



SRAP
Socially Responsible
Agriculture Project

Guide to Confronting Concentrated Animal Feeding Operations in

NEW YORK



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A PROJECT BY SOCIALLY RESPONSIBLE AGRICULTURE PROJECT

For more than 20 years, Socially Responsible Agriculture Project (SRAP) has served as a mobilizing force to help communities protect themselves from the damages caused by industrial livestock operations and to advocate for a food system built on regenerative practices, justice, democracy, and resilience. Our team includes technical experts, independent family farmers, and rural residents who have faced the threats of factory farms in their communities. When asked for help, SRAP offers free support, providing communities with the knowledge and skills to protect their right to clean water, air, and soil and to a healthy, just, and vibrant future. For more information, visit www.sraproject.org.

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Date of publication: October 2018



CAFO Guide Overview

This guide outlines CAFO laws, regulatory processes, and useful resources for advocates. Below is an overview of actions communities can take if a CAFO is being built, expanding, or violating regulations.

EDUCATE YOURSELF

Learn how CAFOs harm communities at sraproject.org. Use this guide to find state agencies that regulate CAFOs; state permitting requirements for zoning, construction, etc.; and public open meetings and records laws. Use SRAP's Federal Guide to learn relevant federal laws like the Clean Water Act, Clean Air Act, and Endangered Species Act.

LOOK FOR PUBLIC NOTICES

Look for public notices of CAFOs in newspapers, state agency websites, and at government buildings. The window for public participation is often brief. Find rules and deadlines for public comment, hearing requests, and appeals. Respond before deadlines.

REQUEST AND REVIEW PUBLIC RECORDS

Search for public records related to the CAFO; if necessary, make a public records request.

NEW OR EXPANDING CAFOS

REVIEW ZONING ORDINANCES

Review municipal or county codes and zoning ordinances to determine if any requirements must be met at the local level.

REVIEW PERMIT APPLICATIONS

Determine if any local, state, or federal permit applications are required; review application materials to make sure all requirements are met.

COLLECT DATA

Test water before the CAFO siting or expansion to establish a baseline. This may show that new pollution came from the CAFO.

EXISTING CAFOS

REVIEW CAFO DOCUMENTS

Review permits, applications, manure management plans, nutrient management plans, monitoring reports, etc. Familiarize yourself with permit and plan provisions so you can spot violations.

COLLECT DATA

Conduct well, soil, water, and/or air testing to establish a connection between the facility and harmful pollution. Keep a log of odor and other impacts.

MONITOR CAFOS AND BUILD A RECORD

Submit complaints to regulators if you observe violations. Take photos and keep a log. Don't trespass!

FOLLOW UP ON AGENCY RESPONSE TO COMPLAINTS

Did the agency take action? If a state agency isn't complying with state or federal environmental laws, contact your U.S. EPA Regional Office.

ORGANIZE A COMMUNITY GROUP

Organize your group and develop a public presence.

Consider forming a nonprofit if you plan long-term advocacy.

SEEK LEGAL ADVICE

Consider contacting law firms or pro-bono clinics for help with legal matters related to CAFOs.

IDENTIFY IMPAIRED WATER BODIES

Determine if impaired waters may be impacted by discharge from the existing or proposed CAFO.

CONTACT STATE OR LOCAL HEALTH DEPARTMENT

The Health Department may monitor or oppose the CAFO due to public health impacts.

CHECK FOR PUBLIC FINANCING

If the CAFO received government-backed loans, see if an Environmental Assessment was conducted.

TRACK PUBLIC NOTICES

CAFO permits come up for renewal, so look for public notices and comment opportunities.

REVIEW STATE RIGHT-TO-FARM LAW

Find exceptions to the law's nuisance liability shield (e.g., compliance with laws and permits is often a prerequisite to nuisance claim protection).

AGENCIES & STATE DEFINITIONS

Familiarize yourself with your state's livestock operation definitions, and with the agencies that regulate the industry. (Definitions and relevant agencies vary by state.)

SEEK PROPERTY TAX ADJUSTMENT

Neighbors may be able to reduce their property taxes due to CAFOs' negative impact on property values.

ENGAGE IN RULEMAKING PROCESSES

Attend regulatory meetings and share your concerns. If your state allows it, develop local ordinances to protect communities.

INTRODUCTION: A BRIEF HISTORY OF CAFOs IN NEW YORK

While large-scale agriculture may not immediately come to mind when one thinks of New York, the state has a robust agricultural industry,¹ ranking third in dairy production among all states, fourth for ducks, nineteenth for poultry layers, twenty-first for cattle, and twenty-ninth for poultry broilers.² It's also rich in non-livestock farming commodities such as apples, maple syrup, and grapes.³ In total, 7 million acres, or 23% of New York's land area is farmland.⁴ Public discourse has increasingly focused on the importance of the state's farmland and agriculture industry as conflicting land uses have expanded.

New York has struggled to find a balance between regulating environmental pollution and protecting the industries that generate it. For example, the state goes beyond federal minimums by requiring permits for non-discharging CAFOs, but New York exempts certain size dairies and its 2017 permit for discharging CAFOs failed to meet the federal minimum standards.

New York strives to promote and protect its dairy industry.⁵ New York's yogurt industry was purportedly a large part of the state's decision to de-regulate smaller dairy operations.⁶ The state historically regulated relatively small farming operations by requiring farms with over 200 mature cows or an equivalent number of animals to submit a waste management plan to the state. However, the New York recently increased the size requirement from 200 to 300 dairy cows, allowing more operations to avoid CAFO designation and regulation.⁷ In addition to relaxing regulations on 200–299-head dairies, the state's 2017 discharge permit required under the Clean Water Act had a number of flaws, including lack of public participation, nondisclosure of nutrient management plans, self-reporting, and lack of oversight. In

¹ National Agricultural Statistics Service, 2018 State Agriculture Overview, https://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=NEW%20YORK.

² *Id.*

³ New York State Department of Agriculture and Markets, Homepage, <http://www.agriculture.ny.gov/>.

⁴ *See id.*

⁵ Dairy Promotion Act, Agriculture & Markets, Article 21-AA, Section 258-aa.

⁶ *See, e.g.,* Dairy Herd, Environmentalists file suit over easing of CAFO regs in New York, <http://www.dairyherd.com/dairy-news/latest/Environmental-lawsuit-targets-NY-dairy-size-regulations-217402631.html>.

⁷ *See, e.g.,* North County Public Radio, Environmental groups challenge new NY dairy waste rules, <http://www.northcountypublicradio.org/news/story/22494/20130807/environmental-groups-challenge-new-ny-dairy-waste-rules>.

2018, the state Supreme Court sided with environmental groups⁸ and ruled that New York's discharge permit did not fully comply with the federal Clean Water Act.⁹ This lawsuit and decision triggered the Department of Environmental Conservation to issue a new permit for discharging CAFOs that went into effect July 9, 2019.¹⁰

With respect to New York land within the Chesapeake Bay watershed, agriculture is the source of roughly half of the state's nutrient loading into this sensitive resource area.¹¹ The state's Chesapeake Bay watershed contains approximately 247 animal feeding operations (AFOs), which generate sediment and nutrients such as nitrogen and phosphorus that end up in the Bay.¹²

A relatively small percentage of New York CAFOs are permitted. According to Environmental Protection Agency's National Pollutant Discharge Elimination System (NPDES) CAFO Permitting Status Report, New York has 571 total CAFOs and only 21 have NPDES permits.¹³ However, New York has two permits for CAFOs: one for discharging CAFOs under the Clean Water Act, and one for non-discharging CAFOs under state pollution control laws.

In addition to guidance available from New York organizations that are already analyzing and responding to the impacts of large-scale livestock operations, this guide will provide a legal and policy framework for understanding the landscape of the state's agriculture industry.

⁸ Riverkeeper, Sierra Club, and Waterkeeper Alliance were the plaintiffs against the DEC.

⁹ Matter of Riverkeeper, Inc et al., v NYSDEC et al., April 23, 2018 & June 1, 2018.

¹⁰ CWA CAFO General Permit (GP-0-19-001).

¹¹ See page 2, Environmental Protection Agency, New York Animal Agriculture Program Assessment, https://www.epa.gov/sites/production/files/2015-07/documents/new_york_animal_agriculture_program_assessment_final_2.pdf.

¹² See *id.*

¹³ See *id.*

¹³ NPDES CAFO Permitting Status Report, U.S. Environmental Protection Agency, https://www.epa.gov/sites/production/files/2018-05/documents/tracksum_endyear_2017.pdf.

CAFOs: STATE DEFINITIONS & REGULATORY AGENCIES

What is a CAFO?

