

What's Going On?: Developing Trends in Agricultural and Environmental Law

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— LAW —

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Waters of the United States



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What's Going on With WOTUS?

What is it?

- Obama era rulemaking to “clarify” EPA/Corps of Engineers jurisdiction in light of *Rapanos* decision
- Controversial because it embraced the Kennedy concurrence, the “significant nexus” test
 - Waterways and channels with “significant nexus” to navigable waters under federal jurisdiction

Trump Administration Actions

- EPA/ACOE issued rule delaying implementation two years
- Agencies plan to replace rule with proposal that curtails fed authority



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What's Going on With WOTUS?

Major Decisions/Actions

- Jurisdiction – (SCOTUS) Jurisdiction to consider challenges to WOTUS rule must be brought in the district courts. *National Ass'n of Manufacturers v. Dept. of Defense*, No. 16-299 (Jan. 22, 2018)
- Delay – EPA/ACOE violated APA when they failed to seek public comment on final rule delaying implementation of WOTUS Rule. Obama-era WOTUS rule in effect in 26 states. *S.C. Coastal Conservation League v. Pruitt*, No. 18-cv-330 (D.S.C. Aug. 16, 2018)
- Stay issued – Preliminary injunction on merits
 - 11 states - *Georgia v. Pruitt*, No. 15-cv-79 (S.D. Ga. June 8, 2018)
 - 13 states – *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015).



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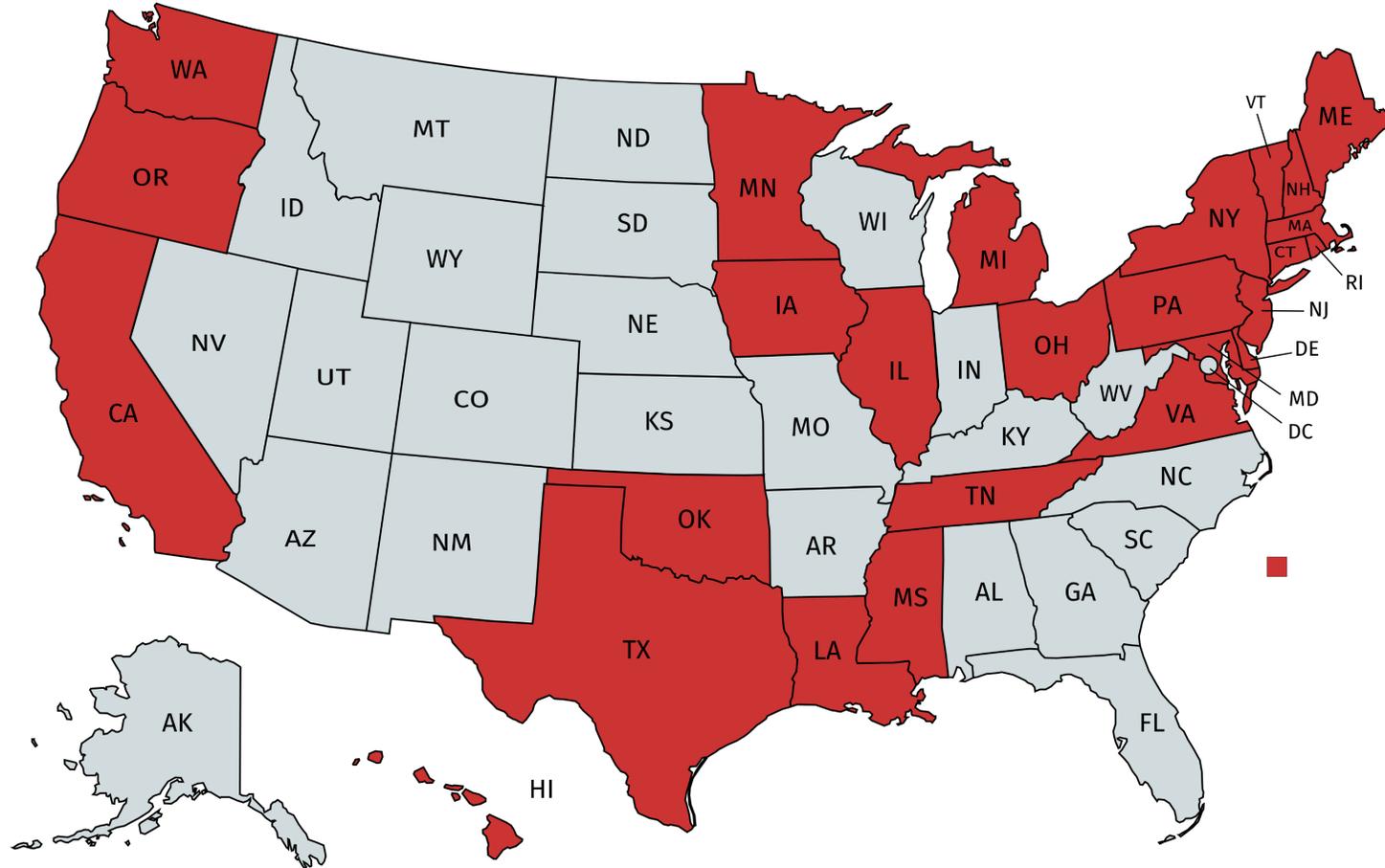
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What's Going on With WOTUS?

