

**RIGHT TO FARM OR RIGHT TO HARM?:
DO NEW YORK STATE’S RIGHT TO FARM LAWS GO
TOO FAR?**

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INTRODUCTION

New York State's dairy farms produced nearly fifteen billion pounds of milk in 2018.¹ Further, as of 2019, 25,673 farms operate on 9.08 million acres of land in New York State.² New York is one of the most prolific agricultural states, ranking in the top ten in the production of over thirty commodities, including first in yogurt, cottage cheese, and sour cream production, second in apple production, third in dairy and grape production, and fourth in pear production.³ These are not new trends, as New York has been a leading agricultural state throughout its history.⁴

When people think of New York, they often think of New York City and the financial district. Yet, New York's agriculture economy contributes nearly 2.4 billion dollars to the state's gross domestic product per year, which ranks as one of the top industries in New York State.⁵ Because of the importance of agriculture to the state, the legislature in 1970 added Article XIV, Section 4 to the state constitution, providing that the state shall by its policies encourage the development and improvement of agriculture.⁶

Although New York is still a leading agricultural state and values its farms, the geographic distribution of people in the state has changed. In

1. U.S. DEP'T OF AGRIC., 2018 STATE AGRICULTURE OVERVIEW: NEW YORK, https://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=NEW%20YORK (last visited Sept. 11, 2019).

2. Bob Somers, *Farmer Benefits & Protections—Agricultural District Program*, N.Y. ST. OPPORTUNITY AGRIC. & MKTS., <https://www.agriculture.ny.gov/ap/agservices/agdistricts.html> (last visited Sept. 11, 2019). This is about thirty percent of New York's land. *Id.*

3. OFFICE OF THE N.Y. STATE COMPTROLLER, AGRICULTURE IN NEW YORK STATE (2018), <https://osc.state.ny.us/reports/economic/agriculture-report-2018.pdf>.

4. U.S. CENSUS BUREAU, UNITED STATES CENSUS OF 1860: REPORT ON AGRICULTURE, <https://www2.census.gov/library/publications/decennial/1860/agriculture/1860b-04.pdf> (last visited Sept. 3, 2019).

5. OFFICE OF THE N.Y. STATE COMPTROLLER, *supra* note 3.

6. N.Y. STATE DEP'T OF AGRIC. & MKTS., GUIDANCE DOCUMENTS SERIES FARMLAND PROTECTION IMPLEMENTATION GRANT PROGRAM (2008), https://www.agriculture.ny.gov/ap/agservices/GD_FP%20and%20Ag%20Districts_%20FINALJPC.pdf.

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the 1950s, people began migrating from urban to rural areas.⁷ Fast-forward sixty years and as of the 2010 Census, only two percent of the population is directly employed in agriculture, but yet nineteen percent of the United States population lives in “rural” areas.⁸ This means that there are a large number of residents who live in rural areas that surround farmland.

Established farms started noticing this trend as early as the 1990s. For example, a farmer in Dutchess County, New York, owned a 170-acre farm for seventeen years.⁹ Originally, the farm was surrounded entirely by other farms.¹⁰ As of 1991, the farm was surrounded by sixty-three neighbors, none of whom farmed.¹¹ Another more recent example is a farmer who owns 3,000 acres of farmland in LaFayette, New York.¹² The farmer planned to build a 2.4-million-gallon manure storage system at the top of a side road in the town that runs along his land.¹³ This side road hosts thirteen houses.¹⁴ Neighbors, in addition to over 300 people in the town, attended meetings and wrote complaints protesting the installation of the manure storage system.¹⁵

As a result of the change in the “rural” population in America, all fifty states adopted a version of the “right to farm” laws.¹⁶ Specifically, among other things, right to farm laws protect farmers from private nuisance suits by neighbors for activity that is considered sound

7. Allison Tarmann, *Fifty Years of Demographic Change in Rural America*, POPULATION REFERENCE BUREAU (Jan. 1, 2003), <https://www.prb.org/fiftyyearsofdemographicchangeinruralamerica/>.

8. U.S. CENSUS BUREAU, URBAN AREAS FACTS (2018), <https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/ua-facts.html>. The definition of “rural” “encompasses all population, housing, and territory not included within an urban area.” U.S. CENSUS BUREAU, URBAN AND RURAL (2018), <https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural.html>.

9. Sam Howe Verhovek, *‘Right to Farm’ Laws Are Tested in Exurbs*, N.Y. TIMES (Sept. 29, 1991), <https://www.nytimes.com/1991/09/29/weekinreview/the-region-right-to-farm-laws-are-tested-in-exurbs.html>.

10. *Id.*

11. *Id.*

12. Glenn Coin, *Upstate NY Dairy Boom Leaves Farmers, Residents at Odds Over How to Handle Manure*, SYRACUSE.COM (Apr. 21, 2017), https://www.syracuse.com/news/2017/04/new_york_state_dairy_farms_manure_spreading_riverkeeper_environment.html.

13. *Id.*

14. *Id.*

15. *Id.*

16. Alexandra Lizano & Elizabeth Rumley, *States’ Right-To-Farm Statutes*, NAT’L AGRIC. L. CTR. (June 11, 2019), <http://nationalaglawcenter.org/state-compilations/right-to-farm/>.

agricultural practice.¹⁷ The main goals of right to farm statutes are to protect agricultural lands and the socio-economic vitality of agriculture.¹⁸

This Note provides an examination of New York's Right to Farm Act and how the law is necessary to protect farmers, but that some statutory changes and other incentives need to be explored in order to adjust to the residential development in rural areas. Part I of this paper provides a brief history of the development of the Right to Farm Act in New York, an analysis of the New York Agriculture and Market Statutes (particularly sections 303, 305, 305a, and 308), and an overview of the implication of these laws for both farmers and residential citizens.

Part II will provide examples of recent instances of nuisance problems for residential citizens in New York. Further, Part II will provide a comparison of the New York State Right to Farm Act to other similar states. Specifically, New York's statute will be compared to the less robust right to farm laws of North Carolina, the extensive right to farm laws of Illinois, as well as the similarly situated states of Wisconsin and Ohio.

Part III will offer suggestions for statutory changes and incentives, specifically the use of buffer zones, which can be implemented to curb the issue of nuisances for residential citizens, but still protect farmers and the important contributions they make to the state.

I. ABOUT THE RIGHT TO FARM ACT

All fifty states have enacted some version of the right to farm laws.¹⁹ The goal of these laws is to protect farmers and ranchers from nuisance lawsuits filed by individuals who have moved to rural areas and try to stop normal farming operations.²⁰ The state legislatures, through the right to farm statutes, wanted to protect the agricultural lands and the socio-economic vitality of agriculture.²¹

The protections afforded by each state's right to farm laws differ, as some states protect farmers much more than others.²² New York, the leading right to farm state when the laws were first implemented, has broad right to farm protections.²³

17. See N.Y. AGRIC. & MKTS. LAW § 308 (McKinney 2019).

18. N.Y. AGRIC. & MKTS. LAW § 300 (McKinney 2019).

19. Lizano & Rumley, *supra* note 16.

20. *Id.*

21. *E.g.*, AGRIC. & MKTS. § 300.

22. Lizano & Rumley, *supra* note 16.

23. Mark B. Lapping, George E. Penfold & Susan Macpherson, *Right-to-Farm Laws: Do They Resolve Land Use Conflicts?*, J. SOIL & WATER CONSERVATION 465, 465 (1983).

