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LAND USE FOR A LIFETIME:

Changing Demographics & Shifting Priorities

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**Trouble with the Feds:
An Overview of Federal Constitutional and
Statutory Issues in Local Urban Planning
and Zoning Law**



Trouble with the Feds: An Overview of Federal Constitutional and Statutory Issues in Local Urban Planning and Zoning Law

- **Moderator:**
 - **Julian Juergensmeyer, Professor of Law, Georgia State University**
- **Speakers:**
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Existing and Obvious Environmental Policies

- The Clean Air Act (**CAA**)
- The Safe Water Drinking Act (**SWDA**)
- The Clean Water Act (**CWA**)
- The Resource Conservation and Recovery Act (**RCRA**)
- The Comprehensive Environmental Response, Compensation and Liability Act (**CERCLA**)
- National Environmental Protection Act (**NEPA**)
- The Emergency Planning and Right to Know Act (**EPCRA**)
- The Toxic Substances Control Act (**TSCA**)
- The Federal Insecticide, Fungicide, and Rodenticide Act (**FIFRA**)

Embedded Environmental Regulations

- **Farm Bill**
- **Federal Power Act**
 - Energy Policy Act of 1992
 - Energy Policy Act of 2005
- **Migratory Bird Treaty Act of 1918**
- **IRS Code**
 - IRC § 170(h)
 - IRC § 4681 and 4682
- **Department of Transportation Act**
- **Food Security Act**
- **FDA**
- **Securities Act**
- **State Level Regulations**



Farm Bill

- **Food, Conservation, and Energy Act of 2008:** 2008 update to omnibus legislation for agricultural policy
 - Includes provisions on food stamps, agricultural subsidies, and crop insurance
- Specifically includes:
 - Support for biomass research, development, and production
 - Conservation programs including the Conservation Reserve Program, Environmental Quality incentives Program, and the new Conservation Stewardship Program
- Results: Shifts focus of conservation portfolio from land retirement to environmental protection of agricultural lands in production and production of biofuels

Federal Power Act

- **Federal Power Act (Federal Regulation and Development of Power):** intended to more effectively coordinate the development of hydroelectric projects in the US
- **Specifically includes:**
 - Created Federal Energy Regulatory Commission
 - Important amendments include Energy Policy Act of 1992, Energy Policy Act of 2005
- **Results:** Creation of authority charged with regulation of sustainable energy production

Energy Policy Act - 1992

- **Energy Policy Act of 1992:** set goals, created mandates, and amended utility laws to increase lean energy use and improve energy efficiency
- Specifically includes:
 - Reducing energy usage in federal buildings
 - Federal fleet fuel usage requirements
- Results: Electric power deregulation, building codes, and new energy efficient products



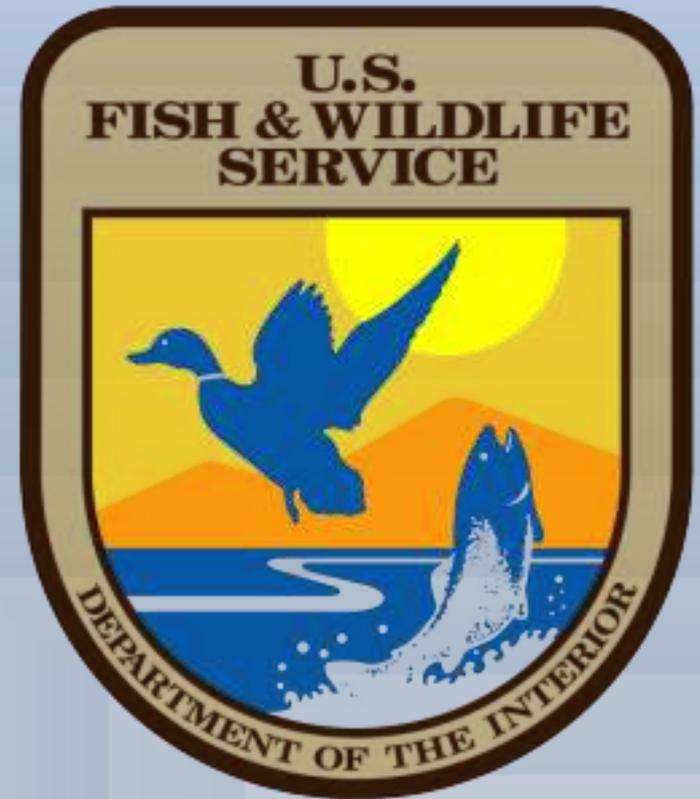
Energy Policy Act - 2005

- **Energy Policy Act of 2005:** provides tax incentives and guarantees for diversification of energy production
- Specifically includes:
 - Includes the Energy Efficient Commercial Buildings Tax Deduction – aimed at reducing cost of investing in energy efficient design
 - Tax reductions by power production area, with \$2.7 billion to extend the renewable electricity production credit
- Results: Promotes land use for renewable energy production as well as the construction of energy efficient buildings



