

# AGRICULTURE AND THE ENVIRONMENT SYLLABUS

**Fall 2021**

Instructor: Jess Phelps

Contact Info: [jphelps@vermontlaw.edu](mailto:jphelps@vermontlaw.edu); 603-643-3300 x. 1160

Prerequisites: Students will benefit from an introductory property class as well as course in land use law, real estate transactions, and/or agricultural law classes, but no prior coursework is required or expected.

Evaluation: Students will be evaluated based on their preparation for class, class participation (including in exercises) as well as the final take home examination.

Course Description: Land used for agricultural purposes (timber land excepted) accounts for nearly 53% of the total land area of the United States - the largest category of land use by far. This course addresses the complex and interconnected relationship of environmental and agricultural law, its historical roots and modern developments with a general focus on agricultural land use effects.

Course Meetings: Mondays: 5:30-8:00 p.m.

Classroom: **Oakes 208**

Course Materials: There is no book for this course and all readings are either embedded as hyperlinks or a citation is given for looking these resources up. If any of the hyperlinks fail to open or if you are having difficulty locating course materials, please email me to let me know.

Method of Evaluation: This course will have a research paper that will be due on Monday, December 6th by 4 p.m. (the last week of class). Deadlines for article topics will be discussed during the semester, but the topic will be due to me no later than October 18<sup>th</sup> with a short introduction of the topic. The paper must be 15-20 pages double-spaced and will use bluebook format. Any topic related to the material covered in this course will be open for the taking. Please feel free to set up time with me to discuss a topic or an area of interest to brainstorm possible research directions early on in the semester. The paper will consist of 75% of the final grade, with class participation and completion of the exercises accounting for the remaining 25%. Attendance is mandatory for this course.

Potential Changes  
to Schedule:

The interaction between agriculture and the environment is one of consistent and constant change. Depending upon events and policy developments, there may be changes in the reading or course structure to tackle these issues. Students will be notified in advance of any changes to the reading assignments/schedule.

### **AUGUST 30 – OVERVIEW OF AMERICAN AGRICULTURE, ORIGINS OF AGRICULTURAL POLICY AND THE ENVIRONMENT**

This session will explore the origins of agricultural policy and its impacts on the environment in the U.S. The learning objective for this session will be to understand the concept of agricultural exceptionalism and why farming has generally been exempted from agricultural law and the ongoing impacts of this policy differentiation.

#### American Agricultural History and Economy:

- USDA, A Condensed History of American Agriculture 1776-1999 (infographic), available at <https://www.usda.gov/sites/default/files/documents/history-american-agriculture.pdf>
- CAROLYN DIMITRI ET AL., USDA, ECONOMIC RES. SERV., THE 20TH CENTURY TRANSFORMATION OF U.S. AGRICULTURE AND FARM POLICY (2005), [https://www.ers.usda.gov/webdocs/publications/44197/13566\\_eib3\\_1\\_.pdf](https://www.ers.usda.gov/webdocs/publications/44197/13566_eib3_1_.pdf)

#### American Agri-Environmental Policy:

- J.B. Ruhl, *Agriculture and the Environment: Three Myths, Three Themes and Three Directions*, 25 ENVIRONS 101 (2002).

#### Guest Lecturer:

- Andrew Schmidt, The Conservation Fund

### **SEPTEMBER 6 – NO CLASS (LABOR DAY HOLIDAY)**

### **SEPTEMBER 13 - THE FEDERAL FARM BILL AND CONSERVATION TITLE**

This session will explore the federal Farm Bill and the Conservation Title in more specific detail. The learning objective for this session will be to have a working understanding of the Farm Bill and how the Conservation Title impacts working lands conservation nationally.

