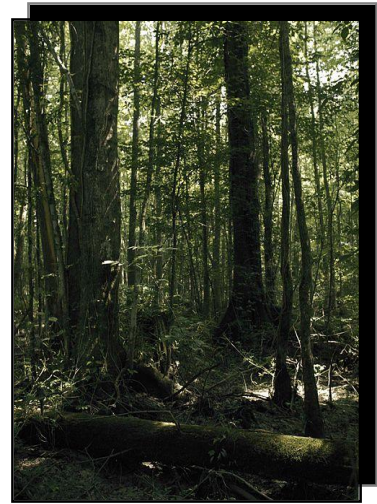


Chapter 2

The History of Regulation

I. Early Development Laws

Sentiments toward wetlands have evolved significantly over the history of our nation, and wetlands laws have evolved significantly as well. For much of the eighteenth and nineteenth centuries, public sentiment and legislation favored the draining and conversion of wetlands. They were long considered “insect-ridden, unattractive, and dangerous” places. See William A. Niering, *Wetlands* 19 (Chanticleer Press, 1985). In 1732, William Byrd II, the founder of Richmond, Virginia, described the [Great Dismal Swamp](#) (now a national wildlife refuge) as “a vast body of mire and nastiness”. See [U.S. Department of Interior, U.S. Fish and Wildlife Service, *The Great Dismal Swamp and the Underground Railroad*](#). Thirty years later, George Washington joined several partners to form “Adventurers for Draining the Dismal Swamp” and the Virginia General Assembly authorized their company to harvest the timber and drain much of the swamp, which extended over 2,000 square miles at the time. See [The Diaries of George Washington, Vol. 1: 11 March 1748–13 November 1765, at 319-320 \(ed. Donald Jackson. Charlottesville: University Press of Virginia, 1976\)](#).



USFWS Photo by S. Bournique
[Wikimedia](#)

To the extent that Congress legislated in the area of natural resources in the eighteenth and nineteenth centuries, laws such as the Homestead Act of 1862, Act of May 20, 1862, Pub.L. 37-62, 12 Stat. 392 (which required the “improvement” of homesteads), and the General Mining Act of 1872, [30 U.S.C. §§ 22-47](#), focused on encouraging the settlement of the country and the exploitation of natural resources, as opposed to protecting and conserving resources. Federal laws regarding wetlands at the time were no different. **The Swamp Wetland Act of 1849**, 9 Stat. 352 (1849), granted to Louisiana all of the swamp lands in the State that were not suitable for cultivation, so that the State could build levees and drains to “reclaim” the wetlands. See [Shaw, Samuel P. and C. Gordon Fredine, U.S. Department of the Interior, Circular 39 *Wetlands of the United States - Their Extent and Their Value to Waterfowl and Other Wildlife* \(1956\) \[hereinafter “USGS, *Wetlands of the United States*”\]](#). **The Swamp Wetland Act of 1850**, 9 Stat. 519 (1850), granted the swamp lands in 12 other states

(Alabama, Arkansas, California, Florida, Illinois, Indiana, Iowa, Michigan, Mississippi, Missouri, Ohio, and Wisconsin) to those states for similar purposes. See [USGS, *Wetlands of the United States*](#). In 1860, Congress extended the provisions of those laws to cover the wetlands in Minnesota and Oregon. *Id.* Through those laws, almost 65 million acres of wetlands were given to the States. *Id.* The States sold or gave away most of those wetlands to local governments or developers, and now most are in private hands. *Id.* Most of the wetlands that were destroyed over the first two centuries of our nation were converted to agricultural lands, usually by private landowners. See [National Research Council. *Wetlands: Characteristics and Boundaries* 17 \(Washington, DC: The National Academies Press, 1995\)](#).

At the end of the nineteenth century, Congress passed the **Rivers and Harbors Appropriations Act of 1899**, see [33 U.S.C. § 401, et. seq.](#), a law that would eventually play a role in limiting the destruction and conversion of wetlands. See Chapters 4 and 6, *infra*. However, the primary focus of that law is on protecting the navigability of the nation's waters and protecting interstate commerce, which is often accomplished through dredging or the construction of channels. While the law includes provisions that limit obstructions in navigable waters, see [33 U.S.C. § 403](#), and prohibit the deposit of refuse in navigable waters, see [33 U.S.C. § 407](#), it was almost three quarters of a century after the law was enacted before courts upheld the government's authority to prohibit obstruction activities in wetlands for environmental reasons under the law. See [Zabel v. Tabb, 430 F.2d 199 \(5th Cir. 1970\)](#). Thus, at the time, enactment of the law did not signal a significant shift in the congressional policy or attitude toward wetlands.

The prevailing sentiment towards wetlands at the turn of the twentieth century was probably expressed most clearly in the Supreme Court's 1900 decision in [Leovy v. United States](#), when Justice Shiras, for the Court, wrote:

If there is any fact which may be supposed to be known by everybody, and therefore by courts, it is that swamps and stagnant waters are the cause of malarial and malignant fevers, and that the police power is never more legitimately exercised than in removing such nuisances.

177 U.S. 621, 636 (1900). The Court also noted that converting the wetlands in the case to agricultural use increased the value of the land from \$5,000 to \$100,000 and could possibly increase the value to \$300,000. *Id.* at 627.

