Significant Changes Coming to Texas Right to Farm Statute

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As of September 1, 2023, there will be significant changes in store for the Texas Right to Farm statute. The Texas Legislature passed, and Governor Abbott signed, HB 1750, HB 2308 and HB 2947, each revising the statute offering important protections to Texas rural landowners, lessees, and agricultural operators. We have prepared a document showing the text of the Texas Right to Farm Statute as of September 1.

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Background

The Texas Right to Farm statute was initially passed in 1981. All 50 states have some version of a Right to Farm law on the books with the primary purpose of protecting agricultural operations from nuisance actions. [See compilation here.]

The Texas law can be seen as serving two different purposes: (1) providing a defense for agricultural operations facing nuisance or other similar lawsuits; and (2) prohibiting cities or political subdivisions from imposing certain regulations or requirements on agricultural operations.

Statutory Amendments – Lawsuits

HB 1750 and HB 2308 included a number of modifications to the portion of the statute protecting agricultural operations from lawsuits.

Broadened protection beyond nuisance suits.

First, the statutory language now applies not only as a defense to nuisance lawsuits, but more broadly to "other actions to restrain" agricultural operations. The scope of the Act's protection was at issue in a prior case, *Ehler v. LVDVD*. There, a plaintiff filed both nuisance and trespass claims when manure from a dairy ran onto the plaintiff's property. The plaintiff argued that the Right to Farm statute was not a defense to the trespass claim as only nuisance claims were mentioned in the statute. The El Paso Court of Appeals rejected this argument, finding that the purpose of the statue was to protect ag operations from litigation and that allowing for creating pleading to avoid the statutory protections was not permissible. This statutory amendment simply makes clear in the statute what has been true in the common law regarding the scope of the Right to Farm defense.

Expands definition of "agricultural operation" to expressly include vegetation, forage, veterinary services, and commercial animal sales.

The Legislature expanded the definition of "agricultural operation" slightly to expressly include operations growing vegetation, forage for livestock or wildlife management, providing veterinary services, or engaged in the commercial sale of livestock, poultry, and other domestic or wild animals. Within the last couple of years, there was a nuisance complaint against a veterinary office in Texas, and there was some question as to whether a veterinary practice would be considered an "agricultural operation" such that it was protected by the Right to Farm statute. This amendment makes clear it is included.

Modified definition of "established date of operation" and "substantial change."

The definition of "established date of operation" is critical to the Texas Right to Farm statute, both with regards to nuisance and regulations/requirements. Under the amended statute, the established date of operation is the date on which the agricultural operations commenced agricultural operations. Previously, if there was an expansion of the physical facilities, there would be a new established date of

operation for each expansion. Now, every facility has one clear date of commencement.

The statute prohibits lawsuits against an ag operation that has lawfully been in operation "substantially unchanged" for one year or more from the established date of operation. So if an existing facility makes a "substantial change" as defined in the statute, it can be subject to suit for the next year following the substantial change. The revised statute provides a new definition of "substantially unchanged" providing that a substantial change means "a material alteration to the operation or type of production at an agricultural operation that is substantially inconsistent with the operational practices since the established date of operation." This is an area of the revised law that we may see litigation necessary to help define exactly how this definition will be applied.

Imposed higher burden of proof requirement on non-Right to Farm Act cases.

The revised statute added a provision requiring that a person who brings a nuisance claim or other action to restrain an ag operation that is not prohibited by the Right to Farm statute must prove each element by clear and convincing evidence. Thus, in a situation where the Right to Farm law may be unavailable (for example, if the defendant had not been operating at least one year from the established date of operation), the defendant will still receive some protection due to this higher standard of proof being imposed on the plaintiff.

Maintained right of state or political subdivisions to enforce state law.

Both the amended and prior version of the Act provide that nothing in the statute limits the right of a state or political subdivision to enforce state law. The prior version appeared to only apply to those laws necessary to protect public health, safety, and welfare, but the revised statute is not so limited, allowing the enforcement of all state laws, including enforcement actions by the TCEQ.

Clarified scope of potential damages.

Texas law provides that if a plaintiff brings an action against an ag operation that has existed substantially unchanged for a year or more prior to the action, the defendant agricultural operation may recover attorney's fees and costs. The revised

statute expressly states that this includes attorney's fees, court costs, travel, and "any other damages found by the trier of fact." Previously the broad "any other damages" language was not included.

Addressed conflicts with other laws.

