

Confined animal feeding operations and state-based right to farm laws: Managing twenty-first century agriculture with a twentieth century framework in the case of Wisconsin, United States

Amy A. Schultz and Harvey M. Jacobs

Over the last several decades, large, industrial livestock farms have increasingly replaced small, traditional family farms, thereby changing normative agricultural practices and increasing the quantity and concentration of externalities associated with farming (dust, odor, manure runoff, chemical drift, and soil and groundwater contamination). Limited federal regulations exist to protect nearby ecosystems, wildlife, and people from soil, air, and water pollution from industrial farms. Furthermore, many statewide right to farm laws continue to protect industrial farms from private and public nuisance claims associated with environmental degradation.

Right to farm laws were first adopted by state legislatures in the 1980s in response to the expansion of peri-urban development and the increased conflict between new suburban residents and existing farmers in the United States (Lapping and Leutwiler 1987). New suburban residents increasingly filed private and public nuisance claims against nearby farmers due to encroachment of agricultural dust, noise, smell, and chemical drift (Lisansky and Clark 1987). The high court costs and desirable real estate offers from developers pressured farmers to discontinue farming, and lawmakers feared the long-term consequences resulting from diminishing agricultural operations (Lisansky and Clark 1987). While every US state adopted their own version of a right to farm law in the 1980s, they all attempted to supersede the common law of nuisance and designate agricultural use of land as superior to all other land uses, particularly land uses in competition with agricultural use (Farm Foundation 2012).

Right to farm laws were mostly viewed as a positive policy change that ensured

family farms prospered and prevented farmland depletion (Friedman and Adesoji 1999). However, right to farm laws were adopted at a time when family farms were still the production standard, with little regard to the transformation agriculture was just beginning to undergo (Zborek 2015). Large livestock industrial farms, also known as concentrated animal feeding operations (CAFOs), and large monocrop farms began replacing small family farms in the 1980s. In fact, USDA and US Environmental Protection Agency (USEPA) estimates show a greater than fivefold increase in the number of CAFOs from 1982 to 2012 (Huber 2013; Zborek 2015). A farm where a 100 head of cattle graze grassy pastures and provide natural fertilization transformed into a CAFO of 1,000+ head of cattle, confined in close quarters for 45 days or more with no access to vegetation, and where manure is stored in large lagoons for later application onto crop fields (USEPA 2016).

The USEPA estimates America's livestock now creates three times more fecal waste than the human population, yet unlike human waste, which goes through advanced treatment and processing, animal waste largely goes untreated (Zborek 2015). Contaminants from animal wastes have been found to enter the environment from, among other factors, manure lagoon leakage, manure lagoon overflow from major precipitation events, and runoff from over application on crop fields (Casey et al. 2015). Nitrates, bacteria, pathogens, veterinary pharmaceuticals, heavy metals, and naturally excreted hormones have been documented in both surface water and groundwater supplies in agricultural areas within the United States, resulting in fish kills, algae blooms, and contaminated private well drinking water (Rodewald 2015). Additionally, manure lagoons and manure spread on crop fields release toxic and malodorous gases, vapors, and particles, which have been associated with respiratory health effects among nearby residents (Casey et al. 2015).

Despite the negative ecological and human health consequences, limited federal

regulation exists to protect the land and water resources surrounding CAFOs. CAFOs are explicitly exempt from the USDA's Animal Welfare Act, and animal agricultural operations submit Comprehensive Nutrient Management Plans on a voluntary-only basis (USDA NRCS 2015). The USEPA's many attempts at regulating CAFOs under the Clean Water Act have been overturned, and in 2012, the USEPA stated it would need to rely on state agencies to collect and provide CAFO operational information including location, number of animals, acres available for spray, and water pollution discharge information (see *National Pork Producers Council v. EPA* [2011] and *Rapanos v. US* [2006]). Furthermore, the USEPA has made exemptions for CAFOs under the Clean Air Act, enabling the USEPA administrator to change threshold levels deemed hazardous "or to exempt entirely, any substance that is a nutrient used in agriculture when held by a farmer."

Right to farm laws are one potential avenue by which states could regulate CAFOs. While some states have made changes to their right to farm law, adapting statutes to reflect differences in small livestock farms versus industrial livestock farms, states like Wisconsin have actually made changes to their right to farm statute that favor CAFOs. This study examines Wisconsin's Right to Farm law and its role in protecting industrial livestock farms from environmental regulation and accountability. We offer alternatives to Wisconsin's Right to Farm law that address the growth of industrial livestock farms and provide increased protection of Wisconsin's natural resources and the wildlife and humans who rely on them.

