draft Bill provides that "[n]o agricultural activity shall be or become a nuisance or trespass when the activity . . . has been in operation for more than one year and the activity was not a nuisance or trespass at the time the activity was initiated . . . ."<sup>8</sup> This provision gives neighbors just one year to file a lawsuit if they believe that a farm is causing a nuisance or a trespass. One year is very little time. It is often too little time for a neighbor and a farmer to discuss a significant issue, settle on a path forward, and implement that solution. Nor is it enough time for a neighbor to file a complaint with the relevant agency and expect a resolution. By establishing such a short window, the Draft Bill would encourage neighbors to file a lawsuit as quickly as possible to preserve their access to the courts.

### **IV. *Aerie Point* demonstrates that nuisance, trespass, and right-to-farm are working as intended in Vermont by providing neighbors recourse to the courts when they have no other option.**

The Draft Bill would respond to *Aerie Point*, the recently decided nuisance and trespass case in Addison County, by substantially limiting the circumstances in which a neighbor can prevail in a nuisance or a trespass lawsuit against a farm.

*Aerie Point*, however, does not show that Vermont's existing right-to-farm law is broken. To the

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<sup>6</sup> 12 V.S.A. § 5753(a)(1).

<sup>7</sup> *Id.* § 5753(a)(2).

<sup>8</sup> Draft Bill, Sec. 1, pp. 4–5.

contrary, the case shows that nuisance, trespass, and right-to-farm are working as intended by providing neighbors recourse to the courts when they have no other option. The neighbors chose not to file a lawsuit until years after the harm began, until after they raised the issue with the farm, until after they complained to the relevant agencies, and until after the government's response failed to abate the harm. In addition, the neighbors did not ask the court to impose damages. They only asked the court to make the harm stop.

In *Aerie Point*, the court held that a Large Farm Operation caused a nuisance and a trespass when it failed to “meet the obligation of every business . . . owner to dispose of its own waste products rather than discharge them onto their neighbor’s land.”<sup>9</sup> Instead, the farm implemented new practices that caused increasing quantities of wastewater the color of “chocolate milk”,<sup>10</sup> that contained *E. coli* at levels higher than Vermont standards,<sup>11</sup> and that burst from an agricultural tile drain outlet as if “from a fire hose” to overrun the neighbors’ property.<sup>12</sup> The result was *E. coli* in the neighbors’ pond, foam and toxic algae where the neighbors once swam, a muddy delta where the neighbors once enjoyed summer fires,<sup>13</sup> and flooded fields where the neighbors rotationally grazed cows, sheep, and chickens on their own farm.<sup>14</sup>

In addition, the farm installed manure pits that combined with local conditions to cause fumes and ammonia to settle over the neighbors’ home, preventing the neighbors from keeping the windows open or going outdoors for long periods of time.<sup>15</sup> The “testimony of several pro farming witnesses,” the court explained, established that the “intensity and location of the smell [were] above and beyond normal community standards, *even within an agricultural neighborhood.*”<sup>16</sup> All these changes occurred only after the neighbors acquired their property.

The court determined that the farm did not qualify for extra protection under the existing right-to-farm law’s rebuttable presumption for several reasons: the farm did not make “a showing of at least substantial compliance with” Vermont’s Required Agricultural Practices (“RAPs”); the farm had recently “acknowledged noncompliance with both state and municipal regulations”; and the farm’s practices had significantly changed when it began removing “10-15% of the water from its land.”<sup>17</sup>

Finally, the court reasoned that the farm had caused both a nuisance and a trespass when, “instead of absorbing the costs and consequences of its improvements, it shifted those consequences to its neighboring landowner.”<sup>18</sup> The court explained that its ruling recognized one of the basic duties that neighbors owe each other:

In other words, the Farm should meet the obligation of every business or property owner to dispose of its own waste products responsibly rather than discharge them onto their neighbor’s land. In this case, the evidence shows that the water can be

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<sup>9</sup> *Aerie Point Holdings*, Vt. Super. Ct., Docket No. 72-4-20 Ancv, Decision, at pp. 3, 29.

<sup>10</sup> *Id.* at 6, 7, 13.

<sup>11</sup> *Id.* at 13, 14, 21.

<sup>12</sup> *Id.* at 10.

<sup>13</sup> *Id.* at 7.

<sup>14</sup> *Id.* at 4, 8, 17, 24, 28.

<sup>15</sup> *Id.* at 19, 21, 25, 29–30.

<sup>16</sup> *Id.* at 30 (emphasis added).

<sup>17</sup> *Id.* at 19–20.

<sup>18</sup> *Id.* at 19–20, 25–30.

collected at a limited number of discharge points for responsible disposal. To prevent future trespasses and damage from nuisance, it is not necessary for [the farm] to change its farming practices; it is only necessary that it manage its own waste.<sup>19</sup>

Far from showing that Vermont's right-to-farm law is broken, *Aerie Point* demonstrates that nuisance, trespass, and right-to-farm continue to provide farmers protection from unfair lawsuits while preserving Vermonters' ability to turn to the courts when they have no other option. The neighbors sued to protect themselves and their property from real harm that had developed over many years, not to harass a farmer; they sued only after complaining to the relevant agencies and only after those agencies did too little to protect them; and they asked only for the harm to stop.

#### **V. Vermont's existing right-to-farm law is neither outdated nor in need of an update.**

Testimony before the Committee has described Vermont's right-to-farm law as a national outlier. This has not always been true. As recently as 2003, the Vermont Supreme Court commented that other states had "right to farm laws virtually identical to" Vermont's existing right-to-farm law.<sup>20</sup> Other states looked at right-to-farm through the same lens as Vermont: their goal was to protect farmers from unfair lawsuits while preserving neighboring landowners' recourse to the courts.

