

**SOUND AGRICULTURAL PRACTICE
Opinion Number 09-1**

SUBJECT: Request for an opinion pursuant to Section 308 of the Agriculture and Markets Law as to the soundness of certain agricultural practices conducted by Fred and Tricia Telesco in the Town of Union Vale, Dutchess County.

REQUESTOR: Mr. Fred Telesco and Mrs. Tricia Telesco
120 Cunningham Drive
Lagrangeville, NY 12540

Preliminary Statement

In a June 19, 2008 e-mail, Fred and Tricia Telesco indicated that a neighbor had brought a nuisance lawsuit against them. The Telescós requested that the Commissioner issue a sound agricultural practice opinion. The Commissioner, pursuant to Agriculture and Markets Law (AML) Section 308, may (upon consultation with the Advisory Council on Agriculture) issue opinions as to whether a particular agricultural practice is sound. An agricultural practice conducted in an agricultural district or on land receiving an agricultural assessment shall not constitute a private nuisance provided that the practice is determined to be a sound agricultural practice pursuant to an opinion of the Commissioner. According to Mr. and Mrs. Telesco, and upon reviewing documentation submitted by the attorney representing the adjoining landowner, it appears that the issues and agricultural practices to be reviewed are as follows: keeping and maintaining wire fence on the property line; corralling and maintaining farm animals within 100 feet of the property line; pasturing of beef cattle along the property line; keeping and maintaining "no trespassing" or any other signs without a valid sign permit; parking, storing, or otherwise maintaining commercial vehicles, trailers, campers, storage sheds, farm equipment, or other equipment or machinery in such a way as to be visible from the adjoining property or from the street; removing plants, trees and other vegetation from designated wetlands or otherwise disrupting the residential buffer; engaging in commercial activities on the property without proper zoning approvals; otherwise violating the terms and conditions contained in the Declaration of Restrictions; and otherwise violating the Zoning Law of the Town of Union Vale.

The Department conducted a sound agricultural practice review of these practices on the Telesco property. The following information and findings have been considered in reaching this Opinion.

Information Considered in Support of the Opinion

1. Fred and Tricia Telesco own and operate a start-up beef cattle farm on 15.86 acres in the Town of Union Vale, Dutchess County. According to Mr.

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Telesco, he intends to have a maximum of 12 to 15 mature cows on his property at any point in time. He stated that he currently has one bull, 6 bred Belted Galloways, two steers and one heifer calf. According to the Department's agricultural district file, the property is located within Dutchess County Agricultural District No. 23. This parcel was added to the district during the last eight year review which was recertified on April 16, 2008 and modifications to the district became effective on July 15, 2008.

2. On June 24, 2008 Dr. Robert Somers, Manager of the Department's Agricultural Protection Unit, conducted a field review of the Telesco property. According to Mr. Telesco, he and his wife began raising animals at the site in 2008. He informed Dr. Somers that the animals will be sold for meat once the desired herd density is obtained. Mr. Telesco indicates that the property does not receive an agricultural assessment at this time.

3. During the field review, Dr. Somers walked through the area used as pasture for the beef cows and examined the fencing constructed by the Telescopes. He observed some of the cows; and examined the barn and smaller containment area adjacent to a metal feed storage bin. The fencing and pasture appeared to be adequate for the number of animals on the property. It appeared that the nutritional needs of the animals were being supplemented through the feeding of hay and grain. A stream runs through the property, providing water for the animals. The pasture was located within a State regulated wetland and the underbrush had been removed and stacked between the fence and NYS Route 55. The removal of the understory vegetation accommodated the movement of animals and machinery within the pasture and opened the area so that the landowners can more easily observe the animals. The only portion of the Telesco property that is not a wetland is where they constructed their residence and an area adjacent to one of the neighbors, the Van Fleets. The Telescopes park and store their farm equipment on the upland portion of their property adjacent to the Van Fleets. Dr. Somers examined one portion of the fence that had been breached by several of the cows. No determination could be made as to how the fence broke.

4. In an October 18, 2008 e-mail to Dr. Somers, Mrs. Telesco indicated that they rotate their animals between two separate pastures. It is a recommended agricultural practice to rotate pasture to provide recovery time so that an area is not over-grazed. Mrs. Telesco stated that in addition to the pasture, which the cows use all year, they supplement their feed with approximately two to three 4-foot by 4-foot round bales of hay each week in the spring, summer and fall. In the winter, they use approximately three to four round bales of hay. She stated that the amount of hay used, however, depends upon herd size. She further indicated that grain is also fed to the cattle each morning and evening.