A. Historical Development of the Right to Farm Act in New York

New York was the pioneering state of the agricultural protection movement.²⁴ The state legislature took notice of the migration of people from urban centers to rural towns and decided to take strong action to protect agriculture and farmers.²⁵ Specifically, in Section 300 of the Agriculture and Markets Law, the legislature cited the extension of nonagricultural development into agricultural areas as a threat.²⁶ In 1969, the New York legislature added Article XIV, Section 4 to the state constitution, stating that “[t]he policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products.”²⁷ In 1971, New York was the first state to pass agricultural district laws.²⁸ Virginia, Illinois, and Maryland were next to follow New York’s lead.²⁹

In 1983, in the *Journal of Soil and Water Conservation*, an article was written about the newly enacted right to farm laws. It opened the article by stating:

Underlying much of the farm-land controversy are local land use conflicts between farmers and rural and suburban residents and industrial users. The irony of the situation is obvious: While farming creates and maintains the atmosphere and bucolic landscape so many wish to be part of, it is the business of agriculture, which mandates certain practices and functions that many find offensive. The result is conflict that prompts nonfarming neighbors to attempt to restrict or eliminate agricultural practices. This often translates itself into a nonfarming majority that employs land use controls to regulate farming or that resorts to nuisance lawsuits to enjoin or restrict certain practices. What many seek, then, is farmland without farms!³⁰

In this sense not much has changed since 1983. There are still many nonfarming neighbors who attempt to restrict the agricultural practices of the farms they surround.³¹ Although many of these complaints are not warranted, there are neighbors that have valid claims and concerns about

24. *Id.*

25. *See* AGRIC. & MKTS. § 300.

26. *Id.*

27. N.Y. DEP’T OF ENVTL. CONSERVATION, ARTICLE XIV OF THE NEW YORK STATE CONSTITUTION PROTECTING NEW YORK’S FOREST PRESERVE, <https://www.dec.ny.gov/lands/55849.html> (last visited Aug. 31, 2019).

28. Lapping, Penfold & Macpherson, *supra* note 23.

29. *Id.*

30. *Id.*

31. *See, e.g.,* Coin, *supra* note 12.

the agricultural practices, particularly concerning the location of certain nuisances. However, due to the right to farm laws, the ability of residents to voice complaints or bring about change has been significantly limited.³² Specifically, in New York, after passing the agricultural district laws in 1971, the legislature passed Section 308 of the Agriculture and Markets law, which limits the ability of private nuisance actions to be brought against farmers for sound agricultural practices,³³ as well as Section 305-a, that limits the ability of local governments to regulate agricultural practices.³⁴

B. The New York Right to Farm Act Statutes

The relevant statutes are New York Agricultural and Market Laws sections 300, 301, 303, 305, 305a, 308, and 310. Section 300 of the New York Agricultural and Markets law codifies the declaration of legislative findings and intent.³⁵ The legislature passed the right to farm laws due to its concern about the loss of agricultural and in the state and the continuation of this trend.³⁶ The legislature stated that “[w]hen nonagricultural development extends into farm areas, competition for limited land resources results. Ordinances inhibiting farming tend to follow, farm taxes rise, and hopes for speculative gains discourage investments in farm improvements, often leading to the idling or conversion of potentially productive agricultural land.”³⁷ The goal of the statutes is to “provide a locally-initiated mechanism for the protection and enhancement of New York State’s agricultural land.”³⁸

1. Section 303: Agricultural Districts

The first section added by New York was Section 303, which codified the creation of agricultural districts.³⁹ To date, New York is part of a minority of states still using agricultural districts.⁴⁰ Agricultural districts establish guidelines and “zones,” which the rest of the New York’s Right to Farm Laws are coordinated to follow.⁴¹ For example, if

32. See N.Y. AGRIC. & MKTS. LAW § 308 (McKinney 2019).

33. *Id.*

34. See N.Y. AGRIC. & MKTS. LAW § 305-a (McKinney 2019).

35. See N.Y. AGRIC. & MKTS. LAW § 300 (McKinney 2019).

36. *Id.*

37. *Id.*

38. *Id.*

39. See N.Y. AGRIC. & MKTS. LAW § 303 (McKinney 2019).

40. Elisa Paster, *Preservation of Agricultural Lands Through Land Use Planning Tools and Techniques*, 44 NAT. RESOURCES J. 283, 301 (2004).

41. See ADDENDUM; Somers, *supra* note 2.

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land is registered in an agricultural district, it results in limitations on the exercise of eminent domain and other public acquisition of land registered in agricultural districts, as well as limitations on the ability of private citizens to bring nuisance actions against farms within registered districts.⁴² As of 2019, there are 174 agricultural districts in New York State.⁴³

Agricultural districts are created by interested landowners (who collectively own at least 250 acres of land) that submit a proposal to their respective county legislature.⁴⁴ The county agricultural and farmland protection board then reviews the proposal and makes recommendations to the county planning board.⁴⁵ The county agricultural and farmland protection board considers factors including the viability of farming in the area, the presence of viable farmland, the extent of other land resources, among other considerations.⁴⁶ The county planning board then submits its district plan to the commissioner, who determines whether the area consists predominantly of viable agricultural land and if it will serve the public interest.⁴⁷ The advisory council on agriculture then makes the final decision.⁴⁸

2. Section 308: Right to Farm and Private Nuisance Actions

Section 308 is of primary concern for the conflict between residential and agricultural citizens. Under Section 308 of the Agricultural and Markets Law, an agricultural practice that is considered sound by the commissioner will not constitute a private nuisance.⁴⁹ However, this does not limit the ability of private citizens to bring suits for personal injury or wrongful death.⁵⁰ But, if a private nuisance claim is brought against a farmer for conduct the commissioner found to be a sound agricultural practice, fees and other expenses incurred by the farmer in connection with the defense will be awarded to the farmer.⁵¹

If a resident is concerned about an agricultural practice occurring, and feel that it is a nuisance, the resident can request that the commissioner issue an opinion about whether a particular agricultural

42. See N.Y. AGRIC. & MKTS. LAW §§ 305, 308 (McKinney 2019).

43. Somers, *supra* note 2.

44. AGRIC. & MKTS. § 303(1).

45. *Id.* § 303(2).

46. *Id.* § 303(3).

47. *Id.* § 303(6)–(7).

48. *Id.* § 303(7)–(8).

49. N.Y. AGRIC. & MKTS. LAW § 308(3) (McKinney 2019).

50. *Id.*

51. N.Y. AGRIC. & MKTS. LAW § 308-a(2) (McKinney 2019).

practice is sound.⁵² If the practice is sound, then nothing can be done about the “nuisance” occurring.⁵³ If the practice is unsound, then an action for private nuisance can be brought.⁵⁴ Sound agricultural practice is defined as “. . . those practices necessary for the on-farm production, preparation, and marketing of agricultural commodities.”⁵⁵ Examples include operation of farm equipment, proper use of agricultural chemicals, and direct sales of commodities.⁵⁶

Since 1993, the commissioner has only found five agricultural practices unsound and nine inconclusive out of the numerous decisions made.⁵⁷ Of the unsound practices, in 2004 a spotlight on a barn was found not to be used for farming purposes.⁵⁸ In 1994, the improper spreading of liquid manure during hot, humid weather was found unsound.⁵⁹ Also, in 1993, the improper storing of dead livestock, the improper use of pesticides, and the improper disposal and spreading of manure were all found to be unsound practices.⁶⁰

3. Sound Agricultural Practices and Why They Are Used

The range of sound agricultural practices is broad. For example, the use of a lagoon manure storage system, the use of an air cannon for the protection of crops, the use of dogs for protection of livestock, having livestock and fences near the property line, and the use of trenches for hog pens have all been found to be sound agricultural practices.⁶¹ Although some of these practices, such as fencing, have obvious utility, the utility of others is less clear.