New York regulates and permits livestock operations according to the number of animals at an operation, and according to whether an operation “confines animals for 45 days or more in any 12-month period in an area that does not produce vegetation.”¹⁴ If an operation does confine animals in such a manner, the operation requires a DEC CAFO permit if it meets the threshold numbers listed below.¹⁵ DEC may require a permit for smaller operations based on the amount of waste reaching waters of the State, or based on other similar and relevant conditions.¹⁶

CAFO Sizes

<u>Animal Type</u>	<u>Large CAFO</u>	<u>Medium CAFO</u>
Dairy Cows, mature	700 or more	200*–699
Veal Calves	1,000 or more	300–999
Cattle	1,000 or more	300–999
Swine: 55 lbs. or over	2,500 or more	750–2,499
Swine: less than 55 lbs.	10,000 or more	3,000–9,999
Horses	500 or more	150–499
Sheep	10,000 or more	3,000–9,999
Turkeys	55,000 or more	16,500–54,999
Laying Hens, liquid manure system	30,000 or more	9,000–29,999
Chickens, without liquid manure system	125,000 or more	37,500–124,999
Laying Hens, without liquid manure system	82,000 or more	25,000–81,999
Ducks, without liquid manure system	30,000 or more	10,000–29,999
Ducks, with liquid manure system	5,000 or more	1,500–4,999

¹⁴ See, e.g., New York State Department of Environmental Conservation (hereinafter “DEC”), Concentrated Animal Feeding Operations, <http://www.dec.ny.gov/permits/6285.html>.

¹⁵ See, e.g., Appendix A(N), DEC ECL SPDES General Permit for CAFOs, [http://www.dec.ny.gov/docs/water_pdf/ec/cafopermit\(1\).pdf](http://www.dec.ny.gov/docs/water_pdf/ec/cafopermit(1).pdf).

¹⁶ See *id.*

*Note: An AFO that confines 200–299 dairy cows that does not discharge is not considered a medium CAFO.

Small CAFOs

A small CAFO is an AFO with less than the number of animals confined in a medium CAFO and is designated as a CAFO or requests CAFO permit coverage.

For the full regulatory definition of a CAFO, see N.Y. COMPILATION OF CODES, RULES, & REGS. title 6, § 750-1.2(a)(21).

CAFOs receive one of two permits: an Environmental Conservation Law (ECL) permit for facilities that are “designed, constructed, operated and maintained to not discharge manure or process wastewater;” and a distinct State Pollution Discharge Elimination System (SPDES) permit for facilities that do discharge.¹⁷ The SPDES permit is consistent with the requirements of the federal Clean Water Act while the ECL permit is required under state law.

Discharge of manure or process waste waters is significant for permitting purposes when such discharges end up in regulated waters, or Waters of the State. These waters are defined as follows:

*Waters or waters of the State shall be construed to include lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic Ocean within the territorial seas of the State of New York and all other bodies of surface or underground water, natural or artificial, inland or coastal, fresh or salt, public or private (except those private waters that do not combine or effect a junction with natural surface or underground waters), which are wholly or partially within or bordering the State or within its jurisdiction.*¹⁸

See the *Water* section below for more information on distinguishing between AFOs, CAFOs, and the corresponding requisite permits.

¹⁷ DEC, Concentrated Animal Feeding Operations, <http://www.dec.ny.gov/permits/6285.html>.

¹⁸ See, e.g., N.Y. COMP. CODES R. & REGS., tit. 6 § 750-1.2(a)(101).

Responsible Regulatory Agencies

State CAFO Permitting Agency

[DEC](#) is the primary state entity responsible for CAFO permitting.¹⁹ According to data from a 2015 U.S. Environmental Protection Agency (EPA) report, DEC oversees 562 permitted CAFOs or AFOs.²⁰ The DEC CAFO website lists contact information and provides means to search for contacts by location.²¹

New York does not have a separate Department with authority over public lands, fishing, hunting, other recreation, wildlife and related issues. Instead, DEC is responsible for these issues along with responsibilities such as water and air quality permitting.

State Agricultural Agency

The New York Department of Agriculture and Markets isn't the main resource for CAFO regulation, but may be helpful for CAFO monitors with questions about other issues such as voluntary agricultural environmental stewardship.²²

Local Conservation Districts

A directory of all Soil and Water Conservation Districts is available on this New York Association of Conservation Districts (NYACD) [website](#).²³ Consider contacting conservation district employees as a resource because of their expertise on local environmental issues, including soil and water conservation. The NYACD website is also a useful resource for agriculture-related legislation and other topics that may be pertinent for CAFO monitors.²⁴

EPA Region 2 Contacts

EPA Region 2 has authority over New York as well as New Jersey, Puerto Rico and the Virgin Island. [This EPA website](#) lists regional animal feeding operation contacts for all 10 EPA regions.²⁵ The EPA Region 2 contact is:

¹⁹ See, e.g., DEC, Concentrated Animal Feeding Operations, <http://www.dec.ny.gov/permits/6285.html>.

²⁰ See *id.*

²¹ U.S. Environmental Protection Agency, New York Animal Agriculture Program Assessment, https://www.epa.gov/sites/production/files/2015-07/documents/new_york_animal_agriculture_program_assessment_final_2.pdf.

²² New York State Department of Agriculture and Markets, Homepage, <http://www.agriculture.ny.gov/>.

²³ New York Association of Conservation Districts, District Directors, <http://nyacd.org/district-directors/>.

²⁴ New York Association of Conservation Districts, Homepage, <http://nyacd.org/>.

²⁵ U.E. Environmental Protection Agency, Contact Us: Animal Feeding Operations (AFOs), <https://www.epa.gov/npdes/contact-us-animal-feeding-operations-afos#afosRegional>.

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Note: most states, including New York, have authority to issue water pollution permits to regulated industries in their states; however, EPA retains oversight authority to take enforcement action when states fail to meet federal requirements like those outlined in the Clean Water Act. For this reason, EPA CAFO contacts are important for residents who are tracking CAFOs or are concerned about a state CAFO program's compliance with federal laws. See the Federal Guide for more information.

WATER

Unpermitted livestock operations

One of the first determinations that a CAFO monitor should make is the type of permit(s), if any, with which a particular the operation must comply. CAFO monitors should note that DEC maintains a [website](#) that details the overall environmental permitting process that governs many permitting programs, regardless of whether an operation is seeking a water pollution, wetlands, or other permit.²⁶

DEC generally exempts from permitting any operations that are below the animal number thresholds in the table above.²⁷ Because the intent of this Guide is to outline CAFO regulations, content does not focus on water pollution impacts of smaller livestock operations. That said, CAFO monitors may play an important role in reporting to the State if an operation is not accurately reporting whether it houses a number of animals that requires a water pollution permit.

Furthermore, residents can and should document certain practices at smaller operations that might cause DEC to regulate a smaller operation as a permitted CAFO. These factors include but are not limited to the following:

1. The size of the AFO and the amount of wastes reaching waters of the State;
2. The location of the AFO relative to waters of the State;
3. The means of conveyance of animal wastes and process waste waters into waters of the State;

²⁶ DEC, Getting an Environmental Permit, <http://www.dec.ny.gov/permits/6230.html>.

²⁷ See *supra*, What is a CAFO? Section of this Guide.

4. The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes, manure and process waste waters into waters of the State; and
5. Other relevant factors.²⁸

New York Pollutant Discharge Elimination System (SPDES) Program

DEC regulates CAFOs that may discharge through the New York Pollutant Discharge Elimination System Program, also known as the State Pollutant Discharge Elimination System (SPDES) permitting program. CAFOs with SPDES permits fall under the definition of a point source as defined by the Clean Water Act, SPDES program laws, and permit terms and conditions. New York statutes define point sources as:

[A]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, vessel or other floating craft, or landfill leachate collection system from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.²⁹

DEC typically issues two types of general permits: (1) an ECL permit for facilities that are “designed, constructed, operated and maintained to not discharge manure or process wastewater;” or (2) a distinct Clean Water Act (CWA) permit for facilities that do cause such a discharge.³⁰

The current ECL CAFO permit was issued in January of 2017 and is valid through July 2022. The CWA CAFO permit was issued in 2017 but was immediately challenged for violating the Clean Water Act. As a result, the 2017 CWA CAFO permit will be vacated on July 8, 2019. The current permit, issued in January of 2019, goes into effect in July 9, 2019. Th

DEC Regulation of SPDES-Permitted CAFOs

Permitted CAFOs, whether issued a CWA or ECL permit, must comply with the requirements that are broadly outlined in this subsection. This list is not all-inclusive;

²⁸ See, e.g., Appendix A(N), DEC ECL SPDES General Permit for CAFOs, [http://www.dec.ny.gov/docs/water_pdf/eclcafopermit\(1\).pdf](http://www.dec.ny.gov/docs/water_pdf/eclcafopermit(1).pdf).

