A right to harm:
How right-to-farm laws violate rural residents' property rights and promote unsustainable farming practices[1]

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With farms growing larger and more intensive, and farmers and non-farming rural residents living in closer proximity, land-use conflicts are increasingly common. The conflicts most frequently concern the contamination of groundwater or surface water and the generation of nuisances, such as odours, noise, and dust. Attempts to resolve them have become increasingly public and political.

For centuries, conflicts about farming in both the United States and Canada were resolved privately by individuals exercising their common-law property rights. Under the common law, farmers – like all others – have a right to both use and enjoy their property. But there is an important limit to this right: In using their property, they have a responsibility not to interfere with their *neighbours'* rights to use and enjoy *their* property. From the thirteenth century until the last quarter of the twentieth century, the common-law rule, "use your own property so as not to harm another's," provided the foundation for the resolution of most agricultural conflicts.

Depending on the nature of the conflicts, they were usually addressed under one of three branches of the common law: trespass law, riparian law, or nuisance law. These torts fell under what is sometimes called the law of neighbours. Together, they provided a set of principles and a body of precedents that enabled neighbours to work things out among themselves, with the help of courts when necessary, but without the intervention of governments.

Trespass law was often used when agricultural pollutants constituted direct, tangible invasions – invasions that could be seen or felt, such as manure or dust. Traditionally, it was a trespass to place anything tangible upon someone else's property. It didn't matter if the trespassing substance was toxic or perfectly harmless. The issue was the invasion, not its effect.

Another branch of the common law – the law of riparian rights – could be used to protect surface water from agricultural pollutants. Under the common law, the people who own or occupy land

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beside lakes and rivers have the right to the natural flow of the water. They have the right to water substantially unaltered in quantity or quality. Such rights would protect those living downstream from farms against the contamination of water by sediments or harmful bacteria.

The branch of the common law most often used against agricultural pollution was nuisance law. A nuisance is something that unreasonably interferes with the use or enjoyment of private property. Unlike a trespass, a nuisance may be an *indirect* invasion, or one that can't be seen or felt. And unlike a trespass, a nuisance is something that actually causes harm. A nuisance might cause physical damage, it might cause financial harm, or it might cause annoyance, discomfort, or inconvenience.

Nuisance law was of tremendous help to those fighting agricultural pollution. Farmers' neighbours used it to protect themselves from foul smells. They used it to challenge noises and vibrations. Sometimes, nuisance law was used to fight more tangible forms of agricultural pollution as well – whenever the pollution had unreasonably interfered with the use or enjoyment of private property.

Of course, there were many qualifications. Nuisance law did not concern itself with trifling matters. Nor did it concern itself with the suffering of unusually sensitive people. Another factor in determining whether something was a nuisance was the character of the neighbourhood in which it occurred.

The common law was a finely tuned instrument. It balanced the interests of farmers with those of their neighbours. It was guided by firm principles and precedents, yet it was site-specific and adaptable. It was enforced by neutral courts. And it effectively controlled agriculture's adverse impacts.

Indeed, the common law was *too* effective for state and provincial governments in the United States and Canada. Lawmakers worried that the common law put costly constraints on farms and prevented them from growing. Thus, in recent decades, lawmakers have transformed the way in which agricultural conflicts are resolved. They have gradually replaced the common law with government-made laws and regulations.

The most dramatic legislative change has been the introduction of right-to-farm laws. Beginning in 1963 in the United States and 1976 in Canada, state and provincial governments passed laws limiting farmers' common-law liability for nuisances. By 2003, every American state and every Canadian province had adopted some form of right-to-farm legislation.

Right-to-farm laws have differed widely. Some have protected farms from legal liability for odours. Some have been broader, and have permitted odours, noise, light, vibration, smoke, flies, and other disturbances. Some – especially those in the United States – have grandfathered nuisances that predate those who complain about them. Others have permitted nuisances only in designated areas. Some have instructed the courts on what issues to consider when deciding

cases. Others have moved conflict resolution out of the courts entirely, establishing administrative bodies in their place.

Right-to-farm laws have often created a new standard for acceptable practices. No longer are practices deemed unacceptable if they unreasonably harm others – the yardstick under nuisance law. Instead, practices that harm others may be deemed acceptable if they meet government standards, or, in many cases, if they are considered "normal" for farmers in similar circumstances. Under such laws, it is the farmer's *input*, rather than the *outcome* of his operations, that matters.

As much as right-to-farm laws have differed, virtually all have four things in common. First, they shift decision making from individuals to politicians and bureaucrats, centralizing land-use control.

Second, right-to-farm laws re-allocate valuable property rights from farmers' neighbours to farmers. They curtail the rights of many rural residents to use and enjoy their property. In this sense, such laws amount to regulatory takings. In the United States, the Supreme Court of the State of Iowa, a key farming state, has recognized this. In 1998, the Court ruled that giving farmers immunity from nuisance suits amounted to a taking of private property for public use without just compensation. Such a law, it found, was unconstitutional. Although the Iowa court decision has not yet been followed widely, it has increasingly informed both jurisprudence and the public debate. The decision has been cited in at least 17 court cases in five states and has been discussed in almost 70 law reviews, periodicals, and text books.

The third thing that right-to-farm laws have in common is that they are subsidies. They subsidize farmers by enabling them to externalize some environmental costs. They shift costs to those living downwind and downstream. These costs may take the form of lower property values, lower business revenues, or higher health costs. Whatever the form, the victims are subsidizing the polluter. That is a violation of the principle of polluter pay – a principle that is at the heart of environmental sustainability.

And fourth, virtually all right-to-farm laws have resulted in at least some degree of environmental harm. In shifting environmental costs to others, right-to-farm laws have removed important incentives to minimize agriculture's adverse effects. They have made possible an unsustainable intensification of agriculture. And they have favoured polluting farming practices over other land uses that may be more valuable and more benign.

When environmentalists see pollution, they push almost reflexively for more centralized regulation. Agricultural pollution is no exception. Environmentalists in the United States and Canada have been calling for stricter state, provincial, and federal regulation of agricultural.

Right-to-farm laws expose the perverse effects of such an approach. They, like many other agricultural regulations, have exacerbated, rather than curbed, pollution. In overriding the property rights of those living near farms, they have taken decision making about agricultural pollution out of the hands of the people who are most directly affected by it – and who have the

strongest incentives to prevent or correct it. They have deprived these people of the tools that they need to ensure that farming practices are sustainable.

If environmentalists fully understood the damage done by such laws, they would push not for stronger regulation but for stronger property rights. Our experience with agricultural pollution demonstrates that nothing more effectively protects the environment than does a population empowered with strong property rights.