WISCONSIN'S RIGHT TO FARM LAW

The first people to notice pollution from a CAFO are often neighbors and nearby community members who witness environmental degradation in the area or pollution crossing over onto adjacent properties. Yet right to farm laws have greatly limited the means by which neighbors and community members can legally address

Amy A. Schultz is a dissertator in the Department of Population Health Sciences and **Harvey M. Jacobs** is a professor in the Department of Planning and Landscape Architecture and the Nelson Institute for Environmental Studies at the University of Wisconsin-Madison, Madison, Wisconsin.

pollution from industrial agriculture. Historically, if a CAFO produced externalities such as excessive noise or odors, a neighbor could claim the CAFO was creating a nuisance and could file a tort claim (Midwest Environmental Advocates 2013). A tort claim is a civil, rather than a criminal, wrong whereby one landowner's practices are unreasonably interfering with the rights of another landowner or that of the public (Midwest Environmental Advocates 2013). In Wisconsin, and many other states, two types of nuisances are recognized:

1. A public nuisance, which is defined as an unreasonable interference with a right common to the general public
2. A private nuisance, which is defined as the invasion of another's interest in the private use and enjoyment of land

Typically, the state or county will file a public nuisance claim on behalf of a neighborhood, community, or group of residents whose well-being or health is affected by a nuisance. Common examples of public nuisances include houses of prostitution, river polluters, or illegal dog fighting facilities (Midwest Environmental Advocates 2013). An individual often files a private nuisance against a neighboring property owner due to nuisances caused by odors, noise, or physical pollutants crossing property boundaries (Midwest Environmental Advocates 2013).

Wisconsin's first Right to Farm law was enacted in 1982, and while amendments were enacted again in 1997, 1999, 2005, and 2009, the most significant changes were those set forth in 1995. Tables 1 and 2 high-

light and compare Wisconsin's 1982 and present-day Right to Farm laws. As found in chapter 823 of the *Wisconsin Statutes*, the legislative purpose largely remained the same throughout the amendments: to encourage agricultural production and discourage land use conflicts between expanding livestock operations and their neighbors. Additionally, in the original legislation the State revoked the control granted to local governments to minimize and prevent land use conflict through local zoning ordinances (although restrictions on local control pertaining to agricultural facility siting laws have been put into effect). Moreover, the broad definition of agricultural use and agricultural practice has remained largely unchanged.

Table 1

Similarities between Wisconsin's 1982 Right to Farm law with present day.

1982 Right to Farm law	Current Right to Farm law
Purpose: To encourage agricultural production and discourage land use conflicts between expanding livestock operations and their neighbors	Purpose: To encourage agricultural production and discourage land use conflicts between expanding livestock operations and their neighbors
Advised local governments to use zoning power to prevent land use conflicts	Advised local governments to use zoning power to prevent land use conflicts
Agricultural use and practice definitions: "agricultural use" has the meaning specified in s. 91.01 (1) and "agricultural practice" means any activity associated with an agricultural use	Agricultural use and practice definitions: (a) "Agricultural practice" means any activity associated with an agricultural use (b) "Agricultural use" has the meaning given in s. 91.01 (2)

Table 2

Differences between Wisconsin's 1982 Right to Farm law with present day.

1982 Right to Farm law	Current Right to Farm law
Did not limit the scope of the cause of action available to plaintiffs.	Limited the scope of the cause of action available to plaintiffs. Court cannot find an agricultural use or practice to be a nuisance if the following two conditions are met: 1. The plaintiff came to the nuisance. 2. The agricultural use or practice does not pose a threat to public health and safety.
Limited remedies available if nuisance is found: 1. If agricultural use was performed within agricultural zone: relief granted "shall not substantially restrict or regulate such uses or practices, unless such relief is necessary to protect public health or safety." 2. If agricultural use was performed outside of agricultural zone: the court could order adoption of practices that have the potential to mitigate the nuisance However, if agricultural use existed in same manner and same location before plaintiff began using his or her property, the court could: - Only assess nominal damages - Not order closure of agricultural use	Limited remedies available if nuisance is found: 1. The relief awarded by the court may not substantially restrict the agricultural use or practice. 2. If the court orders an agricultural operation to mitigate the nuisance, it must consult the Department of Natural Resources (DNR) or the Department of Agriculture, Trade, and Consumer Protection (DATCP) for suggested mitigation measures. 3. The court must provide the agricultural defendant with at least one year to install the measures. 4. Most significantly, any action that the court orders cannot substantially or adversely affect the economic viability of the agricultural use.
Litigations: If nuisance is found, the defendant shall recover the aggregate amount of costs and expenses determined by the court to have been reasonably incurred on his or her behalf in connection with the defense of such action, together with a reasonable amount for attorney fees.	Litigations: "Litigation expenses" is defined as the sum of all costs, disbursements and expenses, including reasonable attorney, expert witness, and engineering fees. If nuisance is found, defendant pays all litigation fees. If nuisance is not found, plaintiff pays all litigation fees.

