

# Protecting Wetlands

Expanding the Clean Water Act

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## Illustrates three aspects of policymaking:

- How a law can come to define policy in an area not originally intended by its creators.
- How an agency can use its regulatory discretion to extend its jurisdiction and take on new missions.
- How the courts can “make” policy by case law.

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## Wetlands Functions & Values

- Flood Mitigation & Storm Flow Control
- Pollution Attenuation
- Wildlife Habitat
  - Food
  - Water
  - Breeding habitat
  - Shelter
- Natural Resource Production
- Recreation

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## Problem – Wetlands Loss

- Not a “problem” until 1970s
  - Public did not value wetlands as a resource
- Main Cause of Wetlands Loss
  - <1980 Agriculture
  - >1980 Suburban Development (sprawl)

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## Clean Water Act – Section 404

- Most of CWA 1972 administered by EPA
- Section 404:
  - Prohibits dredging or depositing of fill in “waters of the United States” without a permit from the USACE

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## USACE Interpretation of Mandate

- Rivers & Harbors Act of 1899
- Jurisdiction limited to navigable waters
  - “those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.” 33 CFR §209.120(d)(1).
  - “[i]t is the water body’ s capability of use by the public for purposes of transportation or commerce which is the determinative factor.” §209.260(e)

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## Court Cases Expand USACE Jurisdiction

- **U.S. v. Holland** (M.D. FL; 1974)
  - Wetlands adjacent to navigable waterways (mangrove swamp) are within the jurisdiction of CWA
  - Broadens interpretation of "navigable"
- **NRDC v. Calloway** (2<sup>nd</sup> Circ. Appeals; 1975)
  - USACE did not properly evaluate a Navy plan to dump polluted spoil in Long Island Sound
    - Failed to use EPA ocean dumping guidelines
      - Strengthens hand of the EPA in issuing permits
    - Potential for drift back to onshore wetlands along the coast must be assessed
  - USACE must be more aggressive in requiring permits

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## More Court Action -- 1977

- **United States v. Riverside Bayview Homes, Inc.**  
(Fed Court 1977)
  - 60 acre building site, subdivided in 1916
    - Riverside wants to fill 20 acres of adjacent wetlands
  - USACE says permit is required under CWA
  - Riverside argument
    - No jurisdiction (not navigable waterway)
    - No wetland (inundated only 17% of the time)
  - Broadens USACE jurisdiction to wetlands adjacent to navigable waterways
  - Appealed to 6<sup>th</sup> Circuit Court of Appeal

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## Executive Order 11990

- **President Carter -- 1977**
  - All federal agencies must consider wetlands protection in their actions
    - Minimize destruction, loss, degradation
    - Preserve and enhance natural and beneficial values of wetlands

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## E.O. 11998

- Federal agencies should avoid direct or indirect support for activities that foster floodplain development

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## USACE Redefines "Waters of these United States" -- 1977

- Reaction to court decisions
- USACE includes as "waters of the United States":
  - "...isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce."

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## More Court Action -- 1985

- United States v. Riverside Bayview Homes, Inc. Take 2 (6<sup>th</sup> Circ. Appeals, 1984)
  - Not generally flooded → not a wetland under CWA
  - Raises a takings issue
  - Severely restricts USACE jurisdiction to navigable waterways only
    - Necessary to avoid a "takings" claim
    - Overturns prior District Court decision
- United States v. Riverside Bayview Homes, Inc. Take 3 (SC, 1985)
  - Broadens USACE jurisdiction to wetlands adjacent to navigable waterways only
    - No "takings" issue
      - Assertion of regulatory jurisdiction does not connote a takings
    - Congressional intent to protect navigable waterways encompasses adjacent wetlands, tributaries, et.
    - Overturns Appeals Court decision

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## USACE Expands Jurisdiction -- 1986

- How do we know when federal jurisdiction is triggered in wetlands not adjacent to navigable waterways?
  - Nexus with interstate commerce?
- 1986 Clarification of 1977 Regulations

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## Migratory Bird Rule [1986]

- Legal basis for federal regulation of isolated wetlands (vernal pools, prairie potholes, etc.)
  - "a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
  - "b. Which are or would be used as habitat by other migratory birds which cross state lines; or
  - "c. Which are or would be used as habitat for endangered species; or
  - "d. Used to irrigate crops sold in interstate commerce." 51 Fed. Reg. 41217.

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## What is a Wetland?

- Intuitive vs. technical delineation
- 1987 USACE, EPA, SCS, & USFW publish separate manuals
- 1989 Unified manual published
  - Expands 1987 definitions
- 1991 New Manual proposed by USACE
  - Developers, agriculture, & industry roll-back
  - Abandoned (unscientific) in 1992
    - Revert to 1987 manual

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## USACE Extends Jurisdiction --1999

- Navigable waterways plus:
  - "...waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . . ." 33 CFR §328.3(a)(3)

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## SWANCC v. USACE

- SOLID WASTE AGENCY OF NORTHERN COOK COUNTY *v.* UNITED STATES ARMY CORPS OF ENGINEERS *et al.*
  - 23 suburban Chicago communities collaborate to handle solid waste
  - Purchase abandoned 533 acre gravel pit
  - 1986 Applies for CWA permits to use site for non-hazardous solid waste

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## SWANCC v. USACE

- 1986 USACE rules it has not jurisdiction over SWANCC property
- 1987 USACE reverses its position
  - Illinois Nature Preserves Commission petition
  - 121 migratory birds use the site

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## SWANCC: Ruling

- Supreme Court (January 2001, 5-4)
  - USACE lacks jurisdiction over isolated wetlands
    - Migratory Bird Rule invalidated for CWA
    - Wetlands adjacent to “navigable waterways” are still protected (*Riverside Bayview Homes*)

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## SWANCC: Implications

- Loss of federal protection of 30%-60% U.S. wetlands
  - Loss of protection for
    - vernal pools
    - isolated wetlands
- USACE New England
  - “Migratory” Turtle Rule

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## Bush Administration 2003

- Withdraw CWA/USACE jurisdiction from tributaries, smaller streams and brooks that feed rivers
  - Response to SWANCC?
  - Impact on the western U.S.

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## What is Wetlands Policy?

- Corps districts differ in how they interpret and apply the federal regulations when determining which waters and wetlands are subject to federal jurisdiction.
- Only 3 of the 16 districts that GAO reviewed made documentation of their practices available to the public.
  - Other districts generally relied on oral communication to convey their practices to interested parties.

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