

# ENVIRONMENTAL AND NUISANCE REGULATIONS IN IOWA: SOMETHING TO RAISE A STINK OVER?

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I. Introduction .....	79
II. Environmental Regulations for Hog Confinements in Iowa.....	81
A. Regulations Dependent upon Confinement Classification.....	82
B. Manure Fertilization Regulations .....	83
C. Are Iowa Regulations Easy for Large Entities to Circumvent?.....	85
III. Environmental Regulations for Hog Confinements in North Carolina, Minnesota, and Illinois .....	87
A. Regulations Dependent upon Confinement Classifications .....	87
B. Manure Fertilization Regulations .....	89
IV. Potential Recommendations for Iowa .....	90
V. Potential Negative Impact of Additional Regulations .....	92
A. Economic .....	92
B. Enforcement .....	94
VI. Protection for Hog Confinements from Nuisance Suits in Iowa .....	95
A. Statutory: The Right to Farm.....	96
B. Judicial Interpretation of the Right-to-Farm Laws in Iowa .....	99
VII. Protection for Hog Confinements from Nuisance Suits in North Carolina, Minnesota, and Illinois .....	101
A. Statutory: The Right to Farm.....	101
B. Judicial Interpretation of the Right-to-Farm Laws in North Carolina, Minnesota, and Illinois .....	104
VIII. Comparison of the Right-to-Farm Laws and Judicial Interpretation.....	107
IX. Should Iowa Amend the Current Right-to-Farm Law?.....	109
X. Conclusion .....	110

## I. INTRODUCTION

Farming is a longstanding tradition in Iowa's history. Raising hogs for production is included in this tradition, resulting in between 14 and 15 million hogs

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residing in Iowa at any given time.<sup>1</sup> That results in seven times more hogs than there are humans.<sup>2</sup> Hog confinements have experienced substantial growth in Iowa over the years.<sup>3</sup> Growth primarily surfaced in the 1970s, with the greatest growth occurring in the 1990s.<sup>4</sup> Hog confinement size grew from 250 head per farm in 1980—accounting for 80,000 farms—to 1500 head per farm in 2002—decreasing the number of farms to 10,000.<sup>5</sup> The increase of head per farm in Iowa in 2002 was roughly double the national increase of head per farm.<sup>6</sup>

This increase was reflected in the United States Department of Agriculture's (USDA) 2012 census, which demonstrated that Iowa led the nation in pork production by a significant margin.<sup>7</sup> Specifically, in 2012, Iowa produced \$6.8 billion worth of pork, whereas North Carolina took the second spot in the nation and produced \$2.9 billion worth of pork, falling \$3.9 billion behind Iowa.<sup>8</sup> Minnesota and Illinois fell even further behind Iowa in 2012 and ranked third and fourth nationally for pork production; they produced \$2.8 billion and \$1.5 billion, respectively.<sup>9</sup> This begs the question, what is responsible for the significant difference in pork production between Iowa and the rest of the nation?

This Note will specifically examine the environmental regulations and nuisance laws in Iowa, in comparison to North Carolina, Minnesota, and Illinois, to determine if Iowa has more lenient and confinement-friendly regulations and laws that attribute to the large production gap. Section II will address the environmental regulations for hog confinements in Iowa. Section III will address the environmental regulations for hog confinements in North Carolina, Minnesota, and Illinois. Section IV will address the potential environmental regulation recommendations for Iowa based on the regulations in place in North Carolina, Minnesota, and Illinois. Section V will address the potential negative impact of additional regulations. Section VI will address the protection hog confinements are granted from nuisance

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1. Lowell Monke, *The Pigs of Iowa*, NATURE INST., <https://perma.cc/5Y9P-LEKA> (archived Jan. 16, 2018).

2. David Pitt, *Water, Air Quality Concerns Heighten Conflict with Pig Farms*, MPR NEWS (Feb. 16, 2015), <https://perma.cc/5XG4-UL2B>.

3. JAN L. FLORA ET AL., IOWA POL'Y PROJECT, HOG CAFOS AND SUSTAINABILITY: THE IMPACT ON LOCAL DEVELOPMENT AND WATER QUALITY IN IOWA 1 (Fall 2007), <http://www.iowapolicyproject.org/2007docs/071018-cafos.pdf>.

4. *Id.*

5. *Id.* at 2.

6. *Id.*

7. U.S. Dep't of Agric., *Hog and Pig Farming—A \$22.5 Billion Industry, Up 25 Percent Since 2007*, 2012 CENSUS HIGHLIGHTS (June 2014), <https://perma.cc/PSZ6-Z5FY> [hereinafter 2012 CENSUS HIGHLIGHTS].

8. *Id.*

9. *Id.*

lawsuits in Iowa. Section VII will address the protection hog confinements are granted from nuisance lawsuits in North Carolina, Minnesota, and Illinois. Section VIII will draw a comparison between the varying protections extended to hog confinements in the addressed states. Section IX will address whether Iowa should amend the nuisance laws in effect. Section X will provide a conclusion for the Note.

## II. ENVIRONMENTAL REGULATIONS FOR HOG CONFINEMENTS IN IOWA

Iowa possesses a variety of environmental regulations in place for hog confinements. However, these regulations have a common theme: they are dependent upon animal unit capacity. Animal unit capacity is simply the number of head the confinement has the capability of holding.<sup>10</sup> The animal unit capacity will determine which of three classifications the confinement operation will fall into: small, non-permitted, or permitted.<sup>11</sup> Each classification has different requirements in place regarding permitting and manure management plans.<sup>12</sup>

The applicable regulations are also dependent upon which of the two classifications of manure storage is utilized: formed or unformed.<sup>13</sup> Formed manure storage means the structure is made of concrete or steel walls and floors; these structures are strong enough to withstand both internal and external load pressures.<sup>14</sup> There are a variety of unformed manure storage devices, including earthen manure storage basins and anaerobic lagoons.<sup>15</sup>

Additionally, regulations are in place regarding the confinement owner utilizing manure as fertilizer on his or her land to confront the possibility of manure runoff into a nearby water source.<sup>16</sup> As recently as 2013, Iowa has seen an increase in the reported incidents of manure reaching a water source, either through runoff

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10. IOWA CODE § 459.102(7) (2017).

11. *Confinements*, IOWA DEP'T NAT. RESOURCES, <https://perma.cc/LQZ5-E86F> (archived Jan. 16, 2018).

12. *Id.*

13. *Id.*

14. IOWA CODE § 459.102(30) (2017).

15. *See* IOWA CODE § 459.102(58) (2017).

16. This avoids the possibility of manure runoff into a nearby water source. *See* IOWA CODE § 459.204 (2017).

or a direct spill into the source.<sup>17</sup> Specifically, in 2012, there were forty-six documented manure contamination incidents, increasing in 2013 to seventy-six.<sup>18</sup> Although the increase may not seem very large itself, it was a 65% spike.<sup>19</sup> The Clean Water Act requires each state to submit a list to the Environmental Protection Agency, which compiles waterbodies that do not meet all the water quality standards and determines the impairment levels.<sup>20</sup> In 2014, the Iowa Department of Natural Resources (Iowa DNR) submitted a list which contained 754 impairments, with only 571 waterbodies being in Iowa.<sup>21</sup> This demonstrates the problem in Iowa regarding water contamination.

#### *A. Regulations Dependent upon Confinement Classification*

To classify as a small animal feeding operation, the confinement must have an animal unit capacity of 500 head or less.<sup>22</sup> If the small confinement utilizes formed manure storage, there are very few regulations and requirements to follow. Specifically, for a small confinement utilizing formed manure storage, a construction permit and manure management plan are not required.<sup>23</sup> However, if the small confinement chooses to utilize a method of unformed manure storage, a construction permit will be required prior to construction of the small confinement.<sup>24</sup> The next confinement size classification is called non-permitted.

Non-permitted confinement operations have an animal unit capacity of 501 head to 999 head.<sup>25</sup> If the confinement utilizes a method of formed manure storage, a construction permit is not required.<sup>26</sup> However, as with small confinements, if the non-permitted confinement utilizes a method of unformed manure storage, the owner is required to obtain a construction permit.<sup>27</sup> The final confinement size classification is called permitted.

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17. Matthew Patane, *Iowa Manure Spills Jump 65% in 2013*, DES MOINES REG. (Feb. 3, 2014, 11:41 PM), <https://perma.cc/XLG4-PURU>; see also David Pitt, *Polluted Iowa Waterways Rise 15 Percent in 2 Years*, DES MOINES REG. (May 14, 2015, 3:05 PM), <https://perma.cc/VM27-KL77>.

18. Patane, *supra* note 17.

19. *Id.*

20. *Iowa's Section 303(d) Impaired Waters Listings*, IOWA DEP'T NAT. RESOURCES, <https://perma.cc/L3SL-H8SN> (archived Jan. 16, 2018).

21. *Id.*

22. IOWA CODE § 459.102(51) (2017).

23. IOWA CODE § 459.303(1)(b)(1) (2017).

24. *Id.*

25. *Confinements*, *supra* note 11.

26. *Id.*

27. IOWA CODE § 459.303(1)(a)(2) (2017).

If the confinement operation has an animal unit capacity of 1000 or more head, the confinement will be classified as permitted.<sup>28</sup> The permitted confinement owner is required to obtain a construction permit regardless of whether a formed or unformed manure storage method is utilized.<sup>29</sup> Permitted confinements are subject to stricter state oversight.

### *B. Manure Fertilization Regulations*

In addition to regulations dependent upon the classification of the confinement operation, Iowa also has regulations regarding the spreading of manure on land as fertilizer. Fertilization regulations are important, as they attempt to ensure manure does not runoff the individual's land into a nearby water source, contaminating the water. Once again, confinement size plays a role regarding manure fertilization: the larger the confinement, the more manure produced and the greater the amount to be spread onto the soil. In a single year, one hog can produce up to 2 tons of wet manure.<sup>30</sup> For a confinement containing 5000 head, this results in 10,000 tons of manure produced in one year, equating to an average of 28 tons per day.<sup>31</sup>

Manure application as fertilizer on the owner's land is a prevalent disposal method for farmers because it is cost-effective.<sup>32</sup> Other methods of manure management and disposal include: pump the liquefied manure onto spray fields, store for later use or treatment, or take it off-site.<sup>33</sup> These methods have the same end result: the manure will still be applied to land, the only difference being the owner of the land. Manure application inevitably presents the possibility the manure will run off the land into a nearby water source, and contaminate the water.<sup>34</sup> An owner utilizing an unformed storage method, such as a lagoon, can let the manure sit in the lagoon. A portion of the liquid will naturally evaporate, reducing the total amount that will ultimately be applied to land.<sup>35</sup> This method can present an unplanned problem: lagoons flooding over due to increased rain, resulting in Mother

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28. *Confinements*, *supra* note 11.