Currently under Wisconsin's Right to Farm law, "agricultural practice" means any activity associated with an agricultural use, and after listing acceptable agriculture uses, the statute includes "any other use that the department, by rule, identifies as an agricultural use." Considering chapter 91 of the *Wisconsin Statutes* defines "agricultural-related use" as agricultural equipment dealerships, facilities providing agricultural supplies, facilities for storing or processing agricultural products, or facilities for processing agricultural wastes, essentially *anything* the state considers to be related to agriculture is protected under Right to Farm, including farm equipment dealerships and animal processing plants.

The 1982 law limited remedies available if a nuisance were found. The 1995 amendments limited the scope of cause of action. Ever since the enactment of the 1995 amendments, the court cannot find an agricultural use or practice to be a nuisance if *both* of the following conditions are met:

1. The plaintiff came to the nuisance
2. The agricultural use or practice does not pose a threat to public health and safety

The "coming to nuisance" statement is further defined in the statute. An agricultural practice or use cannot be found a nuisance if it is "conducted on, or on a public right-of-way adjacent to, land that was in agricultural use without substantial interruption" before the plaintiff began using his or her property. Under Wisconsin's broad agricultural use and practice definitions, changes in agricultural use are protected under the law. The "coming to nuisance" clause means that, for example, if you move next to a 20 ha (50 ac) cornfield (*Zea mays* L.), you also may have unwittingly moved next to a 3,000 cow dairy operation, because under Wisconsin's Right to Farm law a corn farmer can decide to be a dairy farmer with no exemption from protection of nuisance to adjoining land owners (Hanson 2002).

The second statement dramatically raises the bar for proving a private nuisance claim. Proving a nuisance is a threat to public health and safety makes the standard more akin to a public nuisance. In practice, this makes it nearly impossible for

a neighbor to file a private nuisance claim. Proving an environmental exposure is a cause of a human health effect is difficult even for professional epidemiologists to prove in a court of law. An untrained landowner with limited financial resources is unlikely to successfully prove such a claim (Black 1990; Fagin 2013).

The 1982 Right to Farm law limited the remedies available if a nuisance were found. If agricultural use was performed within an agricultural zone, the relief granted "shall not substantially restrict or regulate such uses or practices, unless such relief is necessary to protect public health or safety." On the other hand, if agricultural use was performed outside of an agricultural zone, the court could order adoption of practices that had the potential to mitigate the nuisance. Furthermore, the 1982 statute stated that if agricultural use existed in the same manner and same location before the plaintiff began using his or her property, the court could only assess nominal damages and not order closure of the agricultural use.

The 1995, 1997, and 1999 amendments further limited the remedies available such that if a nuisance is found the current remedies available are restricted by the following four conditions:

1. The relief awarded by the court may not substantially restrict the agricultural use or practice.
2. If the court orders an agricultural operation to mitigate the nuisance, it must consult the Department of Natural Resources (DNR) or the Department of Agriculture, Trade, and Consumer Protection (DATCP) for suggested mitigation measures.
3. The court must provide the agricultural defendant with at least one year to install the measures.
4. Most significantly, any action that the court orders cannot substantially or adversely affect the economic viability of the agricultural use.

So even if a nuisance claim is found against an agricultural use, it would likely have to be determined via a public nuisance action, as avenues for filing a private nuisance claim have essentially been eliminated by the law. Under the current law

any remedy attempting to minimize a nuisance will likely fall short of doing so.

If proving a "threat to public health and safety" is not enough of a deterrent, surely a neighbor burdened by an agricultural nuisance will think twice before filing a nuisance claim. If the neighbor loses a nuisance lawsuit she/he will be assessed all fees, including all expenses, reasonable attorney fees, and expert witness and engineering fees.

