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SLIDES: Rapanos and the Courts: Navigating Through the Fog

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Rapanos and the Courts: Navigating Through the Fog



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“Waters of the United States”

- Congressional history and the Act’s focus on comprehensive water protection shows that Congress intended to broadly protect waters.
- The EPA and Corps have historically defined “WOUS” under regulations to cover virtually all important surface waters, including so-called “isolated” waters and intermittent streams (*E.g.* 33 C.F.R. § 328.3(a)).
- Historically, courts have upheld broad protections. (*E.g.* *U.S. v. Riverside Bayview Homes*, 474 U.S. 121 (1985)).
- Definition applies to THE ENTIRE Act, and is NOT program specific.



Solid Waste Agency of Northern Cook County ("SWANCC") v. Corps,
531 U.S. 159 (2001).

- Under the CWA, Corps cannot regulate geographically isolated ponds based on migratory bird use alone.
- Did not invalidate any regulatory provision.
- Statutory, not constitutional, ruling.
- 5-4 decision with long and passionate dissent.



Rapanos v. United States, 547 U.S.
715 (2006).

- Two consolidated 6th Circuit cases (*Rapanos* and *Carabell*) that involved wetlands adjacent to non-navigable tributaries of navigable waters.
- Fractured 4-1-4 decision with no majority agreement on what is a WOUS.
- Five Justices voted to remand the cases to the lower court for further factual findings, but disagreed as to applicable test and adopted contrary rationales.
- Four member dissent would uphold protections.



Rapanos continued

- All Justices agree CWA protects more than traditionally navigable waters.
- Two tests for protection of waters at issue:
 - Scalia Plurality test:
 - CWA protects “relatively permanent waters;” and
 - Wetlands with a “continuous surface connection” to RPW or TNW.
 - In a footnote, plurality says it does not mean to exclude “seasonal” waters from protections.
 - Kennedy – “significant nexus” test for some adjacent wetlands.
- Dissent would protect waters under either test.

"Significant Nexus" test

- [W]etlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."

