

# **“Sic Utere Tuo”: Common Law Nuisance and the Murphy-Brown litigation (and a few other topics)**

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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)

# First, the news...

Oral arguments in *McKiver I*,  
*McGowan I* & *Artis I* 4<sup>th</sup> Circuit  
appeal scheduled for January 28-  
31(ish) in Richmond

# Fundamental Challenge re Nuisance Litigation

- Public understanding of where **bacon** comes from?
  - There is no system to replace this system
  - Hard to imagine ecological damage from sufficient “pasture pork” to meet current demand
  - Does this feature into nuisance liability “balance” theory?
- Right to Farm laws are increasingly being challenged on constitutional “property rights” deprivation
  - Does the NC RTF (as amended) statute strike enough balance?
  - Iowa RTF statute held unconstitutional “as applied” (*Gacke v. Pork Xtra, L.L.C.*)

# ***Rural Empowerment Association for Community Help et al v. State of North Carolina, et al (19 CVS 8198)***

- On June 19, 2019, three non-profit groups filed a state constitutional challenge (in Wake County) to the 2017 & 2018 right to farm amendments
- Claims include:
  - (1) Illegal “special law”
  - (2) Deprived plaintiffs members of property rights
  - (3) Violates right to jury trial to judge nuisance elements
- Status?

# Farm Nuisance Litigation Generally

- Nuisance litigation tends to reflect the types of agriculture prevalent in the state.
  - WI cranberry bogs (water quality, flooding)
  - LA sugar cane fields (burning)
  - NC swine operations
  - New England wedding barns (noise, traffic)
- **Animal ag nuisance** tends to get the headlines because of the potential impact
- Very difficult to measure the impact of the RTF statutes from across the country
- In early American trespass and nuisance cases, farmers were often the *plaintiffs* (against municipal water treatment)

# General RTF Protection Triggers

- 3 Basic types of triggers
  - Farm existed first (i.e. “Coming to the Nuisance”)
    - **Feature of NC law**
  - Some states have designated agriculture zones and only operations in the zone receive protection
    - **Not a feature of NC law**
    - However statutory ban on local swine zoning (*Craig v. Chatham Co.*)
  - Many states say that if a farm has been in continuous operation substantially unchanged, then it receives protection (statute of repose)
    - **Feature of NC law**

# Common Law Nuisance, Generally

- In general, nuisance is “that activity which arises from **unreasonable**, unwarranted or unlawful use by a person of his own property, working obstruction or **injury to the right of another**, or to the public, and producing such material annoyance, inconvenience and discomfort that law will presume resulting damage”, Black’s Law Dictionary (7th ed.)





# Common Law Nuisance in History

England 1611:

- “**Sic Utere Tuo ut alienum non laedas**” (“Use your own property in such a way that you do not injure other people's use of their property”)
- *William Alred’s Case* (The First “Environmental” Nuisance Case)
- **a swine nuisance lawsuit**



England 1865:

**Balancing of the Equities** (dicta in *St. Helen’s Smelting Co.*)

- Industrial Revolution

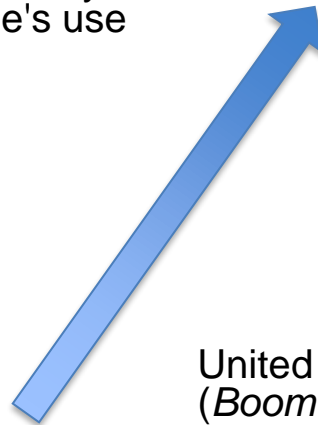
- United States 1890: Still No Balancing of the Equities (*Susquehanna Fertilizer Co.*)



United States 1970: **Balancing Equities** rule (*Boomer Cement*)



Restatement (2) of Torts (Nuisance)



# Common Law Nuisance: The Modern Rule

## General Rule, from Rest. (2<sup>nd</sup>) of Torts, § 822:

“One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either

- intentional and **unreasonable**, or
- unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.”

- § 826. **Unreasonableness** of Intentional Invasion
- § 827. **Gravity** of Harm-- Factors Involved
- § 828. **Utility** of Conduct-- Factors Involved
- § 829. **Gravity** vs. **Utility**-- Conduct Malicious Or Indecent
- § 831. **Gravity** vs. **Utility**-- Conduct Unsited to Locality

# Nuisance Modern Rule (Restatement (Second) of Torts, § 822-831)

- **§ 822 Liable for private nuisance if conduct is:**
  - intentional and **unreasonable**, or
  - unintentional and otherwise actionable under the rules controlling liability for
    - negligent or reckless conduct, or for abnormally dangerous conditions or activities.
- **§ 826 Is conduct unreasonable?**
  - the **gravity of the harm** outweighs the **utility of the actor's conduct**, or
  - the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would *not make the continuation of the conduct not feasible*.

