

STATE OF MICHIGAN  
IN THE COURT OF APPEALS

TOWNSHIP OF RICHLAND,

Court of Appeals Case No. 326734

Plaintiff/Appellee,

vs.

Kalamazoo County Circuit Court

Case No. 2014-0507-AV

JIM NIEUWENHUIS,

Hon. Gary C. Giguere, Jr.

Defendant/Appellant.

Transferred from 8<sup>th</sup> District Court

Other Court Case Nos. 14RT3180A

14RT3181A

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**AMICUS CURIAE BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL  
BY MICHIGAN SMALL FARM COUNCIL**

**STATEMENT OF QUESTIONS PRESENTED**

1. Did the lower courts err when they found that defendant failed to present any evidence whatsoever that the defendant's farm conforms with the applicable GAAMPS when, in fact, defendant presented significant evidence as set forth in the Allegations of Error and Relief Sought portion and other portions of this application?

Defendant's answer:            Yes.  
Plaintiff's answer:            No.  
Lower courts' answers:        No.  
***Amicus answer:***                **Yes.**

2. Did the lower court err when they found contrary to other court decisions, including the *Forsyth* decision, and the RTFA, MCL 286.474, that defendant needed to prove with actual written documentation from MDARD at the time in May 2014 when the Township issued citations to defendant that defendant's farm conformed to GAAMPS?

Defendant's answer:            Yes.  
Plaintiff's answer:            No.  
Lower courts' answers:        No.  
***Amicus answer:***                **Yes.**

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**TOA**

## INTRODUCTION AND STATEMENT OF INTEREST

This brief is offered on behalf of the Michigan Small Farm Council (“MSFC”). MSFC is a statewide organization with nearly 400 members. The mission of the Michigan Small Farm Council is to protect the rights of urban, suburban, and rural small-scale farmers throughout the state. MSFC preserves and enhances the benefits of small-scale agriculture to individuals and communities by engaging in education, outreach, and policy-making processes. MSFC’s primary work is advocating for small farms at the state level, especially with respect to Michigan’s Right to Farm Act (“RTFA” or “the Act”) protection and the Generally Accepted Agriculture and Management Practices (GAAMPs) state policies.

MSFC organized in December 2012, and incorporated as a non-profit corporation in May 2013. Benefits of membership include legal support, educational forums, affiliate membership with the Farm to Consumer Legal Defense Fund, and opportunities for members to participate in discounted plans for farm, home, and auto insurance.

MSFC and its members are particularly concerned about the lower courts’ erroneous rulings in this case because, if allowed to stand, they would require farmers to proactively seek Michigan Department of Agriculture and Rural Development (“MDARD”) proof of GAAMP compliance in order to qualify for the protections of Michigan’s Right to Farm Act. On two different occasions, MSFC’s President has sought MDARD’s help directly in resolving this matter. **Exhibit 1.** MDARD does not have the resources to accomplish state-wide inspections and determinations within a meaningful time frame. The result of letting the lower court ruling

stand would be that thousands of farms across Michigan would be bare of RTFA protections in the interim, which is indeterminable. That situation negates the legislative intent of the RTFA.

The RTFA provides farms with protection from public and private nuisance suits when they are GAAMP-compliant. The Act does not require that farmers obtain official proof of compliance, simply that they are compliant:

A farm or farm operation 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. Generally accepted agricultural and management practices shall be reviewed annually by the Michigan commission of agriculture and revised as considered necessary.

MCL 286.473(1)(emphasis provided).

In this case, the Nieuwenhuis farm is GAAMP-compliant *and* there is official proof of that compliance. If this farm is not protected by the RTFA, then virtually no farm can be protected by the Act, rendering it meaningless.<sup>1</sup>

## ARGUMENT

### A. MAEAP certification Is One Measure of GAAMP Compliance

If a farm has earned certification under the Michigan Agriculture Environmental Assurance Program (MAEAP), then it is, by definition, GAAMP compliant. MDARD, the state agency responsible for overseeing the MAEAP program and determining compliance with GAAMPS states:

Through MAEAP, Michigan farmers and agricultural stakeholders have taken a proactive approach to guarantee farms are both sustainable and environmentally-friendly. As one of the most agriculturally diverse states, the one-size-fits-all

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<sup>1</sup> In order to receive RTFA protection, an operation must meet the statutory definition of “farm” and conform to GAAMPS. That the farm at issue here meets the “farm” definition is not disputed.

approach to environmental protection simply does not work on all Michigan farms. MAEAP effectively overcomes this challenge by using a systems approach including a site and crop specific focus that involves education, risk assessments and third party audit inspections to address all soil and water resource concerns.