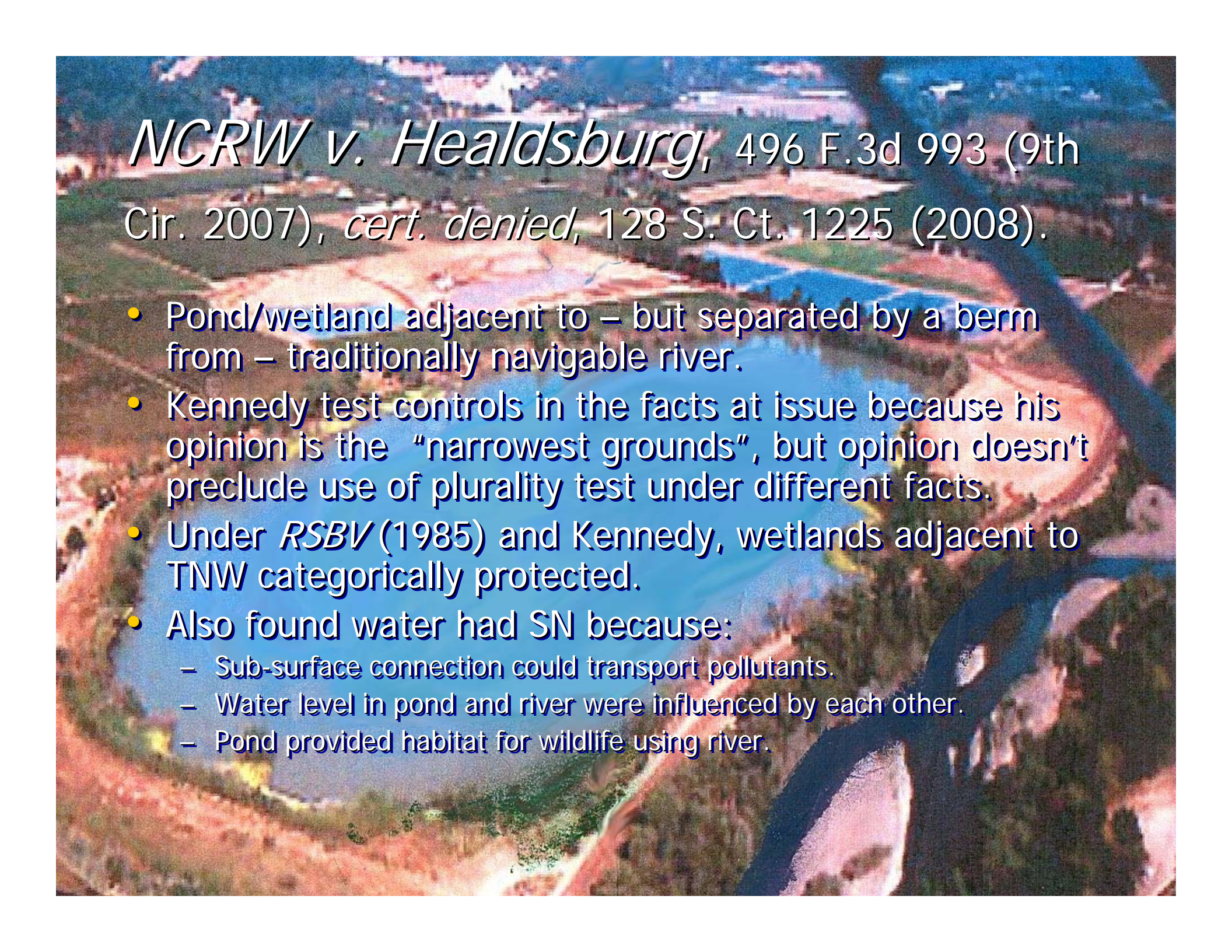
Significant Nexus Test

- Looks at ecological relationship between wetlands and traditionally navigable waters.
- Looks at individual *and* aggregate affects of wetlands on larger waters.
- Is not expressly applied to non-navigable tributaries on a case-by-case basis and indicates current regulatory definition may be adequate to establish protection for non-navigable tributaries.
- States that “adjacency alone” is sufficient to confer jurisdiction upon wetlands adjacent to TNW
 - Finds Corps’ definition of adjacency (which defines adjacent as “neighboring” and does not require a hydrological connection) to be “reasonable.”

An aerial photograph of a river valley. In the foreground, a large concrete dam structure is visible, partially obscuring the view. The river flows through a lush, green valley, surrounded by dense forests. The background shows rolling hills and mountains under a clear sky. The overall scene is a natural landscape with significant human infrastructure.

INTERPRETING *RAPANOS*

- Six circuits have ruled on *Rapanos*, a decision is pending from another.
- Circuit Split regarding what the holding of *Rapanos* is and which opinion or opinions control.
 - Either test (1st); Kennedy only (11th); Kennedy in facts at issue (7th and 9th); declined to decide (5th and 6th)
- General level of frustration among judges.
- Some inconsistent guidance on application of SN test, but indication functions such as flood control, pollution prevention and habitat provision constitute a SN.

An aerial photograph showing a landscape with a river, a pond, and surrounding vegetation. The river is a prominent feature, winding through the area. The pond is located adjacent to the river, separated by a berm. The surrounding area is a mix of green and brown, indicating a natural, somewhat undeveloped environment.

NCRW v. Healdsburg, 496 F.3d 993 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 1225 (2008).

- Pond/wetland adjacent to – but separated by a berm from – traditionally navigable river.
- Kennedy test controls in the facts at issue because his opinion is the “narrowest grounds”, but opinion doesn’t preclude use of plurality test under different facts.
- Under *RSBV* (1985) and Kennedy, wetlands adjacent to TNW categorically protected.
- Also found water had SN because:
 - Sub-surface connection could transport pollutants.
 - Water level in pond and river were influenced by each other.
 - Pond provided habitat for wildlife using river.



U.S. v. Johnson, 467 F.3d 56 (1st Cir. 2006), *reh'g and reh'g en banc denied* (2007), *cert. denied*, 128 S. Ct. 375 (2007).

- Massachusetts case involving unpermitted conversion of wetlands to cranberry bogs in upper Buzzards Bay basin.
- Reissuance of pre-*Rapanos* decision that upheld jurisdiction due to hydrological connection.
- Remanded to lower court in light of *Rapanos* with instruction that lower court could assert jurisdiction under either plurality or Kennedy test.
- Affirmed that under Kennedy test wetlands adjacent to TNW are categorically jurisdictional, but little other guidance as to application of either test.
- Case has yet to be re-tried.



