

Issue Tracking: ARE's Agriculture and Environmental Legal Issues

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This Lawyer's Background

- Member of the Virginia State Bar (1992) and North Carolina State Bar (2003)
- Non-profit work in agriculture
 - American Farmland Trust
 - NC Farm Transition Network
- Private (Farm) Law Practice (2010 - 2018)
- NCSU Agricultural and Resource Economics (2018)
 - 70% Extension appointment
 - 30% Teaching (Environmental and Agriculture Law)

This Lawyer-Extension Professor's Requests

Please help me learn how to teach these legal concepts to our clientele

Please keep sending me your field questions

Please help me prioritize legal materials most helpful to our clientele

Select Topics

- 2019 Farm Act Summary
- *Murphy-Brown* lawsuits and Right to Farm
- Waters of the United States (WOTUS) final rules
- Endangered Species Act final rules
- Voluntary Agricultural District working group status
- Expansion of agricultural mediation services under 2018 Farm Bill
- Tracking challenge to “Ag-Gag” law (PETA v. Stein)
- ~~DEQ Solar Decommissioning Study~~
- farmlaw.ces.ncsu.edu site overview
- “So You Have Inherited a Farm” and “Land Summit” projects

2019 NC “Farm Act” Provisions*

- Hemp
 - Smokeable hemp banned (“I fought the law...”) (June 1, 2020)
 - Applicants must be Qualifying Farmer (have Farm Tax Certificate [or Conditional])*
- PUV disqualification notice requirement
- Abandoned utility right of ways (separate statute) § 62-193. Disposition of certain unused **utility easements**.
 - Landowner may extinguish if no construction within 20 years of grant, pays utility **fair market value** of the easement
 - File complaint with NC Utilities Commission
 - If landowner and utility cannot agree to value, then Clerk of Court appoints commissioners (as in taking valuation)
- Confidentiality of Soil and Water gathered info from farms (on conservation applications)
- No Clean Water Management TF money if have EQIP money
- No Updates to Right to Farm law

* Approved by House/Senate, not signed by Governor as of 10-30-2019

Bona Fide Farm Status - Zoning

- Exemption from County zoning restrictions
- Not an exemption from NC Building Code requirements
 - New statute all but requires issuing permit for all farm buildings
- Safe Harbors NCGS **§ 153A-340**
 - A farm sales tax exemption certificate issued by the Department of Revenue.
 - A copy of the property tax listing showing that the property is eligible for participation in the present use value program pursuant to G.S. 105-277.3.
 - A copy of the farm owner's or operator's Schedule F from the owner's or operator's most recent federal income tax return.
 - A forest management plan
- FSA Farm Numbers no longer qualify

NC Farm Act Bona Fide Farm Expansion*

- Bona Fide Farm zoning exemption changes
 - Response to Harnett County [case](#) (*Jeffries v. Harnett Co.*)
 - Hunting, fishing, shooting sports, equestrian now considered **agritourism**
 - Shooting range requires NC WRC site evaluation
 - Agritourism = bona fide farm
 - Structures exempt on shooting farms in counties < 110,000 population
- Catering from BFF exempt from county **or municipal** permitting (still must comply with health code)
- Roadside signage
 - BFF may erect signage within normal 660 foot buffer from edge of interstate or primary highway RW
 - Sign not bigger than 3 feet long on any side
 - Located on owned or leased BFF

* Approved by House/Senate, not signed by Governor as of 10-30-2019

Murphy-Brown Cases and Right to Farm

- 26 cases (540 plaintiffs)
 - 5 verdicts
 - Remainder stayed pending appeal
- 4th Circuit Appeal
 - Briefs filed (including Farm Bureau amicus)
 - No oral argument on calendar yet!
- Issues on Appeal:
 - Punitive damages: did the trial judge err as a matter of law in allowing award of punitive damages?
 - Right to Farm: does it apply retroactively?
 - Exclusion of defense expert witness on odors and other evidentiary rulings

Nuisance Scenario

- Scenario: Plan to take a loan to build a chicken house, neighbor objects, threatens to sue
- Must unreasonably interfere with neighbor's use and quiet enjoyment
- New Right to Farm standing requirements:
 - Is neighbor legal possessor of property? (owner or signed tenant)
 - Will neighbor have been there when the poultry houses are built?
 - Does the neighbor live within one-half mile of the new poultry houses? (as opposed to ½ mile from boundary)
- Is building a chicken house a fundamental change in the land use?

