

Federal and State Roles in Protecting Wetlands

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WETLANDS



Regulatory Definitions of Wetlands

Corps/EPA:

“areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”

Fish and Wildlife Service:

Areas having at least one of the following characteristics:

- 1. Periodically supports aquatic plants;**
- 2. Has substrate that remains saturated long enough to support aquatic vegetation; and,**
- 3. Covered with shallow water at some time during the growing season.**

Wetland Delineations



1987 Corps-EPA MOA on Wetland Delineations

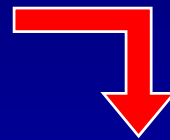
- **“Day to day” wetland determinations were delegated to the Corps; however, the EPA retained the authority to make wetland determinations in “special cases.”**
- **Corps must adhere to EPA guidelines and agency decisions concerning the geographic scope of the 404 program.**

Wetland Functions and Values

- **Prevent flooding and erosion**
- **Filter out harmful pollutants**
- **Habitat for endangered species**
- **Nesting grounds for birds and spawning grounds for commercial fish**
- **Source of recreation and income**

Wetland Losses in Conterminous United States

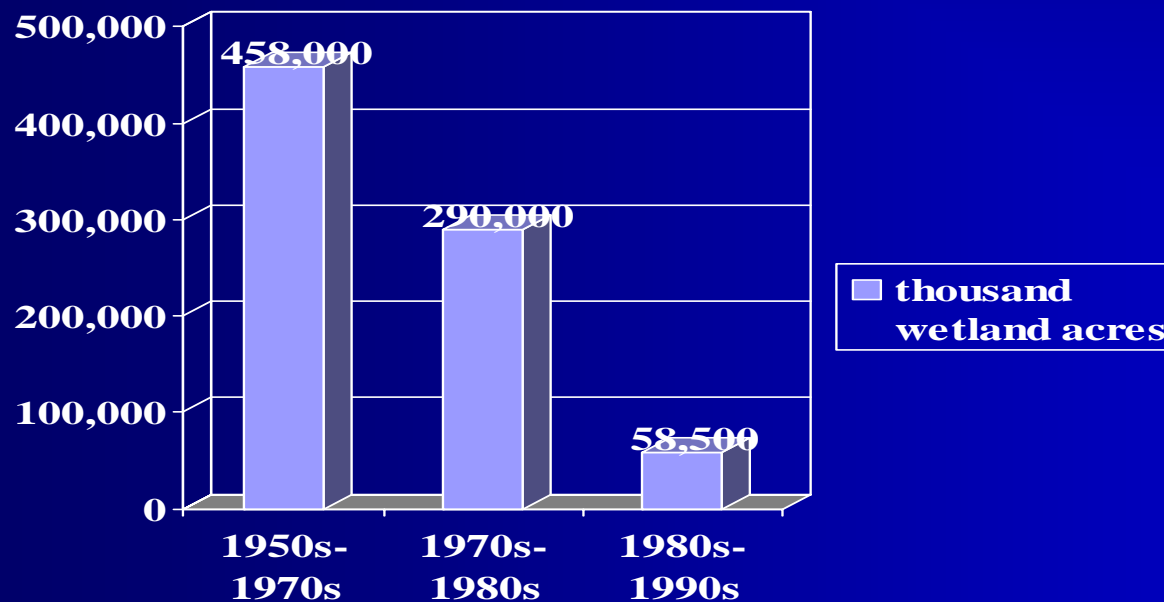
1700's: 221 million acres



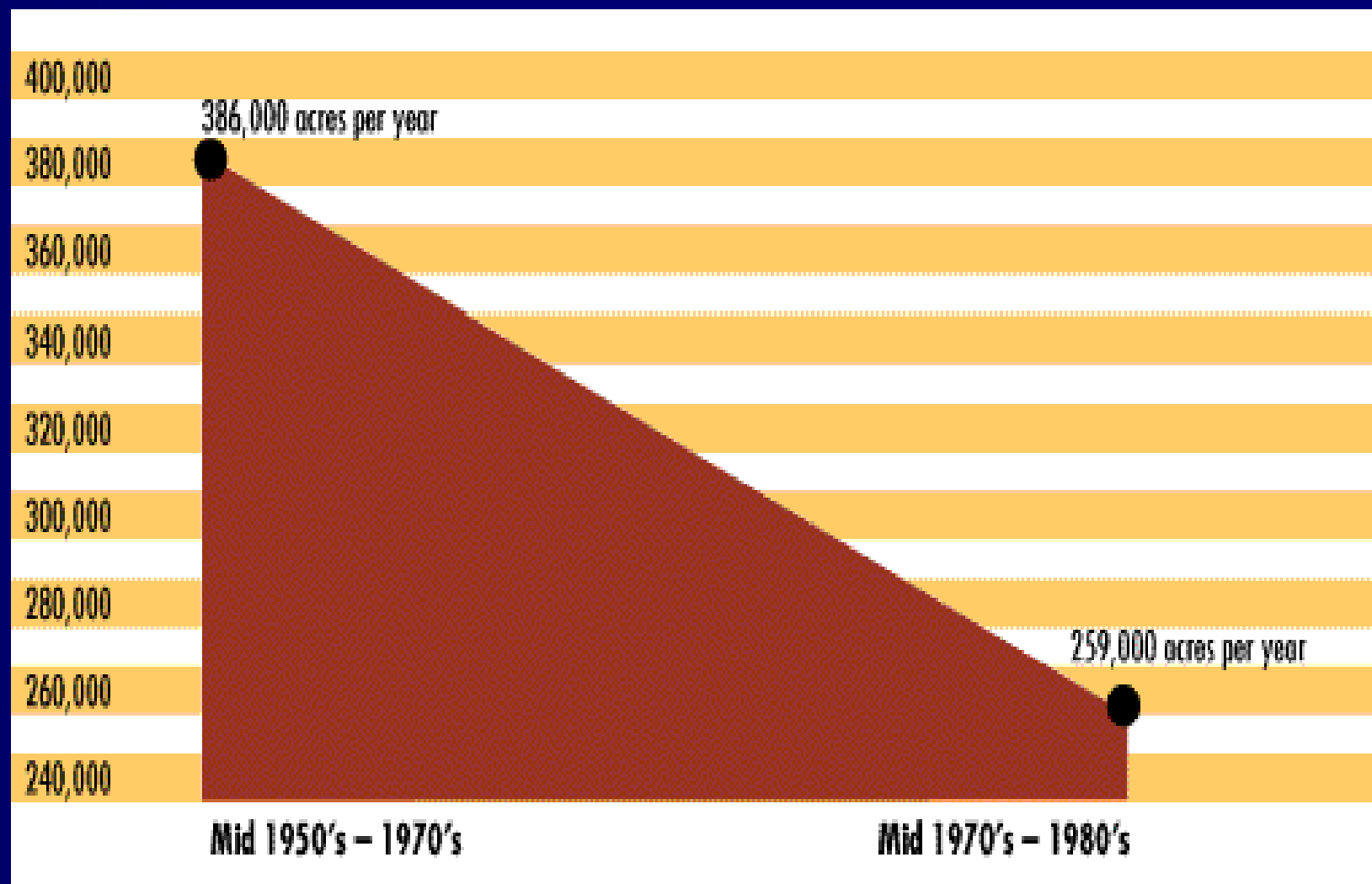
1990's: 105.5 million acres



52% loss



Southeast Wetland Losses



Corps' Regulatory Authority

- **Section 10 of the Rivers and Harbors Act of 1899**
- **Section 404 of the Clean Water Act of 1972**

Section 10

- **Extends to the Ordinary High Water Mark of Navigable Waterbodies**
- **Requires Permit for all Activities affecting the Water's Course, Location, Condition and Capacity**

Clean Water Act Section 404



Authorizes Corps to regulate:

**Discharge of Dredged or Fill Material into
Waters of the U.S.**

A scenic landscape featuring a river or stream in the foreground, surrounded by lush green trees and vegetation. In the background, there are rolling hills or mountains under a cloudy sky. The overall scene is peaceful and natural.

WATERS OF THE U.S.

