

*Growers Legal Update*

# Select Agricultural Legal Issues: WOTUS, Nuisance, Zoning

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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's Experiences*

- Try not to give heirs undivided interests in land
  - (without recorded options)
- Don't worry about the Estate and Gift Tax
  - is 'basis' a concern?
- All land dispositions must be in writing
- Careful of PUV when planning land disposition
- Succession is a framework filled with execution events
- Create "survivorship" to reduce probate estate
- When do you let go of "stuff"?

# Waters of the United States (“WOTUS”)

- The term WOTUS refers to the **jurisdiction limit** of the Army Corps of Engineers over dominion of water on your land
- The “outer limits of Congress’ commerce power” (40 FR 37144)
- Clean Water Act (FWPCA): “The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the **Nation’s waters**” ([33 U.S. Code § 1251\(a\)](#))
  - Defined by Army Corps as that which affects domestic and foreign commerce
  - [40 C.F.R. § 122.2](#) (Army Corps of Engineers Rules)

# “Waters of the United States” (WOTUS) Terms

- The term WOTUS refers to the **jurisdiction limit** of the Army Corps of Engineers
- “**Navigable in Fact**” – waterways used in ordinary condition as highways for commerce
- **Ephemeral** ə'fem(ə)rəl (*adj.*). Lasting for a very short time
  - “An ephemeral channel”
- **Intermittent** in(t)ər'mitnt (*adj.*). Occurring at irregular intervals; not continuous or steady.
  - “An intermittent stream”
- **Nexus** 'neksəs/ (*n.*) A connection or series of connections linking two or more things
  - “The nexus between a wetland and a navigable waterway”

# WOTUS History

- “The term “[navigable waters](#)” means the **waters of the United States**, including the [territorial seas](#).” 32 U.S.C. § 1362(7)
- Previous focus was the “navigable in fact” jurisdiction of Rivers and Harbors Act of 1899
- In 1972, expansion of jurisdiction to achieve CWA directive that “due regard shall be given to the improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife, recreational purposes, and the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes.” 33 U.S.C. § 1252(a)

# WOTUS Litigation History - Wetlands

- *U.S. v. Riverside Bayview Homes, Inc.* 474 U.S. 121 (1985)
  - Wetlands that “actually abutted” traditional navigable waters
  - Corps expands enforcement to sewers and arroyos
- *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC)
  - WOTUS does not extend to isolated ponds
  - Does not overrule *Riverside Bayview*

# ***Rapanos v. EPA* 547 U.S. 715 (2006) to Current**

- Two holdings (4-1-4)
  - Plurality (Roberts, Scalia, Thomas, Alito)
  - Concurrence (Kennedy): significant nexus test
- Lower Courts continue to follow Kennedy holding, under obscure SCOTUS ruling requiring lower courts to follow narrowest holding where no clear majority
- Current Presidential Administration proposes revised rules, eliminate EPA veto of 404 permits
  - *SC Coastal Conservation League v. Pruitt*, No. 2-18-cv-330-DCN (D.S.C. Aug. 16, 2018)



# Current Events

- Current President signs Executive Order directing EPA to rescind 2015 WOTUS rule (Feb 2017)
- Various Plaintiff's challenge WOTUS rule in respective Circuit Courts (appeals), claim of original jurisdiction over rules challenges (APA)
  - Consolidated to 6<sup>th</sup> Circuit (randomly chosen)
  - 6<sup>th</sup> Circuit stays 2015 WOTUS rule **nationwide**
    - **Result of consolidation of circuits**
- EPA and Army Corps of Engineers issue proposed rules
  - [82 FR 34899](#)
- SCOTUS rules challenges properly before District Courts
  - [Nat'l Assn of Manufacturers v. Dept. of Defense](#)

# Current Events

- November 2017: EPA and ACOE issue rule delaying 2015 WOTUS rule for 2 years
- February 2018: several District Court cases filed challenging stay
- February 2018: 6<sup>th</sup> Circuit vacates nationwide stay (per SCOTUS ruling)
- Various District Court cases re-commence around the country (Texas, OK, GA, ND) challenging 2015 rule
- EPA and ACOE try to stay litigation (ND case denied)
- GA District Court **delays WOTUS rule (including NC)**
- **SC District Court invalidates 2 year delay rule**

# Proposed WOTUS Rule Highlights

- **Wetlands** must have “direct hydrologic surface connection” to traditional water (continuous surface)
- 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

# Farm Act of 2018

- Change in Nuisance litigation thresholds
- Modification of Voluntary Agricultural District ordinances
- Oh, and Raw Milk

