

# Environmental and Land Use Update 2021

## NC Cooperative Extension Conference

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# *This Extension Professor's Requests*

- Please keep sending me your field questions
- To extent practicable, please direct public inquiries to the materials on [farmlaw.ces.ncsu.edu](http://farmlaw.ces.ncsu.edu)

# Land Summit Support Publication

- Supported by Tobacco Trust Fund
- Printing of 300 copies for 2022 workshops
- Topics include estate planning, purchase options, PUV, Tenancy, etc.
- Templates (“go by’s”)
- PDF available at [www.farmlaw.ces.ncsu.edu](http://www.farmlaw.ces.ncsu.edu)

## So You Inherited a Farm

Topics and Templates Concerning Transfer and Management of Interests in Farm and Forest Land



# “A Different Time Politically”

National Environmental Policy Act of 1970

Senate: unanimous

House: 372-15

Clean Air Act of 1979

Senate: unanimous

House: 336-40 (10 n/v)

Clean Air Act Amendments 1990

Senate: 89-11

House: 401-21

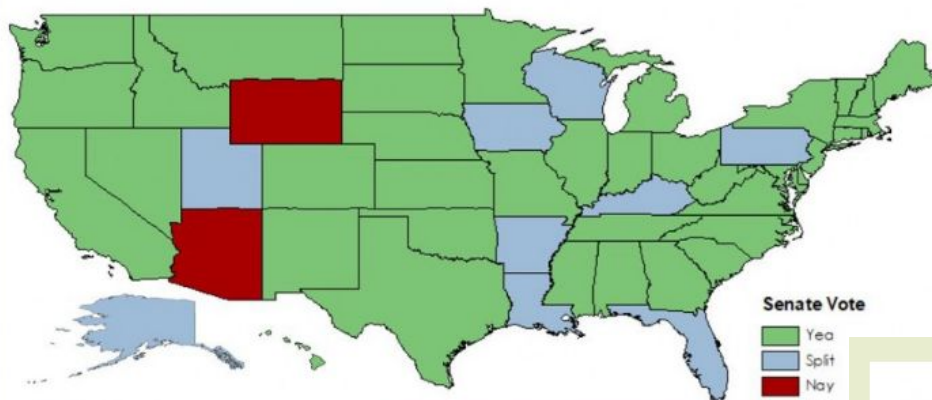
Clean Water Act (1972)

Senate: 52-12 (36 n/v) override of Pres. Nixon veto

House: 247-23 (160 n/v) override...

# Farm Policy Still Bi-Partisan

Figure 1. Results of Senate Vote on Farm Bill Conference Report



Senate Vote

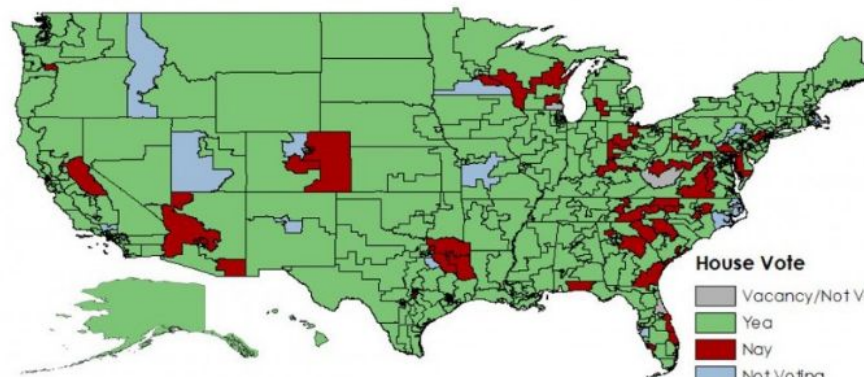
- Yea
- Split
- Nay

**YEAS 87**   **NAYS 13**



Source: Final Vote Results Roll Call 259

Figure 3. Results of House Vote on Farm Bill Conference Report



House Vote

- Vacancy/Not Voting
- Yea
- Nay
- Not Voting

**YEAS 369**   **NAYS 47**



Source: Final Vote Results Roll Call 434

# Battle in the Agencies and Courts

- Congress passes a Statute ('broad brush stroke')
  - statute assigns agency to administer
  - agency writes 'fine print' regulation through public process (Administrative Procedure Act)
- Affected party challenges agency action
  - "abused discretion" in interpretation of statute policy
  - did not follow science-based findings in statute
  - did not follow APA process
- Court rules on discretion, vote of judges based on their political philosophy
  - i.e. the reason they were nominated
  - confirmation votes still largely bi-partisan

# The Rollback of the Great Rollback

- Trump Administration “rolled back” (to lesser regulation) over 100 regulations concerning the environment, land use, agriculture and endangered species
- Biden Administration working to undo these changes
- Major Challenge: Agencies have been denuded of scientists
  - loss of scientific capacity at EPA etc
  - environmental statutes (e.g. Clean Air Act) generally require scientific basis for regulation (any roll back is a new regulation, requires science update)
  - without science, easier to challenge (halt)