²⁹ See, e.g., *id.*, at Appendix A(KK); see also N.Y. ENVTL. CONSERV. LAW § 17-01-05(16).

³⁰ See, e.g., DEC, Concentrated Animal Feeding Operations, <http://www.dec.ny.gov/permits/6285.html>.

for more information, readers should more thoroughly review cited statutes and regulations.

CAFO SPDES permits are generally issued based on authority in the following provisions of the State's Environmental Conservation Law: N.Y. ENVTL. CONSERV. LAW Article 17, Titles 7 & 8, and Article 70. Monitors of permitted operations may also find it useful to review the template terms and conditions incorporated into the general permits for ECL and CWA SPDES-permitted CAFOs.³¹ Residents should also note that regardless of the type of SPDES permit issued, the operation must obtain the permit *prior to* CAFO operation and or any discharges.³²

- Any permitted CAFO must have and comply with a nutrient management plan (NMP), including but not limited to the following information:
 - Protocols for applying manure to fields, including more restrictive application when soil or weather conditions present additional risk;
 - Adequate storage of manure as well as operation and maintenance of storage facilities; and
 - Best management practices to prevent pollution runoff and/or comply with permit terms and conditions.
- CAFOs must comply with recordkeeping requirements and submit annual reports and DEC.
- CAFOs must keep at least five (5) years of records for all manure exported or transferred to other persons or operations.
- CAFOS must comply with standard terms and conditions for all NPDES-permitted facilities, including: duty to comply with the permit and penalty for non-compliance; duty to provide information to the State; and right of the State to inspect and enter permitted facilities.

CAFOs with permits that allow pollutant discharge(s) invoke federal Clean Water Act requirements that apply to more “traditional” point sources like power plants or wastewater treatment facilities. From a CAFO monitor perspective, one key result of permitting a facility with a CWA SPDES permit is the ability to initiate lawsuits pursuant to the citizen suit provision of the federal Clean Water Act. The Clean Water Act is discussed in more detail in the Federal Supplement to this Guide. One pillar of the Clean Water Act is that permits should not cause or contribute to violation of water quality standards that establish acceptable pollutant limits for regulated

³¹ ECL and CWA CAFO General Permits are accessible at DEC, Concentrated Animal Feeding Operations, <http://www.dec.ny.gov/permits/6285.html>.

³² N.Y. ENVTL. CONSERV. LAW §§ 17-0701(a), 17-0803.

waters—this requirement is evidenced in the DEC regulations that apply to SPDES-permitted CAFOs.

Public access to NMPs and other permit documents

The public records requirements, discussed further below, do not ubiquitously apply to all monitoring, data, or other information submitted in order to comply with the State CAFO permitting requirements. However, in general DEC will treat as public most permits, reports submitted to the State, nutrient management plans, and related data.³³

Residents interacting with state or local government regarding a CAFO issue should closely review permits and related documentation to ensure that government is affording residents access to information to the full extent required by state open records laws.

Wetlands

Wetlands impacts, depending on the project details of a new or expanding livestock operation, may provide another means through which residents can review, comment on, and potentially decrease the environmental impacts of large-scale agriculture operations.

The Clean Water Act authorizes states to issue a State Water Quality Certification (401 Certification) for any activity or project that may result in a discharge into waters of the United States.³⁴ Projects subject to 401 Certification most commonly include irrigation or filling of wetlands. A DEC website states the following regarding the federal wetlands certification process:

[A]pplicants for a Federal license or permit for activities (including but not limited to the construction or operation of facilities that may result in any discharge into waters of the United States) are required to apply for and obtain a Water Quality Certification from DEC indicating that the proposed activity will not violate water quality standards.³⁵

³³ N.Y. COMP. CODES R. & REGS., tit. 6 § 750-1.22(a); N.Y. PUB. OFF. LAW § 95(1)(a); see also Section (V)(S), DEC ECL SPDES General Permit for CAFOs, [http://www.dec.ny.gov/docs/water_pdf/eclcafopermit\(1\).pdf](http://www.dec.ny.gov/docs/water_pdf/eclcafopermit(1).pdf).

³⁴ Clean Water Act at 33 U.S.C. § 1341 (West 2016).

³⁵ See, e.g., DEC, Water Quality Certifications for Projects Requiring a Federal Permit, <http://www.dec.ny.gov/permits/6546.html>.

This certification requirement provides a potentially crucial opportunity for public review and comment on an agricultural project's impact on wetlands resources.

Monitors of large-scale livestock operations would benefit from a review of the DEC website that discusses the 401 Certification Program.³⁶ The website provides contact information and other documents that will help make this permitting process more accessible to the interested public.³⁷

Projects that require a federal permit may also require a state permit from DEC, and more minor projects that don't require a federal permit may still fall under this state permitting program. For more information on the ecological importance of wetlands and the different DEC wetlands permitting programs for tidal and freshwater wetlands, see [this DEC website](#).³⁸

Water Quantity

Residents should be aware that New York CAFOs, depending on an operation's water use, may need to comply with water use regulations in addition to surface water pollution requirements discussed above in this Guide. This permitting scheme may serve as another avenue for public comment, input and involvement when required of livestock operations that use significant quantities of water for livestock and field irrigation.

Agricultural operations that use 100,000 gallons per day or more of water during any consecutive 30-day period need to either register with or obtain a permit from DEC.³⁹ Registered but non-permitted operations are those that meet the volume threshold but were in existence and reporting to DEC before February 15, 2012.⁴⁰ Newer operations or operations that are expanding will require a water withdrawal permit.⁴¹

To obtain a permit, individuals must submit a permit application to DEC, a process that is more thoroughly explained on [this DEC website](#).⁴² One key component of this permitting scheme is a requirement that applicants submit a Water Conservation

³⁶ See *id.*

³⁷ See *id.*

³⁸ DEC, Wetlands, <http://www.dec.ny.gov/lands/305.html>.

³⁹ See, e.g., DEC, Agricultural Water Withdrawals, <http://www.dec.ny.gov/lands/86747.html>.

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² DEC, Agricultural Permits for New or Increased Water Supplies, <http://www.dec.ny.gov/lands/86924.html>.

Program along with a water withdrawal permit application.⁴³ Finally, note that these water quality permits are subject to public notice and comment requirements that also apply to CAFO water discharge permits, as described further in the *Permitting & Public Participation* Section of this Guide.

Water Quality

Impaired Water Bodies

Broadly speaking, a primary intent of the federal Clean Water Act is to keep clean waters clean and to improve the quality of polluted, or impaired, waters. Based on a summary of impaired waters submitted by DEC to the EPA in 2014, 626 individual water bodies in New York are listed as impaired by one or more pollutants.⁴⁴ A 2016 spreadsheet of impaired waters suggests that number to be closer to 1,087 impaired waters.⁴⁵ However, as is the case in most states, New York is continually assessing the quality of its water resources, so this does not reflect the impaired status of all New York waters. Though DEC has a more recent proposed draft list of impaired waters as of June 2018, this list is still undergoing approval process and as such there is not a summary document available to the public to date.⁴⁶

EPA has a [tool that shows whether a specific waterbody is impaired](#), and if so, the likely source of impairment.⁴⁷

Considerations for CAFOs with SPDES permits

The quality of the water into which a CAFO discharges or is located near is important because the Clean Water Act requires water pollution permits to include limits that incorporate and protect water quality standards.⁴⁸ SPDES CAFO permits prohibit CAFOs from discharging in a manner that causes violation of water quality standards.⁴⁹ As explained in permit terms and conditions, SPDES permits and

⁴³ DEC, Water Use and Conservation, <http://www.dec.ny.gov/lands/67073.html>.

⁴⁴ DEC, The 2014 New York State CWA Section 303(d) List of Impaired Waters, http://www.dec.ny.gov/docs/water_pdf/303doverview2014.pdf.

⁴⁵ DEC, NYS Section 303(d) List of Impaired/TMDL Waters--All Impaired Waters, <https://www.dec.ny.gov/chemical/31290.html>.

⁴⁶ DEC, NYC Section 303(d) List of Impaired/TMDL Waters, https://www.dec.ny.gov/docs/water_pdf/303dlistdraft18.pdf.

⁴⁷ EPA, WATERS GeoViewer, <https://www.epa.gov/waterdata/waters-geoviewer>.

⁴⁸ See 33 U.S.C. §§ 1311(a), 1342(a) (West 2016); see also 40 C.F.R. § 131.10(b) (West 2015).

⁴⁹ See Section (II)(B)(3), DEC ECL SPDES General Permit for CAFOs, [http://www.dec.ny.gov/docs/water_pdf/eclcafopermit\(1\).pdf](http://www.dec.ny.gov/docs/water_pdf/eclcafopermit(1).pdf);

corresponding comprehensive nutrient management plans are intended to avoid any such violation.⁵⁰

Compliance with water quality standards will have a more significant impact upon CAFOs that are permitted to allow surface water discharges, as compared to those operations that have “zero discharge” permits. Recall that the distinction between these two permit types is discussed above in the *SPDES Program* Section of this Guide.