The Law on the Farm and in the Community



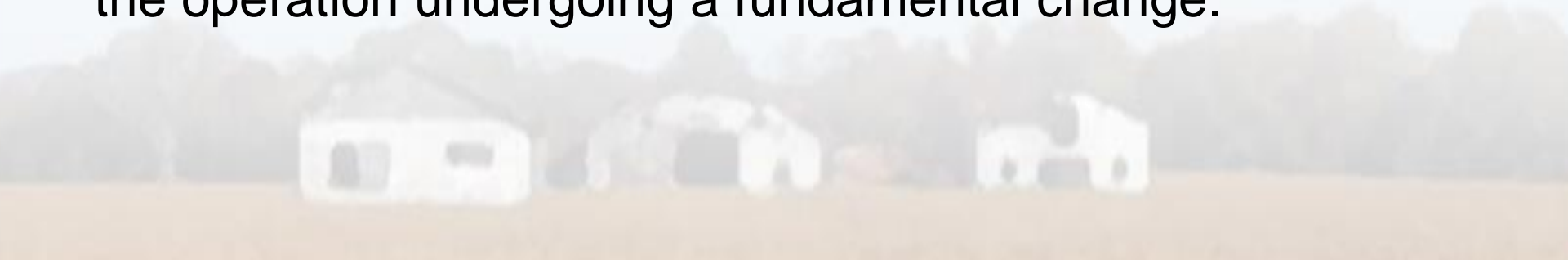
# Voluntary Agricultural Districts Update

- 2018 law (citation)
  - Response to Smithfield nuisance suits
  - County *shall* provide notification of ‘ag district’ or ‘qualified swine, poultry, or dairy’ farm
    - GIS folks struggling to comply (presentation at Feb 2019 conf)
- “Qualified Farm” means have signed an agreement
- “Agricultural District” means whatever county says it is
- Revise Model Ordinance
  - Simplify ag district
  - Streamline decision-making

# Nuisance

- Must unreasonably interfere with neighbor's use and quiet enjoyment
- Right to Farm Law
  - 2018 updated standing and damages
  - Not applicable to negligence, trespass, personal injury, strict liability, other torts
- Mandatory Mediation (NCGS § 7A-38.3)
  - Pre-litigation requirement unless waived
- Voluntary Agriculture District (2018 update)
  - 1000 feet poultry, swine or dairy
  - 600 feet of qualifying farm
  - ½ mile from VAD

# 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?



# Durable Powers of Attorney (New Statute)

- **The NC Hot Powers are powers to**
  - Make a gift.
  - Create or change rights of survivorship.
  - Create or change a beneficiary designation.
  - Delegate authority granted under the power of attorney.
  - Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.
  - Exercise fiduciary powers that the principal has authority to delegate.
  - Renounce or disclaim property, including a power of appointment.

# Estate and Gift Taxes

- Gifting of Land
  - Loss of right to rental/timber income
  - Carry-over basis (potential higher capital gains)
  - Exceed annual gift exclusion
  - Survey Costs and Subdivision Process
- Piece-Gifting of Equipment
  - Bill of sale (non-titled equipment)
- \$15,000 annual exclusion
- Lifetime gift exemption = \$11,200,000 (2018)
  - \$22,400,000 for married

# Disposition by Trust

- Use as “will-substitute” to direct bequests and devises
  - Offers greater level of post-death administration
  - Easier to amend
- Use to Protect Certain beneficiaries
- Separate or Joint?
  - “It depends”
- Use to step-up basis at death of first spouse

# Types of Trusts

- Testamentary Trust (in a will)
- Revocable Trust
  - Fund during lifetime (put in, take out)
  - Fund through ‘pour over’ will
  - Amend as needed
- Irrevocable Trust
  - Insurance Trust (ILIT)
  - “Asset-Protection”
- Special Needs Trust
- Charitable Trusts
- “Dynasty” Trusts