For example, a manure storage system is used by farmers to make it possible to better achieve proper nutrient management.⁶² A manure storage system is essentially a large pit built under certain specifications

52. AGRIC. & MKTS. § 308(1)(a).

53. *Id.* § 308(3).

54. *Cf. id.*

55. *Id.* § 308(1)(b).

56. *Id.*

57. N.Y. STATE DEP’T OF AGRIC. & MKTS., SOUND AGRICULTURAL PRACTICE OPINIONS, <https://agriculture.ny.gov/land-and-water/sound-agricultural-practice-opinions> (last visited February 9, 2019).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. N.Y. STATE DEP’T OF AGRIC. & MKTS. & N.Y. STATE DEP’T OF ENVTL. CONSERVATION, FREQUENTLY ASKED QUESTIONS REGARDING MANURE STORAGE IN NEW YORK STATE, https://www.agriculture.ny.gov/FAQ_manure_storage.pdf (Aug. 31, 2019).

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that hold the fertilizer for farmers.⁶³ Further, it provides farmers with the flexibility to apply manure when weather and field conditions present a low risk of run-off, and for better times for crop harvesting.⁶⁴ When there is not proper manure storage, the risk of negative environmental impacts and nutrient loss is much higher.⁶⁵ As a result of the environmental benefits to this system, the state through the Department of Agriculture and Department of Environmental Conservation provides financial assistance and guidance to farmers to implement these systems.⁶⁶

Another example is the use of air cannons to protect crops. These large cannons, which are often propane-powered, use noise to keep birds and other pests away from various crops, such as corn.⁶⁷ These cannons are often fired during the summer months repeatedly on a schedule for most of the day.⁶⁸

The intention of the laws was to protect farmers and the socio-economic vitality of agriculture.⁶⁹ However, when agricultural practices get to the point of interfering with the use and enjoyment of the land of those who surround the agriculture, then possible alternatives to these very agricultural-friendly laws may need to be explored.

4. Section 310: Disclosures

Section 310 of the Agricultural and Markets Law requires that a person selling or exchanging real property located partially or wholly within an agricultural district present to the prospective buyer a disclosure notice which states that:

It is the policy of this state and this community to conserve, protect and encourage the development and improvement of agricultural land for the production of food, and other products, and also for its natural and ecological value. This disclosure notice is to inform prospective residents that the property they are about to acquire lies partially or wholly within an agricultural district and that farming activities occur within the district. Such farming activities may include, but not be limited to, activities that cause noise, dust and odors. Prospective residents are also informed that the location of the property within an

63. See ADDENDUM.

64. N.Y. STATE DEP'T OF AGRIC. & MKTS. & N.Y. STATE DEP'T OF ENVTL. CONSERVATION, *supra* note 62.

65. *Id.*

66. *Id.*

67. See ADDENDUM; Gregory B. Hladky, *Farm Cannon Disputes Prompt New Legislation*, HARTFORD COURANT (Apr. 26, 2015), <https://www.courant.com/politics/hc-farm-cannon-protests-20150426-story.html>.

68. Hladky, *supra* note 67.

69. N.Y. AGRIC. & MKTS. LAW § 300 (McKinney 2019).

agricultural district may impact the ability to access water and/or sewer services for such property under certain circumstances. Prospective purchasers are urged to contact the New York State Department of Agriculture and Markets to obtain additional information or clarification regarding their rights and obligations under article 25-AA of the Agriculture and Markets Law.⁷⁰

This disclosure notice essentially provides a warning to the prospective buyer that living in an agriculture district comes with different experiences and nuisances.⁷¹ To many people, this warning is about slow tractors on the road, manure being spread, etc.⁷² These minor nuisances are all part of the experience of living in a rural area and are not really a matter of concern. However, it is unlikely that residential people (many of whom are probably unfamiliar with agricultural practices) would think of something like a propane cannon. These cannons, when used by farmers, may be shot for three months during the summer from 7:00 a.m. until 8:30 p.m. every half hour, one to seven minutes apart.⁷³ This practice is well beyond general mention of “noise, dust and odors” in the disclosure, and is unlikely what people think of when signing it.⁷⁴ Although this practice may be effective in protecting crops, it is no surprise that neighbors would find this a nuisance and infringe on their ability to use and enjoy their land. As a result, the state should explore possible incentives and other protective measures to provide farmers with alternatives to these types of disruptive practices.

5. Section 305: Limitation on Local Government Regulations

Private citizens are not the only group that has little power to change the agricultural practices occurring around them. Local government also has limited powers. Under Section 305 of the Agricultural and Markets Act, local government when passing laws, ordinances, rules or regulations can only exercise these powers in such a manner that promotes the goals and policies of the state.⁷⁵ Further, the local

70. N.Y. AGRIC. & MKTS. LAW § 310(1) (McKinney 2019).

71. DAVID HAIGHT & DIANE HELD, *PLANNING FOR AGRICULTURE IN NEW YORK: A TOOLKIT FOR TOWNS AND COUNTIES* 20 (2011).

72. *See generally id.* (implying that many members of the public may be unfamiliar with “modern agricultural practices”).

73. *See* N.Y. STATE DEP’T OF AGRIC. & MKTS., *supra* note 57; *see also* SOUND AGRICULTURAL PRACTICE OPINION: NUMBER 13-2 (May 14, 2013); SOUND AGRICULTURAL PRACTICE OPINION: NUMBER 19-2 (May 31, 2019) (concluding that the practice is inconclusive until more information can be gathered, including this farmer’s specific bird predation management plan and effectiveness of other deterrent methods.).

74. AGRIC. & MKTS. § 310(1).

75. N.Y. AGRIC. & MKTS. LAW § 305-a (1)(a) (McKinney 2019).

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government cannot unreasonably restrict or regulate farm operations within an agricultural district unless public health or safety is threatened.⁷⁶ This law makes sense in theory. The state does not want a town to pass excessive regulations that infringe on the ability of farmers to produce and practice agriculture.⁷⁷ However, when nuisances that come from sound agricultural practice are excessive, and the local government cannot do anything about it, it is hard for the residents to find relief.

For example, when a farmer wants to build a manure storage system, the farmer applies for a permit from the local soil and water conservation district and the New York State Department of Environmental Conservation (NYSDEC).⁷⁸ If a farm is over a certain size and confines animals for forty-five days or more during any twelve-month period, it must obtain a permit by the NYSDEC, known as a Concentrated Animal Feeding Operation (CAFO) general permit.⁷⁹ A farm regulated through a CAFO permit must follow NYSDEC's current Comprehensive Nutrient Management Plan (CNMP).⁸⁰ Further, if a farm is operating under a CAFO permit, or a farm is receiving state or federal aid, "the farmer must retain a professional engineer to design and certify the manure storage system and all other engineering practices in accordance with USDA-Natural Resources Conservation Services (NRCS) Standards."⁸¹

As discussed above, because the majority of the farms in New York State are located in Agricultural Districts, the farms are protected by New York State Agriculture and Markets Law Section 305-a (protecting farmers against local laws that unreasonably restrict accepted farming practices).⁸² According to the NYDEC, these practices include manure storage systems and management.⁸³ As a result, once a farmer applies and gets approved to install the manure storage system, there is nothing that can be done by residents. Municipalities found in violations of the Right to Farm statutes that try to limit these practices would be required to halt the restrictions.⁸⁴ Therefore, the local government must allow the

76. *Id.*

77. *See id.*

78. N.Y. STATE DEP'T OF AGRIC. & MKTS. & N.Y. STATE DEP'T OF ENVTL. CONSERVATION, *supra* note 62.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*; N.Y. AGRIC. & MKTS. LAW § 305-a (McKinney 2019).