EVIDENCE OF CONFLICT IN WISCONSIN

According to Wisconsin's State Legislature *Blue Book on Agricultural Statistics*, the number of farms in Wisconsin has decreased from 100,000 in 1975 to 69,800 in 2013 while the average size of the farm has increased from 78 ha (193 ac) in 1975 to 85 ha (209 ac) for the same period (Wisconsin Blue Book 2016). Since the enactment of Right to Farm law in 1982, the number of CAFOs has increased from fewer than 14 to more than 250, mostly dairy operations in the southern and eastern parts of the state (figure 1) (WDNR 2016).

The increase in the size of industrial farms has resulted in large concentrations of manure stored in manure lagoons, which are prone to spills, leaks, and overflows. Figure 2 depicts the amount of manure spilled in Wisconsin between 2009 and 2014, totaling at least 18 million L (4.8 million gal) of untreated manure spilled (Rodewald 2015). These spills have resulted in numerous contaminated waterways, such as Lake Michigan, Green Bay, Fox River, Lake Winnebago, and Little Eau Pleine River, and numerous documented fish kills (Egan 2014; Rodewald 2015).

According to the Midwest Environmental Advocates, a leading nonprofit environmental law center that has handled and filed many of the complaints and claims pertaining to agricultural nuisances, there has been increasing conflict associated with externalities from CAFOs. A few individual private nuisance lawsuits have been claimed and proven successful. One such case, *State of Wisconsin v. Glen Stahl* (2007), involved the Trembl family, who became seriously ill a few days after Stahl Farms spread tens of thousands of liters (gallons) of animal waste on nearby fields and contaminated their private

Figure 1

Wisconsin Department of Natural Resources estimation of the number of confined animal feeding operations in the state by required Wisconsin Pollutant Discharge Elimination System permits (WDNR 2016).

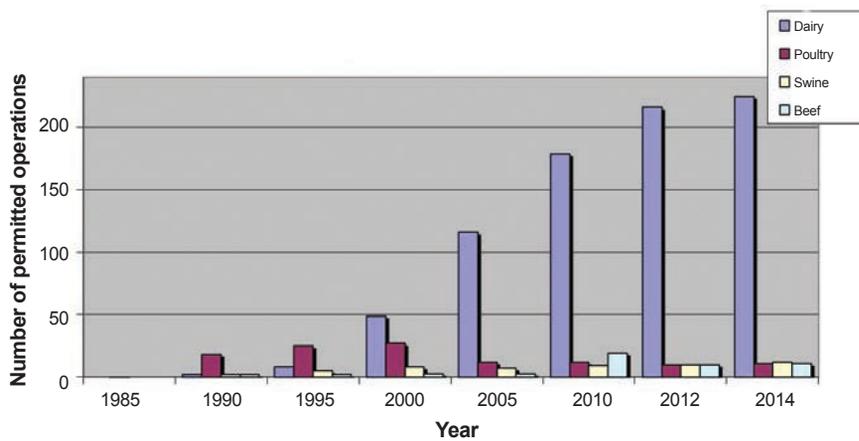
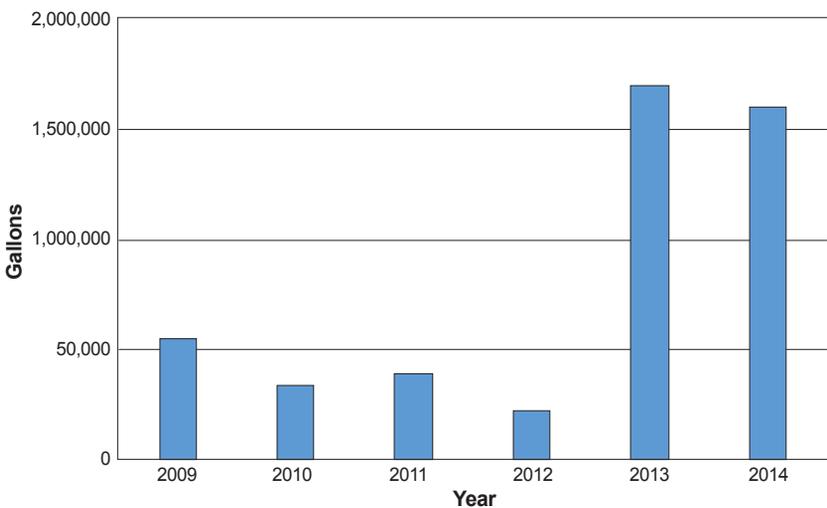


Figure 2

Estimated yearly totals of manure spilled into roads, ditches, and waterways in Wisconsin between 2009 and 2014.



well. The family received settlement when they joined with Wisconsin Department of Justice to file a lawsuit against Stahl Farms for violating terms in its water pollution discharge permit and discharging manure into School Creek.