II. A Slow Shift to Conservation

Although large segments of the public and policymakers adopted views similar to those expressed by the Court, the turn of the twentieth century also witnessed the birth of a national conservation movement. In 1903, by Executive Order, President Theodore

Roosevelt established the country's first National Wildlife Refuge, [Pelican Island National Wildlife Refuge](#), in south Florida. See [U.S. Department of the Interior, U.S. Fish and Wildlife Service, *Short History of the Refuge System : The Early Years \(1864-1920\)*](#). While the Pelican Island Refuge was the first National Wildlife Refuge, federal and state governments and private organizations had already begun to acquire wetlands to establish wildlife sanctuaries in the late nineteenth century. See [National Research Council. *Wetlands: Characteristics and Boundaries 45* \(Washington, DC: The National Academies Press, 1995\)](#). In the six years after he established the Pelican Island National Wildlife Refuge, President Roosevelt issued 51 additional Executive Orders that established wildlife reservations in 17 States. *Id.* As it approached its centennial, the National Wildlife Refuge System included more than 520 units in all 50 states, covering 93 million acres of wildlife habitat. See [U.S. Department of the Interior, U.S. Fish and Wildlife Service, *Short History of the Refuge System : Approaching the Centennial \(1997 and On\)*](#). For an in-depth history of the National Wildlife Refuge System, see [Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 Ecology L. Quarterly 457 \(2002\)](#).

A few years after President Roosevelt left office, in 1913, Congress enacted the **Weeks-McLean Act**, Ch. 145, 37 Stat. 828, 847 (1913), to prohibit the commercial hunting and shipment of migratory birds across state lines. The law, which was enacted as a rider to appropriations legislation, was held unconstitutional as violating the Tenth Amendment, but was replaced a few years later by the **Migratory Bird Treaty Act of 1918**, [16 U.S.C. § 703, et seq.](#), which prohibits hunting, capturing, possessing, selling and many other activities with regard to migratory birds that are protected by an international migratory bird treaty. Although those laws were not enacted to provide protection to wetlands, they demonstrated Congress' concern with protecting migratory birds, and that concern would eventually lead to further legislation to protect the habitat, including wetlands habitat, of those birds.



Public Domain Photo - [Wikimedia](#)

Two of the earliest federal wetland conservation laws were the **Migratory Bird Conservation Act of 1929**, [16 U.S.C. §§ 715-715d, 715e, 715f-715r](#), which authorized, but did not permanently fund, the acquisition and preservation of wetlands as habitat for waterfowl, and the **Migratory Bird Hunting Stamp Act of 1934**, [16 U.S.C. §§ 718 - 718j](#) (generally referred to as "The Duck Stamp Act"), which created a funding source for the wetlands conservation authorized by the 1929 law. See [U.S. Department of the Interior, U.S. Fish and Wildlife Service, *Federal Duck Stamp Office, History of the Federal Duck Stamp*](#) Duck Stamps are pictorial stamps that are produced by the Fish and Wildlife Service which were originally created as federal licenses to hunt migratory waterfowl. *Id.* Today, Duck Stamps also serve as entry passes to National Wildlife Refuges and many people buy Duck Stamps simply to

promote wetland conservation, as ninety-eight cents out of every dollar from the sale of Duck stamps is used to purchase or lease wetland habitat for National Wildlife Refuges. *Id.* Since 1934, the Fish and Wildlife Service has raised more than 800 million dollars from the sale of Duck Stamps and has purchased or leased more than 6 million acres of wetlands with those proceeds. *Id.*

Although Congress created the Duck Stamp program in 1934 to fund federal *acquisition and protection* of wetlands, between 1940 and 1977, the U.S. Department of Agriculture provided technical information and cost-sharing, through its Agricultural Conservation Program, to assist landowners in *draining* wetlands. See [U.S. Congress, Office of Technology Assessment, OTA-O-206, *Wetlands: Their Use and Regulation 77* \(Mar. 1984\)](#).

III. Towards Comprehensive Federal Regulation

As was the case with most environmental issues, though, federal regulatory involvement in wetlands protection grew during the end of the 1960s and throughout the 1970s. At first, Congress and the Corps strengthened the wetland protections in the **Rivers and Harbors Act**. In 1965, Congress amended the [Fish and Wildlife Coordination Act](#) to require agencies to consider opportunities for fish and wildlife enhancement when planning any navigation, flood control, reclamation, hydroelectric or multipurpose water resource project. See Pub. L. 89-72, 79 Stat. 213 (1965). After that, the Corps entered into an agreement with the Fish and Wildlife Service to consult on projects that the Corps would review for authorization under the Rivers and Harbors Act. See [Memorandum of Understanding Between the Secretary of the Interior and the Secretary of the Army \(Jul 13, 1967\)](#). Around the same time, the Corps adopted regulations to incorporate a “public interest” review, including a focus on environmental factors, into the Rivers and Harbors Act permitting program. See [33 Fed. Reg. 18670 \(Dec. 18, 1968\)](#). While these changes provided some additional protection for wetlands, the Rivers and Harbors Act only regulates activities in waters that are, were historically, or could potentially be, navigable, see Chapter 4, *infra*, so the Corps’ jurisdiction over wetlands under the Act is fairly narrow.

