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RE: Protections for Aquaculture in State Right to Farm Bills (NSGLC-17-04-02)

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Dear Elliot,

Thank you for submitting an advisory request to the National Sea Grant Law Center. In February, you requested assistance in conducting a review of aquaculture “generally accepted agriculture management practices” (GAAMPs), or similar best management practices (BMPs) legal requirements, from around the country. This memorandum summarizes the results of our research. Please note, the information below is legal research provided for education and outreach purposes and does not constitute legal advice or representation of Michigan Sea Grant or its constituents.

Beginning in the 1970s, tensions between sprawling urban developments into traditionally rural areas and subsequent encroachments on existing farmlands started to give rise to growing residential complaints and nuisance lawsuits against farmers. Such lawsuits often involve allegations by neighboring property owners that the odors, dust, or noise associated with the farming operations is interfering with the enjoyment and use of their property. In response to this litigation trend, all fifty states passed “Right to Farm” legislation to provide legal protections to farmers against certain types of legal actions. The specific provisions in Right to Farm laws vary by state, but generally the bills protect agricultural operations from nuisance claims, when certain conditions are satisfied.

Twenty-five states expressly include aquaculture operations or fish within the scope of their Right to Farm protections.¹ Of those states, twelve states require farmers to adhere to BMPs for the protections to apply, although the terminology used to reference the practices varies among states. These states are: Arkansas, California, Florida, Hawaii, Idaho, Louisiana, Michigan, New York, Ohio, Oklahoma, Tennessee, and Washington. New Jersey does not expressly mention aquaculture in its Right to Farm Act, but aquaculture operations are addressed in state regulations. Three states – Florida, Louisiana, and New Jersey – have developed best practices manuals for aquaculture operations. Summaries of the relevant provisions from these states are provided below.

Arkansas

Arkansas’s Right to Farm legislation includes aquaculture in the definition of “Agriculture” and “Agricultural Operation.”² Agriculture “includes agriculture, silviculture, and aquaculture.”³ Agricultural or farming operation includes an aquacultural facility and “the production of any plant or animal species in a controlled freshwater or saltwater environment.”⁴

The statute references generally accepted practices twice. First, the statute provides that “an agricultural operation shall not be found to be a public or private nuisance if the agricultural operation alleged to be a nuisance employs methods or practices that are commonly or reasonably associated with agricultural production.”⁵ Additionally, “[e]mployment of methods or practices that are commonly or reasonably associated with agricultural production or are in compliance with any state or federally issued permit shall create a rebuttable presumption that an agricultural operation is not a nuisance.”⁶

California

In California, the term “agricultural activity, operation, or facility, or appurtenances thereof” as used in the state’s Right to Farm law includes the raising of fish.⁷ Agricultural activities will not be deemed a nuisance due to any changed condition as long as the activity has been in operation for more than three years and is conducted in “a manner consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations in the same locality.”⁸

¹ Alaska, Arkansas, California, Florida, Georgia, Hawaii, Idaho, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Washington, and Wisconsin.

² See ARK. CODE ANN. § 2-4-102.

³ *Id.* § 2-4-102(2).

⁴ *Id.* § 2-4-102(1)(C).

⁵ *Id.* § 2-4-107(b)(1).

⁶ *Id.* § 2-4-107(c)(2).

⁷ CAL. CIV. CODE § 3482.5(e).

⁸ *Id.* § 3482.5(a)(1).

Florida

As defined in the Florida Right to Farm Act, farm “means the land, buildings, support facilities, machinery, and other appurtenances used in the production of farm or aquaculture products.”⁹ The definition of “farm operation” includes all activities which occur on a farm in connection with the production of farm products.¹⁰ “Farm product” includes any animal useful to humans.¹¹ Although the definitions of farm operation and farm products don’t expressly mention fish, the inclusion of aquaculture products within the definition of “farm” suggests farm products would be interpreted to include fish.

No farm operation which has been in operation for a year or more and which was not a nuisance at the time of establishment may be deemed a public or private nuisance “if the farm operation conforms to generally accepted agricultural and management practices.”¹² Additionally, local governments may not adopt any ordinance, rule or policy to prohibit, restrict, regulate, or otherwise limit a farm operation on land classified as agricultural land, where such activity is regulated through implemented best management practices or interim measures developed by the Florida Department of Environmental Protection, the Florida Department of Agriculture and Consumer Services (FDACS), or water management districts.

