

THE ACRE INITIATIVE: ADDING STRENGTH TO THE RIGHT-TO-FARM LAW

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I. INTRODUCTION

Agriculture is Pennsylvania's largest industry.¹ It produces over forty-four billion dollars in annual revenue and provides approximately one in six of Pennsylvania's jobs.² In spite of the economic importance of the agriculture industry, its viability is becoming increasingly threatened by urban sprawl, a phenomenon characterized by the conversion of prime farmland into low-density residential developments.³ Nationwide, urban sprawl engulfs over 1.2 million acres of farmland per year.⁴ Yet, perhaps an even larger problem of urban sprawl is that it brings with it new landowners who are unaccustomed to country life and are largely unwilling to deal with its shortcomings.⁵ As an unfortunate coincidence, the same changes in the U.S. economy that have permitted urban sprawl have also driven the expansion of farm operations in a variety of agricultural sectors, including the livestock and dairy industries.⁶ These factors, combined with the lack of zoning ordinances in many rural areas, create an environment ripe for conflicts between farmers and their non-farm neighbors.

As a response to this potential for conflict, Pennsylvania adopted its Right-to-Farm law in 1982.⁷ The Right-to-Farm law, which was designed to preserve the Commonwealth's agricultural operations, has two primary branches. The first provides protection from nuisance suits, while the second addresses oppressive local ordinances.⁸ Despite the fact that Right-to-Farm laws have gained widespread acceptance in all fifty states,⁹ several states' mechanisms for providing protection from nuisance suits have recently come under fire.¹⁰ These lawsuits, which bring the constitutionality of absolute

bars on nuisance suits into question, could reflect poorly on the portion of the Pennsylvania Right-to-Farm law that was added by a 1998 Amendment.¹¹ The Amendment gives any farmer who develops a nutrient management plan¹² in compliance with state law immediate immunity from nuisance suits. Faced with a challenge to the constitutionality of Pennsylvania's Right-to-Farm Law, the Pennsylvania Courts could interpret this provision's absolute ban on nuisance suits as an unconstitutional taking and strike down that portion of the law.

In light of these frailties in the Right-to-Farm law's nuisance provisions, it is important that the Commonwealth take steps not only to remedy these problems but also to fortify the Right-to-Farm law's other branch - the protection against illegal local ordinances. These local ordinances often prevent farmers from changing or expanding their operations, despite the prohibitions of state law. Since it is frequently necessary for farmers to expand their operations in order to generate sufficient income or provide opportunities for the next generation, ordinances that prevent expansion may constitute the fatal blow for many family farms.¹³ The primary misperception about these ordinances is that they only affect very large "corporate" farms. However, in an era when it makes good business sense for a family farmer to consider incorporation,¹⁴ ordinances designed to regulate only the "corporate" farm often unintentionally affect the rights of the traditional family farmer as well. Consider the case of Pennsylvania Farm Bureau Vice President Rick Ebert, a dairy farmer from Westmoreland County, who has encountered ordinances that would "restrict [his] family's ability to modestly expand [their] operation from 75 to 100 cows."¹⁵ This is an impediment on the family farmer that

the Commonwealth must prevent, and it can do just that by adopting the Agricultural, Communities, and the Rural Environment (ACRE) Initiative.

ACRE is a comprehensive proposal designed to enhance Pennsylvania's reputation as a "leader in agricultural and environmental stewardship" by balancing the rights of farmers with those of the community.¹⁶ The proposal, which resulted largely from the collaborative efforts of the Pennsylvania Department of Agriculture (PDA) and the Pennsylvania Department of Environmental Protection (DEP), was prompted by the Governor's call for a "comprehensive and progressive" plan for the future of Pennsylvania agriculture.¹⁷ As is to be expected from any legislation that grows out of the collaborative efforts of several agencies, there are particular aspects of ACRE whose benefits clearly accrue to one interest group more than to the other. The portion of the proposal that most directly benefits Pennsylvania agriculture is a provision that seeks to encourage negotiation rather than litigation in disputes over local ordinances by establishing an Agriculture Review Board. In return, environmental interest groups receive some of "the most comprehensive environmental-quality protections in the nation,"¹⁸ including changes in water and air quality requirements and provisions that subject a greater number of agricultural operations to regulation.

ACRE includes a mix of regulatory and legislative changes to Pennsylvania law. Therefore, some portions of it will require approval by the General Assembly, while others will go through a regulatory development process.¹⁹ Although the results of these processes are largely unpredictable, this paper will comment on the likely effects of the ACRE proposal should it ultimately become law. Part II will describe the current mechanisms used by Pennsylvania and other states to prevent local ordinances and

explain why these efforts may not be enough to prevent harm to farmers. It will then maintain that ACRE is the ideal solution for solving the problem of illegal ordinances. Part III discusses the environmental initiatives addressed by ACRE and explains why they are beneficial to both communities and farmers. Part IV forecasts the likelihood that ACRE will be enacted by the General Assembly. It also discusses the proposal's chances of withstanding constitutional scrutiny should it be enacted. Part V concludes.

II. ADDRESSING THE PROBLEM OF ILLEGAL LOCAL ORDINANCES

As the example of the small dairy farmer who was prohibited from expanding his operation from 75 to a mere 100 cows illustrates, local ordinances can sometimes have a negative effect on just the type of farm operations that state governments should strive to protect. This section will explain why Pennsylvania's current laws are insufficient to protect against local ordinances and why ACRE presents a model solution to this problem.