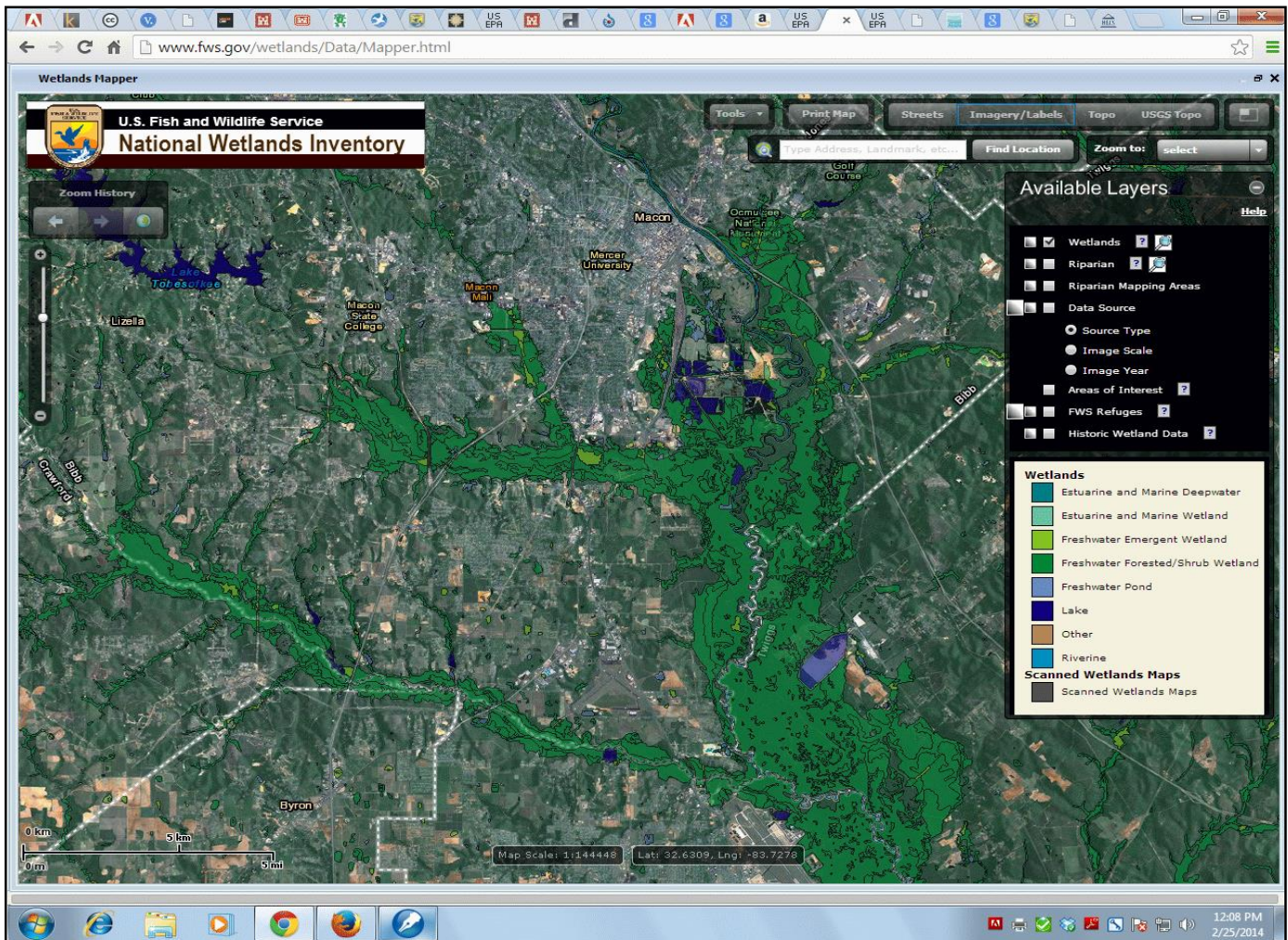
Instead, most federal regulation of wetlands derives from the **Federal Water Pollution Control Act Amendments of 1972**, Pub.L. 92-500, 86 Stat. 816 (1972), which, after subsequent amendments, is commonly known as the [Clean Water Act](#). The statute prohibits the addition of pollutants into navigable waters, a term that has been interpreted by the government and courts to include wetlands. See Chapter 4, *infra*. However, Section 404 of the statute authorizes the Corps of Engineers to issue permits to authorize the discharge of dredged or fill material into navigable waters. See [33 U.S.C. § 1344](#). While the [Endangered Species Act](#) and the [National Environmental Policy Act](#) play a role in protecting wetlands, as discussed later, the Clean Water Act Section 404 permitting program is the primary federal tool for regulating and protecting wetlands and most of this book focuses on that program. Although the statute authorizes the Corps to issue the permits, Congress gave EPA the authority, with the

Corps, to develop the guidelines that the Corps uses to determine whether to issue the permits. See [33 U.S.C. § 1344\(b\)\(1\)](#). The statute also authorizes EPA and the Fish and Wildlife Service to comment on permit applications, and authorizes EPA to veto Section 404 permits. See [33 U.S.C. § 1344\(c\)](#). The division of authority between EPA and the Corps has created some tension over the years.

In the first few years after Congress created the Section 404 permit program, the Corps of Engineers interpreted the Clean Water Act narrowly to provide limited jurisdiction over wetlands. See Chapter 4, *infra*. By 1975, however, the Corps had adopted a more expansive reading of the statute. *Id.* Since those early years of the Section 404 program, several Presidents have issued Executive Orders, adopted action plans or announced policies to expand protection of wetlands.

In 1977, President Carter issued **Executive Order 11990**, which required federal agencies to “take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands.” See [Executive Order 11990, Protection of Wetlands § 1 \(May 24, 1977\)](#). Significantly, the order also required agencies to “avoid undertaking or providing assistance for new construction located in wetlands unless the ... agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use.” *Id.* § 2. A little over a decade later, in 1988, President George H.W. Bush endorsed a policy, which was developed by a National Wetlands Policy Forum, of “no net loss” of wetlands. See [Julie M. Sibbing, National Wildlife Federation, Nowhere Near No Net Loss](#). After President Clinton took office, through a **1993 Interagency Wetlands Plan**, he reaffirmed the “no net loss” policy as an interim goal and called for an increase in the quality and quantity of the nation’s wetlands as a long term goal. See [White House Office on Environmental Policy, Protecting America’s Wetlands: A Fair, Flexible, and Effective Approach \(Aug. 24, 1993\)](#). A decade after that, on Earth Day, 2004, President George W. Bush announced a **Strategy to Increase Wetland Acres and Quality**, which focused on moving from a “no net loss” policy to an increase in wetland acres and quality. See [The White House, Office of the Press Secretary, Wetlands Initiative Announced on Earth Day \(April 22, 2004\)](#).