Major Decisions/Actions

- Replacement – EPA/ACOE proposed undisclosed replacement to White House, likely limiting jurisdiction to navigable waters and: (1) tributaries that are “relatively permanent standing or continuously flowing bodies of water;” and (2) wetlands with a continuous surface connection” to relatively permanent waters (June 15, 2018)

Where is 2015 WOTUS Rule In Effect?



North Carolina Hog Lawsuits





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What's Going on in North Carolina?

- 500 plaintiffs suing Murphy-Brown, live growout operation of Smithfield Foods, in eastern North Carolina
 - Alleging hog barns & manure application are a nuisance, ruin quiet enjoyment of property, and attract flies; environmental justice components
- Plaintiffs split into 26 trials; 3 held so far, all with verdicts for plaintiffs
 - \$50 M (reduced to \$3 M)
 - \$25 M (reduced to \$630k)
 - \$473.5 M (reduced to \$94 M)



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What's Going on in North Carolina?

Major issues with litigation (and potential appeal)

- Right to Farm Act – held that NC statute didn't apply where residents predated hog farm
- Jurors not allowed to view and inspect barns in question
- Rejected defense expert witnesses
- Missing plaintiffs – no farmers sued, just Murphy-Brown
- Gag order for farm groups
- No interlocutory appeals (initially – now withdrawn)



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What's Going on in North Carolina?

What's the latest?

- Parties currently in mediation – may result in settlement
- E.D. N.C. Judge Earl Britt designated a replacement judge to preside over trial nos. 5 & 6
- Farmers have lost contracts where juries find liability
- If mediation unsuccessful, parties can appeal interlocutory matters



Gene Editing



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What's Going on with Gene Editing Regulations?

Biotechnology Regulation

- USDA APHIS – Plant Protection Act
 - Does trait pose plant pest
- FDA – Food, Drug and Cosmetic Act
 - New animal drug
- EPA – Federal Insecticide, Fungicide, and Rodenticide Act
 - If trait has function of insecticide, fungicide, or rodenticide

Attempts to Modernize Regulatory Framework

- Obama – 2017 Update to Coordinated Framework
- Trump – Rolled back Obama framework, promised to release new approach



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What's Going on with Gene Editing Regulations?

FDA

- Agency released Plant and Animal Biotechnology Innovation Action Plan on Oct. 30, 2018
 - High level outline of agency's proposed approach

USDA

- APHIS will not regulate plant that *could* have been developed through traditional breeding techniques (e.g., gene-edited) as long as they are not plant pests – March 28, 2018 Announcement from Sec. Perdue
- Agency plans to shift to a “trait-based” approach, moves away from method of introducing trait
 - Licenses required for traits that are weeds or pests



The National Bioengineered Food Disclosure Standard



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What's Going on with the Bioengineered Foods Disclosure Standard?

National Bioengineered Food Disclosure Standard

- Statute requiring national GMO labeling regime, preempts state labeling requirements (July 29, 2016)
- Requires labeling of foods with the presence of bioengineered genetic material
 - Bioengineered - “(A) contains genetic material that has been modified through in vitro recombinant DNA techniques; and (B) the modification could not have occurred naturally or with conventional breeding”
- AMS responsible for rulemaking, finalization within two years
- Exceptions – Alcohol, most meat products



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What's Going on with the Bioengineered Foods Disclosure Standard?