29. IOWA CODE § 459.303(1)(a)(1) (2017).

30. Leana Stormont, *Detailed Discussion of Iowa Hog Farming Practices*, MICH. ST. U.: ANIMAL LEGAL & HIST. CTR. (2004), <https://perma.cc/9QL8-BXNE> (archived Jan. 16, 2018).

31. *Id.*

32. CARRIE HRIBAR, NAT'L ASS'N LOCAL BDS. HEALTH, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES 3 (Mark Schultz ed., 2010), [https://www.cdc.gov/nceh/ehs/docs/understanding\\_cafos\\_nalboh.pdf](https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf).

33. *Id.*

34. *See id.*

35. Barry Estabrook, *Hog Manure's Disgusting King: How Corporate Pig Production Made North Carolina Nasty*, SALON (May 17, 2015), <https://perma.cc/J946-PDGG>.

Nature taking action into her own hands as to when the manure is spread onto land.<sup>36</sup>

When applying manure onto his or her land, an Iowa confinement owner must stay 750 feet away from the neighboring property line, if the property is owned by another individual.<sup>37</sup> Additionally, manure cannot be applied to land within 200 feet of a stream or tile line surface intake, unless adequate erosion controls are implemented.<sup>38</sup> This accounts for potential runoff problems, for instance, when it rains.<sup>39</sup> Generally, Iowa prohibits manure application while the ground is frozen or snow-covered unless there is an emergency.<sup>40</sup> The regulations for manure application are prevalent because of the contaminants manure contains.<sup>41</sup> The manure can contain nitrogen, phosphorus, E. coli, growth hormones, animal blood, antibiotics, silage leachate, and a variety of other potential contaminants.<sup>42</sup>

Manure contaminants become problematic for surface and ground water when manure storage structures leak or break.<sup>43</sup> Manure storage structures leak more frequently than most non-farmers are aware of.<sup>44</sup> In particular, a 2004 study found over half of the total manure storage structures in Iowa leaked, and did so at a level above the legal limit.<sup>45</sup> In June 2016, a manure hose ruptured, leaking between 800 and 900 gallons of manure.<sup>46</sup> The manure hose had not been in use, and the leak contained only the residual manure left in the hose.<sup>47</sup> It is unknown how much of the manure reached a nearby creek.<sup>48</sup> Manure can also contaminate surface or ground water without leaking directly into the water source, through being over-

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36. *Id.*

37. IOWA CODE § 459.204 (2017).

38. IOWA ADMIN. CODE r. 567-65.3(5)(e) (2017).

39. See HRIBAR, *supra* note 32, at 3.

40. IOWA CODE § 459.313A(1) (2017).

41. See HRIBAR, *supra* note 32, at 2-3.

42. *Id.* at 2.

43. ELANOR STARMER, ENVIRONMENTAL AND HEALTH PROBLEMS IN LIVESTOCK PRODUCTION: POLLUTION IN THE FOOD SYSTEM, AGRIBUSINESS ACCOUNTABILITY INITIATIVE 2, [www.ase.tufts.edu/gdae/Pubs/rp/AAI\\_Issue\\_Brief\\_2\\_1.pdf](http://www.ase.tufts.edu/gdae/Pubs/rp/AAI_Issue_Brief_2_1.pdf) (last visited Apr. 15, 2018).

44. See *id.*

45. David Osterberg & David Wallinga, *Addressing Externalities from Swine Production to Reduce Public Health and Environmental Impacts*, 94 AM. J. PUB. HEALTH 1703, 1704 (2014).

46. *Manure Spill from Hog Producer Leaks into Iowa Creek and Ditches*, NORTH IOWA TODAY (June 2, 2016), <https://perma.cc/52YC-DPDN>.

47. *Id.*

48. *Id.*

applied as land fertilizer.<sup>49</sup> Manure contaminants are not the only concern for Iowans; large corporate control of confinements presents another primary concern due to allegations of regulation circumvention.

*C. Are Iowa Regulations Easy for Large Entities to Circumvent?*

Due to the prevalent history in farming and raising livestock, Iowa regulations and laws have primarily been in place to promote small family farming operations.<sup>50</sup> Iowa had 6266 hog confinement operations at the end of 2012.<sup>51</sup> Of the 6266 hog confinements, 94% were family owned.<sup>52</sup> However, there is a recent national shift from the traditional family farm to large companies contracting with the farmer.<sup>53</sup> Due to this shift, there is growing concern that large companies are taking advantage of the lenient regulations in Iowa to avoid state oversight for large confinement operations.<sup>54</sup>

Specifically, Iowa will consider multiple confinements as a single confinement if the confinement possess common ownership, and they are adjacent or use the same manure storage system.<sup>55</sup> However, it has been speculated that to circumvent the common ownership requirement, pork producers organize multiple limited liability companies, naming different owners for each.<sup>56</sup> Thus, the owners are considered separate even though ownership is actually common.<sup>57</sup> For example, a limited liability company can name three different confinement owners, with each confinement having less than 500 head (but totaling over 1000 head combined) and the confinements would avoid state regulation.<sup>58</sup> Many Iowa citizens have urged state legislators to close this “loophole” available for large companies.<sup>59</sup>

49. JOHN A. LORY ET AL., ENVTL. PROT. AGENCY, USING MANURE AS A FERTILIZER FOR CROP PRODUCTION 4 (2006), [https://www.epa.gov/sites/production/files/2015-07/documents/2006\\_8\\_25\\_msbas\\_in\\_symposia\\_ia\\_session8.pdf](https://www.epa.gov/sites/production/files/2015-07/documents/2006_8_25_msbas_in_symposia_ia_session8.pdf).

50. See Matthew M. Harbur, *Anti-Corporate, Agricultural Cooperative Laws and the Family Farm*, 4 DRAKE J. AGRIC. L. 385, 387 (1999).

51. *Iowa Pork Facts*, IOWA PORK PRODUCERS ASS’N, <https://perma.cc/RS94-PXGW> (archived Jan. 16, 2018).

52. *Id.*

53. Pitt, *supra* note 2.

54. Donnelle Eller, *Iowa’s Hog Confinement Loopholes Causing a Stink*, DES MOINES REG. (June 17, 2016), <https://perma.cc/34R2-JCCZ>.

55. IOWA CODE § 459.201(1) (2017).

56. Eller, *supra* note 54.

57. *Id.*

58. See *id.*

59. Rod Boshart, *Iowa State Panel Tackles Hog Confinement Issues*, GAZETTE (Oct. 18, 2016, 8:05 PM), <https://perma.cc/ZM2U-M8XS>.

However, although this “loophole” seems to exist, there has been a recent trend in Iowa to resist large confinements even though they do not utilize this “loophole,” and meet all the state requirements without attempting to skirt around state regulations. Specifically, River Edge Farms, LLC applied to build a hog confinement in Cerro Gordo County, Iowa in August of 2016.<sup>60</sup> The company planned to have an animal unit capacity of 4992 head.<sup>61</sup> The application met all state requirements for a confinement that size, yet the supervisors unanimously voted to reject it.<sup>62</sup>

It seems the potential motivation behind rejecting this particular confinement was not due to frustration with the LLC attempting to avoid Iowa regulations, as the LLC met all the requirements. Rather, the decision illustrated a frustration with large companies in general.<sup>63</sup> This frustration is demonstrated through previous action Cerro Gordo County took against confinements owned by commercial entities. Cerro Gordo County approved a moratorium to halt confinements built by corporate entities; however, the county ultimately repealed the moratorium for being inconsistent with state law.<sup>64</sup>

Regardless of the underlying motivation in Cerro Gordo County rejecting this particular confinement, the confinement will be built because both the Iowa DNR and the Iowa Environmental Protection Commission (Iowa EPC) approved the construction.<sup>65</sup> Chuck Gipp, director of the Iowa DNR, recognized the concerns Cerro Gordo County supervisors and citizens had; however, he explained his agency hands were tied, requiring approval of the confinement because it complied with all necessary regulations.<sup>66</sup> The Iowa EPC denied an appeal of the decision of the Iowa DNR approving the hog confinement.<sup>67</sup> Environmental concerns were raised to the Iowa EPC.<sup>68</sup> However, the confinement was ultimately approved by the Iowa EPC, affirming the Iowa DNR’s decision, because River Edge Farms, LLC met all of the necessary state requirements.<sup>69</sup>

What does this mean for local counties and citizens who oppose the building

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60. John Skipper, *Cerro Gordo Supervisors Say No to Hog Confinement Facility*, GLOBE GAZETTE (Aug. 16, 2016), <https://perma.cc/N3KC-7E9B>.

61. *Id.*

62. *Id.*

63. *See id.*

64. *Id.*

65. *See* Boshart, *supra* note 59.

66. *County Loses Bid to Block 5,000-Head Hog Confinement*, KCCI (Oct. 19, 2016, 8:04 AM), <https://perma.cc/N9SF-PW9Y>.

67. Boshart, *supra* note 59.

68. *Id.*

69. *Id.*



of an additional confinement that is owned by a commercial entity? Counties are unable to impose moratoriums against entities, as Cerro Gordo County attempted, and are required to approve any confinement that meets regulatory requirements. If the counties do not, and follow in Cerro Gordo County's footsteps, the Iowa DNR and Iowa EPC will overturn their decision and approve the confinement, so long as it meets the necessary regulations.

As Iowa State Senator David Johnson, former chairman of the Iowa Senate Agriculture Committee, acknowledged, if resisters of confinements seek change, Iowans will need to turn to the Iowa legislature to modify the current state statutes.<sup>70</sup> Statutes could decrease the number of head for each regulatory classification, or they could allow counties to restrict the number of confinements which can be built. Any option, however, needs to come from the Iowa legislature. If the Iowa legislature were to change Iowa laws, it could draw influence from the laws currently in place in other top pork producing states.

### III. ENVIRONMENTAL REGULATIONS FOR HOG CONFINEMENTS IN NORTH CAROLINA, MINNESOTA, AND ILLINOIS

North Carolina, Minnesota, and Illinois join Iowa in leading the nation in pork production.<sup>71</sup> However, the amount of pork produced in North Carolina, Minnesota, and Illinois falls greatly behind Iowa.<sup>72</sup> This could be due, in part, to the current environmental regulations in place in each state. Perhaps North Carolina, Minnesota, and Illinois have stricter regulations in place than Iowa.