These considerations are complex, so residents who are reviewing a water pollution permit and have specific concerns about water quality standards should consider reaching out to scientific experts for assistance. Consider seeking advice from state organizations listed toward the end of this guide for information about technical experts and other assistance.

residents with concerns about a new or expanding large-scale livestock operation should also determine whether the operation is or would be in a watershed with projects that are funded by the EPA in order to address nonpoint pollution, such as runoff from agricultural fields.

Like most states, New York receives federal assistance each year through the Section 319 Grant Program to fund projects associated with the reduction of nonpoint source pollution.⁵¹ DEC describes their 319 program as follows:

Under Section 319, New York receives federal grant money to support DEC core water protection programs, water quality assessment, groundwater management, watershed planning and implementation and the management of the nonpoint source program, including development of technical assistance, targeting financial assistance, training, technology transfer and outreach.⁵²

Funding within this competitive grant process may go toward implementing best management practices.⁵³ The outcome of funded projects is generally reported

⁵⁰ See *id.*

⁵¹ See, e.g., DEC, Nonpoint Source (NPS) Program, <http://www.dec.ny.gov/chemical/94150.html>.

⁵² See *id.*

⁵³ See, e.g., DEC, Nonpoint Source Guidance and Technical Assistance, <http://www.dec.ny.gov/chemical/96777.html>.

annually as part of the DEC's reporting responsibilities to the federal government.⁵⁴ "Success stories" regarding 319-funded projects demonstrate that related community collaboration may prove meaningful for CAFO monitors who may feel constrained from legal action or other more intensive options. For more information on the 319 grant program, including contact information, and the importance of addressing nonpoint source pollution, readers should start by reviewing [this DEC website](#).⁵⁵

Residents may argue that it is an inefficient use of taxpayer dollars to allow unregulated water pollution from CAFOs. New York residents can utilize DEC contacts and the State's nonpoint source management annual reports to learn about the extent and impact of nonpoint source pollution in the state. Residents could also use these resources to determine whether these projects are in the same location as new, expanding, or non-compliant CAFOs, and argue that it is an inefficient use of resources to implement nonpoint source management programs in the same area where CAFOs are not well managed.

CAFO Construction

As many states do in order to comply with Clean Water Act stormwater requirements, DEC requires a construction stormwater permit for construction sites over one acre in size.⁵⁶ This requirement extends to construction of structures such as barns at agricultural facilities.⁵⁷ However, DEC cautions that some agricultural construction projects are exempt from permitting requirements so long as the projects constitute operational, vegetative and/or structural best management practices (BMPs).⁵⁸ Examples of such projects include wetland reconstruction projects or projects that improve water quality or reduce soil erosion.⁵⁹ For a complete list of exempted BMPs, visit [this DEC website](#).⁶⁰

Highlights of this permitting scheme include a requirement for projects to have a Stormwater Pollution Prevention Plan and for applicants to submit a Notice of Intent (NOI) to seek coverage under a general stormwater permit.⁶¹ Although general

⁵⁴ See, e.g., DEC, Nonpoint Source Program Reporting, <http://www.dec.ny.gov/chemical/99812.html>.

⁵⁵ DEC, Nonpoint Source (NPS) Program, <http://www.dec.ny.gov/chemical/94150.html>.

⁵⁶ See, e.g., DEC, Water Management for Agriculture, <http://www.dec.ny.gov/chemical/84764.html>.

⁵⁷ See *id.*

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ DEC, Stormwater Permit for Construction Activity, <http://www.dec.ny.gov/chemical/43133.html>.

permitting and s submission of a Notice of Intent that does not afford the public with the same public notice and comment opportunity as an individual CAFO permit, the majority of these permits, plans and reports such as inspection data are available for public use and inspection in order to determine whether a permittee is following permit requirements.

A copy of the general stormwater permit that would apply to the vast majority of permitted agricultural-related construction is available electronically on [this website](#).⁶² From a CAFO monitor's perspective, an important component of the general permit is applicability of the Standard Conditions required for all NPDES permits. These Standard Conditions include a right to facility inspection by the State as well as civil or criminal penalties for permit non-compliance or provision of false information.⁶³

CAFO Inspections

Residents with questions about state inspections of agricultural operations will benefit from a 2015 EPA report that assesses New York's agriculture programs. EPA found that DEC conducted 171 inspections of permitted CAFOs in state fiscal year 2012—more inspections than in any years between 2004 and 2011.⁶⁴ That said, the State did not generally meet its goal of inspecting large CAFOs annually or medium CAFOs every three (3) years, and inspection rates varied between different DEC regions throughout the state.⁶⁵

DEC conducts routine inspections involving, for example, review of a facility's on-site nutrient management plan, but the Department also conducts investigations that follow complaints or other concerns regarding permit violation(s).⁶⁶ EPA's assessment explained that DEC follows complaints by investigating public health and environmental impacts, then follows up with corrective action or formal enforcement when necessary.⁶⁷ As state agencies so often struggle with staffing and/or funding constraints, resident monitoring and complaint submission often proves crucial. [This DEC website](#) provides thorough information on various methods

⁶² DEC, SPDES General Permit for Stormwater Discharges from Construction Activity, http://www.dec.ny.gov/docs/water_pdf/gp015002.pdf.

⁶³ See *id.*

⁶⁴ See Section 8.8, Environmental Protection Agency, New York Animal Agriculture Program Assessment, https://www.epa.gov/sites/production/files/2015-07/documents/new_york_animal_agriculture_program_assessment_final_2.pdf.

⁶⁵ See *id.*

⁶⁶ See, e.g., *id.* at Sections 7.4 and 8.8.

⁶⁷ *Id.* at Section 8.8.

by which to submit complaints of environmental problems to the appropriate state employee(s).⁶⁸

Unfortunately, inspection data for these facilities does not appear to be compiled and readily available to the public on a DEC website. That said, open records procedures discussed elsewhere in this Guide will allow access to at least some materials gathered by the State during inspections. This could prove useful for residents who need monitoring and other pertinent data when considering legal or related action against large-scale livestock operations. Please consult the federal supplement to this Guide for more information on data and other necessary precursors to Clean Water Act citizen suits.

The interested public should review permit(s) for any facility of concern and understand the obligation that owners are under with respect to government monitoring and site visits. For example, all NPDES permits require facilities to grant the State a reasonable right to entry and inspection.⁶⁹ This requirement is also codified in the New York Environmental Conservation Law.⁷⁰ State monitoring and inspection information available from DEC can save residents time, expense, and other efforts necessary to submit open records requests and to gather data when considering how to respond to the environmental impacts of CAFOs.

Finally, several DEC guidance documents may prove useful for those interested in inspections and related components of CAFO permitting in New York:

- [Compliance/Enforcement of SPDES Permits](#)
- [Investigation of Agricultural Sources of Water Pollution](#)

AIR

As is the case in many states, air pollution statutes and regulations in New York are not structured to comprehensively address air quality impacts from large-scale agricultural operations. The inapplicability of air pollution laws and regulations to CAFOs is understandably concerning for residents who are impacted by odors, air pollution, and related nuisances from large-scale agriculture operations. Indeed,

⁶⁸ DEC, Report an Environmental Problem, <http://www.dec.ny.gov/regulations/393.html>.

⁶⁹ See, e.g., DEC ECL SPDES General Permit for CAFOs, [http://www.dec.ny.gov/docs/water_pdf/eclcafopermit\(1\).pdf](http://www.dec.ny.gov/docs/water_pdf/eclcafopermit(1).pdf).

⁷⁰ N.Y. ENVTL. CONSERV. LAW § 17-0829.

resident complaints regarding manure odors were among the most common complaints documented in a study done by Cornell University of the State's dairy farms.⁷¹

DEC's broad position is that New York "farms do not generally require [air] permits,"⁷² and it is true that the water pollution permits issued to CAFOs contain virtually no mention of odor or air quality.⁷³ The following Section details certain regulatory schemes that can serve to manage or at least begin to address these impacts from agricultural facilities.

[DEC's Air Quality Compliance website](#) serves as an overarching resource for regulated agricultural industries and the public regarding air quality requirements that apply to agriculture.⁷⁴ Note that DEC operates a [Community Air Screen Program](#) that could serve as a potential funding source for residents looking to organize and collect air samples in their community.⁷⁵

Open Burning

State restrictions on open burning of waste may provide limited redress for neighbors of agricultural operations where such practices are creating nuisance-type conditions. As an example:

On-site burning of agricultural wastes as part of a valid agricultural operation on contiguous agricultural lands larger than five acres actively devoted to agricultural or horticultural use, provided such waste is actually grown or generated on those lands and such waste is capable of being fully burned within a 24-hour period.⁷⁶

⁷¹ Citizens' Environmental Coalition & Sierra Club, The Wasting of Rural New York State: Factory Farms and Public Health, https://atlantic2.sierraclub.org/sites/newyork.sierraclub.org/files/conservation.issues/Wasting_NYS_Report.pdf.