- National Sustainable Agriculture Coalition, What is the Farm Bill? <https://sustainableagriculture.net/our-work/campaigns/fbcampaign/what-is-the-farm-bill/>

- National Sustainable Agriculture Coalition, 2018 Farm Bill by the Numbers, <https://sustainableagriculture.net/blog/2018-farm-bill-by-the-numbers/>
- National Sustainable Agriculture Coalition, 2018 Farm Bill Drilldown: Beginning and Socially Disadvantaged Farmers, <https://sustainableagriculture.net/blog/2018-farm-bill-drilldown-beginning-farmers/>

The Conservation Title:

- National Sustainable Agriculture Coalition, 2018 Farm Bill Drilldown: Conservation, <https://sustainableagriculture.net/blog/2018-farm-bill-drilldown-conservation/>
- National Sustainable Agriculture Coalition, A Closer Look at the 2018 Farm Bill: Working Lands Conservation Programs, <https://sustainableagriculture.net/blog/a-closer-look-at-the-2018-farm-bill-working-lands-conservation-programs/>

**SEPTEMBER 20 – CONSERVATION COMPLIANCE AND NRCS CONSERVATION PROGRAMS**

This session will explore conservation compliance (or mandatory conservation requirements that a farmer must comply with to maintain program eligibility) and the full mix of NRCS conservation programs. The learning objective for this session is to have a strong understanding of NRCS's role with working lands.

Conservation Compliance:

- USDA, Wetland Conservation Provisions (Swampbuster), <https://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/water/wetlands/?cid=stelprdb1043554>
- Koshman v. Vilsack, 865 F. Supp. 2d 1083 (E.D. Cal. 2012).
- Barthel v. USDA, 181 F.3d 924 (8th Cir. 1999).

NRCS/FSA Conservation Programs:

- National Sustainable Agriculture Coalition, 2018 Farm Bill Drilldown: Conservation, <https://sustainableagriculture.net/blog/2018-farm-bill-drilldown-conservation/>
- National Sustainable Agriculture Coalition, Environmental Quality Incentives Program, <https://sustainableagriculture.net/publications/grassrootsguide/conservation-environment/environmental-quality-incentives-program/>
- National Sustainable Agriculture Coalition, Conservation Stewardship Program, <https://sustainableagriculture.net/publications/grassrootsguide/conservation-environment/conservation-stewardship-program/>
- National Sustainable Agriculture Coalition, Regional Conservation Partnership Program, <https://sustainableagriculture.net/publications/grassrootsguide/conservation-environment/cooperative-conservation-partnership-initiative/>
- National Sustainable Agriculture Coalition, Conservation Reserve Program, <https://sustainableagriculture.net/publications/grassrootsguide/conservation-environment/conservation-reserve-program/>

Guest Lecturer:

- Jessica Schmidt – USDA’s Office of General Counsel, Natural Resources and Environment Division

**SEPTEMBER 27TH – AGRICULTURAL CONSERVATION EASEMENTS**

The focus of today’s session will be on understanding the important role that agricultural conservation easements play in protecting working lands nationally. The learning objective for this session will be to understand the various ways this tool works and operates and some of the benefits/potential challenges for farmers whose lands are already protected or who are considering conserving their farms.

**Reading Assignments:**

Agricultural Conservation Easements Generally:

- Vermont Law School, Center for Agriculture & Food Systems, Farmland Access Legal Toolkit, Conservation Easements, <https://farmlandaccess.org/conservation-easements/>
- Farmland Information Center, Rio Grande Agricultural Land Trust, Sample Farmland Easement, <https://s30428.pcdn.co/wp-content/uploads/sites/2/2021/03/Rio-Grande-Agricultural-Land-Trust-Model-Easement.pdf>
- *Wetlands America Trust Inc. v. White Cloud Nine Ventures*, 291 Va. 153 (2016)

Guest Lecturer:

- Rick Monk, General Counsel, American Farmland Trust

**OCTOBER 4 – AGRICULTURAL CONSERVATION EASEMENT PROGRAM**

Today will center on USDA’s Agricultural Conservation Easement Program and its role in protecting wetlands and farmlands. The learning objective for this session will be to understand how ACEP works and how it plays multiple roles in protecting land and promoting other environmental benefits.