#### *A. Regulations Dependent upon Confinement Classifications*

North Carolina's regulations, which are dependent upon the confinement operation size, are much different than Iowa regulations. For example, for a confinement with an animal unit capacity of more than 250 head, a construction permit is required prior to constructing the confinement.<sup>73</sup> This is much stricter than in Iowa, because a confinement can have just shy of four times as many head than in North Carolina and not be required to obtain a permit.<sup>74</sup>

Regulations in Minnesota, which are also dependent upon the confinement operation size, are also much different than in Iowa. If the confinement has an animal unit capacity of less than 50 head, it does not need to obtain a construction

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70. David Johnson, *Lawmakers, Look at What You've Done to Rural Iowa*, GAZETTE (Aug. 28, 2016, 8:38 AM), <https://perma.cc/EY2D-LEK7>.

71. 2012 CENSUS HIGHLIGHTS, *supra* note 7.

72. *Id.*

73. N.C. GEN. STAT. § 143-215.10B(1) (2017); N.C. GEN. STAT. § 143-215.10C(a) (2017).

74. *See Confinements*, *supra* note 11.

permit.<sup>75</sup> If the confinement has an animal unit capacity of 50 or more head, it must obtain a permit, unless granted a waiver.<sup>76</sup> These regulations are much stricter than in Iowa because of the significant difference in animal unit capacity requiring a permit. Iowa requires a permit for 1000 or more head, if using formed manure storage, whereas Minnesota requires a permit for any confinement having only 50 or more head.<sup>77</sup>

In 1973, Minnesota also passed a law making farming extremely difficult for business entities to protect small family farms.<sup>78</sup> This law is still in effect, and includes confinement operations within the definition of farming.<sup>79</sup> Under the law, entities are allowed to engage in farming only if there are five or less members, the shareholder holdings are limited to 1500 acres of land, and if a member owns more than 51% of the entity, that member must live on the farm or be actively engaged in the farming.<sup>80</sup> The 1973 Farming By Business Organizations Bill provides background for the extremely low head requirement for a permit, because both demonstrate an effort to help the small, average family farm compete with large business entities. It seems the efforts have worked, as the majority of Minnesota confinements are owned by families.<sup>81</sup>

Illinois has size dependent regulations similar to those in place in Iowa regarding manure management plans. If the confinement operation in Illinois has an animal unit capacity of less than 1000 head, the confinement is not required to prepare a manure management plan.<sup>82</sup> Owners of confinements with an animal unit capacity of more than 1000, but less than 5000 head, are required to prepare a manure management plan, maintain the plan, and verify to the Illinois Department of Agriculture that the owner has done so, but, the owner will not be required to actually submit the plan.<sup>83</sup> If the confinement has an animal unit capacity of 5000 head or more, the owner must prepare a manure management plan, maintain the

75. MINN. STAT. ANN. § 116.07(7)(g) (2017).

76. *Id.*

77. *Compare id.* (stating a permit is required for a confinement with 50 or more head), with IOWA CODE § 459.303(1)(a)(1) (2017) (stating if a formed manure storage is utilized, a confinement does not need a permit unless it has at least 1000 head).

78. *Corporate Farming Law—Minnesota*, INST. FOR LOC. SELF-RELIANCE (Nov. 21, 2008), <https://perma.cc/UCV2-9SQE> [hereinafter *Corporate Farming Law*].

79. MINN. STAT. § 500.24(a) (2017).

80. *Corporate Farming Law*, *supra* note 78.

81. See Steve Karnowski, *USDA Census of Agriculture Shows Number of Farms in Minnesota Fell 8 Percent from 2007 to 2012*, STAR TRIB. (May 2, 2014, 3:35 PM), <https://perma.cc/5LAC-BLWB>.

82. 510 ILL. COMP. STAT. ANN. § 77/20(b) (2017).

83. 510 ILL. COMP. STAT. ANN. § 77/20(c) (2017).

plan, and actually submit the plan for approval to the Illinois Department of Agriculture.<sup>84</sup>

Illinois regulations are the most similar to Iowa compared to North Carolina and Minnesota, however, while similar, the regulations in Illinois are more lenient than those in place in Iowa. Illinois only requires implementation and approval of the manure management plan for confinements with an animal unit capacity of more than 5000 head, whereas Iowa requires implementation and approval for confinements with an animal unit capacity of 1000 head.<sup>85</sup>

### *B. Manure Fertilization Regulations*

North Carolina has a history of concern for water quality standards from manure runoff.<sup>86</sup> Prior to 1997, North Carolina had more lenient regulations regarding manure.<sup>87</sup> In 1997, North Carolina expressed concern for water quality by implementing a moratorium that prevented construction of new confinements with more than 250 head.<sup>88</sup> The moratorium was renewed in 2003.<sup>89</sup> In 2007, the moratorium was made permanent in North Carolina, for confinements utilizing the unformed manure management system of anaerobic waste lagoons.<sup>90</sup> Today, new or expanding confinements over 250 head must meet five performance standards to be approved.<sup>91</sup> In addition, if a confinement is cited for a water quality violation, the confinement is required to obtain a permit.<sup>92</sup>

Minnesota protects water quality through set-back requirements, resulting in certain confinements needing permits if they are a certain distance from a water shoreline.<sup>93</sup> Minnesota also incorporates its size dependent regulations within the

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84. 510 ILL. COMP. STAT. ANN. § 77/20(d) (2017).

85. *Compare id.* (stating a manure management plan needs to be implemented and approved when the confinement exceeds 5000 head), *with* IOWA CODE § 459.303(1)(a)(1) (2017) (stating Iowa requires a manure management plan to be implemented and approved when the confinement has 1000 head).

86. *See Key Industries: Hog Farming*, LEARN NC, <https://perma.cc/DHY2-77T4> (archived Jan. 16, 2018).

87. *See id.*

88. *Id.*

89. *Id.*

90. N.C. Env'tl. Quality, *AFO Program Summary: Facts about North Carolina's Animal Feeding Operations Program*, AFO PROGRAM SUMMARY, <https://perma.cc/UQ4F-ETH3> (archived Jan. 16, 2018).

91. 15A N.C. ADMIN. CODE 02T.1307(b)(1)(A)-(e) (2017).

92. N.C. GEN. STAT. § 143-215.1(a) (2017).

93. *See* MINN. STAT. ANN. § 116.07(7)(a)(6) (2017).

set-back requirements.<sup>94</sup> If the confinement has an animal unit capacity of less than 50 head, or has less than ten units located near the shoreline, no permit is required.<sup>95</sup> However, if the confinement has more than ten units located in the shoreline area, a permit may be required.<sup>96</sup> Shoreline area for a lake is construed as being within 1000 feet of the high water mark.<sup>97</sup> For a river or a stream, the shoreline area is only 300 feet.<sup>98</sup> Minnesota also has mandatory buffer strips along all waterways, to assist in preventing water contamination through manure runoff.<sup>99</sup>

Illinois also has regulations regarding application of manure as fertilizer. For example, manure may not be applied within 200 feet of surface water unless the surface water is on a higher grade than the land the manure is applied to.<sup>100</sup> Additionally, manure may not be applied within 150 feet of a well.<sup>101</sup> The regulations in place in North Carolina, Minnesota, and Illinois can provide guidance for Iowa lawmakers.

#### IV. POTENTIAL RECOMMENDATIONS FOR IOWA

There are various methods Iowa could implement to further environmental regulations of hog confinements. First, Iowa could require buffer strips be implemented along all waterways that meet with property where manure is spread as fertilizer. Buffer strips help to reduce the amount of manure contaminants that make it to the nearby water source, thus reducing the potential manure runoff problems by stopping the manure from spreading.<sup>102</sup> This requirement would not be unusual, as Minnesota currently requires buffer strips to be in place along all waterways.<sup>103</sup> This regulation would likely impact both existing and new confinements, unless existing confinements are considered exempt.

Second, Iowa could simply implement stricter regulations that would require more state oversight. Iowa could implement regulations similar to North Carolina or Minnesota, as both states seem to be more restrictive than the current regulations

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94. *See id.*

95. *Id.*

96. *Id.*

97. MINN. STAT. § 103G.005(15)(b) (2017).

98. *Id.*

99. Ray Harden, *When You Journal about Iowa's Water for a Year . . .*, IOWA CITIZENS FOR COMMUNITY IMPROVEMENT, <https://perma.cc/7RAF-5T9W> (archived Jan. 16, 2018).

100. 510 ILL. COMP. STAT. ANN. 77/20(f)(6) (2017).

101. *Id.*

102. *See generally* BLUE EARTH CTY., WATER MANAGEMENT PLAN 2008-2013 (Aug. 2008), [www.gburba.prg/wp-content/uploads/2015/11/blue-earth-water-plan-comprehensive.pdf](http://www.gburba.prg/wp-content/uploads/2015/11/blue-earth-water-plan-comprehensive.pdf).

103. Harden, *supra* note 99.

in place.<sup>104</sup> The revised regulations would not have to be as strict as Minnesota, requiring just more than 50 head to obtain a construction permit, but they could be more similar to North Carolina, using 250 head as the appropriate number. The regulations could consider less than 250 head to be a small confinement, between 250 to 499 head to be a non-permitted confinement, and 500 or more head to be a permitted confinement. This would implement stricter regulations than the regulations in place, but would not be as drastic of a change initially.

Third, the Iowa legislature could act and decrease the current number of head which requires an owner to obtain a permit. This would ensure more confinements are subject to oversight by the state. The regulations could provide for a review date, to determine if water quality increased or if stricter regulations would be necessary. If water quality has not increased, a similar, but slightly more restrictive option would be to copy North Carolina and declare less than 250 head does not require a construction permit, but anything more than 250 head does require one. This would take out the third level of classification currently in Iowa's regulations. This incremental "stepping" toward stricter regulations could be a promising option to decrease the likelihood of potential backlash.