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5. Mr. and Mrs. Telesco informed Dr. Somers that a neighbor has complained about their farming activities and commenced a nuisance law suit against them. This neighbor shares a common border with the Telescopes on the northeastern side of their property.

6. At the time of Dr. Somers' field visit, the Telescopes' agricultural equipment was stored on better drained soils (well-drained Hoosic channery loam and moderately well drained Pittstown silt loam) adjacent to the adjoining neighbor's property. A majority of the Telesco property is comprised of somewhat poorly drained to very poorly drained, frequently flooded, flood plain soils. A Department of Environmental Conservation wetlands map indicates that a majority of the Telesco parcel is identified as a State regulated (Class II) wetland. It is a preferred practice to store farm equipment on better drained soils and out of a flood plain. Furthermore, farm equipment is frequently stored outside, as was found to be the case at the Telesco property. A camper was stored on the Telesco property adjacent to the neighbor's property. The camper is not agricultural equipment.

7. In a memorandum dated June 20, 2008, Tony Leo, Code Enforcement Officer (CEO) for the Town of Union Vale's Building Department, indicated that after a search of the Building Department records, that there were no violations of record on file concerning the Fred and Tricia Telesco parcel located at 120 Cunningham Drive, Town of Union Vale, County of Dutchess, State of New York; Grid Number 18 6660 00 285 572.

8. On June 27, 2008, the Department wrote to ten owners of land adjacent to the Telesco property notifying them of the agricultural practice review and inviting them to comment on the practice. The Department received two responses to its inquiry. One of the neighbors indicated that they live across the street from the Telescopes and have observed no practice or situation that they deemed unfit. This neighbor concluded that in his opinion the Telescopes run an excellent operation with no violations as far as he knows.

9. On July 28, 2008 the Department received correspondence from Karen Folster Lesperance, Esq. of McCabe & Mack, LLP, indicating that she represents a neighboring landowner of the Telescopes. She indicated that the Telescopes' request for the sound agricultural practice opinion was in response to a lawsuit filed in Dutchess County Supreme Court by her clients. She provided copies of the Summons and Complaint filed in the Dutchess County Supreme Court; an Order To Show Cause requesting injunctive relief; and photographs of the Telesco property and their cattle. Ms. Lesperance indicated that the focus of the lawsuit concerns multiple alleged violations, by the Telescopes, of covenants and restrictions placed upon all of the properties in a subdivision where the Telescopes' and her client's properties are located. Ms. Lesperance stated that the restrictive

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covenants include, among other things, restrictions that "no animals, including but not limited to horses, cows, pigs and goats, or poultry shall be kept on any lot", that "any trailer, mobile home, shack, barn, outbuilding or tent...shall be placed ...in such a way that it will not be visible from the street", and that "all zoning and other laws, rules and regulations ...are to be a part hereof and enforceable hereunder and all owners of said lots shall be bound by such laws, rules and regulations." She further stated that the Telescopes are in violation of the Town's Zoning Code, including the storage of commercial vehicles, campers and farm equipment adjacent to a property line and the construction of fencing and grazing of animals adjacent to a property line. Ms. Lesperance indicated that additional wire fencing identical to that which encloses the cattle has been installed along her client's driveway and does not enclose farm animals. Further, Ms. Lesperance stated that on or about June 15, 2008 a cow and a bull broke through the Telescopes' wire fence and entered her client's property.

10. Ms. Lesperance provided pictures of several of the Belted Galloways trespassing on her client's property. Dr. Somers observed the fence in question; which consists of at least five strands of wire attached to wooden posts. Dr. Somers observed that the fence appeared to be in good shape except that one strand of wire attached to a boundary line spruce tree adjacent to the neighbor's property appeared to have been previously broken, but was repaired at the time of his visit.

11. Farmers are responsible for the care, safety and confinement of livestock in their charge. The erection and maintenance of fences for the confinement of livestock is a common agricultural practice. Farmers must provide adequate fencing and gates to confine livestock in a safe and reasonable manner. The public needs to be protected from livestock that may cause bodily harm and/or property damage if the animals venture off the farm. It is the Department's position that farmers should be allowed the full use of their property for the raising, grazing, keeping and care of livestock. The Department has supported the right of a farmer to place a fence on his or her property line and to graze animals up to that line.