1. Pennsylvania's Current Mechanisms for Preventing Local Ordinances that Infringe upon Agricultural Operations

Pennsylvania uses two primary statutes to address the problem of local ordinances. The first is the Right-to-Farm law and the second is the Nutrient Management Act. Pennsylvania's Right-to-Farm law contains a provision which addresses the enactment of local ordinances that detrimentally affect the "continuity, development and viability of agricultural operations."²⁰ However, this provision is largely without teeth. While the Right-to-Farm law requires all municipalities to exclude agricultural operations that are conducted in accordance with normal agricultural practices from their definitions

of public nuisance,²¹ the law outlines no penalties for a municipality's failure to comply with its mandates. This lack of guidance could explain the general reluctance of courts to use Right-to-Farm laws to deprive municipalities of their power to regulate agricultural land uses.²² Even Governor Rendell recognizes that the state's Right-to-Farm Law "has been ignored all too frequently" by municipalities.²³

In addition, the ordinance-limiting provision of the Right-to-Farm law contains a considerable loophole that could be used by a municipality to enact an ordinance that improperly discriminates against agricultural interests. If an agricultural operation has a "direct adverse effect on the public health and safety," the municipality is free to characterize it as a nuisance.²⁴ What constitutes a "direct adverse effect" is not further defined by the statute. This allows a municipality considerable room for argument that its actions fall within the exception to the ordinance-limiting rule.

A final drawback of Pennsylvania's current Right-to-Farm law is that it only addresses ordinances that declare agricultural operations a nuisance.²⁵ This could encourage municipalities to couch otherwise improper ordinances in terms other than nuisance, such as trespass or zoning, to avoid the grasp of the statute. For example, a recent case in the Pennsylvania Commonwealth Court held that the state's Right-to-Farm law does not prohibit a municipality from passing an ordinance banning an agricultural practice as long as that ordinance is rooted in zoning, and not in nuisance, law.²⁶ The court reasoned that because zoning ordinances serve a multitude of purposes beyond merely the suppression of nuisances, they fall outside the realm of the Right-to-Farm law's protection.²⁷ The result is that a municipality may be able to achieve an otherwise impermissible result by a simple change in nomenclature. This cannot be the outcome

that the General Assembly intended when it crafted the Right-to-Farm law as a broad-reaching protection for agricultural interests.

Separate and apart from the Right-to-Farm law, the state's Nutrient Management Act also contains a provision that limits local ordinances. In regards to nutrient management, which includes practices related to the application and storage of manure, state law completely preempts the field.²⁸ Therefore, a municipality may not enact any ordinances or regulations that are more stringent than the state Nutrient Management Act. Just like the Right-to-Farm law's limitations on local ordinances, the Nutrient Management Act's limitations are too limited in scope to comprehensively address the problem of local ordinances. As long as a municipality attempts to regulate an aspect of farming that does not deal with the application or storage of manure, its ordinance will most likely be upheld.

Therefore, a bit of creative drafting is all that a municipality needs to create an ordinance that arguably falls outside of the protections of both the Right-to-Farm law and the Nutrient Management Act. Since a justifiable argument is all a municipality needs to drive a farmer to court and saddle him with the costs of litigation, this can be quite an effective tool for local governments. For example, a case that occurred in Granville Township, Bradford County, was recently cited by the Governor as just the type of local overreaching that the Commonwealth must strive to prevent.²⁹ In this case, the Graybill family, who had operated a dairy farm in Granville Township for a number of years, decided to add a hog finishing operation to their business. In direct response, the township enacted an ordinance prohibiting any manure storage within 1,500 feet of a public road, property line, drilled well, or body of water. This ordinance would have

effectively prevented all future expansion of animal agriculture in the township by making it nearly impossible to find a location meeting all of the required setbacks. Despite Mr. Graybill's attempts to inform the township that its ordinance was clearly more restrictive than the Nutrient Management Act's 200 foot setback, the township still chose to enact the ordinance. After exhausting all local remedies, Graybill contacted the PDA and the Attorney General and asked them to enforce the Commonwealth's Nutrient Management Act by telling the township its ordinance was illegal. Because the Nutrient Management Act provides state agencies with no method of recourse against townships that violate the Act, the agencies were left with no choice but to tell Graybill that they lacked the power to enforce the Act. Graybill resorted to personally suing the township. He won, but at an astounding cost of \$80,000 in legal fees.³⁰ In an occupation like farming, where capital assets are abundant but cash flow is difficult to come by, a lawsuit of this magnitude can be particularly damaging. In fact, the cost of a lawsuit may force farmers to choose between selling part of their land or bringing a claim to vindicate their rights. In light of this, farmers must be provided with another remedy for resolving their disputes with municipalities.

2. Traditional Procedures Used to Regulate Local Ordinances in Other States

As is true of any study of the law, a survey of the approaches of other states may help to inform the issue. Like Pennsylvania, there are several states that use their Right-to-Farm laws as their primary mechanism for preventing improper local ordinances. These include: Arkansas, Idaho, Louisiana, Maine, Michigan, Montana, North Dakota, Oregon, South Carolina, Utah, and Virginia.³¹ Of these states, the most far-reaching

protection is provided by Michigan, where the state's Right-to-Farm law completely preempts the field and prohibits all local ordinances that contradict it in any respect.³² The second most protection is afforded by states that regulate ordinances dealing with more than just nuisance. For example, Oregon prohibits ordinances declaring agricultural practices either a nuisance or a trespass.³³ Several other states include zoning ordinances within their limitations. In Idaho and Louisiana, zoning ordinances are illegal if they force the closure of any agricultural operation.³⁴ In Virginia, it is illegal for a municipality to require special use permits for agricultural uses that are lawful in a particular area.³⁵