⁷² DEC, Air Quality Compliance for Agriculture, <http://www.dec.ny.gov/chemical/84815.html>.

⁷³ See, e.g., DEC ECL SPDES General Permit for CAFOs, [http://www.dec.ny.gov/docs/water_pdf/ec/cafopermit\(1\).pdf](http://www.dec.ny.gov/docs/water_pdf/ec/cafopermit(1).pdf).

⁷⁴ DEC, Air Quality Compliance for Agriculture, <http://www.dec.ny.gov/chemical/84815.html>.

⁷⁵ DEC, Community Air Screen Program, <http://www.dec.ny.gov/public/81629.html>.

⁷⁶ N.Y. COMP. CODES R. & REGS. tit. 6, § 215.3(d).

However, the agricultural waste exemption does not extend to “pesticide containers, fertilizer bags, large plastic storage bags (including bags commonly known as “Ag bags”), offal, tires, plastic feed bags, and other plastic or synthetic materials.”⁷⁷

Hydrogen Sulfide Air Quality Standards

New York State has a relatively low allowable limit for hydrogen sulfide as compared to other surveyed states.⁷⁸ More specifically, the average hourly concentration for hydrogen sulfide cannot exceed .01 parts per million (ppm).⁷⁹ Hydrogen sulfide, an air pollutant generated by industrial livestock facilities, is a gas that limits the ability of cells to use oxygen. Exposure to hydrogen sulfide in high levels can cause skin, eye, and respiratory irritation, neurologic and cardiac disorders, seizures, comas, and death. Chronic exposure at lower levels can cause low blood pressure, headache, chronic cough, and psychological disorders. Hydrogen sulfide is generally associated with hog production facilities.

Resident monitors and/or groups with concerns about air quality and air testing at a particular agricultural facility may benefit from contacting DEC and/or consulting with the statewide organizations listed toward the end of this Guide.

Odor & the New York Right to Farm Law

Neighbors of large-scale agricultural operations may find themselves most concerned with unacceptable odor and related nuisance-type air quality conditions rather than the presence or level of any particular pollutant. Review the *Right to Farm & Nuisance Laws* Section below in this Guide for information on how this Law may help provide some relief with respect to air quality nuisance issues.

ZONING

Local governments are often the first to know of a proposal for a CAFO or other livestock operation to locate or expand in a particular community. It is crucial for residents to know their local elected officials and to establish a working relationship when possible to facilitate a more efficient exchange of information and knowledge.

⁷⁷ See *id.* at § 215.1(d).

⁷⁸ See, e.g., Congressional Research Service, Air Quality Issues and Animal Agriculture: A Primer, at pages 15–16, available at <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL32948.pdf>.

⁷⁹ N.Y. COMP. CODES R. & REGS. tit. 6, § 257–10.3.

The balance of state and local power is complex in any state, and it is also important to seek local legal advice if necessary for guidance on such issues.

New York is a “home rule” state, meaning that local governments have inherent authority in certain traditional spheres of local control such as public health and safety, unless preempted by state law. Local government “home rule” powers are primarily granted through the Stat’s Municipal Home Rule and Statute of Local Governments. The following provision is most pertinent:

[E]very local government shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law relating to its property, affairs or government. . . .⁸⁰

This language reinforces a grant of home rule powers in the New York Constitution.⁸¹ In determining whether a local government has authority to regulate certain agricultural impacts, the key question is therefore whether local action would conflict with state law, the state constitution, or other areas in which the state significantly regulates.

As there are numerous counties and branches of local government within New York, this Guide cannot outline specific potential regulation(s) for each local governing body. However, this Section will discuss the intersection of the New York’s Home Rule Law and local authority to regulate agriculture, particularly in agricultural districts. These districts are discussed below in the Right to Farm Section of this Guide because the location of a farm within a district can afford significant protection against nuisance claims. In the context of local control and zoning authority, a local government’s ability to regulate agriculture can similarly diminish when an operation is located within an agricultural district.

The N.Y. Department of Agriculture and Markets maintains a useful [website](#) about agricultural districts, with a section on how the creation of such districts impacts the ability of local governments to regulate agriculture more restrictively than the State.⁸² For example, the website summarizes local government authority in agricultural districts as follows:

⁸⁰ N.Y. MUN. HOME RULE LAW § 10(1)(i).

⁸¹ NY CONST., Article IX, Section 2(c).

⁸² Department of Agriculture and Markets, Agricultural Districts, <http://www.agriculture.ny.gov/ap/agservices/agdistricts.html>.

The Agricultural Districts Law protects farmers against local laws which unreasonably restrict farm operations located within an agricultural district. Division staff, together with Department legal staff, review both existing and proposed laws to determine if they are compatible with farm operations.⁸³

The same website has a number of Guideline Documents that focus on certain topics and how local governments may or may not enact local laws that affect agricultural operations. One useful document is a Guideline for Review of Local Zoning and Planning Law.⁸⁴ Major lessons for CAFO monitors within those Guidelines include the following:

- Regulation of agriculture in designated districts should comport with a local comprehensive plan.
- Towns and Villages generally must not unreasonably restrict agriculture in agricultural districts unless public health or safety is threatened.
- “In general, the construction of on-farm buildings and the use of land for agricultural purposes should not be subject to site plan review, special use permits or non-conforming use requirements when conducted in a county adopted, State certified agricultural district.”

A much more lengthy resource is available in the form of a [Local Government Handbook](#) from the New York State Department of State.⁸⁵ The Handbook discusses Home Rule authority and the powers of different forms of local government more generally.⁸⁶ In sum, these resources demonstrate that monitors of large-scale agricultural operations should understand the potentially significant impact of the operation’s location within an agricultural district while also understanding whether a proposed local regulation conflicts with state law.

Learn more about New York local governments and their authority by referring the following resources:

- **Counties:** New York State Association of Counties, <http://www.nysac.org/>

⁸³ See *id.*

⁸⁴ Department of Agriculture and Markets, Guidelines for Review of Local Zoning and Planning Laws, <http://www.agriculture.ny.gov/ap/agservices/guidancedocuments/305-aZoningGuidelines.pdf>.

⁸⁵ Department of State, Local Government Handbook, https://www.dos.ny.gov/lg/publications/Local_Government_Handbook.pdf.

⁸⁶ See *id.*

- **Towns:** Association of Towns, <https://www.nytowns.org/>
- **New York State Division of Local Government Services:** <http://www.dos.ny.gov/lg/>

PERMITTING & PUBLIC PARTICIPATION

Permitting Process

Both the ECL and CWA SPDES permits for CAFOs are subject to the New York Uniform Procedures Act (UPA).⁸⁷ For a user-friendly summary of the UPA and DEC contact information, visit [this DEC website](#).⁸⁸ This subsection otherwise focuses on the impact of UPA requirements on CAFOs that are covered under the general ECL and CWA CAFO permits.

Submission of Notice of Intent (NOI) and Nutrient Management Plan

CAFOs must submit an NOI and nutrient management plan documentation to DEC at the beginning of the permitting process.⁸⁹ Operation and/or discharges from a facility should not begin until DEC successfully grants coverage under the pertinent general permit.⁹⁰

Once DEC receives the requisite documentation from a CAFO permit applicant, DEC must make a determination as to whether an application is complete. DEC generally has 15 calendar days after receipt of an application to determine whether the application is complete, and if the Department fails to mail a written incompleteness notice within that timeframe an application is deemed complete.⁹¹ The UPA defines a complete application as follows:

Complete application” shall mean an application for a permit which is in an approved form and is determined by the department to be complete for the purpose of commencing review of the application but which may need to be

⁸⁷ N.Y. ENVTL. CONSERV. LAW, *see generally* Article 70.

⁸⁸ DEC, Environmental Permits, <http://www.dec.ny.gov/permits/6081.html>.

⁸⁹ *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 6, § 750-1.21; *see also* Preface of ECL and CWA CAFO General Permits, *available at* DEC, Concentrated Animal Feeding Operations, <http://www.dec.ny.gov/permits/6285.html>.

⁹⁰ *See, e.g.*, Preface of ECL and CWA CAFO General Permits, *available at* DEC, Concentrated Animal Feeding Operations, <http://www.dec.ny.gov/permits/6285.html>.

⁹¹ N.Y. ENVTL. CONSERV. LAW § 70-0109(1).

supplemented during the course of review as to matters contained in the application in order to enable the department to make the findings and determinations required by law.