- **Navigable Waters**
- **Interstate Waters**
- **Other Waters, The Use, Degradation or Destruction Of Which Could Affect Interstate Commerce**
- **Impoundments**
- **Tributaries To Any Of The Above**
- **Territorial Seas**
- **Wetlands Adjacent To Any Of The Above**

Navigable Waters



Water presently used, historically used, or susceptible to use for transport of interstate or foreign commerce.

Corps Expands “Navigable Waters”

- Phase I (1975): navigable waters and adjacent wetlands.
- Phase II (1976): Lakes over five acres and adjacent wetlands and tributaries Phase I waters.
- Phase III (1977): All other waters of the United States which are necessary for water quality.

Challenges to Corps' Authority

(1985) U.S. v. Riverside Bayview Homes

****led to the inclusion of all wetlands adjacent to navigable or interstate waters and tributaries under “navigable waters”**

Decision's Impact

404 becomes Corps' primary statutory authority to regulate wetlands

Caused confusion over Corps' jurisdiction

Waters that could affect interstate commerce

- **Migratory Bird Rule**
- **Waters which make up an endangered species habitat.**
- **Waters used to irrigate crops sold in interstate commerce.**

(1990-1993) Circuits Split over Corps Jurisdiction

**Employed commerce clause to uphold migratory bird rule. *Hoffman Homes, Inc v. E.P.A.* (7th Cir. 1993).
Leslie Salt Co. v. United States (9th Cir. 1990).**

**Migratory bird rule not connected to the term “navigable.”
United States v. Wilson (4th Cir. 1997)**

**(2001) Solid Waste Agency of Northern Cook County v. Corps
“SWANCC”**

SWANCC:



Based on lack of authority under the CWA,
Corps could no longer claim jurisdiction of
intrastate isolated nonnavigable waterways
using the migratory bird rule

Interpretations of *SWANCC*

Narrow interpretation: *SWANCC* only invalidated the migratory bird rule. Corps can assert jurisdiction over non-navigable or isolated waters that connect in some way to interstate or navigable waters.

Broad interpretation: Corps can only regulate waters that are either navigable in fact or law and its adjacent wetlands.

What happens now?

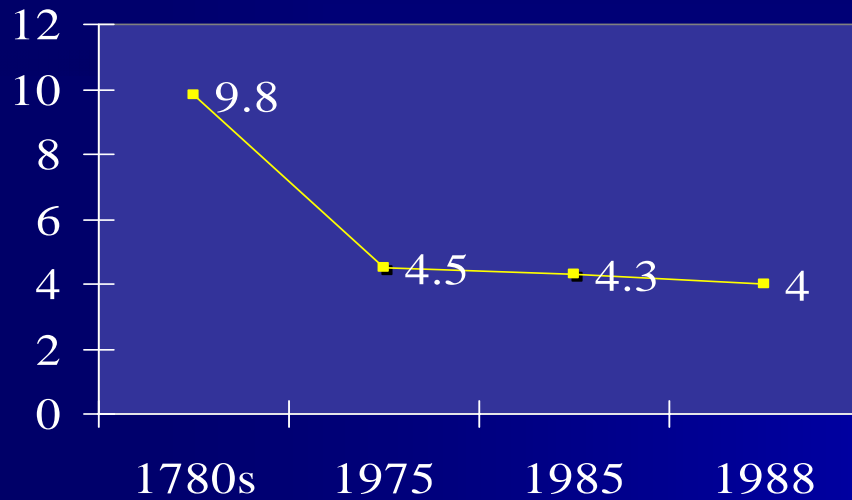
- **How far will the courts go to find a navigable water connection?**
- **Corps must establish a sufficient nexus between the subject water body and a navigable water.**
- **How will courts interpret adjacency?**