Other states provide protection from only nuisance ordinances, just like Pennsylvania. However, most of the states that do so grant more protection than Pennsylvania by avoiding the "direct adverse effect on public health and safety" loophole created by Pennsylvania's Right-to-Farm law. For example, Arkansas has imposed an across-the-board ban on all ordinances that declare an agricultural operation a nuisance.³⁶ Other states provide across-the-board protection to all agricultural operations that fall within a certain category, for example, all operations following "generally recognized agricultural practices"³⁷ or all existing agricultural operations.³⁸ Still other states provide exceptions that qualify their bans on nuisance ordinances, but most are more specific and provide more guidance than the loophole in the Pennsylvania statute. For example, North Dakota and South Carolina have exceptions for ordinances that regulate negligent or improper conduct.³⁹

The only states that provide less protection than does Pennsylvania are the states which regulate local ordinances in agricultural areas or districts only. These include

Maine, where a farmer in an agricultural district who follows best management practices cannot be held in violation of a municipal ordinance, and Utah, where ordinances cannot unreasonably restrict agricultural practices in agricultural districts.⁴⁰

This survey of other states' laws reveals just how little protection is granted by Pennsylvania's Right-to-Farm law. In fact, only two states provide less. In a state like Pennsylvania, which touts the protection of agriculture as a key public policy and which often fashions innovative programs designed to assist farmers, this historical lack of protection against illegal local ordinances is surprising. ACRE seeks to solve this problem by adding yet another innovative agricultural program to Pennsylvania's arsenal.

3. Ways that ACRE can Facilitate the Prevention of Illegal Local Ordinances

ACRE's primary method of policing illegal ordinances is through the creation of an Agricultural Review Board. The Review Board will hear the concerns of farmers, local governments, and residents about the legality of current and proposed ordinances under certain state laws, such as the Right-to-Farm law and the Nutrient Management Act.⁴¹ The Review Board will become a component of the newly created Office of Ordinance Review (OOR) within the State Conservation Commission.⁴² It will be composed of five members: the Secretaries of the PDA, the DEP, and the Department of Community and Economic Development, and two gubernatorial appointees.⁴³ The PDA Secretary will serve as the Board's Chair.⁴⁴

Any farmer who feels he has been aggrieved by an illegal local ordinance will be permitted to file an application for review of that ordinance by the Board. In addition, any local government that wishes to determine if a proposed ordinance is legal may request

Board review.⁴⁵ The key benefit of the ACRE system is that when an application for review is filed, the issue will initially be diverted to mediation. The process of mediation is designed to bring all of the interested parties -- farmers, their non-farm neighbors, and local government officials -- to the table to identify the areas of disagreement between them and to achieve a mutually acceptable resolution without the need for a formal adjudication by the Board.⁴⁶ Mediation has many advantages over traditional litigation. Perhaps the most obvious is the savings of time and money. Legal fees are drastically reduced, and cases are often settled in a few meetings rather than in the months or even years that it takes to finalize a lawsuit. In addition, mediation allows both parties to become active participants in molding an agreement, which can enable them to generate creative solutions that could not be reached in a courtroom. Finally, the process of working together to create a mutually acceptable result will hopefully help to bring community members together rather than divide them. This should in turn reduce the prevalence of future conflicts.⁴⁷

If, and only if, the mediation process fails, the contested ordinance will be reviewed by the OOR, which will offer a proposed adjudication on the legality of the ordinance. The decision of the OOR may be appealed to the Review Board, which will issue a final adjudication. If the Board determines that a local government has overstepped its bounds, it will direct that government to cease enactment or enforcement of its ordinance. In the event that a local government fails to abide by an order of the Board, its decision will be defended by the PDA and enforced by the Attorney General. Either party may choose to appeal a decision of the Board to the Commonwealth Court.⁴⁸

ACRE's proposal is an ideal solution to the problem of illegal local ordinances for several reasons. First, it creates a mechanism for enforcing the ordinance-limiting provisions that already exist in other state laws. This would prevent miscarriages of justice like the one that faced the Graybill family. When Mr. Graybill contacted the PDA about a potentially illegal ordinance, the agency would no longer be without recourse. It could direct Graybill's complaint to the Review Board. The review process will save time and expense for many farmers and local governments. Second, ACRE recognizes the importance of the human component in land use disputes. In conflicts such as these, the parties often hold firmly-rooted beliefs about each other, which may be faulty in many respects. By creating a mediation process designed to bring all parties to the table, ACRE seeks to help dispel these beliefs. If a farmer and a local official sit down with each other and talk about an issue face-to-face, they are likely to realize that they have many things, such as desire to maintain property values, in common. These common threads will help to weave together what were otherwise thought to be incompatible positions into a mutually-acceptable result. Third, ACRE realizes that, although the mediation process has potential, it will not work in all circumstances. Therefore, the formal review process stands as a back-up to force compliance with the law if necessary. Finally, ACRE realizes that prevention of conflicts is as important as their resolution. To that end, ACRE proposes to make changes in several areas of law, which are designed to reduce the negative impact of agricultural operations on the environment. This should in turn improve popular perceptions of agriculture and, hopefully, decrease the need for local governments to resort to illegal ordinances in the first place.

4. Programs Similar to ACRE in Other States

Although ACRE is an innovative program, Pennsylvania is not the first state that has considered creating review boards to address the problem of illegal local ordinances. Among the most prominent states to create review processes are New York,⁴⁹ New Jersey,⁵⁰ and Michigan.⁵¹ New Jersey has enacted a county-based system for the review of local ordinances. This county system is supplemented by the State Agriculture Development Committee. The Committee is comprised of eleven members. They include the Secretary of Agriculture, the Commissioner of Environmental Protection, the Commissioner of Community Affairs, the State Treasurer, the Dean of Rutgers University, and six gubernatorial appointees. Of these appointees, four must be farmers and two must represent the general public. The Secretary of Agriculture serves as the Committee's chair.⁵² The Committee's primary purposes are to develop and recommend best management practices for farms and to ferret out conflicts between local ordinances and these recommended practices. If the Committee uncovers a local ordinance that improperly regulates a recommended management practice, the Committee must attempt to negotiate a resolution with the municipality for a period not to exceed 120 days. At the end of this period, the municipality must establish a schedule for implementing all of the Committee's recommendations.⁵³

