

# 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.

# Wetlands Functions & Values

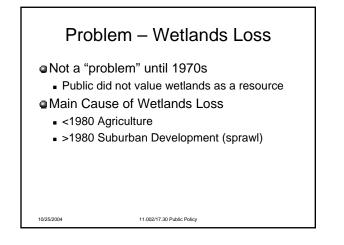
Flood Mitigation & Storm Flow Control
 Pollution Attenuation
 Wildlife Habitat

∎Food ∎Water

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Breeding habitat
 Shelter

Natural Resource Production
 Recreation



# Clean Water Act - Section 404

Most of CWA 1972 administered by EPA

Section 404:

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 Prohibits dredging or depositing of fill in "waters of the United States" without a permit from the USACE

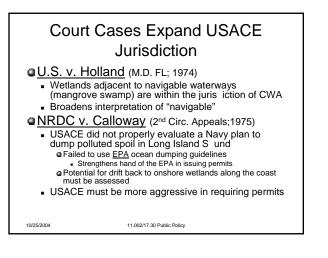
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#### **USACE** Interpretation of Mandate

#### 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)



### 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

#### E.O. 11998

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

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

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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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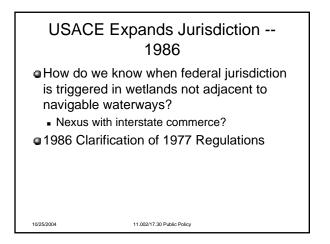
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# More Court Action -- 1985

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 No "takings" issue
     Assertion of regulatory jurisdiction does not connote a takings

    - Assertational intent to protect navigable waterways encompasses adjacent wetlands, t ibutaries, et.
       Overturns Appeals Court decision
    - - 11.002/17.30 Public Policy



# 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

#### 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

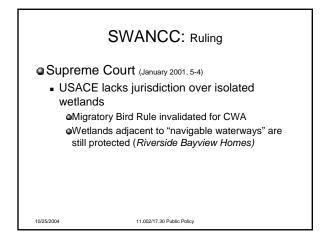
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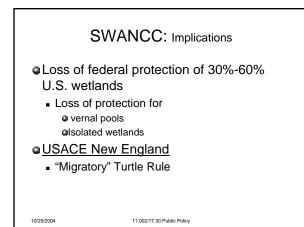
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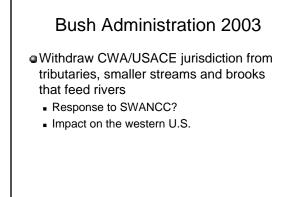
 1986 USACE rules it has not jurisdiction over SWANCC property

1987 USACE reverses its position

- Illinois Nature Preserves Commission petition
- 121 migratory birds use the site







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