WATERS OF THE UNITED STATES

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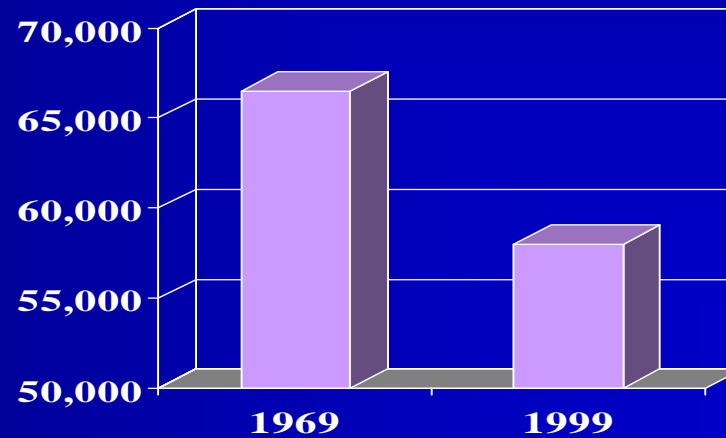


Wetland losses in Mississippi



Total Loss = 59%

■ Coastal wetland acreage



Primary causes of wetland loss in Mississippi

- Conversion to agriculture
- Commercial and residential development
- Agricultural and industrial runoff
- Highway and flood control projects

The Mississippi Approach

- **Coastal Wetlands Protection Act**
- **The Mississippi Coastal Program**
- **The 401 Water Quality Certification Program**
- **The Mississippi Air and Water Pollution Control Law**
- **The Mississippi Storm Water Management District Act**
- **Wildlife Heritage Fund**
- **Migratory Waterfowl Stamp Program**
- **Mississippi Natural Heritage Law of 1978**

Mississippi's Coastal Wetlands



**Coastal Wetlands
Protection Act**

**The Mississippi Coastal
Program**

Mississippi's Freshwater Wetlands

- ✓ Latest assessment revealed 4, 067,000 acres
- ✓ Covers 14% the state's land surface
- ✓ State legislature has not enacted a law specifically designed to regulate freshwater wetlands

401 Water Quality Certification Program

Required before issuance of 404 permit

Administered by MDEQ

- 1. Feasible alternative?**
- 2. What are the direct impacts?**
- 3. Compliance with water quality standards and designated uses?**

Air & Water Pollution Control Law

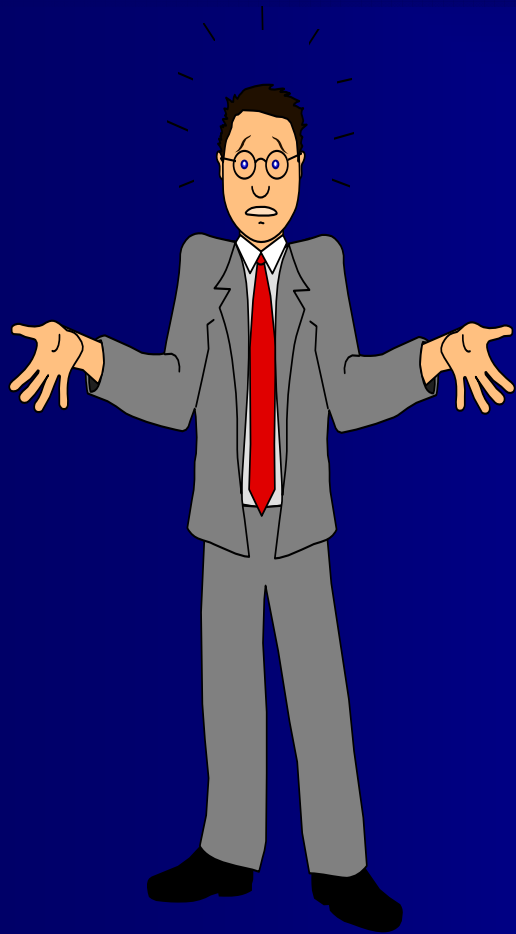
- **The Mississippi Air and Water Pollution Control Law limits state regulatory authority to “waters of the State.”**
- **To not be considered a “water of the State” the waterbody must be hydrologically landlocked on private property and not subject to regulation under the CWA.**