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Within each system there are three phases that must be completed in order to become verified. These phases are:

1. **Education** involves farmer attendance at a qualified MAEAP educational session. Held across the state, these sessions introduce farmers to MAEAP and update them on new and emerging regulations and opportunities affecting agriculture.
2. **On-farm risk assessment** focuses on evaluating environmental risks and devising farm-specific and economically viable solutions. Each MAEAP system implements a unique risk assessment tool developed to address the environmental impacts of that system
3. **Third-party verification** is where MDARD verifies the farm after the requirements of Phase 1 and 2 are met, the State's Generally Accepted Agricultural Management Practices ( GAAMPs ) are being followed, and the farm has implemented practices specific to system requirements.

[http://www.michigan.gov/mdard/0,4610,7-125-1599\\_25432-12819--,00.html](http://www.michigan.gov/mdard/0,4610,7-125-1599_25432-12819--,00.html); updated May 18, 2015; State of Michigan (emphasis provided).

Further, Mr. Wayne Whitman, Right to Farm Program Manager, Environmental Stewardship Division of MDARD testified under oath in the *Forsyth Township v. Buchler/Shady Grove Farm* case that MAEAP certification indicates GAAMP compliance:

Q(Atty) Okay. Would you say it [MAEAP certification] is -- Is it a first step or a step toward coming into compliance with the GAAMPs, is it -- What's the relationship there?

A(WW) It is consistent in that in order for a farm to achieve verification under the MAEAP program, they need to meet the Right to Farm GAAMPs that apply to their farm operation.

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Q(Atty) Okay. It is not the same, but I thought I heard you say that for a person -- a farm to gain MAEAP verification, they had to be meeting the requirements of applicable GAAMPs?

A(WW) Yes.

Deposition of Wayne Whitman, August 30, 2012; Marquette County Courthouse. The Opinion rendered by the Honorable Thomas L. Solka in that case is attached to Defendant's brief and so not duplicated here.

Last, the MAEAP standards themselves clearly incorporate GAAMP compliance. For example, the Cropping System for Field Crops includes compliance with several GAAMPs, including those for Manure Management and Nutrient Utilization, as illustrated here:

(Revised Date: 7-30-14)



**Cropping System for Field Crop and Vegetable Verification Standards**

**A boxed risk level** indicates the level required for environmental assurance verification.

**Bold black print** indicates a violation of state or federal regulation.

**Bold blue italic print** indicates a management practice consistent with a specified 2014 Right to Farm (RTF) Generally Accepted Agricultural Management Practices (GAAMPs).

RISK QUESTION	LOW RISK – 3 (RECOMMENDED)	MEDIUM RISK – 2 (POTENTIAL HAZARD)	HIGH RISK - 1 (SIGNIFICANT HAZARD)	RECORDS OR EVIDENCE FOR MAEAP VERIFICATION	REFERENCE OR GUIDANCE DOCUMENT
<b>NUTRIENT MANAGEMENT PRACTICES - GENERAL</b>					
1.00) Has there ever been a formal Right to Farm complaint against the farm?	There has never been a Right to Farm complaint or the concern was not verified or the concern was resolved.		There was a formal Right to Farm Complaint and the concern was not resolved.	Producer's verbal indication of compliant history.	
1.01) How often are fields tested for nutrient levels (P, K, Ca, Mg) and pH?	<b><i>All fields are sampled and tested on a regular basis, at one to four years, depending on crops being grown, and the cropping system.</i></b>	Most fields are sampled and tested every one to four years. Producer plans to bring all field soil tests up to date. Manure is not applied to fields without a current soil test.	Fields have not been tested within the past four years.	Field names or map. Acres in the cropped portions of the field. Up-to-date soil test reports, or schedule to bring all test us to date.	MSUE Bulletin: E-498S, Sampling Soils for Fertilizer and Lime Recommendations, frequency of soil sampling  <b><i>2014 RTF Manure Management and Utilization GAAMPs, Section V: Manure Application to Land, Soil Fertility Testing, #29</i></b>  <b><i>2014 RTF Nutrient Utilization GAAMPs, Section III: Fertilization Practices for Land Application, Soil Fertility Testing and Tissue Analysis, #7</i></b>
1.02) Do soil sampling procedures adequately represent field conditions?	One composite sample is taken from uniform field areas of 15 to 20 acres or from uniform management areas.	One composite sample is taken from uniform field areas of 20 to 40 acres.	One composite sample is taken from areas greater than 40 acres.	Predominant soil types/soil maps, Cropping histories. Proper soil sampling procedure.	NRCS 590 Standards  MSUE Bulletin E-498, Sampling Soils for Fertilizer and Lime Recommendations

MAEAP Cropping System for Field Crop and Vegetable Verification Standards, page 1. Full document at **Exhibit 2** (GAAMP references highlighted).