Agricultural Conservation Easement Program (NRCS):

- National Sustainable Agriculture Coalition, Agricultural Conservation Easement Program, <https://sustainableagriculture.net/publications/grassrootsguide/conservation-environment/agricultural-conservation-easement-program/>
- USDA, NRCS, ACEP Factsheet, [https://www.nrcs.usda.gov/wps/PA\\_NRCSCConsumption/download?cid=stelprdb1247880&ext=pdf](https://www.nrcs.usda.gov/wps/PA_NRCSCConsumption/download?cid=stelprdb1247880&ext=pdf)

- USDA, NRCS, Saving the Nation's Wetlands, [https://www.nrcs.usda.gov/wps/PA\\_NRCSCConsumption/download?cid=nrcseprd1398820&ext=pdf](https://www.nrcs.usda.gov/wps/PA_NRCSCConsumption/download?cid=nrcseprd1398820&ext=pdf)

Guest Lecturer:

Wayne Van Rooyen, Natural Resources Conservation Easement Program, National Office

**OCTOBER 11 – NO CLASS (INDIGENOUS PEOPLES DAY)**

**OCTOBER 18 – TAX INCENTIVIZED CONSERVATION EASEMENTS AND ENFORCEMENT**

This session will be our last to focus on conservation easements and will provide an overview of how other non-purchase easement programs work and how land trusts and agencies actually make sure that their conservation easements provide the desired benefits. The learning objective for today is to understand other incentive structures and how enforcement and monitoring work in practice.

Research Paper Deadline:

**Research paper topics are due this week.**

Tax Incentivized Conservation Easements:

- Land Trust Alliance, Income Tax Incentives for Land Conservation, <https://www.landtrustalliance.org/topics/taxes/income-tax-incentives-land-conservation>

Enforcement:

- Adena R. Rissman, *Conservation Defense and Enforcement in the Land Trust Community*, SAVING LAND, Winter 2011, <https://www.landtrustalliance.org/news/conservation-defense-and-enforcement-land-trust-community>
- *Long Green Valley Assoc. v. Bellevale Farms, Inc.*, 46 A.3d 473 (Md. Ct. Special Appeals 2011).
- Leslie Ratley-Beach, *Heroic Defense of the Land and Ethics*, SAVING LAND, <https://www.landtrustalliance.org/news/heroic-defense-land-and-ethics> (summarizing the entire Lyme litigation series and takeaway lessons)

Guest Lecturer:

Christy McShea, Staff Attorney Vermont Land Trust

## **OCTOBER 25 – AGRICULTURAL EXCEPTIONALISM AND THE CLEAN WATER ACT**

This session will cover environmental law exceptions applicable to agriculture, focusing on the Clean Water Act. The learning objective will be to understand agriculture's exceptionalism within the construct of environmental laws and the implications of this continuing exemption.

### Overall:

- Megan Stubbs, CRS, Environmental Regulation and Agriculture RS41622, <https://fas.org/sgp/crs/misc/R41622.pdf>
- US EPA, Laws and Regulations that Apply to Your Agricultural Operation by Farm Activity, <https://www.epa.gov/agriculture/laws-and-regulations-apply-your-agricultural-operation-farm-activity>

### Clean Water Act:

#### Overall:

- The National Agricultural Law Center, Clean Water Act- An Overview, <https://nationalaglawcenter.org/overview/cw/>

#### Section 404:

- EPA, Section 404 of the Clean Water Act and Swampbuster: Wetlands on Agricultural Lands, <https://www.epa.gov/cwa-404/cwa-section-404-and-swampbuster-wetlands-agricultural-lands>
- Neil Hamilton, Sixteen Things to Know About the DMWW Proposed Drainage District Lawsuit, <https://www.drake.edu/media/collegesschools/law/documents/Sixteen%20Things%20to%20Know%20About%20the%20DMWW%20Proposed%20Drainage%20District%20Lawsuit.pdf>

#### Section 402:

- *Fishermen Against Destruction of Environment, Inc. v. Closter Farms, Inc.* 300 F.3d 1294 (11th Cir. 2002).
- *Oregon Natural Desert Assoc. v. Dombeck*, 172 F.3d 1092 (9th Cir. 1998).
- *Lake Champlain Basin Program, TMDL Program*, <https://www.lcbp.org/our-goals/clean-water/nutrients-and-cyanobacteria/tmdl/>

#### Guest Lecturers:

- Elena Mihaly, Staff Attorney, Conservation Law Foundation
- Katelyn Ellermann, Associate General Counsel, Vermont Department of Environmental Conservation

## **NOVEMBER 1 – CAFOs AND OTHER ENVIRONMENTAL LAWS**

Building off of last's week introduction, this session will go into depth into other environmental laws and consider how effective they are at regulating agricultural uses. The learning objective of this class will be to have a base level of understanding of these other laws, but to build upon your understanding of agricultural exemptions and why these exist/what challenges they present.

