

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Environment and Natural Resources

BILL: CS/CS/SB 88

INTRODUCER: Environment and Natural Resources Committee; Judiciary Committee; and Senator Brodeur and others

SUBJECT: Farming Operations

DATE: February 15, 2021 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Anderson</u>	<u>Rogers</u>	<u>EN</u>	<u>Fav/CS</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 88 amends the Florida Right to Farm Act. The general purpose of the act is to protect reasonable agricultural activities conducted on farm land from nuisance lawsuits. The bill provides stronger liability protections to farms that comply with best management practices and environmental regulations.

The definition of “farm operations” is expanded to add “agritourism” activities to the list of farm operations that receive limited legal protections in nuisance suits and other similar civil actions. The definition is further revised to include the generation of “particle emissions” to the list of conditions or activities that constitute farm operations.

The bill defines “established date of operation” for an agritourism activity as the date the specific agritourism activity commenced, providing for a separate established date of operation for an agritourism activity than for the farm operation.

The burden of proof that a plaintiff must meet in a nuisance action or similar legal action is raised to the clear and convincing evidence standard if the claim is based upon allegations that the defendant’s conduct did not comply with government environmental laws, regulations, or best management practices.

The bill limits those who may bring a nuisance action against a farm operation to people whose real property that is alleged to be damaged is located within one-half mile of the alleged source of the nuisance.

The bill limits compensatory damages in a private nuisance action to the reduction in the fair market value of the plaintiff's property, which may not exceed the fair market value of the property.

The bill prohibits a plaintiff from recovering punitive damages for a farm operation in a private nuisance action unless the alleged nuisance is based on substantially the same conduct that resulted in either a criminal conviction or a civil enforcement action by a government environmental regulatory agency and the conviction or enforcement action occurred within 3 years of the first act forming the basis of the nuisance action.

A losing plaintiff is liable for a farm's litigation costs and expenses incurred defending a nuisance action if the farm operation has been in existence for 1 year or more before the legal action was instituted and the farm operation conforms to generally accepted agricultural and management practices or government environmental laws.

The bill takes effect July 1, 2021.

II. Present Situation:

Background

In the 1970s, states began to identify the potential conflicts between farmers and developers as urban sprawl crept into rural, agricultural areas. One of the initial concerns was that the relocation of city dwellers into the agricultural areas would result in a rash of very expensive nuisance lawsuits once the new neighbors were confronted with the sensory nature of farm life, complete with an inescapable array of odors, loud noises, dust, and other side-effects.¹

In an effort to protect farms and agricultural operations from the encroaching sprawl, states passed anti-nuisance laws that are referred to as "Right to Farm" laws. These laws, enacted in all 50 states, protect agricultural production against some nuisance lawsuits. The laws do not grant absolute immunity but generally provide protections for defendants based upon a "coming to the nuisance" defense theory. These laws provide a liability shield for pre-existing agricultural operations when changes are made to the use of nearby parcels, such that the plaintiffs are described as "coming to the nuisance."² The Florida Right to Farm Act was enacted in 1979.³

Nuisance

A nuisance is described as an activity, condition, or situation created by someone that significantly interferes with another person's use or enjoyment of his or her property. A private

¹ Alexia B. Borden and Thomas R. Head, III, *The "Right To Farm" In The Southeast – Does it Go Too Far?* 11 No. 1 ABA Agric. Mgmt. Committee Newsl. 8 (April, 2007).

² *Id.*

³ Chapter 79-61, ss. 1-2, Laws of Fla.

nuisance affects a person's private right that is not common to the public while a public nuisance is an interference that affects the general public, for example, a condition that is dangerous to health or community standards.⁴

The Florida Right to Farm Act

The Florida Right to Farm Act⁵ protects farm operations from nuisance lawsuits if the operations comply with generally accepted agricultural and management practices.

The Florida Right to Farm Act states that a farm operation cannot be classified as a public or private nuisance if the farm:

- Has been in operation for 1 year or more since its established date of operation;
- Was not a nuisance when it was established; and
- Conforms to generally accepted agricultural and management practices.⁶

However, the following four unsanitary conditions constitute evidence of a nuisance:

- The presence of untreated or improperly treated human waste, garbage, offal, dead animals, dangerous waste materials, or gases which are harmful to human or animal life.
- The presence of improperly built or improperly maintained septic tanks, water closets, or privies.
- The keeping of diseased animals which are dangerous to human health, unless the animals are kept in accordance with a current state or federal disease control program.
- The presence of unsanitary places where animals are slaughtered, which may give rise to diseases which are harmful to human or animal life.⁷

Additionally, a farm operation cannot be classified as a public or private nuisance due to a change:

- In ownership,
- In the type of farm product that is produced,
- In conditions in or around the locality of the farm, or
- Made in compliance with Best Management Practices adopted by local, state or federal agencies.⁸

The Florida Right to Farm Act, however, may not be construed to permit an existing farm operation to increase to a more excessive farm operation with regard to noise, odor, dust, or fumes where the existing operation is adjacent to an established homestead or business on March 15, 1982.^{9,10}

⁴ BLACK'S LAW DICTIONARY (11th ed. 2019).