83. N.Y. STATE DEP'T OF AGRIC. & MKTS. & N.Y. STATE DEP'T OF ENVTL. CONSERVATION, *supra* note 62.

84. AGRIC. & MKTS. § 305-a.

practice. Further, the state encourages many agricultural practices that can be nuisances to the surrounding neighbors (like the manure storage system) because it is deemed safer for soil and water, the environment, and is more cost-effective for farmers.⁸⁵ Therefore, beyond the initial application to the local soil and water district, the towns and/or local government have little say in what happens.

6. Residential Citizens' Rights

Property owners have the right to possess and use their land without disturbance.⁸⁶ Further, property owners legally have a right to reasonable comfort and convenience in occupying their land.⁸⁷ A disturbance of an owner's rights is considered a nuisance.⁸⁸ A private nuisance is when the use and enjoyment of someone's land are interfered with substantially and unreasonably through an activity or other action.⁸⁹ Private nuisances that disturb the comfort and convenience for a property owner include foul odors, smoke, dust, loud noises and excessive light.⁹⁰

Essentially, the current landscape of the right to farm laws results in an exception to residential neighbor's right to possess his or her land without disturbance and the right to occupy the land in reasonable comfort and convenience. Under the law, property owners only have a right to "reasonable" comfort and convenience.⁹¹ As a result, the everyday activities of farmers such as slow tractors and the smell do not result in an "unreasonable" discomfort to their neighbors. However, when large manure storage systems, cannons that scare away animals, loud guard dogs used to protect livestock, seem to pass the threshold from "reasonable" to "unreasonable" discomfort to residential neighbors. The goal of the right to farm acts, as discussed above, is for the protection of farmers and agriculture.⁹² However, when a farmer's sound agricultural practices pass a threshold of unreasonable interference for those surrounding the farm, alternatives and incentive options for farmers should be explored.

85. N.Y. STATE DEP'T OF AGRIC. & MKTS. & N.Y. STATE DEP'T OF ENVTL. CONSERVATION, *supra* note 62.

86. CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, *Quiet Enjoyment*, https://www.law.cornell.edu/wex/quiet_enjoyment.

87. *Nuisance*, BLACK'S LAW DICTIONARY (10th ed. 2014).

88. *Id.*

89. *Id.*

90. DAVID A. THOMAS, 8 THOMPSON ON REAL PROPERTY, THOMAS EDITIONS 67.07.

91. WILLIAM F. WALSH, A TREATISE ON EQUITY 170 (1930).

92. N.Y. AGRIC. & MKTS. LAW § 300 (McKinney 2019).

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C. Shortcomings of New York's Right to Farm Laws

Although New York has extensive right to farm laws, the laws do not adequately protect the rights of nearby residents. One shortcoming under the current New York statutes is that there are no protections or remedies available for residents who were located and using their land prior to the agricultural practice that resulted in the nuisance being implemented.⁹³ As a result, a person could have been living and using his or her land for a number of years, and then a farm acquires a field next to him or her and begins an agricultural practice that is a nuisance to that neighbor. Under the current law, there is no remedy for the neighbor who was there first.

Further, although Agriculture and Markets Law Section 310 has requires mandatory disclosure, it does not mention any of the problems being complained about.⁹⁴ The disclosure only mentions nuisances in the broad sense, in terms of potential noise, dust, and odor.⁹⁵ It does not give concrete examples.⁹⁶ Also, the nuisances being experienced are going to differ based on the type of agricultural practice occurring, the size of the farm, and other factors. Under the current statute, the prospective grantor must give the disclosure quoted in Section 310.⁹⁷ It does not allow adaptation to the concerns of each individual municipality.⁹⁸ The disclosure neither offers any information about how to submit concerns to the commissioner nor states that some agricultural practices are unsound.⁹⁹

Lastly, the laws were drafted with the important intent of protecting farmers.¹⁰⁰ However, the laws were written prior to the implementation of new farming practices, including large manure storage systems.¹⁰¹ As a result, the laws have broad protections for farmers but need to be

93. *See generally* N.Y. AGRIC. & MKTS. LAW § 308 (McKinney 2019) (lacking any reference to protections for residents who lived in a location prior to the commencement of nearby agricultural practices).

94. *See* N.Y. AGRIC. & MKTS. LAW § 310(1) (McKinney 2019).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. AGRIC. & MKTS. § 310(1).

100. N.Y. AGRIC. & MKTS. LAW § 300 (McKinney 2019).

101. The statutes were enacted in 1987. *See id.* Since 1994, the state has helped fund the building of 461 manure storage systems. Christa Lemczak & Michelle Breidenbach, *What's the Poop on Manure Lagoons? See How They Work, Why Farmers Need Them*, NYUP (June 30, 2017), https://www.newyorkupstate.com/news/2017/06/whats_the_poop_on_manure_lagoons_see_how_they_work_why_farmers_need_them_video.html.

changed in order to keep up with the advancing technology of agriculture. In addition, the growth of agricultural tourism¹⁰² and CAFO¹⁰³ since the adoption of these laws is also of concern. Both of these practices come with their own unique nuisance problems. Currently, under the definition of sound agricultural practice, both of these practices are considered sound.¹⁰⁴ However, if a residential person lives in their home, and then a CAFO acquires land near it, that person has no protection if a nuisance occurs. Or, if a farm begins expansive agricultural tourism, when it has not done this in the past, neighbors do not have protection. The statutes do not account for changes in ownership, changes in practices, or who was there first.¹⁰⁵

II. CASE LAW AND OTHER EXAMPLES OF RESIDENT-FARMER CONFLICT IN NEW YORK AND OTHER COMPARABLE STATES

Because of Agriculture and Markets Statute Section 308, there is little case law in New York concerning private nuisance actions brought against farmers. As mentioned above, there have been seventy findings by the commissioner about the agricultural soundness of different practices.¹⁰⁶ However, traditional case law is limited because the vast majority of nuisance claims cannot be brought against farmers under the current landscape of the law.¹⁰⁷ However, as mentioned before, all fifty states have some version of the right to farm laws.¹⁰⁸ As a result, looking to other states' statutes and case law is a helpful comparison when considering the New York statutes' strengths and weaknesses.

102. New York State Senate Bill S1434 proposed a change in the definition of "Agricultural Tourism" to include wineries, breweries, cideries, and distillers. It also proposed a change to Section 305-a to protect such practices from being restricted by local laws. S.B. 1434, 242d Sess. (N.Y. 2019). The current definition under the statute is:

“‘Agricultural tourism’ means activities, including the production of maple sap and pure maple products made therefrom, conducted by a farmer on-farm for the enjoyment and/or education of the public, which primarily promote the sale, marketing, production, harvesting or use of the products of the farm and enhance the public’s understanding and awareness of farming and farm life.” N.Y. AGRIC. & MKTS. LAW § 301(15) (McKinney 2019).

103. N.Y. STATE DEP’T OF AGRIC. & MKTS. & N.Y. STATE DEP’T OF ENVTL. CONSERVATION, *supra* note 62.

104. *See* N.Y. AGRIC. & MKTS. LAW § 308(1) (McKinney 2019).

105. *See id.*; N.Y. AGRIC. & MKTS. LAW § 310 (McKinney 2019).

106. N.Y. STATE DEP’T OF AGRIC. & MKTS., *supra* note 57.

107. *See* AGRIC. & MKTS. § 308.