New Right to Farm (§ 106–701) **(all must apply)**

- (1) The plaintiff is a legal possessor of the real property affected by the conditions alleged to be a nuisance.
- (2) The real property affected by the conditions alleged to be a nuisance is located within **one half-mile of the source of the activity** or structure alleged to be a nuisance.
- (3) The action is filed within **one year** of the establishment of the *agricultural or forestry operation* or within one year of the operation undergoing a fundamental change.

“Fundamental Change” is not:

- A change in ownership or size.
- An interruption of farming for a period of no more than three years.
- Participation in a government-sponsored agricultural program.
- Employment of new technology.
- A change in the type of agricultural or forestry product produced.
 - Grazing cattle to poultry house?
 - Forestry harvest cleared for poultry house?

Nuisance Damages (§ 106-702)

- measured by the **reduction in the fair market value** of the plaintiff's property caused by the nuisance, but not to exceed the fair market value of the property
- **(new)** “A plaintiff may not recover punitive damages ... from an agricultural or forestry operation that has not been subject to a criminal conviction or a civil enforcement action* taken by a State or federal environmental regulatory agency pursuant to a notice of violation for the conduct alleged to be the source of the nuisance within the **three years prior to the first act on which the nuisance action is based.**”

RCRA Regulation?

- Resource Conservation and Recovery Act of 1976 (RCRA), Pub. L. No. 94-580, 90 Stat. 2795 (codified in scattered sections of 42 U.S.C.)
- Regulates
 - Solid Waste (Subtitle D) (Landfills)
 - Hazardous Waste (Subtitle C) (e.g. toxic substances)
- Applied to livestock waste in *Community Association for Restoration of the Environment, Inc. v. Cow Palace, LLC*, 80 F. Supp. 3d 1180 (E.D. Wash. 2015)
- Dairy Farm

ANIMAL ACTIVISM – “Ag Gag” law

- Creates a civil right of action for private employers
- North Carolina Property Protection Act, N.C.G.S. 99E-2(b)
 - Employee enters non-public space of employment to remove or capture “data, paper, records, or any other documents and uses the information to breach the person's duty of loyalty to the employer”
 - “records images or sound occurring within an employer's premises”
 - “placing on the employer's premises an unattended camera or electronic surveillance device”
 - Commits “An act that substantially interferes with the ownership or possession of real property”
- Under challenge in *PETA v. Stein* (before federal Middle District NC, 1:16-cv-00025-TDS-JEP)
 - 4th Circuit has granted standing to PETA et al in “pre-enforcement challenge” to First Amendment rights

Waters of the United States (WOTUS)

Repeal of 2015 Rule

- Fundamental tension between Clean Water Act jurisdiction (federal) and state jurisdiction over waterways (and what you can discharge to them)
 - If not WOTUS, no federal jurisdiction (state must regulate)
 - Theoretically, state may enforce stricter standards
- February 28, 2017 EO
- Proposed Rules in line with *Rapanos v. US* decision (2006): **wetlands adjacent or direct surface connection to navigable waters**
- Revised rules revoke 2015 final rules
- Relevance:
 - fill of wetlands, ditches, etc. require permit
 - Discharge of pollution (point source) requires NPDES permit
- December 23, 2019 effective date of Final rules

Scenarios

- Landowner wishes to deepen a wetland area into a pond for irrigation or livestock
- Landowner wishes to fill in a wet area on property for crop production
- Landowner wishes to divert established ditching on property
- Landowner wishes to “un-dam” an existing pond
- Must landowner apply for a CWA § 404 permit?

Significant Nexus

- CWA: “**restore and maintain the chemical, physical, and biological integrity of the Nation's waters**”
- What happens upstream affects waters downstream
- Where science shows no effect, no “significant nexus”
- EPA science report: “[Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence](#)”

Review 2015 Rules: 8 Categories of Jurisdictional Waters

1. Traditional navigable waters
 2. Interstate waters
 3. Territorial Seas
 4. Impoundments of jurisdictional waters
 5. Tributaries
 6. Adjacent
 7. Isolated wetlands (5 types)
 8. Waters within 100 year flood plain
4000 ft from traditional navigable water
- “Jurisdictional by Rule”= no additional analysis required
- “Case by Case basis”= significant nexus (Kennedy concurrence)
- 