# Assets to Place in Revocable Trust

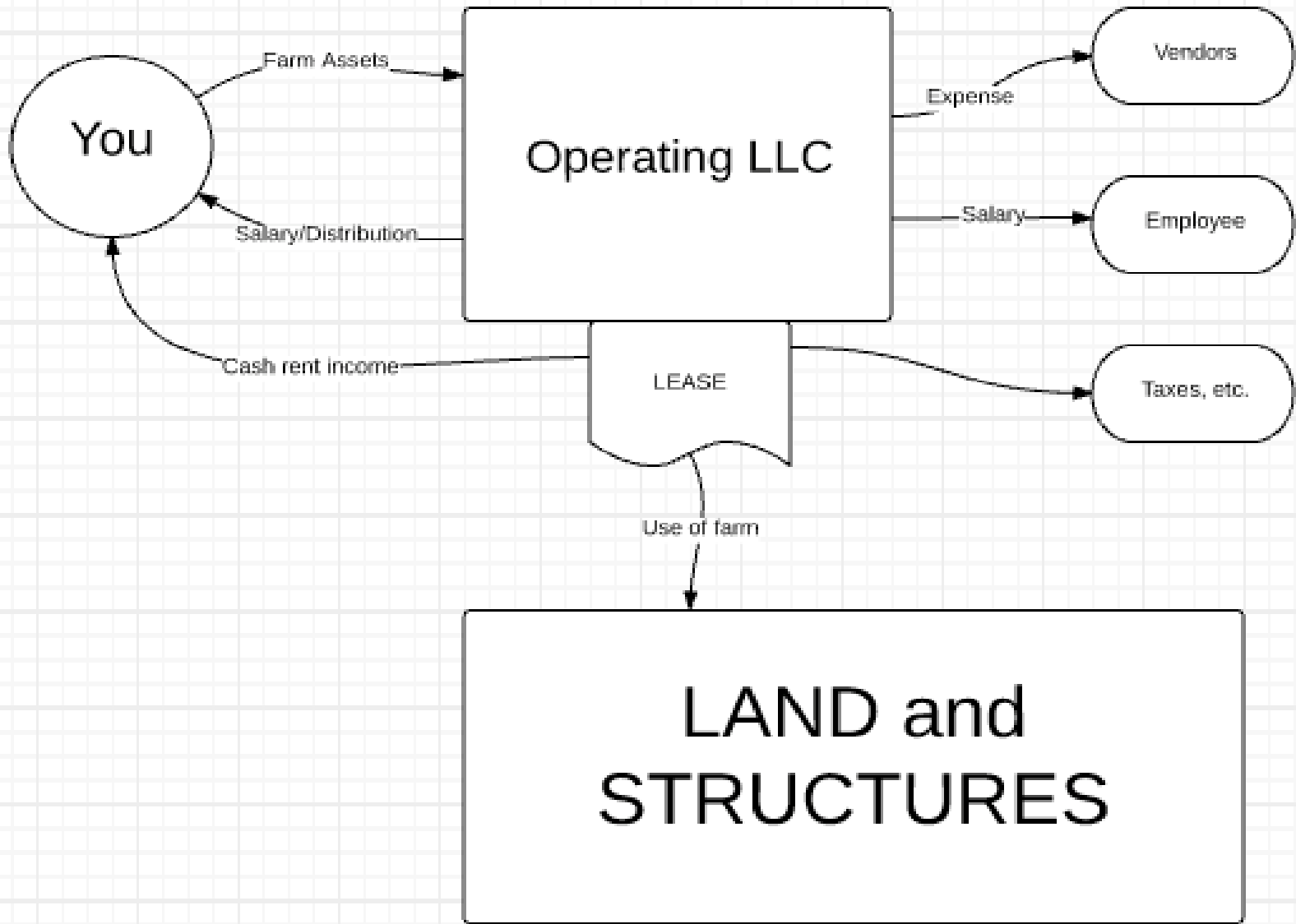
- Land interests
  - Record deed
  - File PUV application within 60 days
- Business entity interests (land or operating)
  - Use transfer of death certificates
- Assets in Trust not listed in Probate inventory
- Trust as insurance beneficiary

# Use of Business Entities

- Liability protection (protect personal wealth, land)
- Contract between owners
  - Income
  - Management
  - Equity
- Buy-Sell (Manage the D's: Death, Disability, Divorce, Disaster, Disagreement, Disengagement)
- Vehicle for reducing parents' estate value
  - Valuation discounts
  - Organized gifting or sale program

# The Operating Agreement

- A **Contract** between contributors of assets
- Restricts who can be members
  - Member vs. Assignee
- Dictates voting requirements for decisions
  - Manager
  - Voting and Non-voting Units
- Dictates triggers for buy-sell
  - **Farming Heir Option to Purchase**
  - Who may buy and when
  - Appraisal procedure
  - Price and payment terms (seller finance option)
- For existing S Corps, use Stock Purchase Agreement





# Transfer of LLC Interests

- Gift of Interest (measured in “units”)
  - Calculate value of company
  - Divide value by number of units to determine price per unit
  - Transfer total units < \$14,000 annual gift tax exclusion
- Sale
  - Purchase from Other Members or Trust
    - Purchase with insurance proceeds under Buy-Sell Agreement (Designate beneficiary and agreement between all participants + spouses)
  - Spread capital gain over term note
  - Discounting of interest value
  - Some relief from Self Employment taxes