108. Lizano & Rumley, *supra* note 16.

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A. Analysis of New York Case Law

Section 308 of the Agricultural and Markets Law has significantly limited the case law in New York. A plaintiff can only bring a case if the agricultural practice is unsound.¹⁰⁹ However, only five agricultural practices have been found unsound by the commissioner,¹¹⁰ and these problems were resolved without further litigation. Further, other case law includes appeals from commissioner decisions finding agricultural practices sound.¹¹¹ Because residents have limited ability to remedy a nuisance, they voice their concerns and annoyances to their friends and family. Or, they often use other avenues, such as the press and public opinion, to relay their frustration.¹¹²

For example, an 8,000 acre, 950-Holstein cow farm in Elbridge, New York (Cayuga County) is in the process of building a ten-million-gallon manure storage system on its land, within a half-mile of neighbors.¹¹³ The farmers are leasing their land to a unit of a California investment group.¹¹⁴ Because the investment group did not have authority to build the lagoon, the company had to stop operations and change its relationships so that the storage system would be covered under the farm's existing CAFO permit.¹¹⁵ The manure storage system is considered a sound agricultural practice.¹¹⁶ The neighbors, having no other options, went to the press about their concerns.¹¹⁷ The neighbors mentioned their concerns about the foul air, groundwater contamination, and the value of their homes.¹¹⁸ Under the current landscape of New York Law, there is nothing that the neighbors can do about the system being placed near their homes.

109. AGRIC. & MKTS. § 308(3).

110. N.Y. STATE DEP'T OF AGRIC. & MKTS., *supra* note 57.

111. *See, e.g.*, In Re Groat v. Brennan, 13 Misc. 3d 1238(A), 1238(A), 831 N.Y.S.2d 353, 353 (Sup. Ct. Albany Cty. 2006); Pure Air & Water, Inc. v. Davidsen, 246 A.D.2d 786, 786, 668 N.Y.S.2d 248, 249 (3d Dep't 1998).

112. *See, e.g.*, Peter Mantius, *Manure Lagoon Wins Green Light Ahead of DEC's New State Rules on CAFOs*, WATER FRONT (Aug. 25, 2018), <https://waterfrontonline.blog/2018/08/25/manure-lagoon-wins-green-light-ahead-of-decs-new-state-rules-on-cafos/>; Julia Botero, *Massive Manure Lagoon Project Worries Watertown City Officials*, WRVO PUBLIC MEDIA (July 7, 2015), <https://www.wrvo.org/post/massive-manure-lagoon-project-worries-watertown-city-officials>.

113. Mantius, *supra* note 112.

114. *Id.*

115. *Id.*

116. N.Y. AGRIC. & MKTS. LAW § 308(1)(a)–(b), (3) (McKinney 2019).

117. Mantius, *supra* note 112.

118. *Id.*

Another example is in Watertown, New York (Jefferson County). Milk Street Dairy, a farm that owns over 1,000 cows, was required to build a seven-million-gallon manure storage system because NYDEC said the farm was running out of space to store its manure.¹¹⁹ The farm selected the location for the storage system and NYDEC approved it.¹²⁰ However, the farm's selected location was on a hill only 1,500 feet away from the Black River, which is the drinking water source for the city and Fort Drum.¹²¹ Because of concern over the location, NYDEC stayed the project for at least a year to make sure the water supply was not put at risk.¹²² Under Section 305-a of the Agricultural and Markets Law, there is an exception for the local government to intervene when it can be shown that there is a public health concern.¹²³ This is a rare example of when the local government was able to help its citizens move an agricultural nuisance.

Since 1994, 461 manure storage systems have been built with financial assistance from the state.¹²⁴ Because of the vast size of many of these systems, these are the stories that receive the most attention. However, the use of cannons and dogs to protect livestock and crops, as well as black fly and other insect infestations due to livestock are other examples of the different nuisances that can result from agricultural practices.¹²⁵ Protecting farmers and agriculture is essential, but when there are alternative, less invasive practices or locations, these options should be encouraged by the state. Further, allowing the local government to have more regulatory say and limiting the protections to those who have used agricultural practices on the land prior to the neighbors (see Wisconsin below) may help mitigate these problems.

B. Analysis of Wisconsin's Statute and Case Law

Wisconsin has a similar agricultural legal landscape to New York.¹²⁶ Like New York Agricultural and Markets Law Statutes, the Wisconsin statute also protects farmers from private nuisance actions that are the

119. Botero, *supra* note 112.

120. *Id.*

121. *Id.*

122. *Id.*

123. N.Y. AGRIC. & MKTS. LAW § 305-a(1)(a) (McKinney 2019).

124. Lemczak & Breidenbach, *supra* note 101.

125. N.Y. AGRIC. & MKTS. LAW § 308(1), (3) (McKinney 2019).

126. *Compare id.* § 308(3) with WIS. STAT. § 823.08(3)(a) (2018). All fifty states have Right to Farm laws. However, for the limited scope of this Note, I selected states that have a similar agricultural landscape to New York and states that have had recent developments in the Right to Farm Laws.

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result of sound agricultural practices.¹²⁷ However, the biggest difference between the Wisconsin and New York laws is that Wisconsin limits the ability of a farmer to be protected from private nuisance actions.¹²⁸ The statute states that only if the farmer used the land for an agricultural purpose without substantial interruption prior to the plaintiff using their property are they protected under the statute.¹²⁹ Essentially, the limitation is meant to protect whoever was utilizing the property first.

Another distinct difference between the Wisconsin and New York Statutes is the ability of the local government to regulate farms. The only mention of the limit on local government in the Wisconsin statute is in the legislative purpose which states “[t]he legislature further asserts its belief that local units of government, through the exercise of their zoning power, can best prevent such conflicts from arising in the future, and the legislature urges local units of government to use their zoning power accordingly.”¹³⁰ Unlike New York, Wisconsin’s only limit on the power of local government regulating farms is an “urge[]” to not have zoning laws that infringe on the agricultural operations.¹³¹

For example, in *Village of Black Earth v. Black Earth Meat Market, LLC* the Village of Black Earth issued Black Earth Meat Markets ten citations for breaking its village ordinances.¹³² Black Earth Meats claimed that it was exempt under the right to farm laws.¹³³ However, the Court of Appeals of Wisconsin held that nothing in the right to farm laws take away the municipalities authority to impose forfeitures, including authority they have to regulate agriculture pursuant to their police powers.¹³⁴ This is in stark contrast to New York, which severely limits the local government’s ability to regulate agriculture.¹³⁵ Because of the broader powers that Wisconsin grants its local governments, farmers still maintain protections, but the local governments, which deal most directly with the people, are able to limit some of the practices that are harmful.

C. Analysis of Illinois’s Statute and Case Law

Illinois is an example of a state with right to farm laws that greatly favor farmers. Its statutes state that no public or private nuisance actions

127. Wis. STAT. § 823.08(3)(a).

128. *See id.* § 823.08(1), (3)(a)(1).

129. *Id.* § 823.08(3)(a)(1).

130. *Id.* § 823.08(1)

131. *Compare* N.Y. AGRIC. & MKTS. LAW § 305-a (McKinney 2019) *with id.*

132. 2016 Wis. App. LEXIS 170, at *3.

133. *Id.* at *1.

134. *Id.* at *11.