Due to the difficulty of filing a private nuisance claim under Wisconsin’s Right to Farm law, residents affected by CAFO nuisances often must come together to form organizations and coalitions in order to prove a “threat to public health and safety” and disperse litigation costs if a lawsuit fails. One such case involved People

Empowered to Protect the Land (PEPL), a grassroots group formed by neighbors of Rosendale Dairy, an industrial dairy with 8,300 cows in Fond du Lac County. PEPL formed out of concern over the dairy’s air and groundwater pollution, excessive groundwater withdrawals, and truck traffic (Midwest Environmental Advocates 2011). The case settled with only a change to the permit and not a change to farming practices—the outcome hoped for by PEPL.

According to Wisconsin’s Department of Health Services, coliform bacteria could be present in as many as 169,000

private wells (Goodner 2016). While the DNR recommends private well water testing, they estimate only 16% of private well owners test their well water. Not only do rural residents need to be fearful of contaminants from agriculture in their well water, but manure irrigation systems and their associated odor and air pollution have posed substantial nuisance problems. A local media article highlighted a landowner whose rural home became surrounded by manure irrigation systems, and as a result of the externalities, was ultimately forced out (Seely 2014). The landowner claimed the liquid manure drifted onto his property from the nearby Central Sands Dairy, and the ammonia smell was so bad it hurt to breathe. There are likely many scenarios like this, which go unreported and never make it to court due to Right to Farm’s protection of CAFOs.

ALTERNATIVES

Several states have enacted changes that aim to mitigate the conflicts evidenced under Wisconsin’s Right to Farm law to their own right to farm laws. Table 3 presents a list of possible changes to the law, which were collected from changes made to other state statutes after 1970s-era laws were judged as going too far in their effort to protect farming at the cost of adjacent property owners’ rights and well-being.

The first suggested change would be to remove the proof of threat to public health and safety as a requirement for private nuisance claim. In *Bormann v. Board of Supervisors*, the Iowa Supreme Court struck down the Iowa Right to Farm Act (1998). In this case, a county had granted a landowner a permit to change to an agricultural use; the landowner was going to raise livestock and produce noise and odor. An adjacent landowner filed suit claiming a private nuisance due to land use change. The court found that the Iowa Right to Farm Act allowing the change in property use to agricultural would be a takings of the adjacent landowner’s right to file a private property nuisance, a right the landowner currently had.

In Washington State’s *Buchanan v. Simplot Feeders* (1998), a small farm filed a nuisance suit in federal court against Simplot Feeders regarding the odor and flies, which

Table 3
Suggested changes to Wisconsin’s Right to Farm law.

Suggested change	Reasoning
Removing proof of threat to public health and safety as necessity for private nuisance.	Proving public health and safety is akin to a public nuisance and not a private nuisance. The inability to file a private nuisance claim was in fact found to be an unconstitutional takings according to Iowa’s state constitution, and Washington State narrowly defined their Right to Farm law protection only against urban encroachment.
Change in definition of agricultural use and practice.	Minnesota provides more explicit and detailed definitions of agricultural uses and practices so that some categories of uses and practices may be exempt or singularly included under specific aspects of the right to farm law, such as expansions or change in use permits.
Add recognition of "change in agricultural use" as either exemption from right to farm, or open period for contested nuisance claims.	Some states, Indiana for example, not only recognize change in use in their right to farm statute, but exempt the change in use from right to farm protection at least for a certain period of time (typically one year), so that private and public nuisance have minimal limitations by which to file claims.
Add mandatory regulation of odor, air, and adjacent property private well water.	Since the federal government minimally regulates air pollution, states can take it upon themselves to regulate it. Minnesota regulates and monitors hydrogen sulfide on confined animal feeding operations (CAFOs) and Missouri enforces regulation of an odor control plan and a numerical odor test on CAFOs in the state.
Exempt farms with over a certain number of animal units from right to farm laws.	Minnesota explicitly exempts CAFOs from right to farm protections under its statute, opening them up for nuisance claims like any other property owner would face.
Ban manure irrigation use and winter spreading of manure.	Michigan and Minnesota, among other states, have banned manure irrigation, at least in counties where the most conflict would ensue. In three counties in Wisconsin, local efforts to ban winter spreading of manure have statistically significantly decreased the contaminant levels in nearby wells, supporting this proposed change.