# LLC Set-Up Tasks

- Sketch plan, get accountant and lender sign-off
- Form entity with Secretary of State (after Jan 1)
- Get EIN (tax ID)
- Open bank account
- Elect S form 2553? (save on payroll tax)
- Re-title over-road equipment with DMV
- Update Contracts (or record DBA's)
- Update FSA payment entities
- For Land, update **PUV** within 60 days

# Hunting Lease Overview

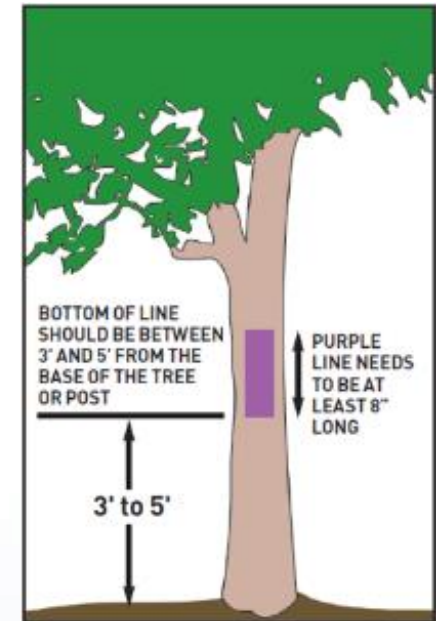
- Description of Property
  - PIN, common name
  - Acreage
  - Exhibit areal photo of 'no hunting' zones
- Term (e.g. April 1 through March 31)
  - Auto renewal? NEVER
- Hunting clubs
  - Copy of member rules
  - Incorporate violation as default
- Deer blinds and structures
- Liability Insurance?
- Require carry club membership card and card permission form (attach to lease as Exhibit)

# Trespass Generally

- **§ 38B-2. General rule.** A possessor of land, including an owner, lessee, or other occupant, does not owe a duty of care to a trespasser and is not subject to liability for any injury to a trespasser.
- **§ 38B-3. Exceptions**
  - Intentional harm = “willful or wanton”
    - Example: thin wire across field entrance (to repel ATV)
    - May use reasonable force to repel a crime
  - Harm to Children (<14) (attractive nuisance doctrine)
    - reason to know that children were likely to trespass **and**
    - owner knew of unreasonable risk of serious bodily injury or death **and**
    - child did not appreciate the risk **and**
    - utility to the possessor of maintaining the condition and the burden of eliminating the danger were slight as compared with the risk discover the condition or realize the risk involved **and**
    - possessor failed to exercise reasonable care to eliminate the danger or otherwise protect the injured child.

# Landowner Protection Act

- Prior to 2011, WRC had to get warrant to arrest trespasser
- NCGS § 14-159.6 (outlines proof of permission)
  - Class 2 Misdemeanor for “willful” trespass
  - Class 1 Misdemeanor for pine straw trespass
  - Must produce written permission when confronted by Wildlife Resources Commission officer or sheriff/deputy sheriff
- HUNT CLUB
  - Must produce hunt club membership card, and
  - Written permission
- NCGS § 14-159.7 (marking)
  - Signs not less than 120 square inches
  - Not more than 200 yards apart
  - May paint Purple Mark
    - Vertical line 8 inches long
    - 3 feet above ground
    - 100 yards apart



Source: NC WRC



# Timber Trespass

- N.C.G.S. § 14-128. Willfull injury to trees is Class 1 Misdemeanor
  - NCDOT gets pass in RW
- NCGS § 1-539.1
  - Injured landowner entitled to **double stumpage** of timber cut (cutting and burning)
  - Need a good boundary survey (mark boundary trees)
  - Timber harvester entitled to reimbursement from landowner who misrepresents property lines
- *Hamby v. Thurman Timber Company* (July 2018)
  - Contractor trespass not attributable to buyer (without more evidence)

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## News and Updates



### Are You a Landowner Interested in Working With Beginning Meat Producers? We Need You!

NC Choices launches a new USDA Beginning Farmer and Rancher grant



### Great Article in the Feb. 10 2019 edition of the Lenoir News About NC FarmLink

Thank you Seth Nagy, County Director of the N.C. Cooperative Extension, Caldwell

### Raw Milk: Branan and Day Present on Cow Sharing Agreements

Andrew Branan, Extension Assistant Professor with the NCSU Department of Agricultural and Resource Economics, along with Marti Day, Extension ...

— 6 days ago

### Is It OK to Grow Under Someone Else's License?

We have been getting this question more





# THANKS FOR INVITING ME!

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