135. *See* AGRIC. & MKTS. § 305-a.

can be brought against farmers if the farm has been established for a year and was not a nuisance when it began operation (presuming that the nuisance results from proper operation).¹³⁶ The Illinois statutes are similar in their construction to New York's statutes, but they provide broader protection to farmers because they also protect against public nuisances.¹³⁷

In the *Village of LaFayette v. Brown*, the Village of LaFayette tried to pass an ordinance which declared commercial farming within the boundaries of the village to be a nuisance.¹³⁸ The court ruled the ordinance was preempted by the right to farm act.¹³⁹ Further, in *Toftoy v. Rosenwinkel*, the plaintiffs alleged that defendants' cattle farm was generating large numbers of flies that were interfering with plaintiffs' use and enjoyment of their property.¹⁴⁰ As such, the plaintiffs requested injunctive relief to eliminate the farming practices that produced the flies.¹⁴¹ The Supreme Court of Illinois barred plaintiffs' nuisance claim because the farm had been in operation well beyond the one-year limitation contained in the statute.¹⁴²

Both of these cases are similar to New York's Right to Farm laws, including the limitation on local government regulation and in the protection of farmers.¹⁴³ The protections in these cases, especially concerning the ordinance by the village, protected agriculture and farmers as originally intended when these laws were adopted.¹⁴⁴

D. Analysis of Ohio Statute and Case Law

Similar to New York, and unlike the states discussed above, Ohio also utilizes agricultural districts.¹⁴⁵ Therefore, under the Ohio statute, it is a complete defense against a private nuisance cause of action if: (1) the agricultural activities were conducted within an agricultural district; (2) the activities were established within the district prior to the plaintiff's activities or interest; (3) the plaintiff was not involved in the agricultural

136. 740 ILL. COMP. STAT. 70/3 (2018).

137. Compare N.Y. AGRIC. & MKTS. LAW § 308(3) (McKinney 2019) with *id.*

138. 27 N.E.3d 687, 689 (Ill. App. Ct. 2015).

139. *Id.* at 690.

140. 983 N.E.2d 463, 464 (Ill. 2012).

141. *Id.*

142. *Id.* at 467.

143. See N.Y. AGRIC. & MKTS. LAW § 305-a (McKinney 2019). Except the one-year provision is different. See *id.* New York is actually broader in that it does not include the timetable. *Id.*

144. See 740 ILL. COMP. STAT. 70/1 (2018).

145. Compare OHIO REV. CODE ANN. § 929.02 (2019) with N.Y. AGRIC. & MKTS. LAW § 303 (McKinney 2019).

production; and (4) the agricultural activities were not in conflict with federal, state, and local rules and were accepted agricultural practices.¹⁴⁶ Like Wisconsin and Illinois, Ohio only offers a complete defense when the agricultural practices were established prior to the plaintiff's activities.¹⁴⁷ New York does not follow this pattern.

E. Analysis of North Carolina Statute and Case Law

Most recently, North Carolina has had contentious litigation and media attention surrounding nuisances, particularly manure storage systems.¹⁴⁸ Currently, Smithfield Farm, the world's largest slaughtering facility and pig farm,¹⁴⁹ and its subsidiary Murphy-Brown, are the named defendants in an ongoing series of nuisance lawsuits.¹⁵⁰ To date, there have been three trials that have taken place, all resulting in awards to the plaintiffs.¹⁵¹ The total amount of jury awards has been \$549,250,000.¹⁵² Over twenty-six lawsuits have been filed against the farm and corporation since 2014.¹⁵³

Prior to the enactment of the new statutes, the North Carolina statute read very similar to Illinois.¹⁵⁴ However, the legislature in their general

146. OHIO REV. CODE ANN. § 929.04 (2019).

147. Compare 740 ILL. COMP. STAT. 70/3 (2018) and WIS. STAT. § 823.08(3)(a) (2018) with OHIO REV. CODE ANN. § 929.04(B) (2019).

148. See Katherine Tovar, *An Update on North Carolina Nuisance Lawsuits*, IOWA ST. U. CTR. FOR AGRIC. L. & TAX'N (Aug. 31, 2018), <https://www.calt.iastate.edu/article/update-north-carolina-nuisance-lawsuits>; Jessie Stolark, *Stink, Swine, and Nuisance: The North Carolina Hog Industry and its Waste Management Woes*, ENVTL. & ENERGY STUDY INST. (Aug. 10, 2018), <https://www.eesi.org/articles/view/stink-swine-and-nuisance-the-north-carolina-hog-industry-and-its-waste-mana>; Ellen Essman, *North Carolina's Smithfield Lawsuits: Could Ohio's Farmers Face Similar Results?*, OHIO'S COUNTRY J. (Dec. 6, 2018), <https://www.ocj.com/2018/12/north-carolinas-smithfield-lawsuits-could-ohios-farmers-face-similar-results/>; H. Claire Brown, *North Carolina Jury Awards Neighbors \$473.5 Million in Smithfield Hog Waste Suit*, NEW FOOD ECON. (Aug. 3, 2018), <https://newfoodeconomy.org/north-carolina-jury-fines-smithfield-foods-nuisance-lawsuit-hog-farm-manure/>.

149. Glenn Greenwald, *The FBI's Hunt for Two Missing Piglets Reveals the Federal Cover-Up of Barbaric Factory Farms*, INTERCEPT (Oct. 5, 2017, 2:05 PM), <https://theintercept.com/2017/10/05/factory-farms-fbi-missing-piglets-animal-rights-glenn-greenwald/>.

150. See Tovar, *supra* note 148.

151. *Id.*

152. *Id.* However, the state implemented a cap on punitive damages, resulting in all the damage awards being reduced. Case #1 damages were reduced from \$50.75 million to \$3.25 million, case #2 damages were reduced from over \$25 million to \$630,000, and case #3 damages were reduced from \$473.5 million to \$94 million. *Id.*

153. *Id.* Due to diversity jurisdiction, the cases are being heard in federal court. Tovar, *supra* note 148.

154. See 740 ILL. COMP. STAT. 70/3 (2018).

assembly session laws indicated that “frivolous nuisance lawsuits threaten the very existence of farming in North Carolina”¹⁵⁵ and that “. . . a federal trial court incorrectly and narrowly interpreted the North Carolina Right-to-Farm Act in a way that contradicts the intent of the General Assembly and effectively renders the Act toothless.”¹⁵⁶ As a result, the general assembly redrafted the statute, now requiring: (1) that the plaintiff be the legal possessor of the real property affected; (2) that the real property be located within a half mile of the source of the activity or structure; and (3) the action is filed within one year of the establishment of the agriculture practice or within one year of the operation undergoing a fundamental change.¹⁵⁷

Although there may have been other factors that influenced the legislature’s decision,¹⁵⁸ the change in the law shows how the right-to-farm laws are still very much relevant and affect the lives of many people. This conflict in North Carolina exemplifies the conflicts that occur surrounding this issue, but on an even larger scale.¹⁵⁹ Contrary to what the legislature stated, these lawsuits were not “frivolous,” but concerned perceived nuisances, including the use of large manure storage systems close to property lines and the rampant fly population infringing on the use and enjoyment of the neighbors’ land.¹⁶⁰ North Carolina demonstrates the problems that occur due to the migration of people to rural areas and

155. 2018 N.C. Sess. Laws 113.

156. *Id.*

157. *Id.*; N.C. GEN. STAT. § 106-701 (2019).

158. *See, e.g.*, N.Y. AGRIC. & MKTS. LAW § 308(3) (McKinney 2019); WIS. STAT. § 823.08(3)(a) (2018). Donations made by the corporation to lawmakers may have influenced the legislature’s voting. *See, e.g.*, Kit O’Connell, *Missourians Fight ALEC Over Big Agriculture’s “Right to Farm,”* MPN NEWS (Aug. 20, 2014), <https://www.mintpressnews.com/missourians-fight-alec-big-agricultures-right-farm/195612/>.