⁵ Section 823.14, F.S.

⁶ Section 823.14(4)(a), F.S.

⁷ *Id.*

⁸ Section 823.14(4)(b), F.S.

⁹ Section 823.14(5), F.S.

¹⁰ In an effort to eliminate duplication of regulatory authority over farm operations, local governments may not adopt an ordinance or similar policy to prohibit or limit an activity of a bona fide farm operation on land that is classified as agricultural land in accordance with statute, where the activity is regulated through implemented best management practices or certain interim measures. The full text of this prohibition is contained in s. 823.14(6), F.S.

Florida's Agricultural Landscape

According to the University of Florida Institute of Food and Agricultural Sciences, Florida had 47,590 farm operations covering 9.7 million acres of farmland in 2018, the most recent year for which this information is available. Agricultural land, which consists of cropland and ranchland, combined with forest land, comprises nearly two-thirds of the state's entire land.¹¹

Data provided by the U.S. Department of Agriculture notes that in 2019, Florida's cash receipts from the sale of agricultural commodities was \$7.67 billion, ranking 18th in the nation for total commodity sales. Florida leads the United States in the production of oranges, sugarcane, and watermelons. The state ranks second in the nation for the production of bell peppers, cucumbers, grapefruit, peanuts, strawberries, and tomatoes.¹²

Agritourism Activity

"Agritourism activity" is defined under "Agricultural Development" in chapter 570, F.S., the Department of Agriculture and Consumer Services chapter. It includes any agricultural related activity that is consistent with a bona fide farm, livestock operation, or ranch or in a working forest which allows the general public to view or enjoy its activities for recreational, entertainment, or educational purposes. These activities include farming, ranching, historical, cultural, civic, ceremonial, training and exhibition, or harvest-your-own activities and attractions. An agritourism activity does not include the building of new or additional structures or facilities that are intended primarily to house, shelter, transport, or otherwise accommodate the general public. An activity is deemed to be an agritourism activity regardless of whether the participant paid to participate in the activity.¹³

Established Date of Operation

"Established date of operation" is defined under the Florida Right to Farm Act as the date the farm operation commenced. The definition provides that:

- If the farm operation is subsequently expanded within the original boundaries of the farm land, the established date of operation of the expansion is the same date the original farm operation commenced.
- If the land boundaries of the farm are subsequently expanded, the established date of operation for each expansion is deemed to be a separate and independent established date of operation. However, the expanded operation does not divest the farm operation of a previous established date of operation.¹⁴

¹¹University of Florida – IFAS, *Florida Agriculture & Natural Resource Facts* (July 2018) published by the UF/IFAS Economic Impact Analysis Program in 2019 and 2020.

¹² U.S. Department of Agriculture, National Agricultural Statistics Service, *Florida Agricultural Facts* (Sept. 2020), https://www.nass.usda.gov/Statistics_by_State/Florida/Publications/More_Features/FL2019.pdf.

¹³ Section 570.86(1), F.S.

¹⁴ Section 823.14(3)(d), F.S.

Litigation

A federal class action lawsuit¹⁵ has been filed against sugarcane farmers in south Florida alleging that the pre-harvest burning of sugarcane has caused damages to nearby individuals and property. The defendants farm sugarcane on approximately 400,000 acres in areas south and southeast of Lake Okeechobee. The farmers burn the outer leaves of the sugarcane during a pre-harvest burn that takes place during a 6-month period from October through May each year. The plaintiffs allege that the burning has diminished their property values, caused long-term health issues, and prevented the area from growing economically.

Although the litigation is continuing through a series of pre-trial motions, the court has determined that pre-harvest burning of sugarcane is an acceptable agricultural practice protected by the Florida Right to Farm Act. However, the court has found that the act does not bar all of the plaintiffs' claims. The court ruled that the act did not protect the farmers from claims that pre-harvest burning released harmful pollutants.

III. Effect of Proposed Changes:

The Florida Right to Farm Act (Section 1)

Legislative Findings and Purpose; Adding Agritourism

The Florida Right to Farm Act contains a section of legislative findings and purposes that establish why reasonable agricultural activities conducted on farmland should be protected from nuisance lawsuits that can force the premature removal of farmland from agricultural use.¹⁶ The language notes, in part, that: agricultural production makes major contributions to the state economy; agricultural lands cannot be replaced; agricultural activities increase tourism; and that agriculture furthers the economic self-sufficiency of the people of the state and should be protected. The bill adds agritourism to this section of the act such that preservation of agricultural activities contributes to the increase of tourism and agritourism. Additionally, and as now amended, the purpose of the act protects reasonable agricultural and complementary agritourism activities conducted on farmland from nuisance suits and other similar lawsuits.

Changes to Definitions in the Florida Right to Farm Act

Agritourism Activity

The definitions section of the act is amended to add a definition of "agritourism activity" and then include it in the definition of what constitutes a farm operation. With this change, agritourism activities receive the nuisance protections that compliant farm operations receive under the terms of the act.