Case by Case “Similarly Situated” Nexus to Downstream Water Quality

- Five types of isolated wetlands
 1. Prairie potholes
 2. Carolina and Delmarva bays
 3. Pocosins (Algonquin for “swamp on a hill”)
 4. western vernal pools in California
 5. Texas coastal prairie wetlands
- “similarly situated” analysis is conducted where it is determined that there is a likelihood that there are **waters that function together** to affect downstream water integrity



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Federal Register / Vol. 84, No. 204 / Tuesday, October 22, 2019 / Rules and Regulations

DEPARTMENT OF DEFENSE**Department of the Army, Corps of Engineers****33 CFR Part 328****ENVIRONMENTAL PROTECTION AGENCY****40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401**

[EPA-HQ-OW-2017-0203; FRL-10000-10-OW]

RIN 2040-AF74

Definition of “Waters of the United States”—Recodification of Pre-Existing Rules

AGENCY: Department of Defense, Department of the Army, Corps of Engineers; Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) and the Department of the Army (“the agencies”) are publishing a final rule to repeal the 2015 Clean Water Rule: Definition of “Waters of the United States” (“2015 Rule”), which amended portions of the Code of Federal Regulations (CFR), and to restore the regulatory text that existed prior to the 2015 Rule. The agencies will implement the new 2015 Rule

authorizing the encroachment of federal jurisdiction over traditional State land-use planning authority. Lastly, the agencies conclude that the 2015 Rule’s distance-based limitations suffered from certain procedural errors and a lack of adequate record support. The agencies find that these reasons, collectively and individually, warrant repealing the 2015 Rule.

With this final rule, the regulations defining the scope of federal CWA jurisdiction will be those portions of the CFR as they existed before the amendments promulgated in the 2015 Rule.

DATES: This rule is effective on December 23, 2019.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-HQ-OW-2017-0203. All documents in the docket are listed on the <http://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

300, 302, and 401,¹ and will continue to interpret the statutory term “waters of the United States” to mean the waters covered by those regulations consistent with Supreme Court decisions and longstanding practice, as informed by applicable agency guidance documents, training, and experience.

State, tribal, and local governments have well-defined and established relationships with the Federal government in implementing CWA programs. This final rule returns the relationship between the Federal government, States, and Tribes to the longstanding and familiar distribution of power and responsibilities that existed under the CWA for many years prior to the 2015 Rule.

In issuing the July 27, 2017 notice of proposed rulemaking (NPRM) and the July 12, 2018 supplemental notice of proposed rulemaking (SNPRM), the agencies gave interested parties an opportunity to comment on important considerations and reasons for the agencies’ proposal, including whether it is desirable and appropriate to recodify the pre-2015 regulations as an interim step pending a substantive rulemaking to reconsider the definition of “waters of the United States.” See 82 FR 34899, 34903 (July 27, 2017); 83 FR 32227 (July 12, 2018). The agencies received approximately 770,000 public comments on this rulemaking and carefully reviewed those comments in

2019 Waters of the United States Rule Highlights

- **Wetlands** must have “direct hydrologic surface connection” to traditional water (continuous surface connection)
- Wetlands physically separated from other waters of the United States by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are ***not adjacent***
- **Ditches** are generally proposed ***not*** to be “waters of the United States” ***unless***
 - functioning as traditional navigable waters
 - constructed in a tributary and also satisfy the conditions of the proposed “tributary” definition
 - constructed in an adjacent wetland and also satisfy the conditions of the proposed “tributary” definition.
- Tributaries do not include surface features that flow only in direct response to precipitation, such as ephemeral flows, dry washes, arroyos, and similar features
 - Perennial means year round
 - Intermittent means continuous flow at certain times in a “typical” year



Endangered Species Act Finalized Rules

- Land fauna administered by U.S. Fish and Wildlife Service (Dept. of Interior); Sea fauna by Marine Fisheries (NOAA)
- Relevance:
 - landowner dominion over land considered critical habitat for threatened or endangered species (e.g. red cockaded woodpecker)
 - Pipeline and other permitted "takings" projects requiring ESA impact analysis
- General "rollback" of environmental regulation under current presidential administration
- Federal Register highlights
 - Removes **climate change** from consideration (redefines "foreseeable future")
 - Allows agency to consider "economic impacts" of listing determinations for 'transparency' (increase political pressure?)
 - "threatened" species no longer given automatic protection (must each go through administrative rulemaking process [APA])
 - Reduction in requirement of inter-agency consultation
- Effective September 26, 2019