Finally, Iowa could also utilize efforts to solve the potential manure runoff problem without implementing any additional regulations. Iowa could expand efforts to raise awareness regarding the value of manure. Farmers with excess manure are unlikely to over-apply the manure if they realized its economic value.<sup>105</sup> A market exists for manure, however, wet manure is difficult to transport and especially for long distances.<sup>106</sup> Manure is a great fertilizer, yet due to transportation issues, it is unlikely that the average urban dweller with a garden would have access to manure and instead would have to use a chemical fertilizer.<sup>107</sup> This is where innovation comes into play, as manure fertilizer pellets have been created.<sup>108</sup> The pellets are sterilized, so the buyer does not have to worry about potential pathogens.<sup>109</sup> One farmer even reported profiting \$40,000 from turning the waste from

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104. Compare N.C. GEN. STAT. §§ 143-215.10B-C (2017) (requiring a confinement with 250 head to obtain a construction permit), and MINN. STAT. ANN. § 116.07(7)(g) (2017) (requiring a confinement with 50 head to obtain a construction permit), with IOWA CODE § 459.303 (2017) (requiring a confinement with 1000 head, or 501 to 999 head if utilizing unformed manure storage, to obtain a construction permit).

105. Tove Danovich, *What to Do with All of the Poo?*, MOD. FARMER (Aug. 22, 2014), <https://perma.cc/VBB2-RLFP>.

106. *Id.*

107. *See id.*

108. *See id.*

109. *See id.*

his 20,000 hens into the pellets.<sup>110</sup> A Vermont dairy farmer realized the economic value in dairy manure and created a business to sell the manure from his cattle.<sup>111</sup> This business started as a project in 1989 and grew to become a “full-fledged side-business.”<sup>112</sup>

The potential problem with trying to increase awareness of this industry in Iowa, specifically for hog confinements, is hog waste is not as dry as poultry or cattle waste. This may be problematic, or at least require additional steps to turn the hog waste into pellet form.<sup>113</sup> Increasing awareness of this industry could significantly help potential runoff issues, because a farmer would want to realize the profit from the excess manure and only apply the necessary amount to fertilize his or her fields.<sup>114</sup> However, this market would only solve the issue involving runoff or over-application from manure used as fertilizer. This market would not affect if Iowa has too lenient of regulations which allow large entities to avoid state oversight.

#### V. POTENTIAL NEGATIVE IMPACT OF ADDITIONAL REGULATIONS

If additional regulations were implemented in Iowa for hog confinement operations, the results that need to be considered are not solely the positive environmental impact from decreased manure runoff. There are potential negative impacts also present with additional regulations. The potential negative impact could be seen in many different areas, including the economic impact and the impact on enforcement agencies. The potential negative impacts can be seen in either of the two overall recommendations for implementation in Iowa resulting in additional regulations: buffer strips and stricter regulations.

##### A. Economic

If Iowa were to implement additional regulations for hog confinement operations, there would likely be a large economic impact. This consequence can be inferred by the large gap with which Iowa leads the nation in pork production.<sup>115</sup> Iowa Alliance for Responsible Agriculture, a new agricultural coalition, wrote a letter to then Iowa Governor Terry Branstad in September of 2016 requesting a

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110. *See id.*

111. *See id.*

112. *See id.*

113. *See* Carl J. Rosen & Peter M. Bierman, *Using Manure and Compost as Nutrient Sources for Fruit and Vegetable Crops*, U. MINN. EXTENSION, <https://perma.cc/NK4D-MTZJ> (archived Apr. 23, 2018).

114. *See* Danovich, *supra* note 105.

115. *See* 2012 CENSUS HIGHLIGHTS, *supra* note 7.

moratorium on factory farms until the water quality in Iowa improves.<sup>116</sup> Governor Branstad turned down the moratorium due to the likely economic impact.<sup>117</sup>

A moratorium would only stop new confinements from being built and would not affect any existing confinements. However, this could impact the Iowa economy because of the growing nature of this economic sector. For example, in 2012 Iowa produced \$6.8 billion worth of pork.<sup>118</sup> This increased to \$7.5 billion worth of pork in 2013.<sup>119</sup> In 2014, the increase was even greater, resulting in \$9.17 billion worth of pork being produced in Iowa.<sup>120</sup> This growth indicates the industry is growing and positively affecting Iowa's economy, an increase which would not be seen if a moratorium was implemented.

Additionally, even implementation of stricter regulations, but not a moratorium, would likely result in a negative economic impact for Iowa. The day-to-day production of hogs in Iowa employs 40,290 Iowans.<sup>121</sup> One-third of the hogs raised in the nation are raised in Iowa.<sup>122</sup> Hog farming alone accounted for \$7.5 billion in total economic activity for Iowa in 2013.<sup>123</sup> If additional regulations were implemented, such as a buffer strip regulation that existing confinements would need to comply with, it is likely less pork would be produced. This is assumed, because not all current confinement owners would be able, or want, to comply with additional regulations.

The decrease in production would negatively affect Iowa's economy. For example, Minnesota saw a decrease in pork production since the signing of its buffer strip law in 2015.<sup>124</sup> In 2014, Minnesota produced \$3.4 billion worth of pork.<sup>125</sup> However, in 2015, Minnesota only produced \$2.5 billion worth of pork.<sup>126</sup> Although the actual cause for the economic decrease has not been directly linked to the buffer

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116. Brianne Pfannenstiel, *Iowans Seeking Improved Water Call for an End to Factory Farms*, DES MOINES REG. (Sept. 21, 2016, 3:43 PM), <https://perma.cc/4ZD6-6GEC>.

117. *Id.*

118. 2012 CENSUS HIGHLIGHTS, *supra* note 7.

119. IOWA PORK PRODUCERS ASS'N, *supra* note 51.

120. U.S. DEP'T OF AGRIC., MEAT ANIMALS PRODUCTION, DISPOSITION, AND INCOME: 2015 SUMMARY 16 (Apr. 2016), [usda.mannlib.cornell.edu/usda/current/MeatAnimPr/MeatAnimPr-04-28-2016.pdf](https://usda.mannlib.cornell.edu/usda/current/MeatAnimPr/MeatAnimPr-04-28-2016.pdf).

121. IOWA PORK PRODUCERS ASS'N, *supra* note 51.

122. *Id.*

123. *Id.*

124. *Buffer Program*, MINN. BD. WATER & SOIL RESOURCES, <https://perma.cc/HAP5-ESTD> (archived Jan. 16, 2018).

125. *Quick Stats*, NAT'L AGRIC. STAT. SERV., <https://perma.cc/67UF-3HNE> (archived May 16, 2018).

126. *Id.*

strip legislation, and not another cause such as a decrease in the price of pork, an economic effect after implementation of mandatory buffer strips is possible and should be considered.

Stricter regulations could also result in less Iowans being employed in the industry, because farms may go out of business. Even if the additional regulations would only affect new confinements, such as through lowering the number of head that requires permitting, there would likely be an economic impact in future growth. This is because the industry production would likely remain stagnant or would not increase as much as Iowa has seen in the recent past, such as in 2012, 2013, and 2014.<sup>127</sup>

Additionally, because 94% of Iowa hog confinements are run by family farms, there is potential for family farm operations to go out of business due to compliance with additional regulations.<sup>128</sup> Although large commercial entities would be the intended target of additional regulations, it is possible the small, family-run farm would be the type of hog confinement operation to actually suffer from the additional regulations.

Small family farms could be the ones affected because the average family farmer would not have the capital that a commercial entity would have in order to comply with the additional regulations. Additionally, since the increase in large company-run confinements, some family farmers, such as Chris Peterson, have had to file bankruptcy just in an effort to stay competitive with the large companies.<sup>129</sup> This would likely be the reality for more small family farmers if additional regulations were placed upon all confinements. If Iowa legislators were to change current regulations or implement a moratorium targeting large commercial entities—such as the moratorium Cerro Gordo County attempted to implement—it would have to be carefully crafted to ensure only commercial entities are affected and that it remains legal.<sup>130</sup>

### *B. Enforcement*

In addition to the solely economic impact which would likely occur with additional regulations, there are issues with enforcement. Currently, the Iowa DNR

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127. See IOWA PORK PRODUCERS ASS'N, *supra* note 51.

128. *Quick Stats*, *supra* note 125.

129. See Jean Doran Matua, *Larson Withdraws Hog Farm Application (For Now)*, TRI-COUNTY NEWS (June 15, 2016), [www.kimballarea.com/newsx/farm-ag-news/61024-larson-withdraws-hog-farm-application-for-now](http://www.kimballarea.com/newsx/farm-ag-news/61024-larson-withdraws-hog-farm-application-for-now).

130. See Boshart, *supra* note 59.



is responsible for enforcement of regulations regarding hog confinement operations.<sup>131</sup> However, if additional regulations are implemented, it is not clear whether the Iowa DNR would be responsible for enforcing those regulations, or if it would defer to local authorities.

Further, the agency responsible for enforcing the regulations would be economically impacted, which would likely result in increased taxes for citizens in order to fund the necessary budgetary increase. The necessary budget increase could also be funded through a fee for the actual confinement permit, or a fee if the agency found a violation of the regulations. The agency would likely hire additional personnel to confront the increased work-load. This is problematic, because, since 2007, the Iowa DNR has cut inspections of potential water quality contamination issues by 60%.<sup>132</sup> This decrease in inspections could explain why water quality concerns have heightened recently. An increase in inspections would be positive, but effectuating an increase would require additional personnel and money.

For example, Iowa Citizens for Community Improvement held a hearing on November 1, 2016, to address concerns of local citizens who feel the Iowa DNR has not adequately inspected and documented manure management plans, which drew concerns to water quality through manure spreading and over-spreading.<sup>133</sup> Ken Hassenius, Iowa DNR field office supervisor, stated the Iowa DNR does have the training and personnel to do the inspection and oversight required by Iowa law; however, there is not enough personnel to do anything additional.<sup>134</sup> It can be inferred, because of the inspection decrease, the Iowa DNR already has more work than it can handle, and adding additional regulations would be problematic for the agency.<sup>135</sup> In addition, the agency would be required to train the additional, and current, personnel regarding the additional regulations; this requires both funds and time.

#### VI. PROTECTION FOR HOG CONFINEMENTS FROM NUISANCE SUITS IN IOWA

“Distance helps, of course. But wind, temperature, humidity, time of day, and geography can confound factors. One moment the air . . . slams you down with a mist of piss, shit, and ammonia. *Not* knowing when an onslaught might come is

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131. IOWA CODE § 459.103(2) (2017).

132. Ted Genoways, *Hog Wild: Factory Farms are Poisoning Iowa's Drinking Water*, MOTHER JONES (Mar. 21, 2014), <https://perma.cc/4QES-PXLU>.

133. Jim Caufield, *Group Says DNR Fails in Oversight, Enforcement of Manure Laws*, PERRY NEWS (Nov. 5, 2015), <https://perma.cc/DL5Y-5XTS>.