For several decades, the [National Wetlands Inventory](#) has played an important role in providing information about whether the “no net loss” goal is being met, at least with regard to wetland **acreage**. The Fish and Wildlife Service began work on the national inventory of wetlands in 1974 “to provide biologists and others with information on the distribution and type of wetlands and to aid in conservation efforts.” See [U.S. Department of the Interior, U.S. Fish and Wildlife Service, NWI Overview](#). The agency developed the Cowardin wetland classification system described in Chapter 1, *supra*, to classify wetlands for the inventory. *Id.* While wetlands in the National Wetlands Inventory were originally plotted on paper maps, the wetlands data in the inventory is now accessible and searchable online in digital maps. *Id.* The data are also used to prepare the Service’s periodic reports on wetland status and trends discussed in



Screen Shot of NWI website – July 2014

Chapter 1. *Id.* Congress required the agency to prepare those periodic reports as part of the **Emergency Wetlands Resources Act of 1986**, [16 U.S.C. §§ 3901-3932](#).

IV. Conservation Programs and Agricultural Programs

While the Clean Water Act Section 404 program ushered in an era of comprehensive federal regulation, the federal government also provides protection for wetlands through a variety of economic incentive programs. Some of the programs have been in place for several decades. For instance, in 1965, Congress passed the **Land and Water Conservation Fund Act of 1965**, creating a Land and Water Conservation Fund, which provides money to federal, state and local governments to purchase property, including wetlands, for conservation and to fund conservation projects. See [16 U.S.C. §§ 4601-4 - 4601-11](#). Through 2014, the Fund provided \$4 billion in grants to States to fund more than 42,000 conservation projects. See [Land and Water Conservation Fund Coalition, 50 Years of Conserving America the Beautiful 6 \(2014\)](#).

In 1970, Congress passed the **Water Bank Act**, which authorizes the Departments of Agriculture and Interior to enter into 10 year contracts with landowners to preserve wetlands on their land and protect wildlife habitat. See [16 U.S.C. §§ 1301-1311](#). In return, the landowners receive annual payments over the contract period. *Id.* In Fiscal Year 2012, Congress appropriated \$7.5 million to fund the Water Bank Program. See [U.S. Department of Agriculture, Natural Resources Conservation Service, *Water Bank Program*](#).

From those modest beginnings, Congress greatly expanded the number and scope of federal programs that provide economic incentives for wetland protection shortly after the release of a report by the Congressional Office of Technology Assessment that identified several federal laws and programs that impeded wetlands protection. See [U.S. Congress, Office of Technology Assessment, OTA-O-206, *Wetlands: Their Use and Regulation 78* \(Mar. 1984\)](#). The report noted that the Federal tax code provided numerous deductions that gave farmers incentives to clear and drain wetlands for agricultural use. *Id.* The report also concluded that several other federal programs, including cost sharing and technical assistance in the U.S. Department of Agriculture's Agricultural Conservation Program, Farmers Home Administration Loans, Federal disaster payments and crop insurance, and commodity programs provided incentives to farmers to clear and drain wetlands. *Id.* at 78-81.

In 1985, the year after the OTA report, Congress included several important provisions in the Food Security Act of 1985 (also known as the 1985 Farm Bill) to protect wetlands. See [Pub. L. 99-198, 99 Stat. 1509 \(1985\)](#). The law created a **Conservation Reserve Program**, which provides yearly rental payments to farmers (owners of highly erodible cropland) who agree to remove their land from agricultural production for 10 - 15 years and to plant vegetation that will improve the environmental health and quality of their land. *Id.* § 1231. The program is administered by the Farm Service Agency within the U.S. Department of Agriculture. See [U.S. Department of Agriculture, Farm Service Agency, *Conservation Programs: Conservation Reserve Program*](#). Since 1988, restoration of cropped wetlands is one of the activities that is eligible for program participation. Although the original law authorized enrollment of up to 45 million acres of highly erodible land in the reserve, that limit was reduced to 39 million acres in the 2002 Farm Bill and 32 million acres in the 2008 Farm Bill. The program provides about \$2 billion to farmers each year and, as of 2012, the program restored over 2 million acres of wetlands and reduced soil erosion by more than 300 million tons per year. See [U.S. Department of Agriculture, Farm Service Agency, *The Conservation Reserve Program: 45th Signup Results* \(Sept. 2013\)](#).

Perhaps the more significant provisions in the 1985 Farm Bill, though, were the **Swampbuster** provisions. Congress included provisions in the law that disqualified farmers from receiving all or a portion of Federal farm program benefits, including loans, subsidies, crop insurance, and price supports, if they produced agricultural commodities on converted wetlands. See [16 U.S.C. § 3821](#). The Swampbuster provisions were strengthened in the Food Agriculture, Conservation and Trade Act of 1990 (also known

as the 1990 Farm Bill), which disqualifies farmers from receiving those benefits if they convert wetlands for the purpose of, or with the effect of, making production of agricultural commodities on them possible. See [16 U.S.C. § 3821\(c\)](#). As noted in Chapters 1, *supra*, and 4, *infra*, the Natural Resources Conservation Service delineates wetlands for purposes of the Swampbuster provisions, see [28 U.S.C. § 3822](#), and uses a different delineation manual than the manual used by the Corps of Engineers, EPA and the Department of Interior. While the Natural Resources Conservation Service and the Farm Service Agency administer the Swampbuster provisions, the Fish and Wildlife Service, within the Department of Interior, provides technical assistance to those agencies, and their relationship in administering the law is outlined in a 2002 Memorandum of Understanding. See [U.S. Department of Agriculture and U.S. Department of Interior, Memorandum of Understanding Regarding Implementation of the 2002 Farm Bill Conservation Provisions \(Aug. 6, 2002\)](#).