# The Federal Judiciary

- Plays deciding role in constitutional questions on laws impacting agriculture and environment
  - conservatives: awards general discretion to agencies interpreting a law to deregulate business; restrictive of government power when law increases regulation of business
- **Supreme Court** facing big test: Is it a partisan political body?
  - Do the justices care?
  - Will Court follow precedent?
  - NYT report of a defensive press tour
- Has ruled in favor of agriculture (and environment) in past few sessions since conservative majority
  - e.g. County of Maui v Hawaii Wildlife Federation (expanded protection of Clean Water Act)
  - e.g. Cedar Point Nursery v Hassid (expanded definition of a “taking” of property by government)



# Obama vs. Trump Federal Court Appointments

- **Supreme Court**
  - Justice Sotomayor (2009)
  - Justice Kagan (2002)
  - Judge Garland nominated
- **Circuit COA**
  - 30 by Jan 1, 2012
  - 55 total by Jan, 2016
- **District Courts**
  - 130 by Jan 1, 2012
  - 268 total by July 2016
- **Supreme Court**
  - Justice Gorsuch (2017)
  - Justice Kavanaugh (2018)
  - Justice Barrett (2020)
- **Circuit COA**
  - 54 by end of term
- **District Courts**
  - 174 by end of term

# 2021 NC “Farm Act” Provisions

- Voluntary Ag Districts
  - qualification tied to Bona Fide Farm definition
  - authorize delegated powers to Ag Advisory Board
  - clarified ‘warning’ buffer in GIS (½ mi from property line)
- Timber Trespass
  - now Class G Felony
  - raises damages to 3x value of cut timber
- Timber load ticket now required, issued to landowner within 30 days of harvest for each load to removed
- Expiration of DL issued to H2A worker (3 yrs after visa issuance; or date of visa expiration)
- Ties farm workers comp exemption to statutory definition of agriculture (ag business required to carry for min 10 non-seasonal FTE; all other business at 3 min)
- No Further Updates to Right to Farm law

# Animal Activism

## “Ag Gag” law update

- 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”
- Middle District NC **declared majority of statute’s provisions unconstitutional (Peta v Stein 1:16-cv-00025-TDS-JEP)**
  - violates first amendment
- Appealed by NC Farm Bureau et al to 4th Circuit COA
- [Farm Law](#) article

# Labor Organizing Access as a “Taking”

- [Cedar Point Nursery v Hassid](#) June 23, 2021
- Issue: may State of California require landowners to allow farm labor union personnel to enter property for purposes of labor organizing?
  - regulation in place since 1975
- Holding: Violation of the US Const. 5th Amendment “takings” clause (“... nor shall private property be taken for public purpose without just compensation”)

# Dicamba Registration for 2022

- 9th Circuit ordered EPA to “deregister” 3 Dicamba products
- **Case: National Family Farm Coalition v. Environmental Protection Agency, No. 17-70810 (9th Cir. 2020)**
- Complaint: EPA relied on insufficient drift impact data
- Court: Federal Insecticide Fungicide and Rodenticide Act (FIFRA) requires examination of economic and social factors
  - argument that dicamba disrupts communities with destroyed crops
  - forces neighbors to buy dicamba-resistant seed
- No decision made on dicamba registration for 2022

# Waters of the United States (WOTUS) and the Navigable Water 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 (e.g. NC has protections of isolated wetlands)

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# 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](#)”




# Navigable Water 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

# Reversing Navigable Water Rule

- Biden Administration moving to reinstate some semblance of 2015 rule
- NWR struck down by 9th Circuit in *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency*
  - is a nationwide stay?
  - will EPA (Biden Administration) appeal?
  - *Does not* revert rules to 2015, but reinstates the 1986 definition of WOTUS

# 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)
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# 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
  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

# Renewable Energy Development

- Prior to 2017, siting anywhere near 3 phase power lines
- HB 589: Duke Energy largely in control of RFPs
  - effectively limits new sites to larger 80MW
  - (1MW  $\approx$  5,068 solar panels  $\approx$  5 ac) (1MW  $\approx$  200 homes)
- Tranche 1 and 2 closed
- Tranche 3 re-opening for 80MW new capacity
  - unsure of locations
- Landowner question: how do I get a solar facility?
  - Response: contact a developer (Cypress Renewables, Strata Solar, etc.)
- HB 329 Report: study of financial assurances for removal, hazardous waste, recycling, etc.
- Fact sheet in CALS editing

# Renewable Energy Update

- Utilities required to meet renewable energy targets by Renewable Energy and Energy Efficiency Portfolio Standard (“REPS”)
- [NC REPS Statute](#) requires utilities to meet REPS with swine and poultry waste
- Biden Plan to open up all coastlines to wind facilities
  - likely to cause consternation for coastal communities

# PFAS (Gen X) Update

- perfluorinated and polyfluoroalkyl substances (“forever chemicals”)
- Released by Chemours in Cumberland Co. into Cape Fear watershed (also air emissions)
- Not a regulated substance under Clean Water Act
- Contaminated land, water supplies of Wilmington
- Biden Administration (Sec. Regan, EPA) proposals
  - high standards under Safe Drinking Water Act
  - require manufacturers to demonstrate toxicity (?)
  - list PFAS as “hazardous substances” under CERCLA
    - can assign clean up liability

# THANKS FOR INVITING ME!

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