

March 6, 2019

To Ohio Farmers and Producers:

We would like to make sure you know and understand your rights as an agricultural operation under Ohio law. The Ohio General Assembly has long recognized the importance and value of the food and agriculture industry to our state by providing “affirmative defenses” that can protect producers from civil liability for the unintended or unavoidable consequences of farming.

An “affirmative defense” is a legal defense that can defeat a claim in a court of law. It cannot prevent someone from filing a lawsuit, but it can assist the defendant in responding to the claim. It’s important to remember that the recognized defenses won’t protect someone who isn’t following the law or using best management practices for the activity that is the source of the complaint.

The attached document from The Ohio State University (OSU) Extension details the six categories of “affirmative defenses” which are:

- Affirmative defense to claims involving the application of fertilizer for certified fertilizer applicators
- The Ohio “Right to Farm Law” affirmative defense to nuisance claims
- The Ohio Agricultural Pollution Abatement law affirmative defense for nuisance involving agricultural pollution
- Affirmative defense to nuisance for facilities operating under a confined animal feeding facility permit
- Affirmative defense to statutory nuisance claims
- Affirmative defense for nuisance involving forestry pollution

In the event of legal action, contact an attorney. Please read the attached document and if you have general questions about this topic, we would encourage you to reach out to your local OSU Extension Office. Thank you for all that you do for Ohio’s food and agriculture industry.

Sincerely,

Dorothy Pelanda, Director, Ohio Department of Agriculture

Dr. Cathann Kress, Vice President for Agricultural Administration and Dean, College of Food Agricultural and Environmental Services at The Ohio State University

Terry Cosby, State Conservationist, United States Department of Agriculture, Natural Resources Conservation Service

Leonard Hubert, State Director, United States Department of Agriculture, Farm Services Agency

Bob Short, President, Ohio Federation of Soil and Water Conservation Districts



Law Bulletin

Law you need to know from OSU Extension's Farm Office

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Laws that provide defenses for agricultural production activities

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Producing crops, livestock, and other agricultural goods can result in unintended effects on neighbors and the environment. Even when using best management practices, it can be difficult to completely prevent dust, odors, surface water runoff, noise, and other impacts from agricultural production activities. But Ohio's legislature has long recognized the value of agricultural production by providing "affirmative defenses" that can protect producers from civil liability for the unintended or unavoidable consequences of farming. It is important for farmers to understand these laws and know how the laws apply to a farm's production activities.

What is an "affirmative defense"?

An "affirmative defense" is a legal defense that can defeat a claim in a court of law. An affirmative defense doesn't prevent someone from filing a lawsuit, but it provides a defense that the defendant can raise in response to a lawsuit. For the following affirmative defenses, if the defendant farmer successfully proves an affirmative defense that applies to the situation, the court will dismiss the claim.

Note that for each of these affirmative defenses, the farmer must demonstrate that he or she is in compliance with an approved management plan, meets all applicable legal requirements, or is using generally accepted agricultural practices. That is, the defenses won't protect a farmer who is not following the law or using best management practices for the production activity that is the source of the complaint.

1. Affirmative defense to claims involving the application of fertilizer for certified fertilizer applicators

The Ohio legislature enacted a law in 2014 that establishes Fertilizer Applicator Certification Training (FACT) for landowners who apply fertilizers to land parcels of 50 acres or more used for growing plants for commercial sales. Fertilizers include nitrogen, phosphorus, potassium and plant nutrient compounds. FACT certification requires the applicator to attend educational training or pass a knowledge test. The law that created FACT provides an affirmative defense to a farmer who receives FACT certification if the farmer also obtains an approved Nutrient Management Plan (NMP). The FACT defense applies to a private civil action for claims involving or resulting from the application of fertilizer if the farmer proves all of the following:

1. The person who applied the fertilizer is FACT certified or is under the instruction and control of a person who is certified.
2. The farmer has properly maintained records for the application of fertilizer as required by FACT rules developed by the Ohio Department of Agriculture.
3. The farmer has an NMP that is approved by the director of the Ohio Department of Agriculture or the supervisors of the applicable soil and water conservation district.
4. The fertilizer has been applied according to and in substantial compliance with the approved NMP.

Ohio Revised Code § 905.325

2. The Ohio "Right to Farm Law" affirmative defense to nuisance claims

Under Ohio court made law, a "nuisance" is an unreasonable interference with someone's right to use and enjoy his or her property. A common law nuisance claim against a farmer would allege that impacts from the farmer's agricultural production

activities are “unreasonably” affecting a person and his or her property. The person may ask a court to order the farmer to stop the agricultural activities and/or seek compensation for harm caused by the activities.

Ohio’s “Right to Farm Law” addresses these types of nuisance claims against farming. Also known as the Agricultural District Program, the law provides an affirmative defense for a farmer when a non-farmer moves near a farm and afterward brings a nuisance claim against the farm. The philosophy behind this “coming to the nuisance” defense is to limit a person’s legal recourse if he or she moves to a pre-existing agricultural area and then complains about the unintended impacts of the agricultural activities. If agricultural activities existed before the person came to the area and the farmer proves all of the requirements of the defense, the nuisance claim would be dismissed.