Subsequent farm bills created additional wetland conservation programs. For instance, the 1990 Farm Bill created the **Wetlands Reserve Program**, which provided money and technical assistance to farmers and other landowners to protect, enhance and restore wetlands on their property. See [16 U.S.C. §§ 3837 - 3837f](#). Landowners could enroll in the program by placing a permanent conservation easement or a 30 year conservation easement on their property, in which case they were fully or partially (for the 30 year easement) compensated for the value of the easement and received funding to cover the restoration costs. *Id.* § 3837a. If the landowners did not prefer to place a conservation easement on their property, they could still enroll their land in the program, but they only received funding to cover the restoration costs. *Id.* In the first twenty years of the program, which was administered by the Natural Resources Conservation Service (NRCS), more than 11,000 landowners participated, enrolling more than 2.3 million acres of wetlands. See [U.S. Department of Agriculture, Natural Resources Conservation Service, Restoring America's Wetlands: A Private Lands Conservation Success Story](#). The program was replaced, in the 2014 Farm Bill, by an [Agricultural Conservation Easement Program](#), also administered by NRCS, which includes a Wetland Reserve Easement program and an Agricultural Land Easement program. In the Wetland Reserve Easement program, landowners place permanent easements, 30 year easements, or shorter term easements on wetlands in exchange for compensation for the easement and funding to cover wetland restoration costs. *Id.*

The Federal Agricultural Improvement and Reform Act of 1996 (the 1996 Farm Bill or Freedom to Farm Act) created the **Wildlife Habitat Incentive Program (WHIP)** and the **Environmental Quality Incentive Program (EQIP)**, both of which are administered by the Natural Resources Conservation Service. See [Pub. L. 104-127, 100 Stat. 888 \(1996\)](#). The Wildlife Habitat Incentive Program provided funding and technical assistance to landowners to develop wildlife habitat on private agricultural land, nonindustrial private forest land, and tribal lands, see [16 U.S.C. 3839bb-1](#), but was not re-authorized when Congress enacted the 2014 Farm Bill. The Environmental Quality Incentives Program provides financial and technical assistance to agricultural producers to plan and implement conservation practices and related projects. See [16 U.S.C. §§](#)

[3839aa - 3839aa-9](#). Landowners sign contracts for a term between one and ten years. [Id. § 3839aa-2](#).

Congress has also created other wetland conservation programs independent of farm bills. For instance, the **North American Wetlands Conservation Act of 1989** created a program to provide matching grants to organizations and individuals who are partnering to carry out wetlands conservation projects in the U.S., Mexico, or Canada. See [16 U.S.C. §§4401 - 4414](#). Between 1998 and 2018, the program provided about \$1.6 billion to more than 6,000 partners, who contributed about \$3.3 billion in matching funds, affecting more than 27.5 million acres of habitat. See [U.S. Department of the Interior, U.S. Fish and Wildlife Service, Division of Bird Habitat Conservation, *North American Wetlands Conservation Act*](#). Congress created another wetlands conservation grant program in the Coastal Wetlands Planning, Protection, and Restoration Act of 1990. The **National Coastal Wetlands Conservation Grant Program** is administered by the Fish and Wildlife Service and provides grants to States and Territories to protect, restore, and enhance coastal habitats. See [16 U.S.C. §§ 3951 - 3956](#). From the time the program was created through early 2013, about \$183 million in grants were awarded to 25 States and one U.S. territory to acquire, restore or protect 250,000 acres of coastal wetland ecosystems. See [U.S. Department of the Interior, U.S. Fish and Wildlife Service, *National Coastal Wetlands Conservation Grant Program*](#). Finally, in 2006, Congress passed the **Partners for Fish and Wildlife Act**, which creates a program to provide financial and technical assistance to landowners and Tribes for projects in a variety of habitats to conserve or restore vegetation, hydrology and soils associated with imperiled ecosystems, including bottomland hardwoods, marshes, rivers, streams and a variety of other habitats, including ecosystems that provide habitat for a rare, declining or protected species. See [U.S. Department of the Interior, U.S. Fish and Wildlife Service, *Partners for Fish and Wildlife Program*](#). Between 1987 and 2010, the program restored and enhanced over 1 million acres of wetlands. See [U.S. Department of the Interior, U.S. Fish and Wildlife Service, *Partners for Fish and Wildlife Program: Regional Showcase Accomplishments: Fiscal Year 2010 at 2*](#).

The following chart summarizes the variety of economic incentive programs for wetlands conservation:

Program	Agency	Recipients	Type of Assistance	Requirements
Conservation Reserve Program	USDA - Farm Service Agency	Farmers	Rental payments for 10-15 years	Remove land from agricultural production and vegetate to improve the environmental health and quality of the land
EQIP	USDA -	Agricultural	\$\$\$ and Technical	Plan and implement

	NRCS	Producers	Assistance	conservation projects and related projects
Land and Water Conservation Fund	DOI - National Park Service	Federal, State and Local Governments	\$\$\$	Conservation projects, including purchase of land for conservation
National Coastal Wetlands Conservation Grants	DOI - FWS	States and Territories	Grants	Protect, restore or enhance coastal habitats
North American Wetlands Conservation Act Grants	DOI - FWS	Organizations and Individuals	Grants	Wetlands conservation projects in the U.S., Mexico or Canada
Partners for Fish and Wildlife	DOI - FWS	Landowners and Tribes	\$\$\$ and Technical Assistance	Conservation or restoration of wetlands and other habitats
Water Bank Act	USDA / DOI	Landowners	Annual payments for a 10 year term	Preserve wetlands and protect wildlife habitat
WHIP (Eliminated in 2014 Farm Bill)	USDA - NRCS	Landowners: Private agricultural; Private forestland; Tribal land	\$\$\$ and Technical Assistance	Develop wildlife habitat on the land
Agricultural Conservation Easement Program	USDA - NRCS	Landowners and Tribes	\$\$\$ and Technical Assistance	Protect, enhance, or restore wetlands and place a conservation easement on the land

Additional Resources

[USDA Farm Service Agency Reports and Statistics](#)
[USDA NRCS Conservation Programs website](#)
[USDA NRCS Data and Reports](#) and [Data Mapper](#)
[USDA Video re: the History of the Conservation Reserve Program](#)
[USDA NRCS report re: WRP Successes](#)
[USDA NRCS Photo Gallery of WRP Restoration Projects](#)
[Land and Water Conservation Fund - Find Grants in Your Community](#)