CAFOs/Animal Agriculture:

- Nat'l Association of Local Boards of Health, Understanding CAFOs and their Impact on Communities, [https://www.cdc.gov/nceh/ehs/docs/understanding\\_cafos\\_nalboh.pdf](https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf)
- *Alt v. U.S. EPA*, 979 F. Supp. 2d 701 (N.D.W. Va. 2013).

Other Environmental Laws:

- Community Association for Restoration of the Environment v. Cow Palace, LLC, 80 F. Supp. 3d 1180 (E.D. Wash. 2015).
- *Sierra Club v. Seaboard Farms, Inc.*, 387 F.3d 1167 (10<sup>th</sup> Cir. 2004) (focus on the sections involving CERCLA).
- *National Cotton Council of America v. US EPA*, 553 F.3d 927 (6th Cir. 2009).

Guest Lecturer:

- Cheryl Morse, University of Vermont, Department of Geography

**NOVEMBER 3 – RIGHT TO FARM LAWS (NOTE: THIS IS A WEDNESDAY MAKE-UP SESSION).**

Right to Farm Laws:

- *Spur Industries, Inc. v. Del E. Webb Development Co.*, 494 P.2d 700 (Ariz. Sup. Ct. 1972).
- Roger McEowen, Right to Farm Law Headed to SCOTUS, AgLawProf Blog, Aug. 31, 2020, <https://lawprofessors.typepad.com/agriculturallaw/2020/08/right-to-farm-law-headed-to-the-scotus.html>
- Farmland Information Center, Vermont's Right to Farm Law, [https://s30428.pcdn.co/wp-content/uploads/sites/2/2019/09/VT\\_5751-5754\\_1.htm](https://s30428.pcdn.co/wp-content/uploads/sites/2/2019/09/VT_5751-5754_1.htm)

Guest Lecturers:

- Kitt Tovar, Iowa State University Center of Agricultural Law and Taxation
- Paul Goeringer, University of Maryland Extension

**NOVEMBER 8 – VERMONT LAND USE**

This session will explore agricultural land use with a specific emphasis on Vermont's laws and regulations applicable to this land use type. The learning objective for this session will be to have a general sense of how farms are treated under land use laws and the challenges facing the industry as it evolves beyond what has been traditionally viewed as farming.

Vermont Agricultural Land Use Laws:

- Chea Evans, *New Law, New Market: Philo Ridge Farm Serves up Delicious Treats and Regulatory Confusion*, THE CITIZEN, August 9, 2018, <http://www.thecitizenvt.com/2018/08/09/new-law-new-market-new-questions-philoridge-farm-serves-delicious-treats-regulatory-confusion/>
- Jess Phelps, *Agricultural Exceptionalism in Vermont Land Use Law*, DUKE ENVIRONMENTAL LAW AND POLICY FORUM (2019). <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1368&context=delpf> (pages 165-190 only).
- Philo Ridge Farm, <https://www.philoridgefarm.com/> (browse website)
- John Lippman, Planned Restaurant on Woodstock Farm Faces Procedural Hurdles, Ire from Neighbors, Upper Valley news, August 14, 2021, <https://www.vnews.com/Bottom-Line-for-Aug-8-2021-41715991>

Guest Lecturers:

- Lynn Ellen Schimoler, State of Vermont, Working Lands Enterprise Initiative
- Meriwether Hardie, Biological Capital

**NOVEMBER 15 – CONSERVATION LEASES AND LOCAL LAND USE REGULATION**

This session focuses on land tenure issues and also explores sustainable leasing and land use regulations that impact urban agriculture. The learning objective for this week is to have a working understanding of these concepts and how they impact sustainable and conventional agriculture.