There are four important requirements that a farmer must prove when raising the Right to Farm defense against a nuisance claim:

1. The farmland where the agricultural activities take place is enrolled as an “agricultural district,” which requires that the land be at least 10 acres devoted to commercial agricultural production or conservation practices or generates an average of at least \$2500 in gross income from agricultural production in the past three years. A landowner may enroll the land in the Agricultural District Program through the county auditor’s office.
2. Agricultural activities were established prior to the plaintiff’s activities or property interests. The farmer must prove that agricultural activities were already taking place on the land when the complaining party came to the area.
3. The plaintiff is not involved in agricultural production. If the complaining party is another farmer who is engaged in commercial agricultural production, the defendant cannot use the Right to Farm defense.
4. The agricultural activities are not in conflict with federal, state, and local laws and rules relating to the alleged nuisance or are conducted in accordance with generally accepted agriculture practices.

Ohio Revised Code § 929.04

3. The Ohio Agricultural Pollution Abatement law affirmative defense for nuisance involving agricultural pollution

Ohio’s Agricultural Pollution Abatement program encourages owners of agricultural land and animal feeding operations to develop and operate under an operation and management plan. The goal of the plan is to reduce the risk of “agricultural pollution,” which the law defines as the failure to use management or conservation practices to abate wind or water erosion of the soil or to abate the degradation of waters of the state by residual farm products, manure, or soil sediment. For farmers who obtain such a plan, the law provides an affirmative defense to a private civil action for a nuisance that is based on a claim of agricultural pollution. If a farmer who owns, operates, or is otherwise responsible for agricultural land or an animal feeding operation has an approved operation and management plan, the farmer may raise the affirmative defense, which requires proving that:

1. The operation and management plan is approved by the director of the Ohio Department of Agriculture or the supervisors of the applicable soil and water conservation district.
2. The farmer is operating under and in substantial compliance with the approved operation and management plan.

Ohio Revised Code § 939.03

4. Affirmative defense to nuisance for facilities operating under a CAFF permit

The Ohio Department of Agriculture oversees the permitting program that regulates confined animal feeding facilities (CAFF) that are beyond a certain number of animals. Farms that operate under a CAFF permit must operate in accordance with permit provisions that address nutrient management practices. The law that established the CAFF program contains an affirmative defense to a nuisance claim for a farmer who owns, operates, or is otherwise responsible for a CAFF if the farmer can prove that:

1. The CAFF is in compliance with the best management practices established in the installation permit or the permit to operate.
2. The agricultural activities do not violate federal, state, and local laws governing nuisances.

Ohio Revised Code § 903.13

5. Affirmative defense to statutory nuisance claims

Ohio also has an affirmative defense for "statutory" nuisance claims. These are claims based on Ohio Revised Code § 3767.13, an old law that prohibits the keeping or feeding of an animal in a way that creates "noxious exhalations" or "offensive smells" that are "injurious to the health, comfort or property" of others or the public and also prohibits collecting waste materials or extremely disagreeable substances on a property. The government may bring a claim under this law, and so can a private citizen who posts a bond. The same law provides an exemption for agriculture, however, if the operator is conducting agricultural activities that are:

1. Outside a municipal corporation.
2. In accordance with generally accepted agricultural practices.
3. Conducted in such a manner so as not to have a substantial, adverse effect on the public health, safety, or welfare.

Note that the law also states that the operator is also exempt from any similar ordinances, resolutions, rules, or other enactments of a state agency or political subdivision, and from any ordinances, resolutions, rules, or other enactments of a state agency or political subdivision that prohibit excessive noise.

Ohio Revised Code § 3767.13

6. Affirmative defense for nuisance involving forestry pollution

Farmland owners might also be engaged in silviculture, or the growing and harvesting of trees. A farmer who owns or operates a silvicultural operation may develop a timber harvest plan that aims to reduce the risk of "forestry pollution," which Ohio law defines as the failure to use management or conservation practices to abate wind or water erosion of the soil from silviculture or to abate the degradation of waters of the state by soil sediment caused by silvicultural operations. A farmer who obtains a timber harvest plan may use the law's affirmative defense in a private civil action for nuisances involving forestry pollution. The law requires proving the following:

1. The farmer has a timber harvest plan that is approved by the chief of Ohio's division of forestry or the supervisors of the applicable soil and water conservation district.

2. The farmer is operating in substantial compliance with the approved timber harvest plan.

Ohio Revised Code § 1503.52

What if a lawsuit does occur?

Many farmers worry about the possibility of being sued because of the unintended consequences of agricultural production activities. A farmer who receives a notice that a legal complaint has been filed against the farm should contact his or her attorney and insurance company immediately. In cases that relate to insurance coverage, the insurance provider might defend the claim pursuant to the insurance policy provisions. Urgency is necessary for the farmer, as Ohio law requires a defendant to file an answer to a complaint within a certain time period, usually 28 days. The answer should contain any and all of the affirmative defenses above that apply to the situation. Raising and proving the applicable affirmative defenses should result in dismissal of the complaint.

The importance of good neighbor relations

Many in agriculture believe that building strong neighbor relations can reduce the conflicts that lead to litigation over agricultural practices. Creating strong relationships involves educating neighbors about agriculture and communicating with them about farming activities. Help neighbors understand the practices that aim to diminish impacts from agricultural production activities, but respect neighbor concerns about their property and the environment. A positive and trusting relationship with neighbors could very well negate the need to raise affirmative defenses, and keep everyone out of court.

FOR MORE INFORMATION FROM OSU EXTENSION'S AGRICULTURAL & RESOURCE LAW PROGRAM:

- Visit our website at <http://farmoffice.osu.edu>.
- Sign up at <http://farmoffice.osu.edu/blog> to receive our blog postings by e-mail with timely articles on legal issues of importance to Ohio agriculture.
- Contact us by e-mail at aglaw@osu.edu.