May 4, 2018 Proposed Rule left a few major issues open

- What constitutes “bioengineered”?
 - CRISPR, gene editing?
- Should highly processed foods that contain little or no genetic material (e.g., soybean oil, high fructose corn syrup) be subject to labeling?
- Where are we now?
 - OMB currently reviewing final rule, expected to be released in December
 - Rule will become effective concurrently with Nutrition Facts panel on Jan. 1, 2020



Air Emissions, Environmental Reviews, CAFO permits, and Dicamba (again)

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Not going to discuss today, but easily could have

- Agritourism definition added to Land Use article
- State moving forward with developing hemp research pilot program
- Renewable energy development issues
- CWA issues
- Syngenta settlement announced
- Many more

DICAMBA DRIFT



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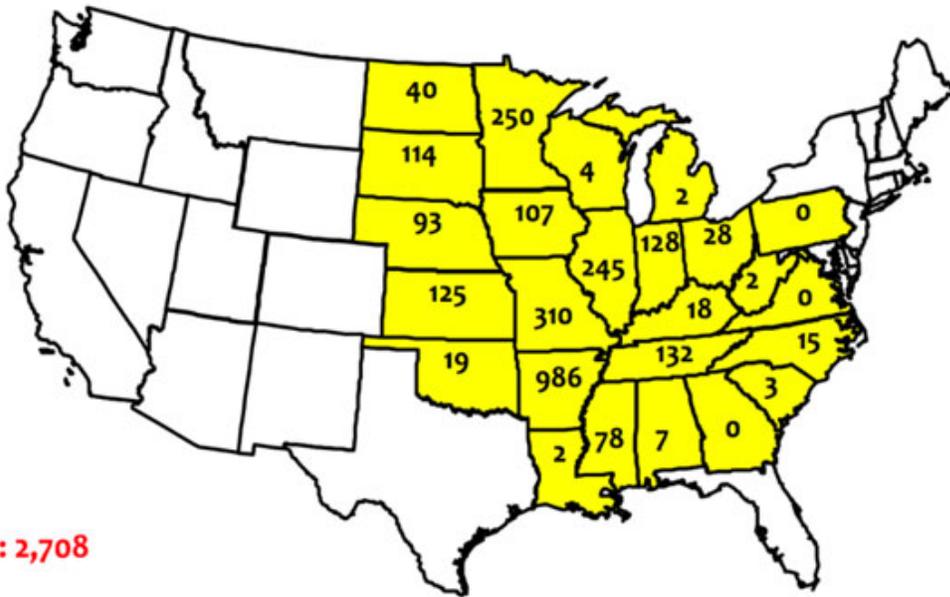
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Dicamba Example

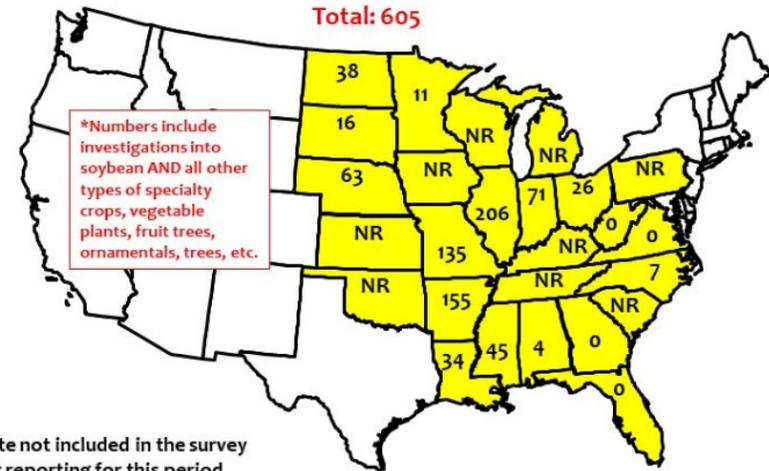
2017



***Total: 2,708**

2018

Official Dicamba-related Injury Investigations as Reported by State Departments of Agriculture (as of July 15, 2018)



©Dr. Kevin Bradley, University of Missouri

Revised EPA Requirements

On Oct. 31, announced extension of dicamba registration for 2 years with cotton and soybeans.