Farm Operation

The definition of a "farm operation" is expanded. The current definition states that a farm operation means all conditions or activities ... which occur on a farm and includes, but is not limited to, "the marketing of produce at roadside stands or farm markets; the operation of machinery and irrigation pumps; the generation of noise odors, dust, and fumes ..." The phrase

¹⁵ *Coffie v. Florida Crystals Corporation*, 460 F. Supp. 3d 1297 (S.D. Fla. 2020).

¹⁶ Section 823.14(2), F.S.

“particle emissions” is added to the list of conditions and activities that constitute a farm operation.

Established Date of Operation

The bill defines “established date of operation” for an agritourism activity as the date the specific agritourism activity commenced, providing for a separate established date of operation for an agritourism activity than for the farm operation.

Lawsuit Protections: Evidence Standard and Damages

New provisions are added to the Right to Farm Act to provide additional protections for farm operations from lawsuits.

Clear and Convincing Evidence

For a plaintiff to succeed in certain claims against a farm for conduct that is alleged to cause harm outside of the farm, the plaintiff must prove by “clear and convincing evidence” that the claim arises from conduct that did not comply with state and federal environmental laws, regulations, or best management practices. Those claims involve actions for:

- Public or private nuisance,
- Negligence,
- Trespass,
- Personal injury,
- Strict liability, or
- Another tort based on a farm operation.

“Clear and convincing evidence” is a standard or burden of proof which measures the level or degree to which an issue must be proved. In civil cases, two standards of proof generally apply: “the greater weight of the evidence standard” which applies most often in civil cases; or “the clear and convincing evidence standard” which applies less often, and is a higher standard of proof.

The clear and convincing standard requires that the evidence be credible and the facts which the witness testifies to must be remembered distinctly. The witness’s testimony “must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue.” The evidence must be so strong that it guides the trier of fact to a firm conviction, to which there is no hesitation, that the allegations are true.¹⁷

One-half Mile Distance Restrictions for Nuisance Claims

A physical distance restriction is placed on nuisance actions. Under the bill, a nuisance action may not be filed against a farm operation unless the real property affected by the alleged nuisance condition is located within one-half mile of the source of the activity or structure which is alleged to be a nuisance. If real property is not affected, it appears that there is no distance restriction on the action.

¹⁷ *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

Compensatory Damages¹⁸ in a Nuisance Claim

If a plaintiff prevails in a private nuisance action and alleges that the nuisance emanated from a farm operation, the measure of compensatory damages is limited. The compensatory damages must be measured by the reduction in the fair market value of the plaintiff's property caused by the nuisance. However, these damages may not exceed the fair market value of the property.

Punitive Damages¹⁹ in a Nuisance Claim

The bill generally limits the availability of punitive damages based on farm operations. A plaintiff may not recover punitive damages in a private nuisance action against a farm unless:

- The alleged nuisance is based on substantially the same conduct that resulted in a criminal conviction or a civil enforcement action by a state or federal environmental regulatory agency; and
- The conviction or enforcement action happened within 3 years of the first act forming the basis of the current nuisance action.

Costs and Expenses Awarded Against a Plaintiff

If a plaintiff does not prevail in a nuisance claim against a farm operation that has been in existence for 1 year or more before the date the claim was filed and the farm operation conforms with generally accepted agricultural and management practices or state and federal environmental laws, the plaintiff is liable to the farm for all costs and expenses incurred in defending the action.

Sections 2, 3, 4, 5, 6, 7, 8, and 9

These sections do not create any substantive changes to the Florida Right to Farm Act. They are necessary changes made by the Senate Bill Drafting Office to correct cross-references, reenact provisions, or incorporate amendments made by changes in the substance of the bill.

Section 10 - Effective Date

The bill takes effect July 1, 2021.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

¹⁸ Compensatory damages are awarded to repay actual losses. BLACK'S LAW DICTIONARY (11th ed. 2019).

¹⁹ Punitive damages are awarded to punish a defendant and are awarded in addition to actual damages. They are awarded when the defendant acted in a reckless manner or with malice or deceit. BLACK'S LAW DICTIONARY (11th ed. 2019).

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill may reduce litigation costs faced by farms based on nuisance-type lawsuits. On the other hand, persons adversely affected by a farm operation will have more difficulties in obtaining redress. At least in some cases, plaintiffs will need to prove that the farm operation was in violation of environmental laws.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 823.14 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Environment and Natural Resources on February 15, 2021:

- Revises the definition of the term “established date of operation” to provide for a separate established date of operation for an agritourism activity than the established date of operation for the farm operation.

- Defines “established date of operation” for an agritourism activity as the date the specific agritourism activity commenced.

CS by Judiciary on February 1, 2021:

The punitive damages section of the bill is amended for clarification. It now states that a plaintiff may not recover punitive damages in a private nuisance action against a farm unless the alleged nuisance is based on substantially the same conduct that resulted in a criminal conviction or a civil enforcement action by a state or federal environmental regulatory agency and that conviction or enforcement action occurred within 3 years of the first act that forms the basis of the nuisance action.

B. Amendments:

None.