12. Town Law Article 18 governs the placement, construction, maintenance and repair of division fences. It provides, in relevant part, that if the fence is constructed with wire it shall have four wires and have posts no further than fourteen feet apart. (Section 309) The Department is not in a position to determine whether the fence complies with these provisions, nor to what extent it is required to comply with these provisions. We note, however, that the Telescopes have not been found in violation of Article 18. Furthermore, the standards of wire fencing set forth in Section 309, which date from 1932, do not reflect modern agricultural practice or take into account new materials, such as high tensile wire or electrically charged wire for controlling livestock. The fence appeared to be

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adequate to contain the animals; however, if the livestock continue to get out of their confinement, it is the responsibility of the farmer to construct a stronger perimeter fence to properly confine the livestock. Dr. Somers observed additional wire fencing along the neighbor's driveway that does not enclose farm animals. The Telescopes gain access to this portion of their property through a gate; this area is fenced but is not intended to contain cattle. This wire fencing does not confine livestock and therefore is not an "agricultural practice" or part of this review.

13. The alleged violation of covenants and restrictions placed on the Telesco property by a developer is beyond the scope of this review. As indicated in paragraph number 7, according to the Town CEO there are no zoning code violations on file against the Telescopes. A determination concerning such covenants and restrictions, including alleged violations of the zoning code, is not part of this review.

14. The adjoining neighbor contends that the Telescopes are in violation of local law because they have not obtained a permit from the Town to install posted signs on the property's perimeter. No trespassing signs are commonly found along the perimeter of parcels where agricultural activities occur and help protect the integrity of the farm operation from trespass by unauthorized visitors. No trespassing signs are used to help safeguard the public from livestock contained on the farm and equipment being operated on the farm. The Department is unaware of any State or local law that requires a permit for a farmer to post no-trespassing signs on property. Further, as indicated above, the CEO has stated that there are no violations of record with regard to this property.

15. The adjoining neighbor has raised an issue about the visibility of farm equipment from their home and the road. In the Department's view, farmers should not be required to bear the extra costs to screen agricultural structures or equipment unless such requirements are otherwise warranted by special local conditions or necessary to address a threat to the public health or safety. Further, as discussed in paragraph 6, it is a preferred agricultural practice to store farm equipment on better drained soils and out of a flood plain.

16. The adjoining neighbor has alleged that the Telescopes removed plants, trees and other vegetation from designated wetlands and disrupted the "residential buffer." Farm operations often use wetlands for agricultural purposes. Farmers frequently selectively remove or, when appropriate, clearcut vegetation on a parcel to convert land to an agricultural use or make the land more suitable for the production, preparation and marketing of crops, livestock and livestock products. Agricultural use of wetlands is recognized in the Environmental Conservation Law (ECL) and implementing regulations. Pursuant

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to ECL §24-0701(4) and 6 NYCRR Part 663.2(c), certain agricultural activities are exempt and as such, allowed within State regulated wetlands.

17. The DEC has provided additional information to the Department concerning the wetlands law agricultural exemption. The exemption allows normal agricultural activities associated with growing agricultural products; including grazing and watering livestock, harvesting, using fertilizers and chemicals, and operating motor vehicles for agricultural purposes. The exemption specifically allows draining, but does not include side-casting spoil material. If a farmer drains, s/he must remove the sidecast material from the wetland. There is no exemption for any type of fill material, regardless of purpose. The exemption also allows for structures necessary for the agricultural productivity of the land such as fences and watering devices in fields. The erection of buildings such as greenhouses or barns in a wetland is not exempt because it is not necessary for the agricultural productivity of land to have a barn in a wetland. Selectively cutting trees is exempt; however, clear-cutting is not.

18. Ms. Lee A. York, NYS DEC, Region 3 Environmental Analyst, in a February 8, 2007 letter, stated that she reviewed Mr. Telesco's application and made a determination of non-jurisdiction and indicated that the installation of livestock fencing and the construction of a run-in shed for the keeping of animals, within a regulated wetland, does not require a Freshwater Wetlands Permit under the Freshwater Wetlands Act, Article 24. Ms. York is no longer at the DEC Region 3 office; Mr. Jim Pinheiro is the new contact. On November 19, 2008, Dr. Somers spoke with Mr. Pinheiro, who indicated that he is very familiar with the Telesco property and has been there on numerous occasions. Mr. Pinheiro indicated that the DEC regulations prohibit clearcutting and limits the use of mechanized equipment within a State regulated wetland unless the equipment is used for agricultural purposes. However, a landowner may remove understory brush and briars but they must be cut and removed by hand. He stated that DEC has not issued any violations to date on the Telesco property with regard to the beef operation and its effect on the wetlands.