The Fish and Wildlife Classification



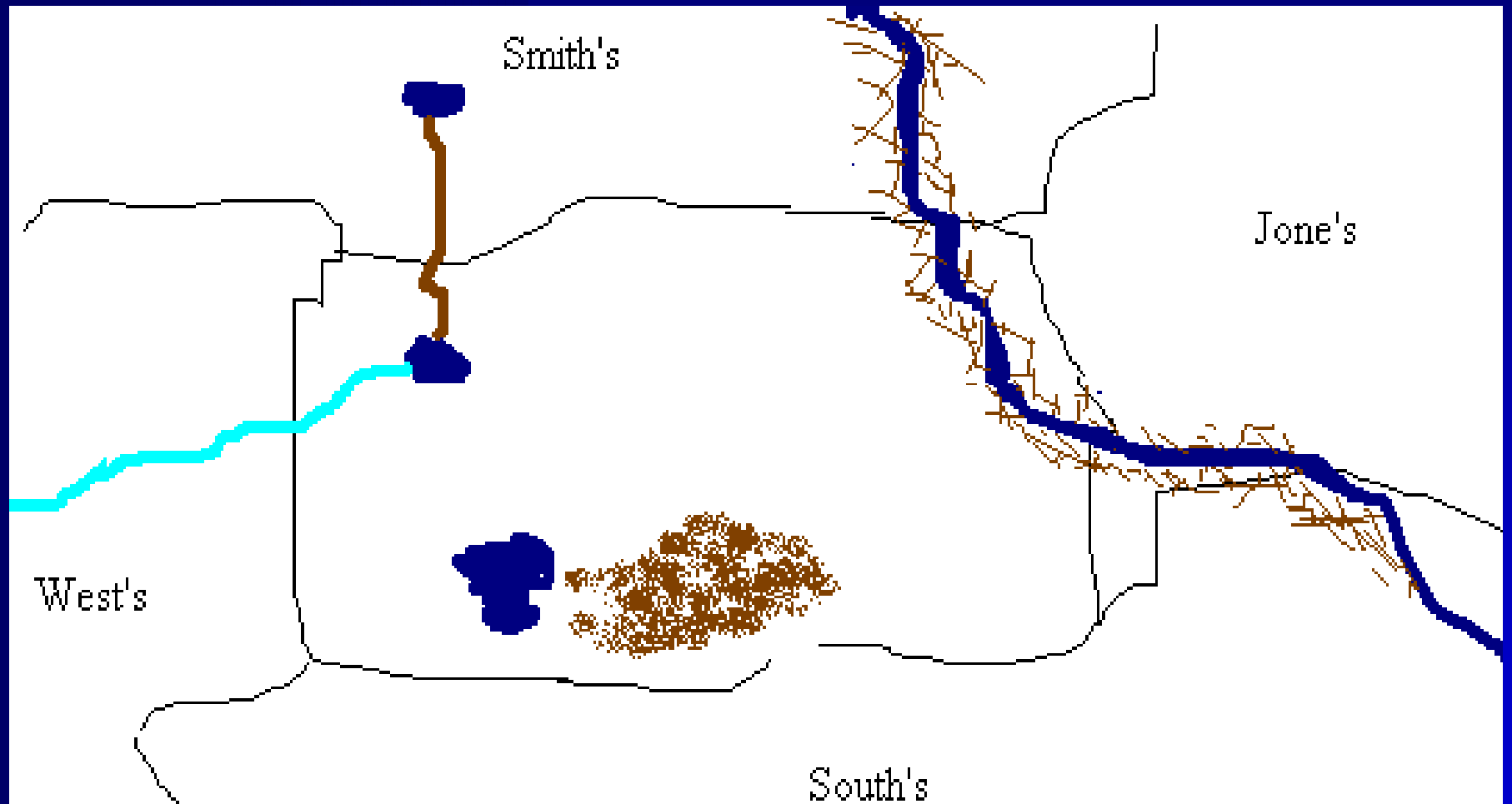
- **Fishing**
- **Support aquatic life and wildlife**
- **Secondary contact**

Problems Associated with Fish & Wildlife Classification



What about other wetland values like flood prevention and pollution control?

Hypothetical



Proposed changes

Adopt a Wetlands Protection Act

VS

Amend existing laws

VS

New MDEQ regulations

Options in Mississippi

LOCAL GOVERNMENTS

- **The Mississippi Storm Water Management District Act**

PRIVATE CITIZENS

- **Wildlife Heritage Fund**
- **Migratory Waterfowl Stamp Program**
- **Mississippi Natural Heritage Law of 1978**

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Contact us!

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