Revised EPA Requirements

- Only certified applicators can apply
- Prohibit over-the-top applications
 - 45 days after planting beans
 - 60 days after planting cotton
- 1 hour after sunrise to 2 hours before sunset

Revised EPA Requirements

- Additional protections in counties with endangered species with buffer requirements
- Clarifying training period for 2019 and onward to ensure consistency with all three products.
- Enhanced tank clean out instructions and enhanced label
- Label clean up and consistency to improve compliance and enforceability

Class Action Lawsuits

Case	Court	Members	Year(s)
Landers v. Monsanto	U.S. Eastern District of Missouri	Any farmer with crop damage that raised non-dicamba tolerant crops in AL, AR, IL, KY, MN, MS, MO, NC, TN, TX	2015-2016
Smokey Alley Farm v. Monsanto & BASF & DuPont	U.S. Eastern District of Missouri	Nationwide & Arkansas Statewide class: Any farmer with crop damage that did not purchase Xtend system products	2015-2017
B & L Farms v. Monsanto & BASF	U.S. Eastern District of Arkansas	Nationwide class for farmers that purchased dicamba or dicamba tolerant seeds	2017
Bruce Farms v. Monsanto & BASF	U.S. Eastern District of Arkansas	Nationwide class for any farmer with crop damage that raised non-dicamba tolerant crops	2014-2017
Claassen v. Monsanto & BASF	U.S. District of Kansas	Nationwide class for any farmer with crop damage that raised non-dicamba tolerant crops	2015-2017
Whitehead Farms v. Monsanto & BASF	Arkansas Circuit Court	Arkansas farmers with documented dicamba drift	2015-2017
Cow-Mil Farms v. Monsanto	U.S. Eastern District of Missouri	Nationwide and Missouri statewide classes: farmers with vegetation damage that raised non-dicamba tolerant crops	2015-2017

Original Lawsuit

- Bader Farms v. Monsanto will head to trial in Oct. 2019
- Claims for damages to peach crop in 2015 and 2016 from drift.





HAZARDOUS WASTE EMISSIONS



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Reporting under CERCLA and EPCRA

2007, EPA proposed to exempt releases of hazardous substances to the air from manure from two laws.

Justified by saying resource burden to the industry and EPA did not foresee a situation a response action from a release.

This was limited to poultry farms

2008, final rule exempted all livestock farms.

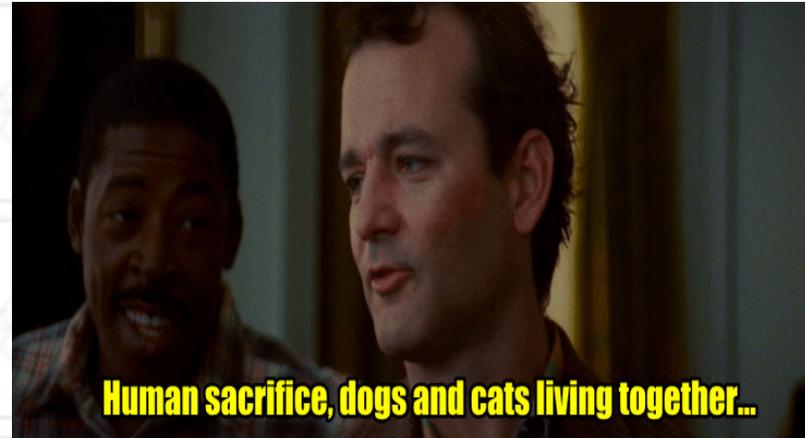
Reporting under CERCLA and EPCRA

- Rule goes into effect, EPA is sued over rule
- 2010 EPA asks court for permission to reevaluate the final rule.
 - EPA never announced a revised rule



Reporting under CERCLA and EPCRA

- April, 2015 the coalition filed a petition to move EPA finalize its review.
- D.C. Court of Appeals this year ruled that neither EPCRA or CERCLA gave EPA authority to create exemptions



Where are we now?



- Congress passed the FARM Act in the Bipartisan Budget Act of 2018
- Exempted all animal operations from CERCLA reporting

Where are we now?