The statute provides that should its provisions conflict with any other law, this chapter shall prevail.

Statutory Amendments – Regulations/Requirements

Both HBs 2308 and 1750 made significant changes to the provisions related to regulations and requirements that may be imposed by political subdivisions upon agricultural operations.

Further limited city requirements on agricultural operations.

The Right to Farm Act has always limited the applicability of certain requirements on agricultural operations in Section 251.005.

For political subdivisions of a state other than a city, the requirements apply when the agricultural operation has an established date of operation subsequent to the effective date of the requirement, but not to those operations with established dates of operations prior to the effective date of the requirement. Keep in mind, the modification of the effective date of operation discussed above will greatly impact this section as well.

For cities, different requirements apply. Not surprisingly, city requirements do not apply to agricultural operations outside the bounds of the city. For operations located within the corporate bounds of a city, the statute amended the language to significantly limit the situations in which a city requirement may apply. Specifically, a city may only impose a requirement on an agricultural operation within its bounds if it complies with the new rules set forth in Section 251.0055.

Section 251.0055 limits situations where a city is allowed to impose requirements on agricultural operations within the corporate bounds of the city. Such requirements are only allowed if there is clear and convincing evidence that the

purposes of the requirement cannot be addressed through less restrictive means and it is necessary to protect persons in the immediate vicinity of the agricultural operation from imminent danger of: explosion; flooding; infestation of vermin or insects; physical injury; spread of an identified contagious disease directly attributable to the ag operation; removal of lateral or subjacent support; identified source of contamination of water supplies; radiation; improper storage of toxic materials; crops or vegetation causing traffic hazards; or discharge of firearms in violation of the law. If a requirement falls within these categories, then the city must pass a resolution based upon a mandatory report that the requirement is necessary to protect public health.

There are certain additional limitations imposed as well.

First, a city may not impose a requirement that prohibits the use of generally accepted management practices as listed in a manual prepared by Texas A&M AgriLife Extension unless it meets the requirements listed in the paragraph above. Second, a city may not prohibit or restrict the growing or harvesting of vegetation for animal feed, livestock storage, or forage or wildlife management unless the height is allowed to be at least 12″ and the requirement applies only to portions of the operation not more than 10′ from a property line adjacent to a public street, sidewalk, or highway or neighboring property owned by someone else upon which there is an inhabited structure. Third, a city may not prohibit the use of pesticides or other measures to control vermin or disease-bearing insects to the extent necessary to prevent infestation and third, a city cannot require an agricultural operation be designated for special use tax valuation. Fourth, a city rule regarding the restraint of a dog does not apply to dogs used to protect livestock on property that are being used for that purpose.

Broadened scope of improvement section.

The Right to Farm law provides that an owner, lessee, or occupier of agricultural land is not liable to the state, governmental unit, or another owner of agricultural land for the construction or maintenance of an agricultural improvement if the construction is not expressly prohibited by statute or governmental requirement at the time it is built. HB 1750 amended this language to narrow the scope of governmental requirements that can prohibit agricultural improvements to only

those adopted in accordance with Section 251.005. Further, the law provides that any such improvement is not a nuisance or subject to lawsuit or injunction. This section does not prohibit the enforcement of a state or federal statute.

HB 2308 changed a couple of definitions within this section as well. First, "agricultural land" now includes not only land that qualifies for agricultural use appraisal, but any land on which agricultural operations exist or take place. Second, the definition of agricultural improvement was modified to now also include arenas, and storage or maintenance of implements used for management functions and equipment necessary to carry about agricultural operations.

Instructed generally accepted agricultural practices manual development.

The amendments instruct Texas A&M AgriLife Extension to draft a manual identifying generally accepted agricultural practices and indicating which of those practices do not pose a threat to public health.

Key Takeaways

First, this is a good reminder that Texas does have a Right to Farm statute that protects agricultural operations from lawsuits and certain regulatory requirements. Producers, landowners, and tenants should take the time to review and understand the protections offered by this statute.

Second, likely the most important change in the nuisance provisions of the statute is the modification to how the established date of operation will be determined. The amendments did away with the portion of the statute that allowed there to be new established dates of operation if there were new or expanded activities on the property.

Third, for agricultural operations located within the bounds of a city, the amendments limit the circumstances in which the city may impose requirements on the operation. While this may not affect most agricultural operations in Texas, it is an important protection for those whose land and/or operations are located within the bounds of a city.