The FDACS has developed BMPs for aquaculture operations. Florida’s Aquaculture Best Management Practices Manual is incorporated by reference into Fla. Admin. Code Ann. r. 5L-3.004 and was most recently revised in November 2016.¹³

Hawaii

In Hawaii, the term “farming operation” includes aquaculture facilities and pursuits, including “the farming or ranching of any plant or animal species in a controlled salt, brackish, or freshwater environment.”¹⁴ Farming operations conducted “in a manner consistent with generally accepted agricultural and management practices” may not be declared a nuisance by any court, official, public servant, or public employee.¹⁵

Idaho

In Idaho’s legislation, agricultural operations include “breeding, hatching, raising, producing, feeding, and keeping” fish and other aquatic species.¹⁶ Agricultural operations “operated in accordance with generally recognized agricultural practices or in compliance with a state or

⁹ FLA. STAT. ANN. § 832.14(3)(a).

¹⁰ *Id.* § 832.14(3)(b).

¹¹ *Id.* § 832.14(3)(c).

¹² *Id.* § 832.14(4)(a).

¹³ The manual and additional information is available online at

<http://www.freshfromflorida.com/Business-Services/Aquaculture/Aquaculture-Certificate-of-Registration/Aquaculture-Best-Management-Practices>.

¹⁴ HAW. REV. STAT. § 165-2.

¹⁵ *Id.* § 165-4.

¹⁶ IDAHO CODE ANN. § 22-4502(2)(e).

federally issued permit shall not be found to be a public or private nuisance.”¹⁷ In addition, local governments are prohibited from adopting ordinances or resolutions that declare any agricultural operation or facility “operated in accordance with generally recognized agricultural practices” to be a nuisance or to require abatement or closure of the facility.¹⁸

Louisiana

In Louisiana, an agricultural operation includes any agricultural facility or agricultural land used for the production and processing of farm-raised fish and fish products.¹⁹

No agricultural operation may be deemed to be a nuisance in Louisiana “if the agricultural operation is conducted in accordance with generally accepted agricultural practices or traditional farm practices” and certain other conditions apply, such as existing in a substantially unchanged state for more than a year.²⁰ Louisiana law establishes the presumption that people engaged in agricultural operations are “operating in accordance with generally accepted agricultural practices or traditional farm practices.”²¹ In addition, local governments may not “adopt any ordinance that declares any agricultural operation operated in accordance with generally accepted agricultural practices or traditional farm practices to be a nuisance or any zoning ordinance that forces the closure of any such agricultural operation.”²²

Generally accepted agricultural practices are defined as “practices conducted in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations in a similar community or locale and under similar circumstances.”²³ Traditional farm practices “means those accepted and customary standards established by similar agricultural operations under similar circumstances using established best management practices.”²⁴

The Louisiana State University AgCenter has developed best management practices in partnership with state agencies and other stakeholders for many agricultural commodities in the state, including aquaculture. Their manual, entitled “Aquaculture Environmental Best Management Practices,” was last revised in June 2011.²⁵

Michigan

Michigan’s Right to Farm law defines farm as “the land, plants, animals, buildings, structures, including ponds used for agricultural or aquacultural activities, machinery, equipment, and other

¹⁷ *Id.* § 22-4505.

¹⁸ *Id.* § 22-4504.

¹⁹ LA. REV. STAT. ANN. § 3:3602(5).

²⁰ *Id.* § 3603(B).

²¹ *Id.* § 3:3604.

²² *Id.* § 3:3607(A).

²³ *Id.* § 3:3602(12).

²⁴ *Id.* § 3:3602(18).

²⁵ The manual is available online at: <http://www.lsuagcenter.com/NR/rdonlyres/F664FF0D-26EA-42DD-990F-A44C29D84D8A/79801/pub2894AquacultureBMPLOWRES.pdf>.

appurtenances used in the commercial production of farm products.”²⁶ Farm products include fish and other aquacultural products.

Farms and farm operations “shall not be found to be a public or private nuisance if the farm or farm operation alleged to be a nuisance conforms to generally accepted agricultural and management practices according to policy determined by the Michigan Commission of Agriculture.”²⁷ GAAMPs are defined as “those practices as defined by the Michigan Commission of Agriculture.”²⁸ In defining GAAMPs, the Commission is to “give due consideration to available Michigan Department of Agriculture information and written recommendations from the Michigan State University college of agriculture and natural resources extension and the agricultural experiment station in cooperation with the United States Department of Agriculture Natural Resources Conservation Service and the consolidated farm service agency, the Michigan Department of Natural Resources, and other professional and industry organizations.”²⁹ GAAMPs must be reviewed annually by the Michigan Commission of Agriculture and revised as considered necessary.³⁰

New Jersey

Although the New Jersey Right to Farm Act does not expressly mention aquaculture, the state does include aquaculture operations within the law’s scope. The New Jersey Right to Farm Act creates an irrebuttable presumption that no commercial agricultural operations that conforms to “agricultural management practices recommended by the [State Agricultural Development Committee (SADC)]” and adopted by regulation may constitute a public or private nuisance.³¹ An irrebuttable presumption is a legal term of art which refers to a presumption that cannot be overcome in court by additional evidence or argument. This is a significant legal protection for farmers operating in conformance with state-adopted agricultural management practices (AMPs).