NC Agricultural Mediation Program – Farm Bill expansion

- Created under Agricultural Credit Act of 1987 (born of 80's farm crisis)
- Mediation: dispute resolution by 3d party neutral
 - Collaborative agreement, not focused on winning
- Program reauthorized under Farm Bill, provides grant funding for ag mediation as free service
 - Run in NC by NC Agricultural Mediation Program (housed at Western Carolina University)
- Existing: adverse letter rulings, wetlands determinations, conservation program compliance
- 2018 Farm Bill expanded list of "issues" a farm mediation program may mediate, now includes
 - Landowner/farmer disputes (leases)
 - Equipment leases
 - "farm transition" (including partition)
 - Organic certification loss
 - Right to Farm (neighbor disputes)
 - "Other" as state agriculture department determines
 - Examples: Easements, water rights, environmental compliance, etc.

Voluntary Agricultural District Workgroup

- Update

- Halifax County situation: DOT taking triggered public hearing, DOT sued, county attorney opined that districts were not legally authorized by Board of Commissioners
- Challenges:
 - loss of landowner interest, benefits unclear
 - Advisory Board authority to designate VADs (enroll land without Commissioner permission)
 - Geographic definition of Ag District hard to establish in light of buffer notification requirement
 - 2018 requirement that VADs be identified in “land records system” (response to *Murphy-Brown* nuisance law suits)
- Branan Templates under review
 - Basic (no optional features)
 - Advanced (includes parliamentary suggestion for Boards)
 - Bylaws (for Boards without ordinance parliamentary guidance)
- Revisions to VAD statute being considered
 - Clarify parcels as districts
 - Reduce VAD Board size (reduce district representation requirements)
 - Other?
- Spring outreach schedule planned

Agricultural and Natural Resource Law

Meet Our Staff

Events

Agribusiness Law

Farm Transition and Succession

Land Use and Zoning

Environmental and Natural Resource Regulation

Energy

Public Lands and Wildlife Management

Department of Agricultural and Resource Economics

Publications & Factsheets



Now on Twitter

ExtensionVoices

A Twitter list by @ExtensionVoices

Tweets from NC Cooperative Extension and colleagues, nationwide.

Currituck Extension @CurrituckCES

News and Updates

Farm and Value-Added Processing Labor: Branan Presents With Farmer Panel at Annual Carolina Meat Conference

Andrew Branan, ARE Extension Assistant Professor, was invited to participate in a discussion on employment law issues faced by ...

FEATURED

Hemp License Application and the "Bona Fide Farmer": Is There a Minimum Farm Income Requirement?

A not uncommon question persists regarding the use of the term "Bona Fide Farmer" in the hemp license application: ...

FEATURED

Farm Tenancy: Letter Template Available to Timely Terminate Verbal Farm Rental Arrangements

Though empirical data is lacking, it is believed that a majority of farmland acres in North Carolina are rented ...

FEATURED



Atlantic Coast Pipeline: Fourth Circuit Finds Continued Shortcomings in Required Endangered Species Act

Wills: NC Court of Appeals Interprets Per Stirpes Testamentary Intent

The North Carolina Court of Appeals demonstrated in September that use of the common law term per stirpes - ...

FEATURED

Endangered Species: New Landowner Extension Publication on Endangered Species Management

North Carolina Cooperative Extension has released a new landowner orientation guide regarding endangered or threatened species under Federal and ...

FEATURED

Gate Disputes: North Carolina Court Affirms Law on Gates and Access

Templates Available:

- Verbal lease termination letter
- Memorandum of Lease (3+ years)
- Pasture Lease
- EQIP Lease
- Silvopasture Lease

Law case summary and commentary

Narratives on business organizations, leases, etc.

Branan Projects 2019

- **Land Summit**
 - Local Foods Program Team economic development track
 - Goal: emulation of Wake County “Keep the Farm” annual landowner meeting
 - Greenville and Morganton (May 2018)
 - Agent Training Topics
 - PUV
 - Land subdivision
 - Forestry resources
 - Produce agent curriculum
- **Beginning Farmer Leasing (CEFS)**
 - Lease templates
 - Three scenarios: land trust land, solar grazing, silvopasture grazing
- **“So You Have Inherited a Farm”**
 - Tobacco Trust Fund
 - Workbook on ownership of agricultural and forest land
 - Publication fall 2020 (by next Extension conference)
- Upcoming Outreach: Working Lands schedule

THANKS FOR INVITING ME!

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