19. Agriculture and Markets Law §308(1)(b) requires that the Commissioner consider whether an agricultural practice is conducted by a farm owner or operator as part of his or her participation in the Agricultural Environmental Management (AEM) program as set forth in Agriculture and Markets Law Article 11-A. According to Ms. Telesco, they were not aware of AEM and are not participating in the program. Ms. Telesco stated that the Dutchess County Soil and Water Conservation District has visited the property and provided suggestions concerning their farm operation.

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20. On September 18, 2008, Dr. Somers again contacted the Town of Union Vale to determine if the Telescopes have been cited by the Town for any violations of local laws or ordinances as a result of their farming operation. Anthony T. Leo, Code Enforcement Officer, stated that as indicated in his June 20, 2008 memorandum, there are no violations of the Town of Union Vale's Zoning Code relative to the Telesco property.

Findings

Based upon the facts, information and circumstances described above, and in consultation with the Advisory Council on Agriculture; the New York State Department of Environmental Conservation; the New York State College of Agriculture and Life Sciences at Cornell; the Natural Resources Conservation Service and the Sound Agricultural Practice Guidelines¹ by which agricultural practices are evaluated, I find the following:

1. The Department has found no evidence or received other information indicating that Mr. and Mrs. Telesco have been cited for any violation of federal, State or local law as a result of their start-up livestock operation.
2. The Department has found no evidence that the livestock operation has resulted in bodily harm or property damage off the site. In the paperwork received from the adjoining neighbor's attorney, there is no claim or demonstration that the Telescopes' cattle have caused any bodily harm or property damage. One response received by the Department is supportive of the farming activities conducted at the Telesco property and the other response, from the adjoining neighbor, is not supportive of the farm operation.
3. The Department's farm visit indicates that the Telescopes are properly managing their farm operation and have provided their cattle with sufficient food, water and foraging area. The Telescopes and the Department have contacted the NYS DEC and the Town's Code Enforcement Officer to determine if the Telescopes' operation is in compliance with State Law and Town Code. The amount of land available for the raising of beef cattle is sufficient to meet the

¹ On November 1, 1993 the NYS Advisory Council on Agriculture published its report entitled *Protecting the Right of New York Farmers to Engage in Sound Agricultural Practices*. The Council developed guidelines to assist the Commissioner of the Department of Agriculture and Markets in determining what is sound pursuant to Section 308 of the Agriculture and Markets Law. The Guidelines state that the practice 1) should be legal; 2) should not cause bodily harm or property damage off the farm; 3) should achieve the results intended in a reasonable and supportable way; and 4) should be necessary. The sound agricultural practices guidelines recommended by the Advisory Council on Agriculture are given significant weight in assessing agricultural practices.

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care, housing, and health related services required for 12 to 15 mature beef cattle.

4. The construction of fencing, open storage of agricultural equipment, partial removal of vegetation on the property and posting the property from trespass is necessary to the Telescosp's livestock farm operation. A tractor and hay is stored in a shed/barn on the edge of the operation. The type and location of the fencing appears to be adequate to keep the animals within their confinement area. The removal of understory trees and brush accommodates animal and farm equipment movement within the property.

Conclusion

Based on the foregoing and in accordance with section 308 of the Agriculture and Markets Law, I conclude that the practices conducted on the Telesco property associated with the erection of fencing, the grazing of animals, the posting of property boundaries, the removal of plants/trees within a State regulated wetland, and the storage of farm equipment on the property, as described above, is sound. In reaching this conclusion, the DEC's determination of non-jurisdiction and the fact that the Telescosp have not been cited for any violation of the Town of Union Vale Code have been taken into account.

January 20, 2009
Date

Patrick Hooker
PATRICK HOOKER
Commissioner of Agriculture and
Markets of the State of New York

Pursuant to Agric. & Mkts. Law Section 23, I hereby certify that this document consisting of 8 pages is a true copy of the original thereof on file with the Department of Agriculture and Markets.

Signature

William K. Ball

Title: Director

Date: 1/22/09