Although the Committee is charged only with uncovering ordinances that are unfair to agricultural interests, individuals who feel they have been aggrieved by a farm operation are also given a method of recourse under New Jersey law. Any aggrieved party can file a complaint with his county agricultural development board or directly with the Committee in counties which have no boards. If the complaint deals with an issue

which the Committee has already determined to be a recommended agricultural practice, the county board must hold a public hearing and issue its findings within sixty days of receiving the complaint. If the Committee has not yet made a determination on the practice in question, the county board must forward the issue to the Committee for its determination. The Committee must then hold a public hearing and issue its decision to the county board. The board must then hold a separate public hearing and issue its recommendations within sixty days of receipt of the Committee's decision.⁵⁴ All decisions of a county board may be appealed to the Committee, and all decisions of the Committee may be appealed to the Appellate Division of the Superior Court of New Jersey.⁵⁵

Michigan has developed a procedure whereby a municipality may submit a proposed ordinance meeting certain criteria to the Director of the Commission on Agriculture to determine if it conflicts with state law. A proposed ordinance is eligible for review if it limits an otherwise acceptable agricultural practice that is alleged to have had an adverse effect on the environment or public health within the municipality. Upon receipt of the proposed ordinance, the Director must hold a public meeting in the municipality to review the ordinance. In formulating his recommendation, the Director must also consider the viewpoints of the Department of Environmental Quality, the Department of Community Health, and the Health Department for the county in which the municipality is located. Within thirty days after the public meeting, the Director must make a recommendation to the Commission concerning the ordinance. Upon approval by the Commission, the municipality may enforce the ordinance.⁵⁶

New York's approach is the most indirect of the three. In that state, an Advisory Council on Agriculture was created with the purpose of advising state agencies on government policies affecting agriculture.⁵⁷ The Advisory Council consists of eleven members appointed by the Governor, five of which must be operators of commercial farms and two of which must be representatives of local governments.⁵⁸ Although evaluating illegal local ordinances is not included among the Council's list of specified duties, the law allows the Commissioner of Agriculture to delegate any additional duties to the Council that he deems necessary.⁵⁹ One such duty that the Commissioner could choose to delegate is the discretion to bring an action to challenge any ordinance believed to be in violation of state law.⁶⁰ Therefore, the Advisory Council could be transformed into a "watchdog" for illegal local ordinances.

It is obvious that the ACRE proposal has borrowed some aspects of the review processes of each of these states. ACRE most resembles the plan in New Jersey. Some of the most beneficial aspects of ACRE that have been borrowed from New Jersey include allowing both farmers and local governments to utilize the review process and creating a mechanism for appeal. However, there are some marked differences from New Jersey's law. First, New Jersey's system is county-based, while ACRE's is centralized with the state. Having a centralized system, rather than one fragmented by county, should actually be an improvement over the New Jersey model because it will create more predictability in ordinance review decisions. Second, New Jersey's Committee contains members from farming backgrounds and from the general public, while ACRE's Board does not. Abandoning these classes of Board members may have been a poor choice on the part of ACRE's drafters because it leaves the Board open to allegations of bias. Finally, New

Jersey's Committee is required to take proactive steps to locate illegal ordinances, while ACRE does not contain an analogous requirement. Again this may have been a poor decision because the onus of contesting ordinances is left entirely on farmers. Despite these slight changes from the New Jersey system, ACRE still remains a very beneficial program. ACRE provides much more definitive protection than does New York and much broader-reaching protection than Michigan. Therefore, the ACRE proposal looks excellent when compared to similar programs in other states.

III. OTHER ENVIRONMENTAL CONCERNS ADDRESSED BY ACRE

Many Pennsylvania farmers recognize the impacts of agricultural operations on the environment and have taken strides to reduce the pollutants created by their operations. For example, nearly 2,000 farms have developed nutrient management plans, and over 60% of them have done so voluntarily.⁶¹ Unfortunately, other farmers have not heeded the call to prevent pollution and must be compelled to take steps to improve their management practices to reduce environmental contamination. There are many provisions in the ACRE proposal that seek to do just that.

1. ACRE Expands the Provisions of the Nutrient Management Act.

ACRE's key initiatives designed to reduce the effects of agricultural operations on the environment include a series of revisions to the Nutrient Management Act. These amendments, which are broader and encompass more farming operations than federal laws,⁶² will help Pennsylvania to remain a leader in the field of nutrient management.

First, the number of agricultural operations that are required by law to create nutrient management plans will be expanded. The Nutrient Management Act requires all Concentrated Animal Operations (CAOs) to implement nutrient management plans.⁶³ Currently, a CAO is defined as any agricultural operation whose animal density exceeds two animal equivalent units per acre.⁶⁴ An animal equivalent unit is further defined as one thousand pounds live weight of livestock or poultry.⁶⁵ As a result, under the current law equine and other non-livestock operations can never be required to implement nutrient management plans, regardless of their size. ACRE seeks to change this to create equal regulations for all large animal farms, regardless of the species of animal raised.⁶⁶ The addition of these other species will increase the number of CAOs subject to regulation by nearly 500 operations.⁶⁷

Second, all nutrient management plans will be required to include a phosphorus index analysis, an approach that is more protective of water quality than is traditional nitrogen indexing.⁶⁸ The phosphorus index is a calculation of a field's potential to contribute phosphorus to surface water and is based on factors such as existing soil phosphorus levels, proximity to surface water, manure and fertilizer application methods, erosion levels, and field drainage.⁶⁹ Third, where winter manure application is included in a nutrient management plan, the plan will be required to specifically describe how and where application is planned to occur so that the application can be monitored.⁷⁰