- EPA announced last week final rule to clarify reporting under EPCRA
- Animal waste no longer needs to be reported under EPCRA





MD CAFO GENERAL PERMIT



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2014 Maryland CAFO General Discharge Permit

In May, Court of Special Appeals upheld 2014 General Discharge Permit

Environmental Group Challenges

- Wanted MDE to require more than just:
 - annually analyzing manure for phosphorous and nitrogen content and
 - collecting soil samples every three years
- Wanted to see more regular testing of water where runoff from farms ran.

Court's Decision

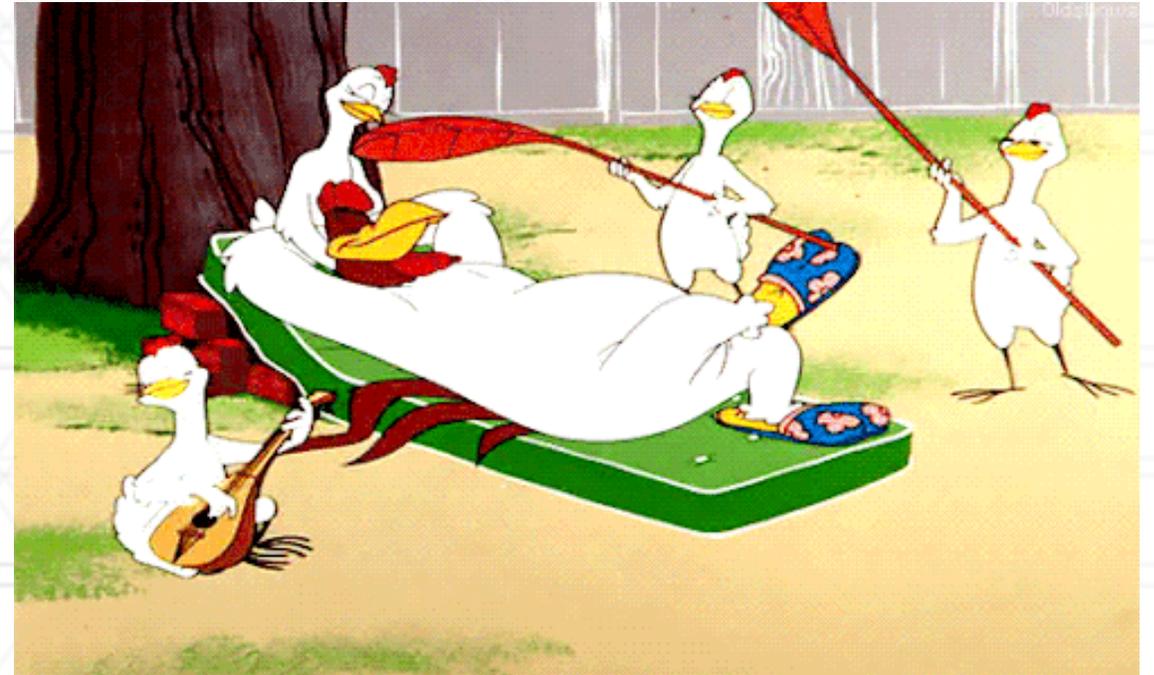
Court finds permit requires effective monitoring and appropriate to use BMPs to comply with Clean Water Act.



MARYLAND CAFOS IN COURT

Food & Water Watch v. USDA

- Challenge that NEPA review before granting FSA loan guarantee to poultry farm not adequate
- Filed in the federal district court in DC



Food & Water Watch v. USDA

District court recently found:

- Claims brought by FWW not moot
- FWW has standing

Mootness

- FSA arguing that because farm is built and operating nothing FSA can do to remedy FWW's issues
- Court disagrees still has control over farm and can revise NEPA review
- Prior court rulings show this is the case.

Standing

- FWW had demonstrated requirements of standing
 - Demonstrated actual injury from claims of members near the farm.
 - Injuries are traceable to FSA's action providing the loan guarantee.

Moving forward?

- Case is moving forward
- Court has not ruled yet on the issue of if FSA's NEPA review is adequate



MDE v. Bishop

- Administrative decision involving challenge to Worcester County poultry farm's nutrient management plan.
- Challenge centered allowing temporary storage in house and temporary composters till MACS funding available.

MDE v. Bishop



Admin judge agreed with argument that temporary storage of manure in house and allowing for composting in temp facility does not compile with NRCS req.

MDE v. Bishop

Admin judge did reject arguments that MDE should consider air emissions from poultry houses



Thank you

Any questions?



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