Once DEC determines that it has a complete application from a CAFO permittee, the UPA requires certain public notice and comment procedures that are discussed immediately below.

Public Notices for SPDES Permits

The public notice requirements for all SPDES permits are found in the New York Environmental Conservation Law at N.Y. ENVTL. CONSERV. LAW § 17-0805. DEC must public notice its SPDES permits for at least 30 days.⁹² This requirement extends to new permits, renewed permits, and any substantive permit modifications.⁹³ DEC publishes a weekly [Environmental Notice Bulletin](#), (ENB), which houses all DEC proposals and actions for review by the public.⁹⁴ ENB notice publication is required no less than 10 days after DEC makes a completeness determination for a particular application.⁹⁵ Public comments on a proposed SPDES permit as a general rule become public information:

Except insofar as trade secrets would be disclosed, the following information shall be available to the public for inspection and copying;

(a) [A]ny public comments, testimony or other documentation concerning a permit application, including a permit renewal application, priority ranking fact sheet or request for permit modification, suspension or revocation; and

(b) [A]ny information obtained pursuant to any monitoring, records, reporting or sampling requirements or as a result of sampling or other investigatory activities of the department.⁹⁶

Public comments received regarding any SPDES permit, including CWA and ECL CAFO permits, impact the DEC's decision regarding whether to hold a public hearing:

[W]here any comments received from members of the public or otherwise raise substantive and significant issues relating to the application and resolution of any such issue may result in denial

⁹² N.Y. ENVTL. CONSERV. LAW § 17-0805(1)(b).

⁹³ N.Y. ENVTL. CONSERV. LAW § 17-0805(1)(a).

⁹⁴ DEC, Environmental Notice Bulletin (ENB), <http://www.dec.ny.gov/enb/enb.html>.

⁹⁵ N.Y. ENVTL. CONSERV. LAW § 70-0109(2).

⁹⁶ N.Y. ENVTL. CONSERV. LAW § 17-0805(3).

of the permit or the imposition of significant conditions thereon, the department **shall** hold a public hearing on the application.⁹⁷ DEC must make a decision to hold a public hearing within 60 days after receipt of a complete permit application, and then hold such hearing within 90 days of receipt of the complete application.⁹⁸ The public is entitled to notice of these hearings.⁹⁹

For residents who participate in the permit notice and comment proceedings and any public hearing that follow, more formal permit hearings are a next option. At this stage of the permitting process, legal advice may become more crucial. Permit hearing procedures are outlined at N.Y. COMP. CODES R. & REGS. tit. 6, § 624.1–624.13.¹⁰⁰

Other general public involvement resources include the general [DEC Citizen Participation Website](#).

RIGHT TO FARM & NUISANCE LAWS

New York, along with the vast majority of states, has a Right to Farm Law that hinders the possibility of private nuisance lawsuits against agricultural facilities.¹⁰¹ The purpose of the Law is “to provide a locally-initiated mechanism for the protection and enhancement of New York state's agricultural land as a viable segment of the local and state economies and as an economic and environmental resource of major importance.”¹⁰²

The practical impact of the Law is to make it very difficult for residents to file private nuisance lawsuits against agricultural operations. For example, a resident may be able to file a private nuisance lawsuit for unpleasant odors from a facility that burns garbage, but the same sort of lawsuit is not legally feasible as against a large-scale farm.

⁹⁷ N.Y. ENVTL. CONSERV. LAW § 70-0119(1) (emphasis added).

⁹⁸ N.Y. ENVTL. CONSERV. LAW §§ 70-0119(1)–(2).

⁹⁹ N.Y. ENVTL. CONSERV. LAW § 70-0119(2).

¹⁰⁰ Available at

[https://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=Ifc83bdf0b5a011dda0a4e17826ebc834&originationContext=documenttoc&transitionType=Default&contextData=\(sc.Default\)](https://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=Ifc83bdf0b5a011dda0a4e17826ebc834&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default)).

¹⁰¹ N.Y. AGRIC. & MKTS. LAW § 300–310.

¹⁰² N.Y. AGRIC. & MKTS. LAW § 300.

Nuisance lawsuits against agricultural facilities are not preempted without exception. The law is more likely to afford protection to facilities in established agriculture districts where the facility is using “sound agricultural practice[s].”¹⁰³ More specifically:

[O]n any land in an agricultural district . . . an agricultural practice shall not constitute a private nuisance . . . provided such agricultural practice constitutes a sound agricultural practice pursuant to an opinion issued upon request by the commissioner.¹⁰⁴

Notwithstanding this limitation, the statute specifically does not apply to cases where an aggrieved party is seeking damages for personal injury or wrongful death.¹⁰⁵

Readers will note that New York’s Right to Farm statute places a great deal of weight upon whether or not a particular agricultural practice is “sound.” Sound agricultural practices are defined as:

Sound agricultural practices refer to those practices necessary for the on-farm production, preparation and marketing of agricultural commodities. Examples of activities which entail practices the commissioner may consider include, but are not limited to, operation of farm equipment; proper use of agricultural chemicals and other crop protection methods; direct sale to consumers of agricultural commodities or foods containing agricultural commodities produced on-farm; agricultural tourism; “timber operation,” . . . and construction and use of farm structures.¹⁰⁶

One useful component of New York’s Right to Farm Law is that it allows “any person” to seek an opinion regarding the soundness of an agricultural practice without having to resort to costly litigation.¹⁰⁷ Interested persons can request such an opinion from the State’s commissioner of agriculture and markets.¹⁰⁸ The commissioner must

¹⁰³ N.Y. AGRIC. & MKTS. LAW § 308(1)(b).

¹⁰⁴ N.Y. AGRIC. & MKTS. LAW § 308(3).

¹⁰⁵ *See id.*

¹⁰⁶ N.Y. AGRIC. & MKTS. LAW § 308(1)(b).

¹⁰⁷ N.Y. AGRIC. & MKTS. LAW § 308(1)(a).

¹⁰⁸ *See id.*

provide public notice of its opinion to all landowners with property adjoining an operation where soundness of an agricultural practice is at issue.¹⁰⁹

Although a request for a sound agricultural practice opinion may take six to 12 months to process and resolve,¹¹⁰ residents may be able to save time and resources by reviewing general state guidance on how soundness is determined.¹¹¹ A record of the State's sound practice decisions dating back to 1993 is also available to the public on a [Department of Agriculture and Markets website](http://www.agriculture.ny.gov/ap/agreview.html).¹¹²

A cursory review of these opinions shows how sound agricultural practice findings may afford some relief with respect to issues such as air quality and odor—many opinions fall under the category of “Odor & Fly Control.”¹¹³ Neighbors of large-scale agricultural operations can review the range of pertinent opinions to determine potential success of arguing that a CAFO neighbor is not sufficiently addressing odor issues. For example, unsound practices may include spreading of liquid manure in “hot, humid weather,” or uncovered storage of dead fowl prior to incineration.¹¹⁴

The legal result of the Right to Farm Law is to stymie residents who might otherwise work with a private attorney to bring a nuisance claim against a neighboring farm for a threat to use and enjoyment of property, such as air pollution. Until the Right to Farm Law is successfully legally challenged or changed by the State's Legislature, alternatives to a nuisance claim against an agricultural operation are more likely to afford restitution to impacted residents. In the interim, a growing number of legal practitioners in New York are analyzing the possibility that neighbors of large-scale agricultural operations may, depending on the operation's insurance coverage, seek redress under insurance policies when manure causes pollution issues.¹¹⁵

¹⁰⁹ N.Y. AGRIC. & MKTS. LAW § 308(2).

¹¹⁰ Department of Agriculture & Markets, Sound Agricultural Practices, <http://www.agriculture.ny.gov/ap/agreview.html>.

¹¹¹ Department of Agriculture & Markets, Typical Sound Agricultural Practice Review Procedures – Section 308, <http://www.agriculture.ny.gov/ap/agreview.html>.

¹¹² Department of Agriculture & Markets, Sound Agricultural Practice Opinions, <http://www.agriculture.ny.gov/ap/agreview.html>.

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See, e.g., David Ganje, Esq., Full Immunity from Liability Not Possible for New York Farmers, <http://www.lexenergy.net/full-immunity-from-liability-not-possible-for-new-york-farmers/>.

PROPERTY TAX APPEALS

CAFO Property Tax Appeal Guidelines

Neighbors of CAFOs may also be harmed by government inaction on another front: failure to account for the potentially detrimental presence of a CAFO in assessing a property for tax purposes. Without knowing how to challenge an uninformed assessment, individuals may over-pay in property taxes while at the same time responding to the public health, environmental and related issues that may result from living near a large-scale livestock operation.

Comprehensive resources for New York property tax assessments and related issues are listed below. The remainder of this Section will provide a broad overview of tax appeal options.