159. Since the lawsuits in North Carolina, legislators in multiple states, including Utah, Nebraska, Georgia, West Virginia and Oklahoma have proposed legislation that would protect farmers from facing lawsuits like those in North Carolina. These proposals include the reduction in potential damages or to limit the distance a neighbor must live from the farm in order to bring suit. Further, farm lobby groups, such as the Utah, Georgia, and Nebraska Farm Bureaus wrote in support of the tightening of the right to farm laws in each respective states, citing the North Carolina lawsuits as reasoning. *See Leah Douglas, Big Ag is Pushing Laws to Restrict Neighbors’ Ability To Sue Farms*, NPR (April 12, 2019) <https://www.npr.org/sections/thesalt/2019/04/12/712227537/big-ag-is-pushing-laws-to-restrict-neighbors-ability-to-sue-farms>.

160. *See State v. Quality Egg Farm, Inc.*, 104 Wis. 2d 506, 508–9 (1981) (involving a nuisance suit where defendant’s chicken houses produced fifteen tons of chicken manure per day and emitted manure odor that was forced on the community by fans that ventilate the birds, and attracted flies); *see also Tinsley v. Monson & Sons Cattle Co.*, 2 Wash. App. 675, 678 (1970) (involving a nuisance suit against a corporation because the corporation’s livestock pens filled the air in plaintiff’s house with offensive and nauseating odors and flies).

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the use of large CAFOs.¹⁶¹ The farms are being subjected to expensive lawsuits, but the large CAFO's are causing extensive nuisances.¹⁶² New York needs to learn from what is happening in North Carolina and implement a compromise that protects farmers, but also the residents.

III. CAN A HAPPY MEDIUM BE REACHED UNDER THE CURRENT NEW YORK RIGHT TO FARM LAWS?

Under the current landscape of the law, New York is one of the states with the broadest protections for farmers. However, as more and more people move outside urban centers to rural areas, this issue will keep arising, even with the required disclosures. A happy medium through incentives, as well as a slight statutory change, should be implemented to continue to protect farmers, but also to protect the rights of residents to use and enjoy their land.

As seen by the right-to-farm laws of Wisconsin, Illinois, Ohio, and North Carolina, no right-to-farm law is perfect. However, taking the most beneficial aspects of the laws of other states, and learning from the big problems happening there—like the many lawsuits in North Carolina—are important. For better or worse, the state needs to strike a balance to protect farmers and agriculture, but also to deal with the reality that there are more residential people living in rural areas. Further, the state needs to address the added nuisance problems that are being caused by so-called “factory farms” or CAFOs. Lastly, with the growth of the agricultural tourism business, whether these practices should fall under a right-to-farm law should be considered.

A. Statutory Change to Agricultural and Market Laws

New York should amend its current Agricultural and Markets Law statute to protect residents who were located at their home prior to the agricultural practice of concern beginning. Under the current New York statute, there is no protection for residents who were located and using their land prior to the agricultural practice that resulted in the nuisance being implemented.¹⁶³ Even if the resident was there first and then the farmer either acquired the land or started using it for an agricultural purpose, the resident does not have a remedy.¹⁶⁴

161. Cordon M. Smart, *The “Right to Commit Nuisance” in North Carolina: A Historical Analysis of the Right-to-Farm Act*, 94 N.C. L. REV. 2097, 2105 (2016).

162. *Id.* at 2126.

163. *See generally* N.Y. AGRIC. & MKTS. LAW § 308 (McKinney 2019) (failing to exclude persons who resided near the agricultural land prior to the implementation of the nuisance).

164. *Id.*

Therefore, New York should amend its statute to be similar to either Wisconsin or Ohio. Under both of these state statutes, the farmers are only protected if they utilized the land prior to the plaintiff utilizing his or her land.¹⁶⁵ Adopting Ohio specifically may be best because Ohio, like New York, uses agricultural districts.¹⁶⁶ The goal of the right-to-farm laws as stated in New York Agricultural and Markets Law Section 300 was to protect agriculture from the extension of nonagricultural land use into farm areas.¹⁶⁷ However, the law currently is one-sided, as it does not offer protections for residents when agriculture extends where it was not prior.¹⁶⁸

New York could also amend its statute to be similar to part of North Carolina's, in which a private citizen can bring a suit if there is a "fundamental change" in the use of the property, such as a change in ownership or the addition of a nuisance.¹⁶⁹ This way, there may be protections for residents when agricultural tourism, a large CAFO, or another large change occurs.¹⁷⁰ This change will have similar protections to changing the statute to protect who was there first.¹⁷¹ These changes will still protect farmers and follow the legislative intent declared.¹⁷² However, it results in more fairness and protection to residents when there has been a change.¹⁷³

Further, under the New York statute, the local government has little to no power to regulate the agricultural practices of the farmers.¹⁷⁴ In contrast, Wisconsin provides the local government with some police power over agricultural practices.¹⁷⁵ Although this can be a slippery slope of excessive regulations, allowing some local government input, such as being able to have input about where nuisances like manure storage systems can be placed, would allow for more direct control by the people who these decisions affect the most.

165. See OHIO REV. CODE ANN. § 929.04 (2019); see also WIS. STAT. § 823.08(3)(a) (2019).

166. OHIO REV. CODE ANN. § 929.04.

167. N.Y. AGRIC. & MKTS. LAW § 300 (McKinney 2019).

168. See generally *id.* (failing to make any reference to residents located near agricultural lands prior to those lands becoming agricultural).

169. See N.C. GEN. STAT. § 106-701 (2019).

170. *Id.*

171. *Id.*

172. See *id.* (quoting 2018 N.C. Sess. Laws 113).

173. See *id.* (quoting 2018 N.C. Sess. Laws 113).

174. See N.Y. AGRIC. & MKTS. LAW § 305-a(1)(a) (McKinney 2019).

175. See WIS. STAT. § 823.08(1) (2018).

B. Incentives for Farmers to Abate Nuisances

The NYSDEC, Department of Agriculture, as well as the Federal and local governments often provide aid to farmers to build and utilize more environmentally friendly practices, including manure storage systems.¹⁷⁶ This aid includes funding and grants for the farmers to build such systems.¹⁷⁷ As a result, the state should explore offering other incentives to farmers to limit or relocate their nuisances that affect their neighbors. Farmers, like their non-farmer neighbors, have a right to use and enjoy their land. However, exploring options like tax incentives may be a way to limit the conflict that is occurring. For example, New York State could, as part of its financial aid requirements for farmers, require the farmer to place the nuisance (ex. a manure storage system) as far away from other residents as possible. For example, the NYSDEC helps determine the location of manure storage systems in order to protect the water supply.¹⁷⁸ Adding in this additional requirement for the location of the system is a relatively quick solution to a growing problem.

1. Buffer Zones Between “Nuisances” and Residents

New York, as well as other states including Minnesota, North Dakota, and South Dakota, have implemented the use of “buffer zones” or “buffer strips” to protect certain areas from pesticides and other contamination.¹⁷⁹ New York, Minnesota, North Dakota, and South Dakota use the “buffer strips” to protect water from runoff and other containments caused by agriculture.¹⁸⁰ This is done by planting certain vegetation in these “zones” to catch the run-off before it reaches the water.¹⁸¹ In California, “buffer zones” are used to protect schools from

176. N.Y. STATE DEP’T OF AGRIC. & MKTS. & N.Y. STATE DEP’T OF ENVTL. CONSERVATION, *supra* note 62.

177. *Id.*

178. *Id.*

179. N.Y. STATE DEP’T OF ENV’T. CONSERVATION, RIPARIAN BUFFERS, <https://www.dec.ny.gov/chemical/106345.html> (last visited Sept. 17, 2019); Walker Orenstein, *Minnesota’s Buffer Law is Likely to Change—No Matter Who Wins the Governor’s Race*, MINNPOST (Oct. 25, 2018), <https://www.minnpost.com/environment/2018/10/minnesotas-buffer-law-is-likely-to-change-no-matter-who-wins-the-governors-race/>; John Hult, *South Dakota’s Buffer Strip Tax Break Sees Few Takers in Year One*, ARGUS LEADER (Dec. 16, 2017), <https://www.argusleader.com/story/news/2017/12/16/south-dakotas-buffer-strip-tax-break-sees-few-takers-year-one/956242001/>.