Questions and Comments

1. **Multiple agencies:** Why do you think that Congress divided responsibility for administration of the Section 404 permit program between the Corps of Engineers and EPA in the manner that it did? What expertise and historical regulatory authority did each have with regard to wetlands and water pollution? Does having regulation divided between the Corps and the EPA make effective regulation more difficult? Should only one agency have authority over regulation? Which one? See [Alyson C. Flournoy, *Section 404 at Thirty-Something: A Program in Search of a Policy*, 55 Ala. L. Rev. 607 \(2004\)](#); [Sam Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands*, 69 N.D. L. Rev. 873 \(1994\)](#); [Michael C. Blumm and D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. Colo. L. Rev. 695 \(1989\)](#). This division has created some tension, as will be explored in the chapters in this book that address jurisdiction over waters of the United States, delineation, mitigation, and the EPA veto process, among others.
2. **Access to information:** The Department of Interior and the Department of Agriculture provide Internet access to significant amounts of data regarding their wetlands programs. For instance, the Department of Interior provides a user-friendly mapping interface for its National Wetlands Inventory and convenient access to information about grants provided through the Land and Water Conservation Fund. Who are some of the audiences that might use that information and how could it be used? To familiarize yourself with the tools, (a) find the wetlands that are located near you and identify the type of wetlands; (b) find the most recent grant awarded by the Land and Water Conservation Fund to a project in your community.
3. **Swampbuster exemptions:** Although the Food Security Act disqualifies farmers from receiving various federal farm benefits or participating in various federal farm programs if they produce agricultural commodities on converted wetlands,

the statute includes a grandfather provision that allows farming on wetlands that were converted (or the conversion was commenced) to cropland prior to December 23, 1985 (the date of enactment of the law) as long as the wetlands did not exhibit wetlands characteristics after the conversion. [16 U.S.C. § 3822\(b\)\(1\)\(A\)](#). The exemption applies even if the converted cropland once again exhibits wetland characteristics due to various reasons outlined in the statute. [Id. § 3822\(b\)\(1\)\(G\)](#). The statute or agency regulations also exempt farmers from disqualification for farming artificial wetlands, farming that does not destroy natural wetland characteristics or that has a minimal effect on wetland functions and values in the area, or farming where the farmer has acted in good faith and without intent to violate the law. [Id. § 3822](#).

4. **Voluntary programs:** What are some of the limitations to the effectiveness of voluntary economic incentive programs as a tool to conserve and protect wetlands? Is there a national plan or are there regional plans that identify the ecosystems and resources to protect under the voluntary programs? Who determines which wetlands and resources should be protected, and on what criteria? How much wetland acreage can be protected under the programs? What factors limit the amount of acreage? Where does the money to protect the wetlands come from? Are there advantages to conservation easements over rental payments and cost sharing? Advantages to loans versus grants? Is there strong federal oversight of the projects? Several years ago, EPA's National Center for Environmental Economics prepared a comprehensive report on various environmental economic incentive programs. See [U.S. Environmental Protection Agency, EPA-240-R-01-001, *The United States Experience with Economic Incentives for Protecting the Environment* \(Jan. 2001\)](#).
5. The Clean Water Act Section 404 program is unusual in the sense that federal environmental laws tend to avoid imposing mandates or restrictions on individual behavior, although many environmental problems, such as climate change, are caused primarily by individual lifestyle choices. See [Stephen M. Johnson, *Is Religion the Environment's Last Best Hope?: Targeting Change in Individual Behavior Through Personal Norm Activation*, 24 J. Env'tl. L. & Litig. 119 \(2009\)](#); [Michael P. Vandenberg, *From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law*, 57 Vand. L. Rev. 515 \(2004\)](#). One of the reasons that direct regulation of individual behavior frequently generates public opposition is that direct regulation makes the costs of the regulation more transparent than indirect regulation. See [Katrina Fischer Kuh, *When Government Intrudes: Regulating Individual Behaviors That Harm the Environment*, 61 Duke L. J. 1111 \(2012\)](#). While Professor Kuh reports that customer service surveys of Section 404 permit applicants do not generally reveal animosity or opposition to the program, she acknowledges that the permitting requirement can generate opposition in specific cases because (1) it imposes burdens on the applicant that create benefits for the public; and (2) it involves federal regulation of land use, a traditionally local activity. *Id.* at 1142-

1143.

6. **A program in flux:** As you read this book, focusing on issues such as the delineation of wetlands, federal jurisdiction over waters of the United States, the divided responsibility of the Corps and EPA, and the implementation of compensatory mitigation requirements, consider the following quote by Professor Alyson Flournoy: “A review of the section 404 program’s evolution ... reveals a program (and agency) perpetually in flux with a poorly defined goal.” See [Alyson C. Flournoy, Section 404 at Thirty-Something: A Program in Search of a Policy, 55 Ala. L. Rev. 607, 608 \(2004\)](#). Is there a need for a different federal law to protect wetlands? What might be done differently?

V. International Wetlands Protection - U.S. Role

In 1971, 18 nations reached agreement on the terms of a treaty that committed the nations to identify and protect “Wetlands of International Importance” and to plan for the “wise use” (sustainable use) of all their wetlands. See [Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb. 2, 1971, T.I.A.S. No. 1084, 996 U.N.T.S. 245 \(amended 1982 & 1987\)](#). The Ramsar Convention, named for the city in Iran that hosted the negotiations, came into force in 1975. See [The Ramsar Convention on Wetlands, A Brief History of the Ramsar Convention](#). As of October, 2014, 168 nations signed on to the Convention. See [The Ramsar Convention on Wetlands, Country Profiles](#). The United States joined in 1987. *Id.* Two years later, Congress passed the North American Wetlands Conservation Act of 1989, mentioned in the last section, to partially implement the convention in the United States. Pursuant to the terms of the Ramsar Convention, the Fish and Wildlife Service adopted a “Policy on Wetlands of International Importance” in 1990. See [55 Fed. Reg. 13856 \(Apr. 12, 1990\)](#). As of February, 2014, 36 sites in the United States were designated as wetlands of international importance. See [The Ramsar Convention on Wetlands, The Annotated Ramsar List: United States](#).