Over the years, however, more and more states have passed right-to-farm laws designed to allow farmers to ignore their neighbors. These laws have often been supported by the giants of industrial agriculture who see being a good neighbor as inconvenient and who dismiss their neighbors' property rights as troublesome.

Vermont's right-to-farm law stands out not because it is weak or outdated, but because it still takes farmers, their neighbors, and their communities seriously.

Relatedly, Vermont's right-to-farm law was updated last year. After significant consideration, the legislature determined that Vermont's right-to-farm law did not need to be restructured. Instead, the legislature concluded that it needed to clarify which agricultural activities Vermont's right-to-farm applied to. The legislature consequently passed a bill to broaden the definition of "agricultural activities" to help courts better implement the existing right-to-farm law.<sup>21</sup>

#### **VI. The Draft Bill would dramatically shift policy and threaten property rights by expanding right-to-farm to include trespass.**

The Draft Bill provides that "[n]o agricultural activity shall be or become a nuisance *or trespass* when the activity . . . has been in operation for more than one year and the activity was not a nuisance or trespass at the time the activity was initiated; or . . . the activity complies with the requirements of 6 V.S.A. chapter 215, including permitting requirements or requirements of the [RAPs]."<sup>22</sup> By contrast, Vermont's existing right-to-farm law extends only to nuisance.<sup>23</sup>

Adding trespass would mark a dramatic change in policy. Trespass protects a landowner's right to exclusive possession of their property. It guarantees a landowner's right to determine when

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<sup>19</sup> *Id.* at 29.

<sup>20</sup> *Trickett v. Ochs*, 2003 VT 91, ¶ 27.

<sup>21</sup> See 6 V.S.A. § 4802(10).

<sup>22</sup> Draft Bill, Sec. 1, pp. 4–5 (emphasis added).

<sup>23</sup> 12 V.S.A. § 5753.

others may enter or use their property. The Draft Bill would change this. It would allow farms to cause a trespass on private property without the landowner's permission if either (1) the landowner fails to file a lawsuit within one year of the trespass beginning, or (2) the farm's practices comply with Vermont's agricultural water quality laws and regulations. Critically, Vermont's water quality laws and regulations do not cover the full breadth of on-farm activities that might cause a trespass.

In addition, the Draft Bill's inclusion of trespass raises important constitutional questions. Both the Constitution of the United States<sup>24</sup> and the Constitution of the State of Vermont<sup>25</sup> require that property owners receive just compensation when their property is taken for public use. A series of cases in Iowa found that overly broad right-to-farm statutes created an easement on neighboring properties that required just compensation under Iowa's constitution.<sup>26</sup> The statutes in question only addressed nuisance. The Draft Bill's inclusion of trespass creates the potential for an even greater interference with property rights. For example, if a neighbor found that a farm in compliance with Vermont's agricultural water quality laws and regulations was causing a trespass, they would have no recourse to the courts no matter how quickly they filed a lawsuit. This should cause concern.

## **VII. The Draft Bill relies too heavily on Vermont's water quality laws to protect neighboring landowners.**

The Draft Bill provides that “[n]o agricultural activity shall be or become a nuisance or trespass when the activity . . . complies with the requirements of 6 V.S.A. chapter 215, including permitting requirements or requirements of the [RAPs].”<sup>27</sup> 6 V.S.A. chapter 215 includes agricultural water quality statutes primarily designed “to ensure that agricultural animal wastes do not enter the waters of [Vermont].”<sup>28</sup>

The Draft Bill relies too heavily on Vermont's agricultural water quality laws and regulations to determine whether an activity causes a nuisance or a trespass. These laws and regulations do not address a range of potential nuisances or trespasses that are independent of water quality, particularly if those nuisances or trespasses are caused by Medium, Certified Small, or Small Farm Operations. In addition, Vermont's agricultural water quality laws and regulations likely do not address all the ways that water management could cause a nuisance or a trespass. For example, the way that the farm in *Aerie Point* disposed of water using subsurface tile drains probably did not violate the RAPs even though it caused a trespass.

The Draft Bill also relies too heavily on the Agency of Natural Resources (“ANR”) and the Agency of Food, Agriculture and Markets (“AAFM”) to protect neighbors' property, health, and welfare by diligently enforcing Vermont's laws and water quality standards. First, *Aerie Point* shows that enforcement is not always enough to protect neighbors. Second, the Clean Water Act Withdrawal Petition that CLF, VNRC, and LCC filed with the U.S. Environmental Protection

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<sup>24</sup> U.S. CONST. amend. V (“ . . . nor shall private property be taken for public use, without just compensation.”).

<sup>25</sup> VT. CONST. ch. I, art. 2 (“That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money.”)

<sup>26</sup> *Borman v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998) (en banc); *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168 (Iowa 2004).

<sup>27</sup> Draft Bill, Sec. 1, pp. 4–5.

<sup>28</sup> 6 V.S.A. § 4801.

Agency on March 16, 2022 shows that there are systematic problems with how ANR and AAFM coordinate to enforce water quality regulations. And last, AAFM's testimony to the Committee on January 11, 2023 indicates that 30 percent of farms are not in compliance with Vermont's agricultural water quality laws and regulations.

### **Conclusion**

Vermont's existing right-to-farm law already protects farmers from unfair lawsuits and preserves their neighbors' access to the courts. By contrast, the Draft Bill would curtail important property rights; deny Vermonters full recourse to the courts when they have no other option to protect their property, health, and welfare; and upset the careful balance already established by Vermont's existing right-to-farm law. Vermont should keep its existing right-to-farm law.

Thank you for the opportunity to offer testimony on the Draft Bill. I look forward to continuing to engage with the Committee on this important issue.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'RSK' with a long horizontal flourish extending to the right.

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