134. *Id.*

135. See Genoways, *supra* note 132.

what drives many rural residents to despair.”<sup>136</sup> Hog confinements are a source of controversy when it comes to how they affect surrounding property owners and the owners’ ability to enjoy their land.<sup>137</sup> The legal remedy private land owners have is through state nuisance laws. Primary concerns from neighboring property owners are the odor, health issues, and a potential decrease in property value caused by the hog confinements.<sup>138</sup> In addition to the arguably lenient environmental regulations, potentially, Iowa nuisance laws are also more favorable to hog confinements. This could result in the prevalent gap between Iowa and other pork producing states, such as North Carolina, Minnesota, and Illinois.

#### A. Statutory: *The Right to Farm*

Historically, the Iowa legislature granted significant protection to hog confinement owners through a set of four different laws.<sup>139</sup> The set of laws were known as the “right-to-farm laws.”<sup>140</sup> The first of these laws was enacted in 1976 and is currently still in use.<sup>141</sup> Essentially, this Iowa Code section provides a defense to confinement owners against a nuisance suit: as long as the confinement was operating prior to the neighbor owning their property, the neighbor is presumed to have notice of the confinement.<sup>142</sup> Additionally, the confinement must be in compliance with any department regulations including federal and state<sup>143</sup> and the applicable zoning regulations.<sup>144</sup>

The second of these laws was enacted in 1992 and is no longer enforced.<sup>145</sup> This law provided that if the confinement was located within a geographic area that had been deemed an “agricultural area,” the confinement would not be considered a nuisance regardless of when the confinement started operating, or if it had since expanded.<sup>146</sup> The confinement could only be sued under a cause of action for nuisance if the confinement was negligently operated or not in compliance with

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136. DAVID KIRBY, *ANIMAL FACTORY: THE LOOMING THREAT OF INDUSTRIAL PIG, DAIRY, AND POULTRY FARMS TO HUMANS AND THE ENVIRONMENT* 52 (2010).

137. See Joe Vansickle, *Nuisance Lawsuits on the Rise*, NAT’L HOG FARMER (Mar. 15, 2003), <https://perma.cc/YL5W-PFE7>.

138. *The Issues*, JEFFERSON COUNTY FARMERS & NEIGHBORS INC., <https://perma.cc/RU5A-S52F> (archived Jan. 16, 2018).

139. Stormont, *supra* note 30.

140. *Id.*

141. IOWA CODE § 172D.2 (2017).

142. *Id.*

143. IOWA CODE § 172D.3(1) (2017).

144. IOWA CODE § 172D.4(1) (2017).

145. IOWA CODE § 352.11 (1992), *invalidated by* Bormann v. Kossuth Cty. Bd. of Supervisors, 584 N.W.2d 309 (Iowa 1998).

146. IOWA CODE § 352.11(1)(a) (2017).

federal, state, or local laws.<sup>147</sup> The law also mandated mediation prior to filing the lawsuit, which is still actively enforced.<sup>148</sup>

The third portion of these laws was enacted in 1995 and is no longer enforced.<sup>149</sup> The Iowa legislature enacted this law to “protect and preserve animal agricultural production operations.”<sup>150</sup> A confinement was granted protection under this statute and would not be considered a nuisance.<sup>151</sup> A person could bring a nuisance claim against a confinement owner if the person could prove his or her injury was proximately caused by the confinement owner’s failure to comply with either a federal or state law or regulation.<sup>152</sup> If the confinement owner was in compliance with all applicable laws and regulations, the complainant had to prove the confinement “unreasonably and for substantial periods of time interferes with the person’s comfortable use and enjoyment of the person’s life or property,”<sup>153</sup> and the confinement “failed to use existing prudent generally accepted management practices reasonable for the [confinement].”<sup>154</sup>

The immunity granted did not apply if the confinement owner was classified as a “chronic violator,”<sup>155</sup> which meant the owner committed three or more violations,<sup>156</sup> within five years of the latest violation,<sup>157</sup> and resulted in either a civil penalty of \$3000 or more,<sup>158</sup> or a court order or judgment.<sup>159</sup> The immunity was granted regardless of when the confinement operation began, or if the confinement had since expanded.<sup>160</sup> Finally, if a claim brought for nuisance was declared frivolous, the person who brought the suit was held liable to the confinement owner for “all costs and expenses incurred in the defense of the action.”<sup>161</sup>

Currently, the confinement owner could take solace in the fact that complainants must file a request to mediate the claim in an attempt to settle the dispute prior to defending a nuisance suit in court, or even drafting an answer to a petition. Prior

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147. IOWA CODE § 352.11(1)(b) (2017).

148. IOWA CODE § 352.11(1)(c) (2017).

149. *See* IOWA CODE § 657.11 (2017).

150. IOWA CODE § 657.11(1) (2017).

151. IOWA CODE § 657.11(2) (2017).

152. IOWA CODE § 657.11(2)(a) (2017).

153. IOWA CODE § 657.11(2)(b)(1) (2017).

154. IOWA CODE § 657.11(2)(b)(2) (2017).

155. IOWA CODE § 657.11(3)(a) (2017).

156. IOWA CODE § 657.11(3)(b)(1) (2017).

157. IOWA CODE § 657.11(3)(b)(2) (2017).

158. IOWA CODE § 657.11(3)(b)(1)(a) (2017).

159. IOWA CODE § 657.11(3)(b)(1)(b) (2017).

160. IOWA CODE § 657.11(4) (2017).

161. IOWA CODE § 657.11(5) (2017).

to filing a nuisance claim against the owner of a hog confinement, the party bringing the suit must file a request for mediation.<sup>162</sup> The request is filed with the farm mediation service.<sup>163</sup> Once filed, the farm mediation service meets with each party privately to conduct an initial consultation and does so without charge.<sup>164</sup> Unless both parties agree to go forward with mediation, the mediation will be canceled after the initial consultation is finished.<sup>165</sup> If mediation does progress, the parties will be given a notice with the time and location for mediation within twenty-one days of the initial request being filed.<sup>166</sup> The mediation is held within twenty-one days of the notice.<sup>167</sup>

The fourth right-to-farm law, section 657.11A, was passed by the Iowa legislature in 2017.<sup>168</sup> This law has yet to be challenged and remains enforced. The purpose of the legislature in adopting this law was to promote use of “prudent and generally utilized management practices” by granting confinement owners protection from nuisance lawsuits.<sup>169</sup> The law has the effect of limiting the damages a successful plaintiff can recover in a nuisance lawsuit to compensatory damages.<sup>170</sup> Under the statute, a plaintiff cannot recover more than his or her portion of diminution in property value proximately caused by the confinement.<sup>171</sup> Furthermore, a plaintiff can only recover compensatory damages for adverse health conditions with an objective determination made from documented medical evidence that the proximate cause of the adverse health condition was the confinement.<sup>172</sup> Finally, a plaintiff can only recover compensatory damages for special damages, such as loss of enjoyment of property, if he or she was awarded compensatory damages for the diminution in property value or also adverse health conditions.<sup>173</sup> Special damages are calculated as being no more than one and one half times the sum of the property value and health conditions recovery combined.<sup>174</sup> Thus, if a plaintiff is unable to prove diminution in the fair market property value, or a documented adverse health condition, recovery for special damages is not possible.

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162. See *Nuisance Lawsuits—Protecting Yourself from Nuisance Liability*, IOWA PORK PRODUCERS ASS’N, <https://perma.cc/UWB3-3SXZ> (archived Jan. 16, 2018).

163. IOWA CODE § 654C.2(1) (2017).

164. *Id.*

165. *Id.*

166. IOWA CODE § 654C.2(2) (2017).

167. *Id.*

168. IOWA CODE § 657.11A (2017).

169. IOWA CODE § 657.11A(1)(b) (2017).

170. IOWA CODE § 657.11A(3) (2017).

171. IOWA CODE § 657.11A(3)(a) (2017).

172. IOWA CODE § 657.11A(3)(b) (2017).

173. IOWA CODE § 657.11A(3)(c) (2017).

174. *Id.*

The limitation of damages imposed by the fourth law does not apply to all confinements.<sup>175</sup> The limitation will not apply if a confinement owner does not comply with federal or state regulations or rules, and if that noncompliance is the proximate cause of the plaintiff's loss of enjoyment of the property.<sup>176</sup> Similarly, if a confinement owner does not use existing prudent and generally utilized management practices that are reasonable, and noncompliance is the proximate cause of the plaintiff's loss of enjoyment of property, the damages limitation does not apply.<sup>177</sup> Finally, the damages limitation does not apply to a nuisance suit against a habitual violator or causes of actions that accrued prior to the act being in effect.<sup>178</sup>

### *B. Judicial Interpretation of the Right-to-Farm Laws in Iowa*

The second Iowa law, section 352.11, was partially declared unconstitutional by the Iowa Supreme Court in 1998.<sup>179</sup> The Court held the immunity created by the legislature and board of supervisors resulted in the granting of an easement for the confinements on the neighbors' property.<sup>180</sup> This gave the confinement owners authority to commit acts which would otherwise constitute a nuisance.<sup>181</sup> The court found this authority amounted to a taking of the neighbors' property without just compensation, which violated both the United States Constitution and the Iowa constitution.<sup>182</sup>

In 2004, the Iowa Supreme Court declared the third law, section 657.11, which granted nuisance immunity, unconstitutional as applied to the particular case.<sup>183</sup> The court held the law violated the Iowa constitution because it prevented a property owner from recovering for the diminished property value due to a nuisance.<sup>184</sup> In addition, the court found the law also violated the Iowa constitution as an "oppressive exercise of the state's police power."<sup>185</sup> The court did not determine if this law amounted to a violation of the United States Constitution as a taking of

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175. See IOWA CODE § 657.11A(5) (2017).

176. IOWA CODE § 657.11A(5)(a) (2017).

177. IOWA CODE § 657.11A(5)(b) (2017).

178. IOWA CODE § 657.11A(6)-(7) (2017).

179. *Bormann v. Kossuth Cty. Bd. of Supervisors*, 584 N.W.2d 309, 321 (Iowa 1998).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 185 (Iowa 2004).