Research Problems

International Materials: International materials can be very difficult to locate, but the Ramsar Convention website includes the governing documents and many other useful wetlands resources, including a [site database](#). See if you can answer the following questions after browsing through their website: (1) Which wetlands were the first wetlands in the United States to be included on the Ramsar List of Wetlands of International Importance? (2) In what year were they added to the list? (3) Which wetlands on the List of Wetlands of International Importance are located closest to your home? Sounds like a good field trip opportunity. February 2 is [World Wetlands Day](#).

VI. The Agencies That Regulate Wetlands

Although there are hundreds of agencies at the federal, state and local level that play some role in the regulation or protection of wetlands, the four primary **federal** agencies that are involved in wetlands protection are the U.S. Army Corps of Engineers (within the U.S. Department of Defense), the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service (within the U.S. Department of Interior) and the Natural Resources Conservation Agency (within the U.S. Department of Agriculture).

A. Corps of Engineers

The [Corps of Engineers](#) is part of the Department of the Army, within the Department of Defense. The Corps' military leader, the Chief of Engineers, a three star general, reports directly to the Assistant Secretary of the Army for Civil Works. See [Melissa Samet, American Rivers & National Wildlife Federation, A Citizens Guide to the Corps of Engineers 10 \(2009\)](#). The Corps has primary authority for issuing Section 404 permits, including both individual permits and general permits, and is responsible for the day to day administration of the permit program. The Corps also administers the Section 10 Rivers and Harbors Act permitting program. Both permitting programs are part of the [Department of the Army Regulatory Program](#).

The Corps' headquarters is located in Washington, D.C., and the agency is divided regionally into 9 Divisions, each of which is commanded by a Division Engineer. There are 43 Districts within the 9 Divisions, each of which is commanded by a District Engineer. Although regulations and general program policies are developed at the headquarters level, other aspects of the Corps' regulatory program are very decentralized, with most permitting and enforcement decisions being made on a regional level. For instance, final agency decisions on most administrative appeals are made by the Division Engineers. See [33 C.F.R. § 331](#). General permits may also be issued on a regional basis, as well as national basis. See Chapter 6, *infra*.

A map of the Corps' [Divisions and Districts](#) is included below:



Corps of Engineers Map from [Corps Website](#)

For more information about the Corps, [American Rivers](#) and the [National Wildlife Federation](#) have prepared a useful guide to the history and structure of the agency and its programs. See [Melissa Samet, American Rivers & National Wildlife Federation, A Citizens Guide to the Corps of Engineers 10 \(2009\)](#).

B. Environmental Protection Agency

The [Environmental Protection Agency](#) is an independent agency within the Executive Branch and it administers most of the nation's environmental laws. For wetlands, EPA developed the guidelines that are used to evaluate Section 404 permits, the agency reviews and comments on the permits, and it can veto permits. See [33 U.S.C. § 1344\(c\)](#). EPA also shares wetlands enforcement authority with the Corps. See Chapter 10, *infra*.

EPA is headed by an Administrator and has its headquarters in Washington, D.C. See [U.S. Environmental Protection Agency, About EPA](#). The agency is divided into [ten regions](#), each of which is headed by a Regional Administrator. Development of regulations and national policies on wetlands takes place in the [Office of Water](#), within EPA's headquarters in Washington. However, daily administration of the agency's

responsibilities related to permitting and enforcement under the 404 program takes place in the regions, in coordination with headquarters. Unlike the Corps, though, EPA's administrative appeals are handled by an [Environmental Appeals Board](#), headquartered in Washington. In the event that there are disputes between EPA and the Corps regarding individual permits, EPA's Assistant Administrator for Water (head of the Office of Water), makes final decisions regarding permit vetoes. A map of EPA's regional office structure is included below:



EPA Map from [EPA Website](#)

C. U.S. Fish and Wildlife Service

The [U.S. Fish and Wildlife Service](#) is an agency within the Department of the Interior (DOI). The agency is headed by a Director, who reports to the Assistant Secretary for Fish, Wildlife and Parks in USDA, and it is divided into 8 regions. See [U.S. Department of the Interior, U.S. Fish and Wildlife Service, Our Regions](#). The agency reviews and comments on Section 404 permits and Rivers and Harbors Act permits based on authority in the Fish and Wildlife Coordination Act and the Clean Water Act. The agency also administers the National Wetlands Inventory.

D. Natural Resources Conservation Service

The [Natural Resources Conservation Service](#) is an agency within the Department of Agriculture (USDA). It is headed by a Chief, who reports to the Under Secretary for Natural Resources and the Environment in DOI, and it is divided into 4 regions, which are headed by Regional Conservationists. See [U.S. Department of Agriculture, Natural Resources Conservation Service, National Headquarters Directory](#). The agency administers the Swampbuster provisions of the Food Security Act and administers several economic incentive programs for protection of wetlands on agricultural lands.

See *supra*.

E. U.S. Department of Justice, Environment and Natural Resources Division

While many disputes involving wetlands are resolved administratively, without going to court, wetland litigation for the Corps, EPA and other federal agencies is handled by the [Environment and Natural Resources Division](#) of the United States Department of Justice. Within the Division, the [Environmental Defense Section](#) handles wetlands enforcement as well as defense of most lawsuits against the Corps and EPA involving actions relating to the Section 404 permitting program. For a history of the Division, see [Richard J. Lazarus, *One Hundred Years of the Environment and Natural Resources Division*, 41 ELR 10985 \(Nov. 2011\)](#); [U.S. Department of Justice, *ENRD: Public Lands and National Treasures: The First 100 Years of the Environment and Natural Resources Division* \(2009\)](#).