## “Gravity of Harm”

- § 827. What is the **gravity** of the harm? Factors:
  - the extent of the harm involved;
  - the character of the harm involved;
  - the social value that the law attaches to the type of use or enjoyment invaded;
    - Private property rights
  - the suitability of the particular use or enjoyment invaded to the character of the locality; and
    - Is “rural” rural enough?
  - the burden on the person harmed of avoiding the harm

## “Utility of Conduct”

- **§ 828 Utility of Conduct**
  - the social value that the law attaches to the primary purpose of the conduct;
    - E.g. production of bacon and pork products
  - the suitability of the conduct to the character of the locality; and
    - Does this invite evidence of water impact?
    - Is “rural” rural enough?
  - the impracticability of preventing or avoiding the invasion.
    - Is there any other way to meet pork demand?
    - Impracticability = economic impracticality
    - Loss of profit? What are the margins?
      - Cost of “better” odor management techniques?

## “Conduct Unsited to Locality”

- § 831. **Gravity** vs. **Utility** - **Conduct Unsited to Locality**
  1. An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm is significant, **and**
  2. the particular use or enjoyment interfered with is well suited to the character of the locality; **and**
  3. the actor's conduct is unsited to the **character of that locality**.
    - Rests on the assumption that current waste management techniques are appropriate in rural areas

# Coming to the Nuisance: NC's Right to Farm Law

- “No agricultural or forestry operation...shall be or become a nuisance...after the operation has been in operation for more than one year, ***when such operation was not a nuisance at the time the operation began.***” NCGS § 106-701
  - Codifies “coming to the nuisance” defense
  - 1979: one of the earliest in the U.S.
  - *The early test: **Durham v. Britt***
    - Is poultry to swine a “fundamental change”?
- NCGS § 106-701 amended after ***Durham v. Britt*** to say a fundamental change to the operation does not include:
  - 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; or
  - A change in the type of agricultural or forestry product produced

# History of Litigation Against NC CAFOs

- *Mayes v. Tabor* (1985)
  - Neighbor pre-dated farm, barring come-to-the-  
nuisance defense
  - ***Misapplied by EDNC?***
- *Parker v. Barefoot* (1998)
  - Prospect that use of latest technology not a  
defense against nuisance
- *Powell v. Bulluck* (2002)
  - Affirmation (and limitation) of pre-litigation  
mediation (late plaintiffs not bound to mediate)



# 2018 NC Legislative Responses

- Farm Act of 2018
  - *“Whereas, regrettably, the General Assembly is again forced to make plain its intent that existing farms and forestry operations in North Carolina that are operating in good faith be shielded from nuisance lawsuits filed long after the operations become established; Now, therefore*  
...”
- Changes to NCGS § 106-700
  - Occupation requirement
  - Half-mile proximity
  - 1-year statute of limitations
- Response to punitive damages awarded in Smithfield cases
  - **§ 106-702.** Limitations on private nuisance actions against agricultural and forestry operations.
    - Measured by property value
    - Require civil or criminal **enforcement** action on record
- Voluntary Agricultural District (VAD) chain of title proximity notice
  - Farm qualifications
  - Proximity Notice Requirement

## **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
  - Q: Grazing cattle to poultry house?
  - Q: 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.**”

\*more than a warning?

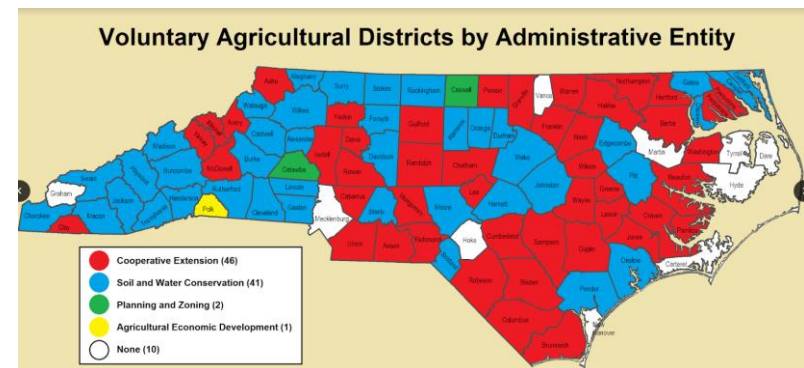
## Attorneys Fees

(f) In a nuisance action against an agricultural or forestry operation, the court shall award costs and expenses, including reasonable attorneys' fees, to:

- (1) The agricultural or forestry operation when the court finds the operation was not a nuisance and the nuisance action was ***frivolous or malicious***; or
- (2) The plaintiff when the court finds the agricultural or forestry operation was a nuisance and the operation asserted an affirmative defense in the nuisance action that was frivolous and malicious.