Migratory Bird Treaty Act of 1918

- **Migratory Bird Treaty Act:** protection migratory birds between the US and Canada
- **Specifically:**
 - Prohibits removal of all listed species or their parts from private property
 - Allows implication that relocation is undue harm
 - Includes lists of all species covered
- **Results:**
 - Until 2001, allowed application of Clean Water Act to cover regulation of isolated waters that would be used as habitat by migratory birds that cross state lines
 - Can still prevent development of migratory bird habitat





Department of the Treasury
Internal Revenue Service

IRS Code

- **IRC § 170(h):** creates a federal tax income deduction and establishes required conservation purposes
- **Specifically:**
 - Lists perpetual conservation or historic conservation easement, a remainder interest, or the entire interest of the donor (other than a qualified mineral interest) as acceptable
 - IRS also added conservation easements to “Dirty Dozen” list of abusive transactions, although it has since been removed
- **Results:**
 - Mass audit of conservation easements to ensure claimed deduction value was accurate has resulted in reluctance to use IRS deduction

IRS Code

- **IRC § 4681 and 4682: 1990 imposition of excise taxes on the importation, sale, or use of ozone depleting chemical (ODCs) or items manufactured with ODCs**
- **Specifically:**
 - Excise tax on the sale or use of ODCs by the manufacturer, producer or importer of the ODC, and the sale or use in the United States by the importer of any “imported taxable products”
 - A floor stock tax on any person (other than the manufacturer or importer of the ODCs) that holds ODCs for sale or for use
- **Results:**
 - Reduction in production and use of ODCs in the US

Calendar Year	Base Tax
2000	\$7.60
2001	\$8.05
2002	\$8.50
2003	\$8.95
2004	\$9.40
2005	\$9.85
2006	\$10.30
2007	\$10.75
2008	\$11.20
2009	\$11.65
2010	\$12.10

The base tax amount is determined based on the year of sale or use of the produced, manufactured, or imported ODC. Under IRC § 4681(b)(1)(B), the base tax amount on the sale or use of an ODC after 1995 is \$5.35 per pound. In each year after 1995, the base tax amount is increased by 45 cents per pound.