This brief alone presents ample evidence that MAEAP verification does indicate GAAMP compliance. In this case, the Nieuwenhuis farm should be afforded RTFA protection because it is MAEAP certified; that is more than enough to demonstrate GAAMP compliance.

**B. RTFA’s Requirement of Compliance with GAAMPs Does Not Require Third-party Certification**

The Court of Appeals has held that the farmer can prove conformance with the GAAMPs “by introducing credible testimony or other evidence to show that their farm or farm operation complies with applicable GAAMPs as set forth by the Michigan Commission of Agriculture.” *Lima Twp. v. Bateson*, unpublished opinion of the Court of Appeals, Sept. 9, 2013 (Docket Nos. 306575, 306583), 2013 WL 5288853(emphasis added).

The *Lima* Court’s interpretation aligns with the Act’s language:

A farm or farm operation 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. Generally accepted agricultural and management practices shall be reviewed annually by the Michigan commission of agriculture and revised as considered necessary.

MCL 286.473(1)(emphasis provided). The Act states that a farm must conform to the GAAMPs, not that it must produce official proof of conformation. The rules of statutory construction support applying the plain meaning of statutory language and not importing meaning when none is indicated. *Rinas v Mercer*, 259 Mich App 63, 672 NW2d 542 (2003).

**C. THE RTFA INTENDS THAT FARMS HAVE THE OPPORTUNITY TO BECOME GAAMP-COMPLIANT, EVEN AFTER A COMPLAINT IS LODGED**

Not only is a farm not required to be pre-certified as GAAMP compliant, the RTFA implies that the farm need not be GAAMP compliant at the time a complaint is made in order to qualify for RTFA protection, as long as it quickly comes into compliance. If MDARD receives a

complaint about a farm, it is required to conduct an on-site investigation of the farm within seven days of receiving the complaint. MCL 286.474(1). After that inspection:

If the director identifies that the source or potential sources of the problem were caused by the use of other than generally accepted agricultural and management practices, the director shall advise the person responsible for the farm or farm operation that necessary changes should be made to resolve or abate the problem and to conform with generally accepted agricultural and management practices and that if those changes cannot be implemented within 30 days, the person responsible for the farm or farm operation shall submit to the director an implementation plan including a schedule for completion of the necessary changes.

MCL 286.474(3). If the farm is compliant, the director of MDARD must inform, in writing, that person, the complainant, and the city, village, or township and the county in which the farm or farm operation is located of this finding. But, even if the farm is not GAAMP-compliant, it has the right to a consultation with MDARD and 30 days to become compliant. After the 30 days expire, a follow-up on-site inspection to verify whether the necessary changes were made or not is required of MDARD, and the director is required to inform, “in writing, the person responsible for the farm or farm operation, the complainant, and the city, village, or township and the county in which the farm or farm operation is located of this determination.” MCL 286.474(3). The director has similar notification duties in the event the farm has not implemented necessary changes.

The requirement that MDARD consult with a farm that is the subject of complaint and *that the farm gets 30 days to implement any changes needed to become GAAMP-compliant*, clearly shows that the RTFA’s intent is to facilitate compliance, and therefore RTFA protections for farms. This process shows that there is not an expectation that farmers seek pre-certification of GAAMP compliance, but that they have MDARD input and at least a month to become GAAMP compliant.

## CONCLUSION

*Amicus curiae*, the Michigan Small Farm Council, advocates that this honorable Court grant leave to appeal to Defendant Nieuwenhuis. Without clarification from this Court, preferably in the form of a published opinion, farmers across Michigan will not know if they are protected by the RTFA unless they have official proof that they comply with the GAAMPs. And, even if they do, in lower courts like those from which this appeal stems, it will not matter. In addition to the burden this imposes on farmers, allowing the lower court decisions to stand in this particular case is unjust and worthy of this Court's consideration because they ignore the intent and plain language of the Michigan Right to Farm Act, essentially voiding it of meaning.

Respectfully submitted,

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