184. *Id.*

185. *Id.*

property without just compensation.<sup>186</sup> The court remanded the case, in part to determine if the confinement was a nuisance.<sup>187</sup>

In November 2016, the Iowa Court of Appeals also considered Iowa Code section 657.11 and found it to be unconstitutional as applied to the particular case.<sup>188</sup> The McIlraths purchased and lived on their property for forty-one years before Prestage Farms of Iowa, L.L.C. (Prestage Farms) constructed a hog confinement about 2200 feet away.<sup>189</sup> The McIlraths filed a lawsuit, claiming the emitted odor constituted a nuisance, to which Prestage Farms claimed immunity.<sup>190</sup> At trial, Prestage Farms had an employee of the DNR testify that the confinement was in compliance with all of the applicable regulations and laws.<sup>191</sup> In addition, Prestage Farms had two agricultural engineers testify that little gas was emitted from the confinement, resulting in little odor.<sup>192</sup> The district court found the immunity statute did not apply, and the jury found Prestage Farm's confinement was a nuisance.<sup>193</sup>

The court of appeals also found the immunity granted in Iowa Code section 657.11 was unconstitutional in the present case.<sup>194</sup> The court found the facts were similar to *Gacke v. Pork Xtra, L.L.C.*, resulting in the confinement not being immune from suit.<sup>195</sup> The court reasoned the McIlraths had lived on the property long before Prestage Farms built the confinement facility, and the McIlraths made improvements to the property.<sup>196</sup>

Of the four different laws, only the first and fourth enacted have not been declared unconstitutional as applied to particular case facts.<sup>197</sup> The fourth law, however, has not yet been considered by the Iowa Supreme Court at the time of this Note. All fifty states have their own version of the right-to-farm laws<sup>198</sup> (hereafter collectively referred to as the respective state's "right-to-farm law," irrespective of

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186. *Id.* at 174.

187. *Id.* at 185 (the court also remanded the case due to trial court improperly admitting hearsay evidence).

188. *McIlrath v. Prestage Farms of Iowa, L.L.C.*, No. 15-1599, 2016 WL 6902328, at \*8-9 (Iowa Ct. App. Nov. 23, 2016).

189. *Id.* at \*1-2.

190. *Id.* at \*2.

191. *Id.* at \*4.

192. *Id.*

193. *Id.*

194. *Id.* at \*9.

195. *Id.* at \*8-9.

196. *Id.* at \*9.

197. See IOWA CODE § 172D.2 (2017).

198. Kyle Weldon & Elizabeth Rumley, *States' Right-To-Farm Statutes*, NAT'L AGRIC. L. CTR., <https://perma.cc/WVB4-SNST> (archived Jan. 16, 2018).

the statutory title). Only Iowa has deemed a version unconstitutional.<sup>199</sup> Therefore, in Iowa, a confinement owner *likely* only has protection against a nuisance suit if his or her operation began prior to the complainant buying his or her property, and if the confinement is in compliance with federal, state, and local laws and regulations.<sup>200</sup> The confinement owner could have protection under the third set of the laws, Iowa Code section 657.11, depending on the particular case facts.<sup>201</sup> However, given the judicial interpretation, it is difficult to determine a circumstance in which a confinement owner would be granted immunity under this provision.<sup>202</sup> Further, without judicial interpretation of the most recent set of laws, the confinement owner will be protected from the type and amount of recoverable damages.<sup>203</sup>

## VII. PROTECTION FOR HOG CONFINEMENTS FROM NUISANCE SUITS IN NORTH CAROLINA, MINNESOTA, AND ILLINOIS

### A. Statutory: *The Right to Farm*

North Carolina first enacted its right-to-farm law in 1979.<sup>204</sup> The statute created immunity for preexisting confinements, meaning the confinement was operating prior to the complainant owning his or her property.<sup>205</sup> Additionally, the confinement owner was immune from a nuisance suit for any changed conditions, as long as the confinement was operating for more than one year and was not considered a nuisance at the time it began operation.<sup>206</sup>

In 1995, the North Carolina legislature amended the state's right-to-farm laws, creating more protection for the confinement owners.<sup>207</sup> This amendment mandated the parties attend mediation prior to litigation.<sup>208</sup> If mediation did not occur, the lawsuit could be dismissed.<sup>209</sup>

In 2013, the North Carolina legislature enacted its most recent amendments

199. IOWA PORK PRODUCERS ASS'N, *supra* note 162.

200. See IOWA CODE § 172D.2 (2017); see also IOWA CODE § 657.11A (2017).

201. See *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 185 (Iowa 2004); see also *McIlrath*, 2016 WL 6902328, at \*9.

202. See *Gacke*, 684 N.W.2d at 185; see also *McIlrath*, 2016 WL 6902328, at \*9.

203. See IOWA CODE § 657.11A (2017).

204. Cordon M. Smart, *The "Right to Commit Nuisance" in North Carolina: A Historical Analysis of the Right-to-Farm Act*, 94 N.C. L. REV. 2097, 2116 (2016).

205. See N.C. GEN. STAT. § 106-700 (2017).

206. N.C. GEN. STAT. § 106-701(a) (2017).

207. Smart, *supra* note 204, at 2128.

208. N.C. GEN. STAT. § 7A-38.3(c) (2017).

209. *Id.*

to the right-to-farm law, which is the current form.<sup>210</sup> This amendment denoted what is not considered a fundamental change for a confinement, thus limiting what could be considered a nuisance.<sup>211</sup> Additionally, the legislature changed the phrase “changed conditions in or about the locality *thereof*” to “changed conditions in or about the locality *outside of the operation*.”<sup>212</sup> The North Carolina legislature also included a fee-shifting provision in case either party presents a frivolous or malicious claim or affirmative defense.<sup>213</sup> The law also excludes immunity for the negligent or improper operation of a confinement<sup>214</sup> and for the pollution of water or overflow of water onto the complainant’s property.<sup>215</sup>

Minnesota first enacted its right-to-farm law in 1991.<sup>216</sup> Under the law, a confinement was not considered a nuisance if it was part of a family farm which had been operating for six years and was not a nuisance when the operation began.<sup>217</sup> If the confinement had been “subsequently expanded or significantly altered,” then the relevant date for nuisance consideration would be the date the expansion or alteration occurred, and not when the confinement began operation.<sup>218</sup> The immunity did not apply if the confinement was negligently or improperly operated, violated state or local laws,<sup>219</sup> or caused either an injury or a direct threat of an injury to health or safety.<sup>220</sup> Additionally, it did not extend immunity to lawsuits for the pollution of water or water overflow onto the complainant’s land.<sup>221</sup> Finally, the immunity did not extend protection if the confinement possessed an animal unit capacity of 1000 or more head.<sup>222</sup>

In 1994, the Minnesota legislature amended the right-to-farm law to step closer to the law currently in force.<sup>223</sup> The legislature amended the time requirement

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210. Smart, *supra* note 204, at 2133.

211. N.C. GEN. STAT. § 106-701(a1) (2017).

212. N.C. GEN. STAT. § 106-701(a) (2017) (emphasis added).

213. N.C. GEN. STAT. § 106-701(f) (2017).

214. N.C. GEN. STAT. § 106-701(a2) (2017).

215. N.C. GEN. STAT. § 106-701(c) (2017).

216. MINN. STAT. § 561.19 (1991).

217. MINN. STAT. § 561.19(2) (1991).

218. MINN. STAT. § 561.19(1)(b) (1991).

219. MINN. STAT. § 561.19(2)(a) (1991).

220. MINN. STAT. § 561.19(2)(b) (1991).

221. MINN. STAT. § 561.19(2)(c) (1991).

222. MINN. STAT. § 561.19(2)(d) (1991).

223. Compare MINN. STAT. § 561.19 (1994) (amending the original right-to-farm law), with MINN. STAT. § 561.19 (2017) (the right-to-farm law in its current version).



for the confinement to not be considered a nuisance, greatly decreasing the operation years to two.<sup>224</sup> If the confinement was in operation for two years, and was not a nuisance at the date the operation began, then the confinement would not be considered a nuisance.<sup>225</sup> The legislature also added definitions for what constitutes a “subsequent expansion” or “significant alteration of a confinement.”<sup>226</sup> A confinement has subsequently expanded the operation if the owner increases the number of head by 25% or more.<sup>227</sup> A confinement will significantly alter the operation if the owner changes the kind of livestock produced.<sup>228</sup>

In 2004, the Minnesota legislature amended the right-to-farm law to its current form.<sup>229</sup> The legislature modified the definition of what is considered to be a significant alteration of a confinement; specifically, the law now lists what is not considered to be a “significant alteration.”<sup>230</sup> The four reasons include change in ownership if the transferor, who actively operates the confinement, is within the third degree of kindred to the transferee, or if it was made to a family trust;<sup>231</sup> a temporary cease in operation;<sup>232</sup> new technology;<sup>233</sup> or a change in the crop produced.<sup>234</sup>

Additionally, the current law provides a confinement is not considered a nuisance after two years from the date the operation began if three criteria are met.<sup>235</sup> First, the confinement is located within an area zoned for agriculture.<sup>236</sup> Second, the confinement complies with not only state and local laws, ordinances, rules, or regulations, but also federal.<sup>237</sup> Third, the confinement is operated “according to generally accepted agricultural practices,”<sup>238</sup> which means practices commonly used by farmers either in the county or a contiguous county where the nuisance claim was asserted.<sup>239</sup> Additionally, from the beginning of operations until the two year mark,

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224. MINN. STAT. § 561.19(2) (1994).

225. *Id.*

226. MINN. STAT. § 561.19(1)(b) (1994).

227. MINN. STAT. § 561.19(1)(b)(1) (1994).

228. MINN. STAT. § 561.19(1)(b)(2) (1994).

229. MINN. STAT. § 561.19 (2004).

230. MINN. STAT. § 561.19(b)(1)-(4) (2017).

231. MINN. STAT. § 561.19(b)(1) (2017).

232. MINN. STAT. § 561.19(b)(2) (2017).

233. MINN. STAT. § 561.19(b)(3) (2017).

234. MINN. STAT. § 561.19(b)(4) (2017).

235. MINN. STAT. § 561.19(2)(a) (2017).

236. MINN. STAT. § 561.19(2)(a)(1) (2017).

237. MINN. STAT. § 561.19(2)(a)(2) (2017).

238. MINN. STAT. § 561.19(2)(a)(3) (2017).

239. MINN. STAT. § 561.19(1)(c) (2017).

there is a rebuttable presumption that the confinement is in compliance with the previous three requirements and is not a nuisance.<sup>240</sup>

The Illinois legislature enacted its right-to-farm law in 1992.<sup>241</sup> Since the law's enactment, none of its provisions have been amended, and only one has been added. In 1995, a provision was added to grant a prevailing defendant the recovery of costs and expenses, in addition to reasonable attorney fees.<sup>242</sup> A defendant was considered prevailing if the final judgment or order was entered in his or her favor.<sup>243</sup> Conversely, a defendant was not considered prevailing if a settlement agreement is reached.<sup>244</sup>

In its current form, the Illinois right-to-farm law grants a confinement immunity from a nuisance suit for any changed conditions in the surrounding area if the confinement had been in operation for one year and was not a nuisance when the operation began.<sup>245</sup> However, the nuisance immunity does not extend protection to a confinement under negligent or improper operation.<sup>246</sup> Additionally, nuisance immunity is not extended to protect a confinement from a suit to recover damages from the pollution of water, change in the condition of water, or any water overflow onto the complainant's property.<sup>247</sup> Finally, the current form retained the provision enacted in 1995 to grant a prevailing defendant recovery of costs, expenses, and reasonable attorney fees.<sup>248</sup>

*B. Judicial Interpretation of the Right-to-Farm Laws in North Carolina, Minnesota, and Illinois*

In 1985, the Court of Appeals of North Carolina interpreted the ability of a confinement owner to claim immunity from a nuisance suit.<sup>249</sup> In *Mayes v. Tabor*, the complainant, Mayes, was an owner of a private summer camp and owned the property for nineteen years.<sup>250</sup> The confinement owner, Tabor, purchased the adjoining property four years later and began raising hogs.<sup>251</sup> The Mayeses alleged the

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240. MINN. STAT. § 561.19(2)(b) (2017).