Department of Transportation Act

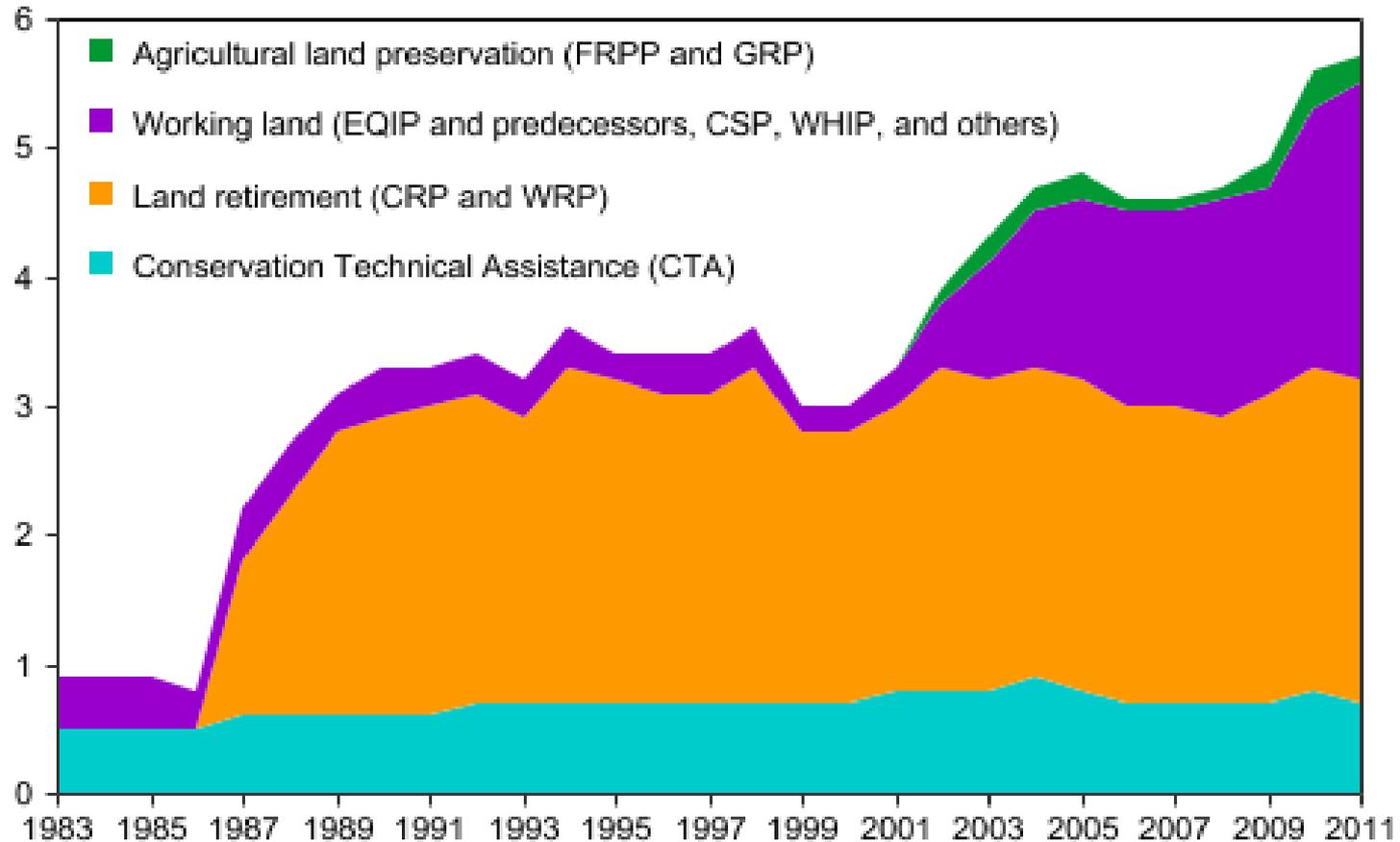
- **9 U.S.C. §303 and 23 U.S.C. §138 (DOT Act of 1966 Section 4(f)):** FHWA and other DOT agencies can't approve the use of land from public land unless meets exception
- **Specifically:**
 - US DOT must evaluate all publicly owned parks, recreation areas, and wildlife or waterfowl refuges, or any publicly or privately owned historic site
 - If US DOT determines that a transportation use of Section 4(f) property results in a de minimis impact, analysis of avoidance alternatives are not required and the Section 4(f) evaluation process is complete Includes lists of all species covered
 - Otherwise, 4(f) evaluation must be undertaken and if there is an alternative that avoids Section 4(f) properties it must be selected
- **Results:**
 - Restricted development of highway projects in an attempt to protect greenspace and with consideration of historic preservation

Food Securities Act

- **Swampbuster and Sodbuster (Food Securities Act of 1985):** discourage conversion of wetlands to croplands, and discourages the plowing of erosion-prone grasslands for use as cropland, respectively
- **Specifically:**
 - Producers converting a wetland or erosion prone area to cropland lose federal farm benefits
- **Results:**
 - Has in some cases preserved soil losses and preserved wetlands
 - May have led to underreporting of violations to avoid citing farmers with subsequent ramifications
 - Variable implications of loss of federal farm benefits, may not provide sufficient incentive

Trends in major USDA conservation program expenditures, 1983-2011

\$ billion (2010 dollars)



Source: ERS analysis of USDA Office of Budget and Policy Analysis (OBPA) data.

Agricultural land preservation represent Sodbuster and Swampbuster programs

FDA

- **National Environmental Policy Act of 1969 (NEPA):** requires FDA to evaluate all major agency actions to determine if they will have a significant impact on the human environment
- **Specifically:**
 - Requires an environmental impact assessment or a categorical exclusion for: Investigational New Animal Drug exemptions, New Animal Drug Application, Abbreviated New Animal Drug Application, Food Additive Petition, Investigational Food Additive File, Supplemental applications submitted to an
- **Results:**
 - Allows for potential impacts to be disclosed and understood by the lead agency and public in advance of implementing of the action

Securities Act

- **Securities Act Rule 408 and Exchange Act Rule 12b-20:** requires a registrant to disclose such further non financial statements related to climate change
- **Specifically:**
 - Material effects that compliance with laws regarding the discharge of material into the environment may be having on finances
 - Describe any legal proceedings related to environmental litigation
 - Disclosure of potential environmental impacts that may make investment risky
- **Results:**
 - Potential of driving away investors due to financial risks associated with climate change legislation compliance leads to voluntary investment in mitigating technologies

State Level Regulation



John Hickenlooper

- **Enforcement of federal directives:** state agencies ensure compliance with federal regulation, and also establish standards for constitutionality interpretation of local actions
- **Examples:**
 - Mortgager's Warranty of Compliance with Environmental Laws and Regulations
 - Choice of takings constitutionality test
 - Permitting for shoreline construction
- **Results:**
 - Local regulations must comply with state level policy. Recent shifts to redistribute land use regulatory power from local to the state level will have further impacts

Any Questions?