# Voluntary Agricultural District update

- Voluntary program, non-binding, get signage
- Counties must provide a land records warning (in chain of title, GIS, etc.) to warn of proximity to farms enrolled in the program
  - 1000 feet poultry, swine or dairy
  - 600 feet of qualifying farm
  - ½ mile from VAD



## 4<sup>th</sup> Circuit Appeal

- Oral arguments scheduled for January 28-31(ish)
- Argument for retroactive application of 2018 changes to Right to Farm law
  - Some precedent for “clarifying” laws
- Other issues:
  - Whether damages are appropriate remedy
  - Judges ruling on evidentiary issues
    - Odor expert testimony
    - Denial of juror farm visit
- Decision will likely not serve as precedent for North Carolina state law on Right to Farm

## Following North Carolina's Lead

- Updated RTF laws in Nebraska, Oklahoma, Utah, West Virginia and Washington
- Updated bills introduced in Louisiana, Oregon and Vermont **update**
- **Recovery caps** in Kansas, Missouri, North Carolina and Virginia



## What Else: 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 (dairy farm) in *Community Association for Restoration of the Environment, Inc. v. Cow Palace, LLC*, 80 F. Supp. 3d 1180 (E.D. Wash. 2015)

# 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 )
  - 4<sup>th</sup> Circuit has granted standing to PETA et al in “pre-enforcement challenge” to First Amendment rights

# Drone Law

- Any person who is the subject of unwarranted surveillance, or whose photograph is taken in violation of the provisions of this section, shall have a civil cause of action
  - If you hear a drone you think is trying to take evidence on your property, go outside and make sure it is taking a picture of you!
- In lieu of actual damages, the person whose photograph is taken may elect to recover five thousand dollars (\$5,000) for each photograph or video that is published or otherwise disseminated, as well as reasonable costs and attorneys' fees and injunctive or other relief as determined by the court.

## Drone Law ( § 15A-300.1)

- Surveillance of real property prohibited without consent of owner or lessee ( § 15A-300.1[b][1][b])
- May not photograph an individual, without the individual's consent, for the purpose of publishing or otherwise publicly disseminating the photograph.
  - Does not apply to **newsgathering**, newsworthy events, or events or places to which the general public is invited
- Maximum height: 400 feet
- Permit for commercial operation
- *18 U.S.C. 32 prohibits destruction of aircraft*
- Cannot use to hunt or fish or interfere with taking of wildlife

# Waters of the United States (WOTUS)

## Repeal of 2015 Rule

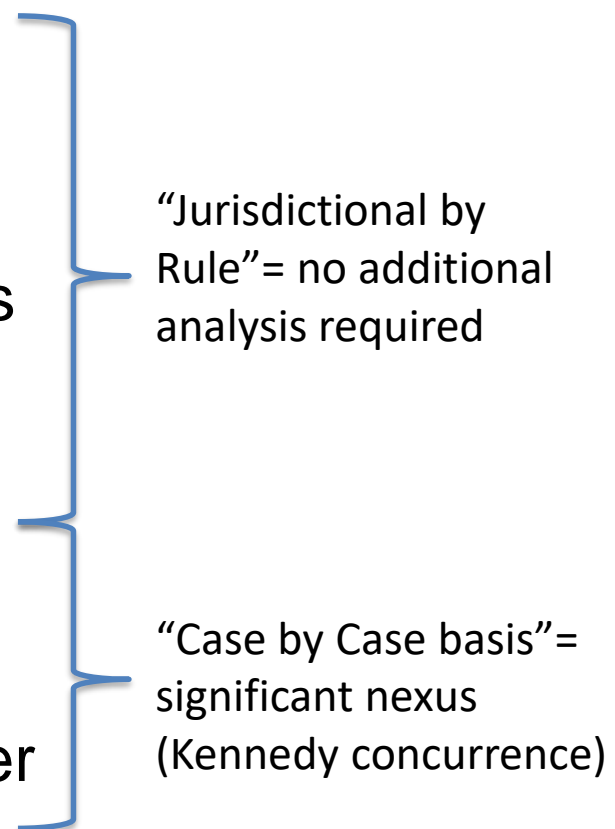
- Fundamental tension between Clean Water Act jurisdiction (federal) and state jurisdiction over waterways (and what you can discharge to them)
  - If not WOTUS, no federal jurisdiction (state must regulate)
  - Theoretically, state may enforce stricter standards
- February 28, 2017 EO
- Proposed Rules 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

# WOTUS 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?

# ***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)

# 2019 Waters of the United States Rule Highlights (revocation)

- **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



# 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.

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

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

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

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# THANKS FOR INVITING ME!

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