Finally, ACRE seeks to close the manure "export loophole," whereby high-density farming operations are permitted to transfer manure to smaller operations without nutrient management plans.⁷¹ Under ACRE, farms importing manure from CAOs and CAFOs will be required to have signed agreements and nutrient balance sheets

documenting allowable application rates. They will also be required to keep specific records and to retain the same manure application setbacks and buffers as the farm that produced the manure.⁷²

2. ACRE Brings Pennsylvania's CAFO Regulations in Line with Federal Standards.

In addition to the changes to the Nutrient Management Act, Concentrated Animal Feeding Operation (CAFO) regulations will also be changed to reflect the Environmental Protection Agency's (EPA) new animal number thresholds for defining a CAFO.⁷³ The regulations for CAFOs are designed to protect the quality of water resources by ensuring that manure is appropriately managed.⁷⁴ CAFOs are operations that are defined as point sources of pollution under the federal Clean Water Act. That Act prohibits pollutant discharge from point sources like CAFOs into surface water, unless those point sources have received and are in compliance with a National Pollutant Discharge Elimination System permit.⁷⁵ The changes in ACRE will increase the number of operations that will be required to obtain a permit and will also bring poultry operations which produce only dry litter within the definition of a CAFO. These changes will more than double the number of Pennsylvania farms subject to CAFO regulations.⁷⁶

To protect water quality, minimum setbacks and buffer zones will also be created to prevent CAFOs from applying manure too near water supplies. Farms will be required to either establish a manure application setback of 100-feet from surface water or create a thirty-five foot vegetative buffer.⁷⁷ In addition, the currently law requiring a 100-foot setback from public wells will be amended to require analogous setbacks for private

wells. These restrictions will not affect the farmer's ability to use the setback or buffer area for crop production, animal pastures, or fertilizer application.⁷⁸

3. ACRE Confronts Issues of Air and Water Quality.

ACRE would also make Pennsylvania one of the first states to confront the issue of odors, which is one of the most prevalent areas of hostility between farmers and their non-farm neighbors. The initiative would require all CAFOs and CAOs to adopt best management practices for odor control. In addition, all newly constructed operations would be required to implement best management practices in the construction and operation of their facilities.⁷⁹ Examples of best management practices for odor might include more strategic placement of exhaust fans and covering of manure storages.⁸⁰ Best management practices will be determined by the State Conservation Commission, in consultation with the PDA, DEP, and Nutrient Management Advisory Board, before any farms are required to implement them.⁸¹ Specific requirements for an individual operation will become part of its nutrient management plan.⁸²

In anticipation of the Federal Environmental Protection Agency's movement to study air emissions from agriculture,⁸³ ACRE will also create an Agricultural Air Quality Task Force. The Task Force, which will report its findings to the Nutrient Management Advisory Board, will examine data on the specific causes of air emission problems on farms and suggest ways to address this concern.⁸⁴ If the findings of the Pennsylvania Task Force predate the EPA's findings, Pennsylvania farmers stand to benefit by gaining more time to bring their operations into compliance.

ACRE also seeks to improve "agriculturally impaired" waterways by implementing a series of programs designed to research and correct water quality problems caused by agriculture. Current research has revealed almost 4,000 miles of streams within the Commonwealth that do not meet environmental standards because of nutrient releases from agricultural operations.⁸⁵ Clearly, this is a problem that agriculture cannot continue to ignore. Included within this program will be an investigation of the effects of antibiotic residues on fish and other organisms. The initiative will also contain outreach programs designed to help farmers understand the link between agricultural operations and decreased water quality.⁸⁶

4. ACRE Provides Realistic Funding, Education, and Enforcement Mechanisms.

Insufficient education about and funding for environmental programs can prevent farmers from implementing environmentally-friendly management practices on their farms, even if they would otherwise be willing to do so. The ACRE initiative seeks to resolve this problem by creating educational programs at the state and county level at which farmers can learn how to reduce the environmental impacts of their operations. Educational programs are a key avenue by which farmers can come to see manure as an asset rather than as a liability. For instance, manure digesters can convert waste products into a clean energy source. Current estimates are that the output from Pennsylvania's hog and dairy farms could produce enough energy to fuel all of the cars registered in Philadelphia.⁸⁷ Methods of manure conversion like these can benefit both the environment and the farmer's pocketbook.

In addition, numerous financial incentives will be created to entice farmers to take part in environmental initiatives. The Governor has already launched a \$5 million grant program designed to finance the implementation of clean and renewable energy technologies, such as manure digesters, on Pennsylvania farms. The ACRE program would add as much as \$13 million in resources, a portion of which will be available as direct grants to farmers.⁸⁸

But, education and financial assistance alone cannot work miracles. There will always be some farm operators who will refuse to comply with environmental regulations unless they are forced to do so. In recognition of this disheartening reality, ACRE provides more than \$1 million dollars per year to enhance on-farm compliance programs within the Department of Environmental Protection and the local conservation districts.⁸⁹

IV. ACRE'S LIKELIHOOD OF SUCCESS

Like any other proposed legislation, it is far from certain that ACRE will become law. While many interest groups support it, several others adamantly oppose it. Even assuming that ACRE does become law, it will still be required to withstand constitutional scrutiny.