241. 740 ILL. COMP. STAT. ANN. § 70/1 (1992).

242. 740 ILL. COMP. STAT. ANN. § 70/4.5 (1995).

243. *Id.*

244. *Id.*

245. 740 ILL. COMP. STAT. ANN. § 70/3 (2017).

246. *Id.*

247. 740 ILL. COMP. STAT. ANN. § 70/4 (2017).

248. 740 ILL. COMP. STAT. ANN. § 70/4.5 (2017).

249. *Mayes v. Tabor*, 334 S.E.2d 489, 490 (N.C. Ct. App. 1985).

250. *Id.* at 489-90.

251. *Id.* at 490.

Tabors' confinement constituted a nuisance, to which the Tabors claimed immunity.<sup>252</sup> The court of appeals held the one-year limitation stated in the right-to-farm law only applied to changed condition, and did not preclude a nuisance suit which is not based on a changed condition if the complainant preexisted the confinement.<sup>253</sup>

In 1994, the Court of Appeals of North Carolina considered if a change in the type of animal produced on the property constituted a fundamental change, disallowing immunity for the confinement owner.<sup>254</sup> Specifically, Britt operated turkey houses on his property since the mid-1960s.<sup>255</sup> In 1979, Durham purchased the property that he built his home on, and in 1988 he purchased the land across the street from his home.<sup>256</sup> In 1990, Britt informed Durham he intended to construct and operate a hog confinement facility.<sup>257</sup> Durham filed a lawsuit against Britt, alleging a nuisance claim, to which Britt claimed immunity.<sup>258</sup> The court held that changing the operation from turkeys to hogs was a fundamental change.<sup>259</sup> The court found Britt was not immune from the lawsuit due to the fundamental change.<sup>260</sup> This holding is arguably reflected in the current form of the right-to-farm law, as a change in the type of agricultural product produced is a reason not to extend immunity to the confinement owner.<sup>261</sup>

In 1996, the Minnesota Court of Appeals interpreted the 1991 right-to-farm law to determine what constituted an expansion or significant alteration of a cow-calf operations.<sup>262</sup> In *Haas v. Tellijohn*, Tellijohn rearranged his feed bunks to "allow permanent confinement of feeder cattle in his operation."<sup>263</sup> Haas alleged Tellijohn changed the nature of his operation when he changed from a "cow-calf operation to a feeder cattle operation" and increased the number of cattle.<sup>264</sup> The court found the actions could constitute a significant alteration within the six-year period under the statute and reversed the district court's grant of the defendant's motion

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252. *Id.*

253. *Id.* at 491; *see* N.C. GEN. STAT. §106-701(a) (2016).

254. *Durham v. Britt*, 451 S.E.2d 1, 3 (N.C. Ct. App. 1994).

255. *Id.* at 1.

256. *Id.*

257. *Id.* at 1-2.

258. *Id.* at 2.

259. *Id.* at 3.

260. *Id.* at 4.

261. *See* N.C. GEN. STAT. § 106-701(a1)(5) (2017).

262. *Haas v. Tellijohn*, No. C1-95-2229, WL 104743, at \*2 (Minn. Ct. App. 1996).

263. *Id.* at \*2-3.

264. *Id.* at \*3.

for summary judgment.<sup>265</sup>

In *Wendinger v. Forst Farms, Inc.*, the Minnesota Court of Appeals considered if the phrase “operating according to generally accepted agricultural principles” created an affirmative defense for the confinement owner.<sup>266</sup> The Wendingers brought suit against Forst Farms, Inc., alleging many claims, including nuisance relating to their hog confinement.<sup>267</sup> The district court granted summary judgment for Forst Farms, Inc., holding it was entitled to the affirmative defense of operating the confinement “according to generally accepted agricultural practices.”<sup>268</sup> The court of appeals disagreed, interpreting the provision to only provide a definition of “commonly accepted agricultural practices.”<sup>269</sup> The court held the provision does not grant confinement owners an affirmative defense to a nuisance suit when the confinement is operating in accordance to agricultural practices that are generally accepted.<sup>270</sup>

In *Toftoy v. Rosenwinkel*, the Illinois Supreme Court interpreted what the provision stating “any changed conditions in the surrounding area” encompassed.<sup>271</sup> In 1991, the Rosenwinkels purchased their land and began their cattle confinement operation in 1992.<sup>272</sup> Clarence Toftoy owned a farmhouse across the street which had been occupied by a tenant since 1985.<sup>273</sup> The tenant left the farmhouse in 1991, and no other tenant moved in.<sup>274</sup> Clarence Toftoy divided his property in 1998 and gave the portion of property with the farmhouse to his son and daughter-in-law, the plaintiffs.<sup>275</sup> The farmhouse was torn down and the plaintiffs completed construction and moved into their new home in 2004.<sup>276</sup> In 2007, the plaintiffs filed a lawsuit against the defendants alleging nuisance from their cattle confinement.<sup>277</sup>

The Rosenwinkels claimed when the plaintiffs acquired and occupied the property, they changed the condition in the surrounding area.<sup>278</sup> As this action gave

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265. *Id.* (holding the granting of defendant’s motion for summary judgment was improper because of the genuine issue of material fact).

266. *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546, 553 (Minn. Ct. App. 2003).

267. *Id.* at 549.

268. *Id.* at 553; *see* MINN. STAT. § 561.19(2)(b) (2016).

269. *Wendinger*, 662 N.W.2d at 553.

270. *Id.*

271. *Toftoy v. Rosenwinkel*, 983 N.E.2d 463, 464 (Ill. 2012).

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 463.

277. *Id.* at 464.

278. *Id.*

rise to the nuisance suit, the Rosenwinkels claimed they were immune from liability because the cattle confinement had been in operation for more than one year.<sup>279</sup> The Illinois Supreme Court agreed with the Rosenwinkels, finding the cattle confinement was not a nuisance until the plaintiffs acquired the property in 1998.<sup>280</sup> The changed condition was the change in ownership, which occurred six years after the Rosenwinkels began their cattle confinement.<sup>281</sup> Additionally, the plaintiffs did not file suit within the one-year limitation, thus their claims were barred.<sup>282</sup>

#### VIII. COMPARISON OF THE RIGHT-TO-FARM LAWS AND JUDICIAL INTERPRETATION

Out of the states considered, the state legislatures provide, or attempted to provide, relatively similar protection for confinements. However, the Iowa courts have limited the protection afforded to confinement owners, resulting in greater protection afforded to confinement owners in North Carolina, Minnesota, and Illinois.

Specifically, in Iowa, a confinement owner is *likely* only granted immunity from a nuisance suit if the confinement preexisted the complainant and the confinement is in accordance with any applicable federal, state, or local law or regulation.<sup>283</sup> The confinement owner could also be granted immunity under section 657.11,<sup>284</sup> however, based on judicial interpretation denying immunity, it is unlikely a confinement owner could successfully rely on this provision.<sup>285</sup> In comparison, in North Carolina and Illinois, a confinement owner is not liable for any changed condition in the surrounding area if the confinement was in place for one year and was not considered a nuisance when the confinement began operation.<sup>286</sup> This provides greater protection for a confinement owner in North Carolina and Illinois, because if the complainant created the condition, through changing the conditions, the confinement owner will not be held liable if it has been over one year. In Iowa, a confinement owner could be liable for any changed condition, and there is no time limitation on the action.

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279. *Id.*

280. *Id.* at 467.

281. *Id.*

282. *Id.*

283. IOWA CODE § 172D.2 (2016).

284. *See* IOWA CODE § 657.11 (2016).

285. *See Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 185 (Iowa 2004); *see also* McIlrath v. Prestage Farms of Iowa, L.L.C., No. 15-1599, 2016 WL 6902328, at \*9 (Iowa Ct. App. Nov. 23, 2016).

286. *See* N.C. GEN. STAT. § 106-701(a) (2017); *see also* 740 ILL. COMP. STAT. ANN. § 70/4.5 (2017).

Additionally, North Carolina and Illinois both have a provision relating to granting fees under certain circumstances in the lawsuit. Illinois has a friendly provision to confinement owners, which grants costs, fees, and reasonable attorney fees upon prevailing.<sup>287</sup> However, North Carolina grants fees to either party if the claim or affirmative defense is either frivolous or malicious.<sup>288</sup> Iowa does have a similar provision granting costs and fees to the confinement owner if the claim was frivolous,<sup>289</sup> but with judicial interpretation of the statute favoring the neighboring property owner, it is unlikely this provision provides much support to a confinement owner defending a nuisance suit.<sup>290</sup> Minnesota does not have similar provisions.<sup>291</sup> Thus, there is no monetary incentive to prevent a plaintiff from bringing a nuisance lawsuit against a confinement owner in Minnesota, and there is likely not much of an incentive in Iowa.

Minnesota limits its right-to-farm immunity through implementing a limit on the number of head that can be in the confinement.<sup>292</sup> Out of the four analyzed states, Minnesota is the only state with this numerical limitation.<sup>293</sup> Minnesota is also different from North Carolina and Illinois, because it has a two year requirement to not be considered a nuisance,<sup>294</sup> rather than the one year requirement for North Carolina<sup>295</sup> and Illinois<sup>296</sup> regarding changed circumstances.