- Property Assessment Grieving for Homes Near Factory Farms:
<http://factoryfarmtaxprotest.org/NewYorkGuide.pdf>
- NY Department of Taxation and Finance:
<https://www.tax.ny.gov/pit/property/contest/contestasmt.htm>

New York laws prescribe a potential avenue of relief for aggrieved property owners pursuant to assessment procedures found at N.Y. REAL PROP. TAX § 500 et seq., in combination with judicial review procedures found at N.Y. REAL PROP. TAX § 700 et seq. The steps below are adapted from those Laws and other taxpayer resources referenced throughout this Section.

THE GRIEVANCE PROCESS

Step 1: Review the tentative assessment roll

The New York State Department of Taxation and Finance [lists assessment information](#) for the assessed properties within the assessing unit for the current year, including each property's assessed value, estimated full value, and level of assessment/uniform percentage of value.¹¹⁶

Step 2: Gather Information¹¹⁷

Before the tentative assessment roll is published, the home owner may wish to contact their assessor's office for information about the assessment and review

¹¹⁶ *Contest Your Assessment*, New York State Department of Taxation and Finance
<https://www.tax.ny.gov/pit/property/contest/contestasmt.htm>.

¹¹⁷ See *id.*

process. Find information to questions like: When is the tentative assessment roll published, and where can I view it? What is the deadline for filing a complaint to seek a reduction in my assessment?

It's a good idea for the homeowner to familiarize themselves with properties in their assessing unit that are familiar with their property's characteristics, e.g., square footage, style, age, quality of construction, etc. Note the distance of such properties from factory farms.

Step 3: Seek reduction by speaking with assessor¹¹⁸

It's possible to reduce a homeowner's assessment without appearing before the Board of Assessment Review (BAR), by meeting with their assessor. This works best when the homeowner has recently purchased the property for less than the assessed value. If the owner(s) has evidence that the assessment should be adjusted, the assessor should be willing to modify it accordingly. If the assessor is not inclined to adjust the homeowner's property value, consider asking an independent real estate appraiser to provide a written assessment.

Step 4: Seek reduction before BAR¹¹⁹

If the homeowner cannot agree on an assessment reduction with their assessor, the next step is to seek a reduction by appearing before BAR. The BAR operates on the assumption that the original assessment by the assessor was correct, and the homeowner has the burden of proving otherwise. The homeowner must fill out the free complaint form, RP-524. This form must be filed with any supporting materials by Grievance Day, which is usually the fourth Tuesday in May. The BAR will schedule a hearing, which homeowners are encouraged to attend in order to present their case and answer any questions. Sometimes the BAR will require homeowners to attend their hearing, and in which case attendance is mandatory in order to get an assessment reduction.

Step 5: Appeal options in the vent of reassessment denial¹²⁰

Note that property owners generally may only pursue one of the two appeal options mentioned below.

¹¹⁸ See *id.*

¹¹⁹ Gary Abraham, *Property Assessment Grieving For Homes Near Factory Farms, New York Guide*, <http://factoryfarmtaxprotest.org/NewYorkGuide.pdf>.

¹²⁰ See *id.*

1. An informal hearing before Small Claims assessment Review. This assessment is part of the local Supreme Court and is designed to facilitate homeowner's involvement in the process. Property owners should note the eligibility requirements when filling out the form.¹²¹ The deadline to file a petition is 30 days from the completion of the final assessment roll.
2. The other option is an Article 7 tax certiorari to the New York Supreme Court. This is a formal process in which legal counsel is strongly advised. The deadline to file a petition is also 30 days from the completion of the final assessment roll.

ENFORCEMENT

DEC permits for ECL or CWA-permitted CAFOs alert permittees that violation of terms and conditions may result in enforcement and/or permit revocation and non-renewal. Permits also confirm that DEC may issue civil penalties of up to \$37,500 per day per violation and up to 15 years of imprisonment, depending upon the type of violation(s) and corresponding enforcement.¹²² Operator and permittee liability is outlined in more detailed fashion in state regulation at N.Y. COMP. CODES R. & REGS. tit. 6, § 750-2.4.

Public Reporting of Violation(s)

The [DEC website on enforcing environmental laws](#) outlines two ways for residents to report potential permit non-compliance.¹²³

1. Calling the DEC Public Protection Dispatch Center at 1-877-457-5680;¹²⁴ and/or
2. Using the DEC online reporting system.¹²⁵

This website also includes useful resources such as ongoing enforcement actions and a Guide to Enforcement Hearings.¹²⁶ You can also review [this separate website](#) on reporting environmental problems.¹²⁷

¹²¹ See, e.g., New York Court System, Petition for Small Claims Assessment Review, <http://www.nycourts.gov/litigants/scar/Petition.pdf>.

¹²² See Section V (Standard Permit Conditions), ECL and CWA CAFO General Permits, *available at* DEC, Concentrated Animal Feeding Operations, <http://www.dec.ny.gov/permits/6285.html>.

¹²³ DEC, Enforcing Environmental Laws, <http://www.dec.ny.gov/regulations/391.html>.

¹²⁴ See *id.*

¹²⁵ DEC, Report and Environmental Violation Online, <http://www.dec.ny.gov/regulations/67751.html>.

¹²⁶ DEC, Enforcing Environmental Laws, <http://www.dec.ny.gov/regulations/391.html>.

¹²⁷ DEC, Report an Environmental Problem, <http://www.dec.ny.gov/regulations/393.html>.

CAFO monitors can assist DEC with its enforcement and compliance efforts. Monitors may obtain the permit(s) for a livestock facility of concern, and thereafter can alert DEC and/or local Conservation District staff upon observation of operation in ways that do not or may not comply with permit conditions. When reporting potential permit violations, it's always useful to record the date, time, and location of an event, as well as the permit condition that was violated. Photographs of violations are always helpful. **Don't trespass when documenting violations!**

Enforcement Hearings

Enforcement steps below are included in a publicly-available [Guide to Enforcement Hearings](#).¹²⁸ Applicable state regulations are found at N.Y. COMP. CODES R. & REGS. tit. 6, Part 622.

State regulations that apply to SPDES enforcement hearings are found at N.Y. COMP. CODES R. & REGS. tit. 6, Part 622. DEC generally begins enforcement hearings by serving a notice of hearing and complaint upon the alleged violator.¹²⁹ These notices alert the permittee of specific permit violations and request a pre-hearing conference.¹³⁰ If a violator fails to respond to the notice or attend a pre-hearing conference, DEC may pursue enforcement action without further hearings and assess penalties as described below.¹³¹ When enforcement hearings do occur, these events are open to the general public.¹³² Hearings are presided over by an Administrative Law Judge.¹³³

Civil Penalties

Civil penalties are fines that DEC issues against parties who violate environmental regulation(s). The [DEC Water Pollution Control Enforcement Policy](#) states the following with respect to imposition of penalties in response to water pollution violations:

DEC must utilize its enforcement resources in a manner calculated to obtain the greatest environmental benefit with its limited resources. It may be impractical and counterproductive to environmental protection

¹²⁸ DEC, Guide to Enforcement Hearings, <http://www.dec.ny.gov/regulations/2440.html>.

¹²⁹ N.Y. COMP. CODES R. & REGS. tit. 6, § 622.3.

¹³⁰ *See id.*

¹³¹ *See id.*

¹³² *See, e.g.,* DEC, Guide to Enforcement Hearings, <http://www.dec.ny.gov/regulations/2440.html>.

¹³³ *See, e.g., id.*

to obtain penalties and other sanctions in each and every instance of violation.

However, there are at least four circumstances where DEC Enforcement personnel must seek the assessment of payable penalties and other sanctions:

1. Where a discharger has engaged in willful, bad faith, or negligent conduct, which has resulted in a persistent or preventable violation, punitive penalties for this conduct must be sought. Unpermitted discharge violations are to receive special scrutiny for this type of conduct.
2. Where a discharger has gained economic advantage by non-compliance while failing to take responsible steps towards compliance, a penalty must be sought and related to the size of the unlawful economic benefit.
3. Where tangible public health and/or environmental damages have been detected, e.g., contamination of a water supply or fishkills, a penalty must be sought. The amount of the payable penalty should be related to the size of the damage.
4. Where substantial administrative or judicial efforts are required to bring a source into compliance with well-defined legal obligations, a penalty must be sought which is related to these costs.¹³⁴

DEC also abides by a more extensive [Civil Penalty Policy](#) that applies to the SPDES program as well as violation of other New York Environmental Conservation Laws.¹³⁵ Broadly speaking, DEC first assesses a fine based upon the gravity of the harm caused by violation(s) and upon the economic benefit obtained by the permittee due to those violation(s).¹³⁶ DEC can then increase the fine amount based upon factors such as a history of noncompliance, or decrease the fine amount based on factors such as violator cooperation.¹³⁷

¹³⁴ DEC, DEE-3: Water Pollution Control Enforcement Policy, <http://www.dec.ny.gov/regulations/25249.html>.