180. N. Y. STATE DEP’T OF ENV’T. CONSERVATION, *supra* note 179; Orenstein, *supra* note 179; Hult, *supra* note 179.

181. N. Y. STATE DEP’T OF ENV’T. CONSERVATION, *supra* note 179.

being exposed to pesticides sprayed by farmers.¹⁸² Using this concept of “buffer zones” can be adopted to abate certain nuisances.

2. *Current Uses of Buffer Zones*

In New York, “riparian buffers” are strips of vegetation planted next to bodies of water to create space and protection from run-off and contamination from agricultural practices.¹⁸³ New York has offered different funding programs to farmers in order to implement these zones, but participation is not mandatory.¹⁸⁴ Similarly, in South Dakota, a voluntary rewards program was implemented for farmer’s who put run-off absorbing crops between their land and bodies of water.¹⁸⁵ If this was done, the farmers land was taxed at sixty percent of its value.¹⁸⁶ However, as of 2017, only thirty applications were submitted from eleven counties.¹⁸⁷

Unlike New York and South Dakota, Minnesota implemented a mandatory buffer zone law in 2015 that required the zones to be completed by November of 2018.¹⁸⁸ It requires farmers to plant vegetation between cropland and waterways.¹⁸⁹ The zones are to be an average width of fifty feet.¹⁹⁰ Also, there was a law before the legislature that would have provided fifty dollars per acre property-tax credit to farmers who have complied with the buffer zone law.¹⁹¹ As of May of 2018, there was ninety-eight percent compliance with the Minnesota law.¹⁹² However, as of 2018, there has not been any implementation of the tax cuts or aid to the farmers, who can no longer use this viable farmland.¹⁹³

Lastly, in January of 2018, California implemented a quarter-mile buffer zone to protect schools.¹⁹⁴ These zones do not allow the spraying

182. CAL. FOOD & AGRIC. § 6447.2 (2019).

183. N. Y. STATE DEP’T OF ENV’T L. CONSERVATION, *supra* note 179.

184. *Id.*

185. Hult, *supra* note 179.

186. *Id.*

187. *Id.*

188. Albert Lea Seed, *Minnesota Buffer Law: 7 Things Farmers Need to Know* (May 15, 2018), <http://www.alseed.com/News/Minnesota-Buffer-Law-7-Things-Farmers-Need-to-Know-2018-05-15/1098>.

189. *Id.*

190. *Id.*

191. *Id.*

192. Orenstein, *supra* note 179.

193. *Id.*

194. Sophia Schillinger & Sabine Martin, *Little Interest in Buffer Zones, New Pesticide Application Rules in Iowa*, COURIER, (June 11, 2018),

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of pesticides around public schools and daycares from 6:00 a.m. to 6:00 p.m.¹⁹⁵ Further, it requires notification requirements to schools by farmers about their anticipated use of pesticides.¹⁹⁶ This is a mandatory law and was implemented as a response to complaints and pesticide-related illnesses in children.¹⁹⁷

C. Implementation for Nuisance Problem

“Buffer zones” have been implemented by some states to combat other agricultural related problems.¹⁹⁸ This concept should be adopted by New York State in order to help abate the problems of nuisances affecting residential peoples’ ability to use and enjoy their land. Making this option voluntary likely will not have the participation to make a difference, as seen by South Dakota’s limited success.¹⁹⁹ Adding a statute to the Agriculture and Markets Laws or implementing local programs through municipalities (which would also require a change to Agriculture and Markets Law Section 305 in order to allow municipal power to do so) is the best way implement this change.

As seen by Minnesota, mandatory programming results in almost complete adoption by farmers.²⁰⁰ But, New York should make sure to compensate farmers for the loss of the ability to use certain parts of their land. This can be achieved through tax cuts and/or some sort of financial compensation. It is hard to determine how large the buffer zones should be. In California, the buffer zone is a quarter-mile.²⁰¹ Likely, the type of agricultural practices being performed near the residential houses will dictate how large the buffer zone will need to be.

Alternatively, if buffer zones would not work for a certain kind of a nuisance, the state could offer aid to implement different practices that are as effective but cause less of a nuisance. This way, the state is actively trying to protect the interest of both their residential and agricultural citizens. This could include financial aid and implementation assistance

https://wfcourier.com/news/local/govt-and-politics/little-interest-in-buffer-zones-new-pesticide-application-rules-in/article_1bbe062d-e44d-5ea6-bc74-8441adbafc7e.html.

195. CAL. FOOD & AGR. § 6447(g) (2019); Jane Sellen, *New Rule Puts Limits on Pesticide Use Near Schools*, CAL. PESTICIDE REFORM (Nov. 8, 2017), <http://www.pesticidereform.org/2017/11/08/new-rule-puts-limits-on-pesticide-use-near-schools/>.

196. CAL. FOOD & AGR. § 6447(g).

197. See N.Y. AGRIC. & MKTS. LAW § 308(3) (McKinney 2019); WIS. STAT. § 823.08(3)(a) (2018).

198. CAL. FOOD & AGR. § 6447(g).

199. Tovar, *supra* note 148.

200. Orenstein, *supra* note 179.

201. See CAL. FOOD & AGR. § 6447(g).

through NYDEC or the Department of Agriculture. For example, instead of using cannon fire to protect trees, proper fencing could be installed and sponsored by the Department of Agriculture.

CONCLUSION

The right to farm laws throughout the country, and particularly in New York, has served the important function of protecting and sustaining agriculture as people have migrated from urban to rural areas. However, under the current status of the laws in New York, there is no remedy for residential people when nuisances substantially infringe on their rights to use and enjoy their land, even if they were there prior to the agricultural practice. As a result, there have been increased instances of residential people complaining about these new nuisances, particularly concerning state-sponsored manure storage systems. As a result, New York should look to other states, many of which have also been experiencing problems, and amend the statute to protect residential people who used their land prior to the agricultural practice, or if there has been a fundamental change in the agricultural practice. Further, the state should explore offering incentives, whether that be aid or tax breaks, to help abate nuisances through funding alternative agricultural practice options such as mandating the use of “buffer zones.”

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ADDENDUM

I. AGRICULTURE DISTRICTS



Image of New York State's Agricultural Districts. Green areas represent certified agricultural districts.²⁰²

²⁰² Somers, *supra* note 2.

II. MANURE STORAGE SYSTEMS



Manure Storage System in Iroquois County, Illinois.²⁰³

²⁰³ Daniel Charles, WORLD'S BIGGEST PORK PRODUCER PLEDGES TO COVER MANURE PONDS, <https://www.iowapublicradio.org/post/worlds-biggest-pork-producer-pledges-cover-manure-ponds#stream/0> (Last visited February 8, 2020).

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III. PROPANE CANONS



“Joe DeFrancesco with his propane-powered air cannon used to scare away birds from his crops when they are growing during the summer months. He uses the cannons mostly in his corn fields to scare away red-winged blackbirds.” (STEPHEN DUNN, Hartford Courant)²⁰⁴

²⁰⁴ Hladky, *supra* note 67.