Finally, an interesting point of comparison is in respect to North Carolina and its stance on mediation. North Carolina requires mediation prior to litigation of a nuisance lawsuit against a confinement owner.<sup>297</sup> This provision was included in the second right-to-farm law in Iowa which was enacted in 1982.<sup>298</sup> This law was declared unconstitutional by the Iowa Supreme Court as applied to the particular

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287. 740 ILL. COMP. STAT. ANN. § 70/4.5 (2017).

288. N.C. GEN. STAT. § 106-701(f) (2017).

289. IOWA CODE § 657.11(5) (2017).

290. See *Gacke*, 684 N.W.2d 168 at 185; see also *McIlrath*, No. 15-1599, 2016 WL 6902328, at \*9.

291. See MINN. STAT. § 561.19 (2017) (indicating lack of a fee shifting provision).

292. MINN. STAT. § 561.19(2)(c)(1) (2017).

293. Compare MINN. STAT. § 561.19(2)(c)(1) (2017) (stating nuisance immunity will not apply to confinements with 1000 or more head), with IOWA CODE § 172D.2 (2017) (demonstrating lack of a similar provision), and N.C. GEN. STAT. § 106-701 (2017) (demonstrating lack of a similar provision), and 740 ILL. COMP. STAT. ANN. § 70/4.5 (2017) (demonstrating lack of a similar provision).

294. MINN. STAT. § 561.19(2) (2017).

295. N.C. GEN. STAT. § 106-701(a) (2017).

296. 740 ILL. COMP. STAT. ANN. § 70/4.5 (2017).

297. N.C. GEN. STAT. § 7A-38.3(c) (2017).

298. IOWA CODE § 352.11(1)(c) (2017).

case.<sup>299</sup> However, in Iowa, parties are typically required to file a request for mediation prior to litigation of a nuisance lawsuit against a confinement owner.<sup>300</sup> Iowa's law is written as permissive but is applied as mandatory, similar to North Carolina's, and failure to mediate could result in the claim being dismissed.<sup>301</sup>

#### IX. SHOULD IOWA AMEND THE CURRENT RIGHT-TO-FARM LAW?

Nuisance laws need to balance two similar, yet conflicting interests: one property owner (the confinement owner) being able to use his or her land as he or she wishes, and another property owner (the neighbor) being able to fully enjoy and use his or her land as he or she wishes.<sup>302</sup> Regulations and laws become a source of controversy, as they are commonly thought of as being too lenient on confinements. Confinement regulations and laws have even been referred to as being "about as tough as Kleenex."<sup>303</sup>

Out of the states considered, judicial interpretation of the right-to-farm laws in Iowa provide the greatest protection to the neighboring property owner and very limited protection to the confinement owner. If the Iowa legislature were to attempt to provide more protection for the confinement owner, as it did in 1995,<sup>304</sup> it is likely the judicial branch will hold in a similar fashion, and deny to extend protection to the confinement.<sup>305</sup> Confinement owners have a limited history of success in nuisance suits, and this would likely continue if the Iowa legislature were to adopt greater protections.<sup>306</sup> This consideration may be affected depending upon anticipation of likely challenges to the newly enacted fourth right-to-farm law limiting damages recovery.

If Iowa were to draw influence from North Carolina, Minnesota, or Illinois for an amendment, the Iowa legislature would be affording confinement owners greater protection. The only provision that *may* withstand judicial interpretation in

299. *Bormann v. Kossuth Cty. Bd. of Supervisors*, 584 N.W.2d 309, 321 (Iowa 1998).

300. IOWA CODE § 654C.2(1) (2016).

301. *See Arends v. State Select Farms, L.P.*, 556 N.W.2d 812, 816 (Iowa 1996); *see also* N.C. GEN. STAT. § 7A-38.3(c) (2016).

302. *See An Overview of Nuisance*, LAWS, <https://perma.cc/6A5T-PS63> (archived Jan. 16, 2018).

303. DAVID KIRBY, *ANIMAL FACTORY: THE LOOMING THREAT OF INDUSTRIAL PIG, DAIRY, AND POULTRY FARMS TO HUMANS AND THE ENVIRONMENT* 68, 224 n.13 (2010).

304. *See* IOWA CODE § 657.11 (1995).

305. *See Bormann v. Kossuth Cty. Bd. of Supervisors*, 584 N.W.2d 309, 321 (Iowa 1998); *see also Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 185 (Iowa 2004).

306. Neil D. Hamilton, *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective*, 3 DRAKE J. AGRIC. L. 103, 108 (1998).

Iowa would be a fee-shifting provision. There is a type of fee-shifting provision currently in force, which is similar to the North Carolina statute, except the defendant in Iowa can only recover when the claim is frivolous<sup>307</sup> instead of either party's ability to recover for a frivolous or malicious claim or affirmative defense in North Carolina.<sup>308</sup> With judicial interpretation favoring neighboring property owners and not confinement owners for the immunity provision, it is not absurd to speculate Iowa courts would rarely utilize the provision as it currently stands. The provision would likely be more useful if the legislature were to adopt North Carolina's approach and award either party costs, fees, and reasonable attorney fees.<sup>309</sup> Iowa could also amend the current fee-shifting statute to explicitly provide for attorney fees, as it currently states "all costs and expenses."<sup>310</sup>

#### X. CONCLUSION

Iowa led the nation in pork production in 2012 by a significant margin.<sup>311</sup> Pork production is a vital aspect of Iowa's economy.<sup>312</sup> Water quality and property rights are also vital concerns of Iowans. North Carolina, Minnesota, and Illinois are also national leaders in pork production, yet they all fall far behind Iowa in the economic benefit to their respective states.<sup>313</sup>

This significant difference could be due to increased environmental regulations in North Carolina, Minnesota, and Illinois compared to the lenient environmental regulations in place in Iowa. Implementation of additional regulations could have a significant impact on Iowa's economy and enforcement mechanisms.<sup>314</sup> Although implementation of additional regulations would benefit the environment, Iowa legislators would be required to balance the environmental benefit with the likely negative impact on the economy.<sup>315</sup>

Is it a completely binary choice where Iowa legislators would have to choose between improving water quality or maintaining a vital part of Iowa's economy? Or, is there a potential solution to address both? If it is strictly a binary test, and if history has any indication, I would anticipate the economy will come out ahead.

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307. See IOWA CODE § 657.11(5) (2017).

308. See N.C. GEN. STAT. § 106-701(f) (2016).

309. See *id.*

310. IOWA CODE § 657.11(5) (2016).

311. 2012 CENSUS HIGHLIGHTS, *supra* note 7.

312. IOWA PORK PRODUCERS ASS'N, *supra* note 51.

313. 2012 CENSUS HIGHLIGHTS, *supra* note 7.

314. See Editorial, *Loophole Lets Pork Industry Spoil Air, Water*, DES MOINES REG. (June 20, 2016), <https://perma.cc/M9DV-D4VY>.

315. *Id.*



Two solutions could potentially address both issues.

First, the Iowa legislature could do incremental “stepping” toward stricter regulations and gradually make the regulations stricter to increase the number of confinements subject to state oversight. Second, Iowa officials could increase awareness of the actual market for manure, which seems to be a solution that could address both issues and may be more favorable than going directly to stricter regulations. This would require determining how to turn hog manure, which is wetter, into pellets—but the option seems to strike a balance between increasing water quality and maintaining pork production as a vital part of Iowa’s economy. The appropriate course of action is unclear, however one thing is clear: any action taken would need to be through the Iowa legislature, as is also the case with an amendment of nuisance law.

Every state has a version of right-to-farm laws which grant protection to a confinement owner when subjected to a nuisance suit.<sup>316</sup> Although Iowa is the top pork producing state in the nation,<sup>317</sup> it provides very little protection to a confinement owner in a nuisance suit.<sup>318</sup> The confinement owner is only likely to be granted immunity if the confinement was preexisting the neighbor, has not made any changes in the confinement, and the confinement is in compliance with any applicable federal, state, or local laws or regulations.<sup>319</sup> The states of North Carolina, Minnesota, and Illinois grant far greater protection to confinement owners when confronted with a nuisance suit.<sup>320</sup> Nuisance suits relating to hog confinements have been on the rise<sup>321</sup> and will likely continue to rise.

Iowa does have lenient and confinement-friendly environmental laws, which could contribute to the large gap between the state and the rest of the nation in pork production. However, because Iowa’s right-to-farm laws are more protective of neighboring landowners and not confinement owners, they are likely not a factor in the large gap between Iowa and the rest of the nation in pork production. This Note only addressed two narrow areas which may be confinement-friendly, as potential justifications to the significant gap between Iowa and the rest of the nation for pork production. Many other factors, such as Iowa’s large production of corn

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316. Weldon & Rumley, *supra* note 198.

317. 2012 CENSUS HIGHLIGHTS, *supra* note 7.

318. Vansickle, *supra* note 137.

319. See IOWA CODE § 172D.2 (2017).

320. See N.C. GEN. STAT. § 106-701 (2017); see also 740 ILL. COMP. STAT. ANN. § 70/4.5 (2017); MINN. STAT. § 561.19 (2017).

321. See RICHARD H. MIDDLETON, JR. & CHARLES F. SPEER, THE RURAL REVOLUTION: THE RISE OF NUISANCE SUITS AGAINST ANIMAL FACTORIES 17 (Mar. 2011), <http://www.vtla.us/2014/Convention/Materials/Section17-Middleton.pdf>.

and soybeans providing cost-effective feed, were not considered.<sup>322</sup> Another justification could be Iowa's livestock cruelty law,<sup>323</sup> which is a confinement-friendly law not in force in North Carolina, Minnesota, or Illinois.<sup>324</sup> One thing is certain, however. As long as a market for pork production remains, Iowa farmers will continue to supply pork, and there will likely always be concerns relating to environmental effects and neighbors who view the production as a nuisance.

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322. Kevin Schulz, *Cheap Corn, Soybeans Play Well into Hogs' Needs*, NAT'L HOG FARMER (Aug. 29, 2016), <http://www.nationalhogfarmer.com/nutrition/cheap-corn-soybeans-play-well-hogs-needs>.

323. IOWA CODE § 717A.3A (2017) (commonly referred to as the "Ag-Gag" law, which makes reporting and investigating acts of livestock cruelty challenging).

324. Editorial, *'Ag-Gag Laws' Have No Place Under the First Amendment*, DES MOINES REG. (Aug. 16, 2015), <https://perma.cc/P4HR-JNZZ>.