¹³⁵ DEC, DEE-1: Civil Penalty Policy, <http://www.dec.ny.gov/regulations/25227.html>.

¹³⁶ See *id.*

¹³⁷ See *id.*

Public Information Laws Generally

The New York Freedom of Information Law (FOIL) is found in the State's Statutes at N.Y. PUB. OFF. LAW § 84 et seq. Highlights of the New York FOIL include but are not limited to the following:

- "'Record' means any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever. . . ." ¹³⁸
- Agencies subject to FOIL are defined as "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature." ¹³⁹ FOIL also extends to the state legislature and court system.
- Though a presumption exists that the public can inspect all state agency records, FOIL outlines exceptions that protect records such as those that involve personal privacy, trade secrets, law enforcement purposes, and related confidential information. ¹⁴⁰
- Agencies responding to requests may only charge the actual cost of reproducing records, and in the case of photocopying should not charge more than twenty-five cents per photocopy. ¹⁴¹
- The public is entitled to a response to a records request within 5 business days. During this time frame the public agency must make records available, deny the request at issue, or notify the requester of the date on which the government can reasonably make the requested records available. ¹⁴²
- When an agency records access manager makes a decision that the records requester wishes to appeal, this appeal must go to the head of the agency at issue within 30 days of the contested decision. Agency heads must provide records or provide written explanation of a denial within ten days. ¹⁴³

¹³⁸ N.Y. PUB. OFF. LAW § 86.4.

¹³⁹ N.Y. PUB. OFF. LAW § 86.3.

¹⁴⁰ N.Y. PUB. OFF. LAW § 87.2.

¹⁴¹ N.Y. PUB. OFF. LAW § 87.1(b).

¹⁴² N.Y. PUB. OFF. LAW § 89.3(a).

¹⁴³ N.Y. PUB. OFF. LAW § 89.4(a).

The National Freedom of Information Coalition has state-specific resources for New York, including a sample records request,¹⁴⁴ which outlines how to obtain a waiver of processing fees for an open records request made for public interest purposes.¹⁴⁵ Note that the New York statute does not contain an explicit public interest fee waiver provision.

Other summary resources include:

- Reporters Committee for Freedom of the Press: [Open Government Guide, Access to Public Records and Meetings in New York](#)
- [New York Committee on Open Government website](#)
- [New York Attorney General Executive Division, FOIL Resource Center](#)

Although public entities like municipalities must comply with FOIA, each local government may have a unique way of accepting and providing records. Contact government officers for more information, keeping in mind that absent a specific exception, the presumption of almost all open records laws is to provide information and reasonable accommodations when doing so.

DEC

[This DEC website](#) lists the central office address and staff member contact for open records requests.¹⁴⁶ The website also links to a number of resources that should help records requesters obtain information as quickly as possible. Resources include a sample records request form, a link to an online option for records requests, and information on records that are maintained online without the need for any specific FOIL request. DEC must comply with the state FOIL, but members of the public with more specific questions about DEC open records procedures may also benefit from review of DEC regulations that implement FOIL.¹⁴⁷

EPA Region 2

Each EPA Regional Office has a FOIA officer who acts as a first point of contact for FOIA Requests. Contact information for the EPA Region 2 FOIA Officer is as follows:

Region 2 (States: NJ, NY, PR, VI)

¹⁴⁴ See National Freedom of Information Coalition, New York FOIA Resources, <http://www.nfoic.org/new-york-foi-resources>.

¹⁴⁵ See *id.*

¹⁴⁶ DEC, Freedom of Information Law (FOIL), <http://www.dec.ny.gov/public/373.html>.

¹⁴⁷ N.Y. COMP. CODES R. & REGS. tit. 6, §§ 616.1–616.10.

Regional Freedom of Information Officer
U.S. EPA, Region 2
290 Broadway, 26th Floor
New York, NY 10007-1866
(212) 637-3668

Refer to the Federal Guide for more information on FOIA. Several EPA websites contain useful summaries of the FOIA process, response time, and other information.¹⁴⁸ Note: Residents are entitled to a waiver of fees if requesting information that is “likely to contribute significantly to public understanding of the operations and activities of the government and is not primarily in the commercial interest of the requester.”¹⁴⁹ EPA only considers waiver requests submitted at the same time as the corresponding FOIA request.¹⁵⁰

OTHER RESOURCES

Protecting your community from factory farms is difficult. Avoid working alone by building relationships in your community, consulting with experts, and collaborating with groups working on similar issues.

Socially Responsible Agriculture Project (SRAP)

SRAP provides free advice and technical assistance to communities throughout the U.S. facing factory farms. Find additional resources at www.srapproject.org, and contact SRAP for support at 503-632-8303 or through our [website](#).¹⁵¹

State Organizations

Citizens Campaign for the Environment: <http://www.citizenscampaign.org/>
Earthjustice Northeast Office: <http://earthjustice.org/about/offices/northeast#>
Environment New York: <http://www.environmentnewyork.org/home>
Environmental Advocates of New York: <http://www.eany.org/>
Hudson Riverkeeper: <http://www.riverkeeper.org/>

¹⁴⁸ See, e.g., U.S. Environmental Protection Agency, The FOIA Request Process, <https://www.epa.gov/foia/foia-request-process>.

¹⁴⁹ U.S. Environmental Protection Agency, Fee Waivers, <https://www.epa.gov/foia/foia-request-process#waivers>.

¹⁵⁰ See *id.*

¹⁵¹ Contact, SOCIALLY RESPONSIBLE AGRICULTURE PROJECT, <http://www.srapproject.org/contact/>

Natural Resources Defense Council, New York: <https://www.nrdc.org/new-york>
Sierra Club Atlantic Chapter: <https://atlantic2.sierraclub.org/>

State Pro-Bono Clinics

Pace University of School of Law, located in White Plains, New York, is consistently ranked among the top environmental law schools in the U.S. Pace houses a number of [environmental law clinics](#) that are potential resources for pro-bono or low-cost services. Other pertinent programs at Pace include the [Pace-Natural Resources Defense Council Food Law Initiative](#).

Other law school clinics and centers include:

- [The New York University Law School Guarini Center on Environmental, Energy and Land Use Law](#)
- [Columbia Law School Environmental Law Clinic](#)

A full list of New York Law Schools is available on [this website](#).

STATUTES & REGULATIONS

Below is a list of relevant statutes and regulations, most of which are discussed in this guide. This list serves as a starting reference point for additional research or more in-depth analysis of environmental authority in New York.

Statutes

The New York statutory compilation, also known as the Consolidated Laws, are publicly available at <http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO>:

- New York Right to Farm: N.Y. AGRIC. & MKTS. LAW § 300–310.
- Municipal Home Rule: N.Y. MUN. HOME RULE LAW §§ 10; 11.
- Real Property Tax Assessment and Related Statutes: N.Y. REAL PROP. TAX LAW §§ 500–727.
- New York Open Freedom of Information Law: N.Y. PUB. OFF. LAW § 84 et seq.
- Water Pollution Control Statutes: N.Y. ENVTL. CONSERV. LAW § 17–0101 et seq.
 - Permits and Certificates: N.Y. ENVTL. CONSERV. LAW § 17–0701 through 17–0707.
 - State Pollutant Discharge Elimination System: N.Y. ENVTL. CONSERV. LAW § 17–0801 through 17–0831.

- Uniform Procedures Act: N.Y. ENVTL. CONSERV. LAW Article 70
- Real Property Tax Assessment and Judicial Review: N.Y. REAL PROP. TAX LAW Articles 5 and 7.

Rules/Regulations

The New York Compilation of Codes, Rules and Regulations are publicly available at [online](#).¹⁵²

- DEC Air Quality Regulations: N.Y. COMP. CODES R. & REGS. tit. 6, §§ 200–317.
- Registration of Water Withdrawals for Agricultural Purposes: N.Y. COMP. CODES R. & REGS. tit. 6, § 601.17.
- DEC Public Access to Records: N.Y. COMP. CODES R. & REGS. tit. 6, §§ 616.1–616.10.
- DEC Uniform Procedures: N.Y. COMP. CODES R. & REGS. tit. 6, Part 621.
- DEC Uniform Enforcement Hearing Procedures: N.Y. COMP. CODES R. & REGS. tit. 6, Part 622.
- Permit Hearing Procedures: N.Y. COMP. CODES R. & REGS. tit. 6, § 624.1–624.13

¹⁵²

[https://govt.westlaw.com/nycrr/index?_lrTS=20161221190026809&transitionType=Default&contextData=\(sc.Default\)](https://govt.westlaw.com/nycrr/index?_lrTS=20161221190026809&transitionType=Default&contextData=(sc.Default))