were coming onto his property from the defendant’s 40,000 cow operation. The Washington Supreme Court interpreted the state’s Right to Farm law to limit only nuisance protection to farms that were facing encroaching urbanization rather than protection from all nuisance claims.

The second suggested change would be to expand the definitions of agricultural use and practice to include categories of different types of agricultural practices instead of all activities related to farming broadly defined under one definition. This would allow the size of the farm to be defined based on animal units for livestock operations and area for croplands, and the type of farm operation to be designated under separate categories. If livestock, crop fields, processing plants, small family farms, and CAFOs are all protected under right to farm, then they could be protected differently. Explicit definitions of different types of agricultural use and practice would help to enable the remaining changes listed in table 3 by allowing restrictions and protections of right to farm only under certain conditions of agricultural use. More specific categorization of agricultural practices would also

make room for variability in application of the law throughout the state in response to differences in geology and soil type.

Another suggestion follows on Minnesota’s action. In chapter 561, section 19 of the *Minnesota Statutes*, the state excludes large animal feeding operations exceeding a set number of animal units from all right to farm protections. This would facilitate the first suggested change, as private and public nuisance actions could proceed without the current limitations set forth by the law. Certain agricultural uses, such as large farms, or only livestock farms, could then be targeted for increased odor, air, and water regulation as both Minnesota and Missouri have set in place in the *Minnesota Administrative Rules* chapter 720, part 2002, and in the *Missouri Code of State Regulations*, title 10, division 10, chapter 3. The recent well water study conducted by the DNR suggests further regulation could be useful for CAFOs. CAFOs could be required to pay for annual well water testing of private wells within a designated proximity of manure-spread crop fields and manure lagoons with results sent to the DNR. Changes to management practices

could be required if contaminants above certain levels are found.

Several states have banned manure irrigation, at least in some counties, due to the adverse environmental and human health effects (Seely 2014). This, along with winter manure spread, could be outright banned statewide. Three counties in Wisconsin—Brown, Manitowoc, and Kewaunee—acting on their own, passed ordinances that prohibit winter manure spreading or restrict spreading on land with porous bedrock (Goodner 2016). A recent study on these regulations concluded the rules have caused “statistically significant reductions” in well contamination compared to other counties with fractured bedrock that only offered voluntary education on best practices to farmers and manure spreaders (Erb et al. 2015).

Finally, a change in agriculture use should not be protected under the state’s Right to Farm law, at least for a designated period during permit processing and after implementation of the agricultural change. For example, as determined in *Laux v. Chopin Land Associates* (1989) Indiana does not protect changes in farming activity, such as switching from grain

farming to hog raising. Arguably, many would agree that a person moving next to a cornfield, has not agreed to live next to a dairy CAFO. The adjoining neighbor should have the right to file a nuisance claim without the state's Right to Farm law being an obstacle.

CONCLUSION

Wisconsin's Right to Farm law greatly limits nuisance actions against CAFOs. The law attempts to protect and preserve the agricultural industry and productive farmland from unreasonable claims by those who come later into a productive agricultural landscape. Yet, CAFOs are contaminating surrounding areas and sometimes forcing neighbors off their property. In Wisconsin, the economic viability of agriculture—and especially the dairy industry—is of great importance. However, so too are the health and vitality of nearby community members and the natural resources on which they depend.

All citizens of the State would be well served if one or more of the suggested amendments were adopted into the Right to Farm law. If they were, it would be a significant step in addressing the public's concern over the environmental and human health effects posed by CAFOs. Under Wisconsin's current Right to Farm law, the health of Wisconsin's soils, ground and surface waters, and aquatic life are threatened. CAFOs and their impact on the environment and human health is an issue gaining evermore media coverage and one that has been addressed by some neighboring states. The time for a revision to Wisconsin's Right to Farm law, which recognizes how agriculture has changed from the late twentieth century, is ever more evident. A revision that balances the rights of all land uses, including CAFOs, is needed.

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