The SADC has adopted 12 Agricultural Management Practices (AMPs), including one for Aquaculture.³² The SADC adopted by reference the “Recommended Management Practices for Aquatic Farms,” published by Rutgers Cooperative Extension and the New Jersey Department of Agriculture in 2004, with a revision date of March 2004.³³

New York

“Crops, livestock, and livestock products” as defined in New York’s Right to Farm legislation include “aquaculture products, including fish, fish products, water plants, and shellfish.”³⁴ On

²⁶ MICH. COMP. LAWS § 286.472(a).

²⁷ *Id.* § 286.473(1).

²⁸ *Id.* § 286.472(d).

²⁹ *Id.*

³⁰ *Id.* § 286.473(1).

³¹ N.J. STAT. ANN. § 4:1C-10.

³² N.J. ADMIN. CODE § 2:76–2A.11

³³ The text of the regulation adopting the Aquaculture AMP and the manual can be accessed at: <http://www.state.nj.us/agriculture/sadc/rtfprogram/amps/adoptedamps/aquaculture.html>.

³⁴ NY AGRI. & MARKETS § 301(2)(h).

any land in an agricultural district or land used in agricultural production subject to an agricultural assessment, an agricultural practice may not constitute a private nuisance provided such agricultural practice “constitutes a sound agricultural practice pursuant to an opinion issued upon request by the commissioner.”³⁵

Ohio

Ohio’s Right to Farm legislation includes commercial aquaculture in the definition of “agriculture production.”³⁶ In a civil action for nuisances involving agricultural activities, it is a complete defense if “the agricultural activities were not in conflict with federal, state, and local laws and rules relating to the alleged nuisance or were conducted in accordance with generally accepted agricultural practices.”³⁷ A complete defense is one that bars any recovery by the plaintiff against the defendant, here the farmer.

Oklahoma

The Oklahoma Right to Farm legislation includes aquaculture in the definition of “agricultural activities.”³⁸ Agricultural activities conducted on farm or ranch land, “if consistent with good agricultural practices and established prior to nearby nonagricultural activities, are presumed to be reasonable and do not constitute a nuisance unless the activity has a substantial adverse affect on the public health and safety.”³⁹ Additionally, agricultural activities “undertaken in conformity with federal, state and local laws and regulations” are presumed to be good agricultural practices.⁴⁰

Tennessee

Tennessee’s Right to Farm law defines “farm operation” to include activities that occur on a farm in connection with the commercial production of farm products.⁴¹ Farm product “means those plants and animals useful to man” including fish.⁴² The legislation creates a rebuttable presumption that a farm or farm operation is not a public or private nuisance.⁴³ A rebuttable presumption can be overcome in court through the provision of additional evidence. In the case of the Tennessee Right to Farm provisions, the presumption can only be overcome in court if the person bringing the action presents enough evidence to establish (1) that the farm operation does not conform to generally accepted agricultural practices or (2) does not comply with applicable statute or rule.

³⁵ *Id.* § 308(3).

³⁶ OHIO REV. CODE § 929.01(A).

³⁷ *Id.* § 929.04.

³⁸ OKLA. STAT. ANN. tit. 50 § 1.1(A)(1).

³⁹ *Id.* § 1.1(B).

⁴⁰ *Id.*

⁴¹ TENN. CODE ANN. § 43-26-102(2).

⁴² *Id.* § 43-26-102(3).

⁴³ *Id.* § 43-26-103.

Washington

Washington's Right to Farm legislation defines "agricultural activity" as an activity which occurs on a farm in connection with the commercial production of farm products.⁴⁴ The definition of farm product includes freshwater fish and fish products. Agricultural activities conducted on farmland, if consistent with good agricultural practices and established prior to surrounding nonagricultural activities, are presumed to be reasonable and shall not be found to constitute a nuisance unless the activity or practice has a substantial adverse effect on public health and safety.⁴⁵ Agricultural activities undertaken in conformity with all applicable laws and rules are presumed to be good agricultural and forest practices not adversely affecting the public health and safety.⁴⁶

I hope you find this information useful. Please contact us if you would like more information or have follow up questions.

Sincerely,

Stephanie Otts /s/
Director

Alexandra Chase /s/
Ocean and Coastal Law Fellow

⁴⁴ WASH. REV. CODE § 7.48.310(1).

⁴⁵ *Id.* § 7.48.305(1).

⁴⁶ *Id.*