1. ACRE's Chances of Becoming Law.

Many key agricultural organizations in Pennsylvania support the ACRE program. Farm Bureau President Guy Donaldson says the program should give farms "confidence that there is a future for their investment and families' livelihood in Pennsylvania."⁹⁰ PennAg, the Pennsylvania State Grange,⁹¹ the American Farmland Trust,⁹² and the

Pennsylvania Association of Conservation Districts⁹³ have also spoken out in support of the proposal. In addition, many individual farmers also support the proposal. As part of the Pennsylvania Farm Bureau's 2005 State Legislative Conference, more than 300 farmers voiced their support for ACRE to members of the General Assembly and called for its swift passage.⁹⁴

Several other interest groups have emerged as outspoken opponents of ACRE, but their arguments seem to ignore the facts of the proposal in most instances. Citizens for Pennsylvania's Future (PennFuture) opposes the Review Board, characterizing it as "a forum for bare-knuckled litigation where lawyers will reign."⁹⁵ However, this argument ignores the importance of the mediation process within the ACRE proposal. The Pennsylvania Family Farm Coalition, a group which often speaks out against "corporate" farming, also opposes the Review Board, saying that ACRE "subsidizes agribusiness interests by creating a special quasi-judicial authority" that agribusinesses can use to avoid the traditional forums of litigation.⁹⁶ This argument ignores the fact that the Review Board can be utilized by farmers, neighbors, and townships alike. Rather than subsidizing farmers alone, the Board will reduce the costs of litigation for all parties involved in a dispute.

Township organizations and officials, who fear the loss of their power to enact ordinances, also oppose ACRE.⁹⁷ However, the Pennsylvania State Association of Township Supervisors (PSATS) recently expressed its conditional support of the ACRE initiative. In its annual report issued on February 28, 2005, PSATS revealed that its support of ACRE was conditioned upon the following factors: First, ACRE must preserve townships' powers to enact ordinances for the health, safety, and welfare of their

residents. Second, ACRE must afford farmers and non-farmers alike the use of its provisions. Third, it must allow townships to seek voluntary review of their ordinances. Finally, it must establish procedures for appealing decisions of the Agriculture Review Board.⁹⁸ Since it appears that the ACRE proposal meets all of these conditions, PSATS should continue to support the initiative. However, ACRE's proponents should be sure to avoid encroachment on these areas of contention if possible to avoid losing PSATS as a supporter.

As recently as April 10, State Senator Mike Waugh, Chairman of the Senate Agriculture and Rural Affairs Committee, said he was less than optimistic about reaching a resolution on the ACRE proposal in the near future and that "the two sides are probably as divided as they've ever been."⁹⁹ Therefore, the outcome of ACRE is still less than certain. However, the proposal appears to have some very influential supporters, while most of its opponents are extremist interest groups. This, plus the support of the Governor, should help ACRE to become law.

2. ACRE's Chances of Withstanding Constitutional Scrutiny.

Even if ACRE overcomes all of the opposition to become law, it could still be faced with constitutional scrutiny at some point in the future. One issue that could be raised is whether the Review Board improperly appropriates legislative and judicial power to an administrative body. Since ACRE is still in a stage of infancy, looking to cases that construe similar laws in other states may help shed light on the issue. The New Jersey Superior Court has recently held that the grant of primary jurisdiction to an administrative agency, such as the State Agricultural Development Committee, is permissible. According to the Court, both

the administrative agency and the courts retain subject matter jurisdiction, but matters of policy dictate that the agency should exercise its jurisdiction first.¹⁰⁰ The establishment of primary jurisdiction in this fashion does not improperly infringe upon the province of the courts because a mechanism for appeal remains.¹⁰¹ Furthermore, although the agencies have primary jurisdiction over disputes between municipalities and farmers, that does not give them a *carte blanche* to impose their views.¹⁰² Instead, the agencies must "temper their determinations" with considerations of the impact of agricultural practices on public health and safety.¹⁰³ Given the striking degree of similarity between ACRE and the New Jersey law, ACRE should arguably withstand scrutiny on this issue.

A second issue that could be raised is whether the Review Board process can properly be held to apply retroactively to ordinances that were in place before ACRE was passed. In general, statutes that relate to remedies alone, which do not create new or take away vested rights, do not fall within the general prohibition against the retrospective application of statutes.¹⁰⁴ Clearly, ACRE's Review Board is remedial in the sense that it creates a remedy which farmers and municipalities can utilize for the evaluation of local ordinances. However, opponents of ACRE's constitutionality could argue that it gives farmers a new vested right to have the legality of ordinances tested outside of the courtroom. Although it seems as if the remedial portions of the statute would outweigh the substantive ones, the issue of retroactivity could in fact pose a problem for ACRE. Therefore, the provision that makes ACRE's reach retrospective should be tempered with a severability clause that preserves the rest of the statute should that provision be ruled unconstitutional.

V. CONCLUSION

Farm operations are changing and expanding so that farmers can compete in a global marketplace. Unfortunately, these changes often directly conflict with the quality of life and environmental goals of the farm's neighbors. This breeds an environment of unrest and adversity within local communities. ACRE aims to resolve this problem by bringing divided rural communities together to discuss and amicably resolve their differences. By turning to the Review Board rather than to litigation, local communities can avoid the unnecessary costs of legal actions that tend to polarize debates rather than resolve them. In addition, ACRE's environmental programs should help to improve the public perception of agriculture and reduce the need for illegal local ordinances in the first place. Although ACRE's fate remains unresolved, its prognosis of becoming law seems good. Therefore, it stands to become one of Pennsylvania's most influential agriculture laws.

1. The industry is the largest in terms of total revenue. *AgImpacts: The Role of Production Agriculture in the Local Economy*, Pennsylvania State University, at <http://agimpact.aers.psu.edu> (last visited Apr. 4, 2005).

2. American Farmland Trust, at http://www.farmland.org/mid_atlantic/Pennsylvania.htm (last visited Apr. 4, 2005).

3. *In re Dolington Land Group*, 839 A.2d 1021, 1029 n.8 (Pa. 2003).

4. Alan Gregory, *Who Bought the Farm?*, THE STANDARD SPEAKER, available at <http://www.msnbc.msn.com/id/3765154/> (last visited Apr. 4, 2005).