Interview



Stephen Samuels, an Assistant Section Chief in the Environmental Defense Section of the Environment and Natural Resources Division of the U.S. Department of Justice, discusses:

- The division of responsibility for wetlands litigation within the Environment and Natural Resources Division ([YouTube](#)).
- How the Environmental Defense Section represents multiple federal agencies that may take conflicting positions on issues in litigation ([YouTube](#)).
- The role that DOJ's Environment and Natural Resources Division plays in developing regulations and legislation, focusing specifically on legislative and regulatory initiatives to clarify the scope of the "waters of the U.S." ([YouTube](#)).

Research Problems

Agency Contacts: You represent a landowner in Charleston, South Carolina, who is interested in obtaining a wetlands permit from the Corps. You understand that the Regulatory Section of the Corps issues those permits at the District level. What telephone number would you call for more information about the permitting process? If you ultimately needed to appeal a decision of the District Office, to what Divisional Office would you appeal?

Assume that your client lives in Langhorne, Pennsylvania, instead of Charleston, and that your client is a neighbor of a developer who is filling wetlands without a permit. Your client wants to speak to someone at EPA about the violation in their office, rather than on the phone. Where is the closest Regional Office located?

Hypothetical

Environmental law can be a complex area of practice. It often involves an intricate web of federal, state and local laws, regulations and policies, and the disputes may focus on complicated scientific principles. Consider that as you read the following dialogue between a lawyer and a client regarding a wetlands matter. The lawyer has practiced family law for twenty-five years and specializes in divorce cases. The client has retained the lawyer to finalize the terms of the client's third divorce.

Scene: Lawyer's office in Whitefish, Montana

Client: Well, three times was not the charm. I guess I keep you pretty busy, don't I?

Lawyer: I'm sure that you'll find true love one of these days. But until you do, I'm happy to help you move on with your life.

Client: Thanks. You do a great job and I'm very happy with your work, but I would like it if I didn't need to keep seeing you like this every few years. While I'm here, though, I had a question about a different issue. Do you do any environmental law?

Lawyer: If someone's got an environmental law question, I usually try to stay as far away from those as I can.

Client: I don't think this one is that tough. Here's the thing. You know that my daughter just graduated from college with an environmental science degree.

Lawyer: That's great. Congratulations.

Client: Thanks. Well, she's visiting a few weeks ago and she tells me that she thinks that this little ditch in my backyard is a wetland. I told her that I was going to be filling it in to build a garage back there and she told me that I might need to get a permit to do that. She said something about a Clean Water Act. Does the city require permits for things like that? I know that I had to get a permit from P&Z when I re-built my deck, but I didn't know that they made you get permits to fill ditches.

Lawyer: Like I said. I really have never handled any environmental cases, so I'm not sure about whether the city or anyone else would require a permit for that. My sister is a lawyer, too, and she deals with a lot of environmental matters in her real estate practice. I'd give her a call, but we're not really talking right now. I've got a friend in town who does hazardous waste law. He might know something about wetlands and I could probably call him, but he's on vacation until next week.

Client: Next week would be o.k. I'm not planning to do anything about the garage for a while, but I just wanted to know if I would need to get a permit **before** I did anything.

Lawyer: I'll do a little research on it, then, and get back to you. But you know, I really don't feel right about charging you for that, since I don't really do environmental law. This one will be on the house.

Client: Well, that's nice of you, but I really would feel better if I paid you for it.

Lawyer: I insist. No charge on this one. I'll look into it and get back to you as soon as I can. And I should have those papers for the divorce ready for you to sign tomorrow.

Client: Thanks. So I'll stop back tomorrow, then.

(Client leaves)

Lawyer: Sam, could you call Paul's office and see if he has some time to talk about a wetlands issue?

Sam (Lawyer's assistant): I would, but he's on vacation for the next month.

Lawyer: A month? I thought that he was getting back next week.

Sam: No. It's a month. He rented an RV and took the family to see all of the national parks in California.

Lawyer: Oh, well. I guess he won't be any help, then. Pat, I've got some research for you to do.

Pat (Lawyer's paralegal): O.K. What do you need?

Lawyer: I need you to find out whether someone needs to get a permit to fill a ditch to build a garage. Our client says that his daughter thinks that the ditch is a wetland and that the Clean Water Act might require him to get a permit to fill the ditch.

Pat: I'll get right on it.

(Pat does some research and returns)

Pat: Good news. I searched through the whole Clean Water Act online and it only mentions wetlands a few times, but doesn't say anything about requiring a permit to fill wetlands. It does have a few different permit programs, but they are only triggered if there is an addition of a pollutant to a navigable water. You said that the client was asking about a ditch, right?

Lawyer: Yeah. The client said a ditch. The client's daughter said a wetland. Neither of them said anything about a navigable water. I would imagine that a navigable water is something that you can navigate, right?

Pat: Well, I checked the regulations, and it's actually a little broader than that. It turns out that it's the federal government - EPA and the Army - that administer the Clean Water Act. It's not a local government thing. They've adopted regulations to define navigable waters. I didn't see anything in the regulations about ditches, though, so I think that our client can go ahead and fill the ditch without worrying about getting a permit.

Lawyer: That's great. Thanks for finding that so quickly. I guess this environmental law isn't that tough, after all. I'm sure our client will be happy to hear that they can go ahead and fill the ditch. I'll call the client right now and fill them in on the good news.

Lawyer (on the phone): Jordan, good news. I did some research on your wetlands issue and it looks like you won't need a permit. You can go ahead and get started on your garage whenever you like.

Question

Were you troubled, in any way, by the lawyer's representation of the client on the wetlands issue in the scenario above? Is it relevant that the lawyer was not paid for the advice? What should the lawyer have done differently? See [American Bar Association, Model Rule of Professional Conduct 1.1 \(and accompanying comments\)](#).

Chapter Quiz

Now that you've finished Chapter 2, why not try a CALI lesson on the material at <http://www.cali.org/node/10719>. It should only take about fifteen minutes.

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