Local Agriculture and Land Use:

- Healthy Food Policy Project, <https://healthyfoodpolicyproject.org/key-issues/zoning-for-urban-agriculture>
- Neil Hamilton, The Role of Land Tenure in the Future of American Agriculture, <https://landforgood.org/wp-content/uploads/The-Role-of-Land-Tenure-by-Neil-Hamilton.pdf>
- Ed Cox, A Leased Based Approach to Sustainable Farming, <https://aglawjournal.wp.drake.edu/wp-content/uploads/sites/66/2016/09/agVol15No3-Cox.pdf>

Guest Lecturer:

Ed Cox, Partner, Craver, Grothe & Cox

**NOVEMBER 22 - FARMLAND ACCESS AND TRANSFER**

This session focuses on myriad issues involved in farmland access and transfer and the learning objective is to gain an appreciation or understanding of how these issues matter within the agri-environmental context.



- Center for Agriculture & Food Systems, Farmland Access Legal Toolkit, <https://farmlandaccess.org/>
- American Farmland Trust, Farmland Information Center, Landowner Options, <https://www.farmlandinfo.org/landowner-options/transfer-your-farm-or-ranch> (skim, but good background information about topics and how to get started)
- UVM Extension, A Legal Guide to the Business of Farming in Vermont, <http://www.uvm.edu/farmtransfer/?Page=legalguide.html> (skim: some of the sections are outdated/have been removed, but the business entity section and leasing sections are still posted and are helpful).

Guest Lecturers:

- Mike Ghia, Land for Good
- Maggie Donan, Farmland Access Director, Vermont Land Trust

**NOVEMBER 29 – FUTURE OF AGRICULTURAL LAW (DAY ONE) (COMPARATIVE LAW AND CLIMATE CHANGE)**

This (and the last session) will focus on the future of the agricultural sector in the United States and various issues/challenges/opportunities that also exist. The learning objective of these sessions will be to gain familiarity with key concepts and gain critical context for future exploration of these issues.

**Reading Assignments:**

Overall:

- Susan A. Schneider, *A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming and Sustainability*, 34 WM. & MARY ENVT'L L. & POL'Y REV. 935 (2010).

Climate Change:

- National Sustainable Agriculture Coalition, Agriculture and Climate Change (pages 1-14), [https://sustainableagriculture.net/wp-content/uploads/2019/11/NSAC-Climate-Change-Policy-Position\\_paper-112019\\_WEB.pdf](https://sustainableagriculture.net/wp-content/uploads/2019/11/NSAC-Climate-Change-Policy-Position_paper-112019_WEB.pdf)

Guest Lecturers:

- Elizabeth Dooley, Research Officer – People in Dairy Programme, Teagasc (Ireland)
- Carly Hotvedt, Associate Director, Indigenous Food and Agriculture Initiative

**DECEMBER 6 – FUTURE OF AGRICULTURAL LAW (DAY TWO)**

See above.

### Ecosystem Services:

- USFS, Valuing Ecosystem Services, <https://www.fs.fed.us/ecosystemservices/pdf/ecosystem-services.pdf>
- J.B. Ruhl, *Farms and Ecosystem Services*, Choices Magazine, <https://www.choicesmagazine.org/magazine/article.php?article=18>

### Carbon Markets:

- California Air Resources Board, Cap-and-Trade Program, <https://ww3.arb.ca.gov/cc/capandtrade/capandtrade.htm> (skim website).
- The Regional Greenhouse Gas Initiative, <https://www.rggi.org/> (skim website).
- Gosia Wozniacka, *Are Carbon Markets for Farmers Worth the Hype?* CIVIL EATS, Sept. 24, 2020, <https://civileats.com/2020/09/24/are-carbon-markets-for-farmers-worth-the-hype/>

### The Future of Agricultural Law

- Blake Hurst, *The Omnivore's Delusion: Against the Agri-Intellectuals*, <http://www.aei.org/publication/the-omnivores-delusion-against-the-agri-intellectuals/>
- Neil Hamilton, *Moving Toward Food Democracy: Better Food, Better Farms and the Myth of Feeding the World*, 16 DRAKE J. AGRIC. L. 11 (2011).

### Guest Lecturer –

- Misti Schmidt, Conservation Law Partners