5. See, e.g., Kent Fleming, *Farming in the Shadow of the City*, in 1989 YEARBOOK OF AGRICULTURE: FARM MANAGEMENT 308, 322-24 (Deborah T. Smith ed., 1989).

6. Between 1997 and 2002, the number of dairy and beef farms with less than 499 head of cattle decreased by fifteen percent, from 33,051 to 27,957. See *2002 Census of Agriculture*, U.S.D.A. Nat'l Agricultural Statistics Serv., Pa. State Data – Table 12, available at <http://www.nass.usda.gov/QuickStats/> (last visited Apr 4, 2005). In that same time period, the number of dairy and beef farms with between 500 and 5,000 head of cattle increased by thirty percent. *Id.* Other agricultural industries experienced similar trends. The number of hog farms with less than 1,000 head decreased by fourteen percent, while the number with over 1,000 head increased by seven percent. *Id.* at Table 19.

7. Act of June 10, 1982, Pub. L. No. 454, No. 133.

8. 3 PA. CONS. STAT. ANN. § 951 (West 2005).

9. See Farmland Information Center, at http://www.farmlandinfo.org/farmland_preservation_laws/ (last visited Apr. 4, 2005) (database which provides links to the text of the right-to-farm laws of all fifty states).

10. See, e.g., *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998) (holding portions of Iowa's Right-to-Farm law an unconstitutional taking); *Buchanan v. Simplot Feeders Ltd. P'ship*, 952 P.2d 610 (Wash. 1998) (holding likewise for Washington's Right-to-Farm law).

11. Act of May 15, 1998, Pub. L. No. 441, No. 58, § 2.

12. See 3 PA. CONS. STAT. ANN. § 1703 (West 2005) (defines nutrient management plan as a “written site-specific plan which incorporates best management practices to manage the use of plant nutrients for crop production and water quality protection” consistent with certain established criteria.)

13. Press Release, Farmers Discuss Choices and Challenges Facing PA Farm Families (Apr. 12, 2005), *available at* <http://www.pfb.com/news/release/05statelegisconf.htm> (last visited Apr. 14, 2005) [hereinafter Choices and Challenges].

14. ROGER A. MCEOWEN & NEIL E. HARL, PRINCIPLES OF AGRICULTURAL LAW 9-23 (2005).

15. Choices and Challenges, *supra* note 13.

16. Press Release, Pennsylvania Department of Environmental Protection, Rendell Administration Unveils 'ACRE' Initiative (Aug. 10, 2004), *available at* <http://www.dep.state.pa.us/newsreleases/default.asp?ID=3032&varQueryType=Detail> (last visited Apr. 4, 2005) [hereinafter DEP Unveils ACRE].

17. Governor's Veto Statement, H.B. 1222, ??th Gen. Assem., Reg. Sess. (Pa. 2004) [hereinafter Veto].

18. *Id.*

19. *Summary of the Proposed Agriculture, Communities & Rural Environment (ACRE) Initiative*, Pennsylvania Farm Bureau, *available at* <http://www.pfb.com> (last visited Apr. 14, 2005) [hereinafter PFB Summary].

20. 3 PA. CONS. STAT. ANN. § 953 (West 2005).

21. *Id.*

22. Alexander A. Reinert, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694 (1998).

23. Veto, *supra* note 17.

24. 3 PA. CONS. STAT. ANN. § 953 (West 2005).

25. *Id.*

26. *Wellington Farms, Inc. v. Township of Silver Spring*, 679 A.2d 267 (Pa. Commw. Ct. 1996).

27. *In re Burger*, 17 Pa. D. & C.4th 280 (Bucks Co. Common Pleas Ct. 1992).

28. 3 PA. CONS. STAT. ANN. § 1717 (West 2005).

29. Veto, *supra* note 17.

30. *Id.*

31. The statutes limiting local ordinances in each of these states are as follows: ARK. CODE ANN. § 2-4-105 (Michie 2005); IDAHO CODE § 22-4504 (Michie 2005); LA. REV. STAT. ANN. § 3607 (West 2005); ME. REV. STAT. ANN. tit. 17, § 2805 (West 2005); MICH. COMP. LAWS § 286.474 (2005); MONT. CODE ANN. § 76-2-903 (2005); N.D. CENT. CODE § 42-04-04 (2005); OR. REV. STAT. § 30.935 (2005); S.C. CODE ANN. § 46-45-60 (Law. Co-op. 2005); UTAH CODE ANN. § 17-41-402 (2005); VA. CODE ANN. § 3.1-22.28 (Michie 2005).

32. MICH. COMP. LAWS § 286.474 (2005).

33. OR. REV. STAT. § 30.935 (2005).

34. IDAHO CODE § 22-4504 (Michie 2005); LA. REV. STAT. ANN. § 3607 (West 2005).

35. VA. CODE ANN. § 3.1-22.28 (Michie 2005).

36. ARK. CODE ANN. § 2-4-105 (Michie 2005).

37. IDAHO CODE § 22-4504 (Michie 2005); LA. REV. STAT. ANN. § 3607 (West 2005).

38. MONT. CODE ANN. § 76-2-903 (2005).

39. N.D. CENT. CODE § 42-04-04 (2005); S.C. CODE ANN. § 46-45-60 (Law. Co-op. 2005).

40. ME. REV. STAT. ANN. tit. 17, § 2805 (West 2005); UTAH CODE ANN. § 17-41-402 (2005).

41. DEP Unveils ACRE, *supra* note 16

42. *Agricultural, Communities, and Rural Environment Initiative Fact Sheet*, Pennsylvania Department of Agriculture, at <http://www.agriculture.state.pa.us/agriculture/cwp/view.asp?a=3&q=131379&pp=12&n=1> (last visited Apr. 14, 2005) [*hereinafter* PDA *Fact Sheet*].

43. PDA *Fact Sheet*, *supra* note 42. Other sources conflict on this point, replacing one of the two gubernatorial appointees with the Dean of Penn State's College of Agricultural Sciences. *See, e.g.*, DEP Unveils ACRE, *supra* note 16.

44. PDA *Fact Sheet*, *supra* note 42.

45. *Id.*

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46. DEP Unveils ACRE, *supra* note 16.
47. PENN STATE AGRICULTURAL LAW RESEARCH AND EDUCATION CENTER, FARM PROTECTION FROM NUISANCE LAWSUITS (1999).
48. PDA *Fact Sheet*, *supra* note 42.
49. N.Y. AGRIC. & MKTS. LAW § 301-310 (McKinney 2005).
50. N.J STAT. ANN. § 4:1C-1 - 4:1C-10.4 (West 2005).
51. MICH. COMP. LAWS § 286.474 (2005).
52. N.J STAT. ANN. § 4:1C-4 (West 2005).
53. *Id.* at § 4:1C-6.
54. *Id.* at § 4:1C-10.1.
55. *Id.* at § 4:1C-10.2.
56. MICH. COMP. LAWS § 286.474 (2005).
57. N.Y. AGRIC. & MKTS. LAW § 309 (McKinney 2005).
58. *Id.*
59. *Id.*
60. *Id.* at § 305-a.
61. ACRE: *The Plan to Protect Agricultural, Communities, and the Rural Environment*, Pennsylvania Department of Environmental Protection, at http://www.dep.state.pa.us/dep/deputate/watermgt/wqp/wqp_wm/HB1222/HB1222FactSheet (last visited Apr. 14, 2005 [hereinafter *ACRE Plan*]).
62. DEP Unveils ACRE, *supra* note 16.
63. 3 PA. CONS. STAT. ANN. § 1706(B) (West 2005).
64. *Id.* at § 1706(A).
65. *Id.* at § 1703.
66. PDA *Fact Sheet*, *supra* note 42.
67. *ACRE Plan*, *supra* note 61.

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68. *Id.*
69. *Phosphorus Index Component in Nutrient Management Plans*, Pennsylvania Farm Bureau, at <http://www.pfb.com/issues/phosphoruscomponent.htm> (last visited Apr. 14, 2005).
70. PDA *Fact Sheet*, *supra* note 42.
71. DEP Unveils ACRE, *supra* note 16.
72. PDA *Fact Sheet*, *supra* note 42. *See infra* next section for a discussion of manure application setbacks and buffers.
73. *Id.*
74. PENN STATE COLLEGE OF AGRICULTURAL SCIENCES, NEW FEDERAL CAFO RULES (2003).
75. *Id.*
76. *ACRE Plan*, *supra* note 61.
77. PDA *Fact Sheet*, *supra* note 42.
78. PFB *Summary*, *supra* note 19.
79. PDA *Fact Sheet*, *supra* note 42.
80. [Charlene M. Shupp Espenshade, ??, LANCASTER FARMING, at A32.](#)
81. PFB *Summary*, *supra* note 19.
82. *Id.*
83. *EPA Announces Air Quality Agreement for Animal Feeding Operations*, Pennsylvania Farm Bureau, at <http://www.pfb.com/news/Information%20Station/05EPAairqualitynewfinancing.htm> (last visited Apr. 14, 2005).
84. PDA *Fact Sheet*, *supra* note 42.
85. DEP Unveils ACRE, *supra* note 16.
86. PDA *Fact Sheet*, *supra* note 42.
87. Answering the Veto of House Bill 1222, Pennsylvania Department of Environmental Protection, at <http://www.dep.state.pa.us/dep/deputate/watermgt/wqp/wqp>

_wm/HB1222/HB1222VetoMessage/ (last visited Apr. 14, 2005).

88. *Id.*

89. *Id.*

90. Espenshade, *supra* note 80, at A32.

91. *Id.*

92. American Farmland Trust, *available at* http://farmland.org/mid_atlantic/pennsylvania.htm (last visited Apr. 14, 2005).

93. *PACD Position on ACRE*, Pennsylvania Association of Conservation Districts, *available at* <http://www.pacd.org/about/committees/soil&water.htm> (last visited Apr. 14, 2005).

94. Choices and Challenges, *supra* note 13.

95. Press Release, ACRE Stinks, PennFuture Claims, as Rendell Administration Offers Farm Legislation that is Worse than Vetoed Bill (Apr. 12, 2005), *available at* <http://news.findlaw.com/prnewswire/20050412/12apr2005135856.html> (last visited Apr. 14, 2005).

96. *Making Farm Policy in Pennsylvania that Supports Family Farms, Not Corporate Farms*, The Pennsylvania Family Farm Coalition, *at* www.celdf.org/cdp/pffc01.asp (last visited Apr. 14, 2005).

97. Press Release, Farm Organizations, Municipal Governments, and Conservation Groups Launch the Pennsylvania Family Farm Coalition to Support Family Farms and Oppose Attempt to Limit Local Control Over Corporate Farming (Jan. 24, 2004), *available at* http://www.celdf.org/cdp/pffc_press.asp (last visited Apr. 14, 2005).

98. *Id.*

99. Jennifer Gish, *Farmers, Local Government Debate ACRE Effort*, YORK DAILY RECORD, April 10, 2005, *at* <http://www.ydr.com/story/farm/64693/> (last visited Apr. 14, 2005).

100. Borough of Closter v. Abram Demaree Homestead, Inc., 839 A.2d 110, 116 (N.J. Super. Ct. App. Div. 2003).

101. *Id.* at 117.

102. Township of Franklin v. Hollander, 796 A.2d 874, 877 (N.J. 2002).

103. *Id.*

104. 73 AM. JUR. 2D *Statutes* § 247 (2004).