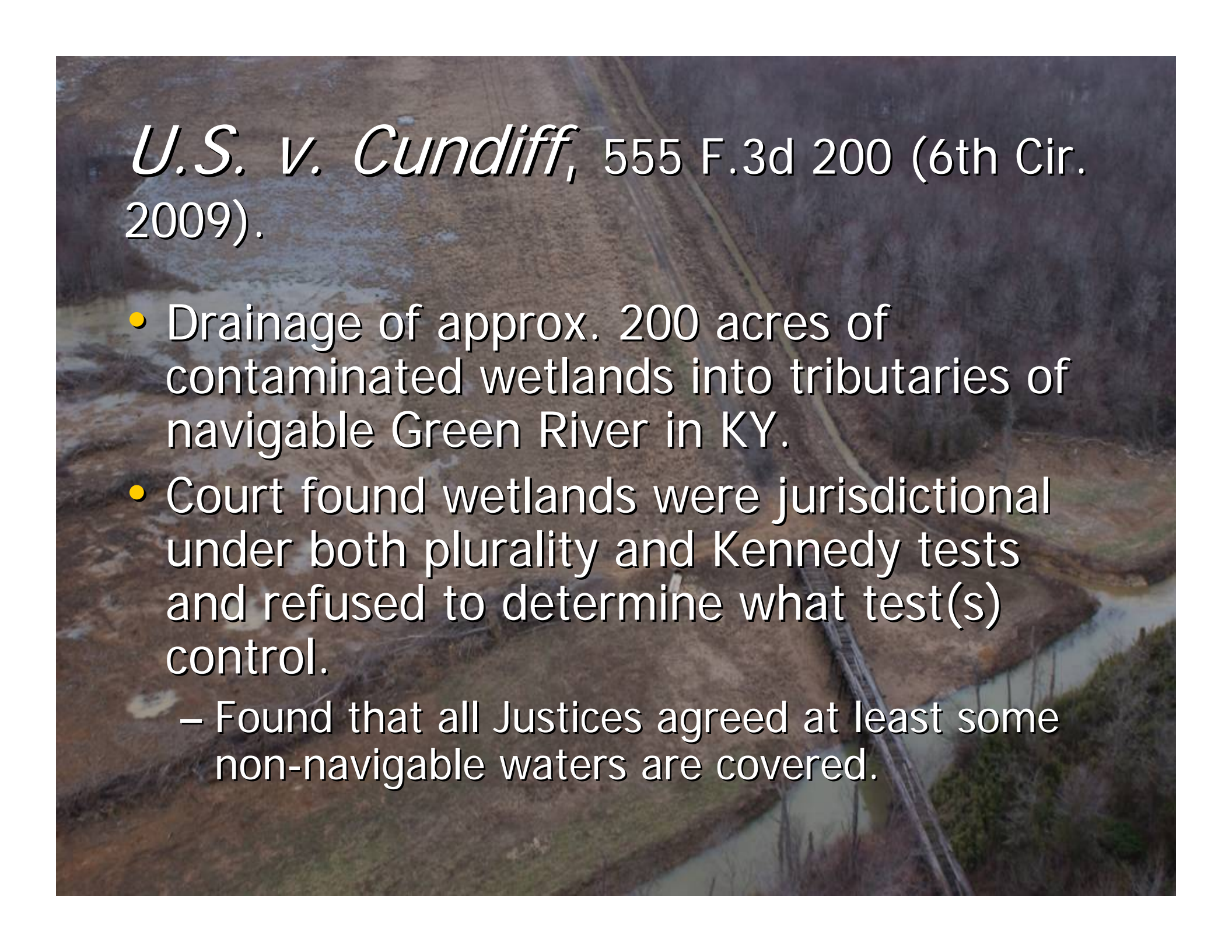
U.S. v. Robison (McWane), 505 F.3d 1208 (11th Cir. 2007), *cert. denied*, 129 S. Ct. 627 (2008).

- Criminal case involving industrial discharges of grease, heavy metals, and trash into perennial tributary of navigable Black Warrior River in Alabama.
- Jury conviction of discharger overturned on appeal.
 - Court ruled only Kennedy test applies.
 - Applied Kennedy test to tribs (Kennedy did not).
 - Said although stream most likely satisfied plurality test, government must show SN and jurisdiction cannot be established under plurality opinion.
- U.S. Supreme Court denied pet. for cert. filed by OSG in December 2008.



Robison (McWane) Continued

- Lower court judge declined to re-hear case based on the incoherent nature of both the *Rapanos* and *Robison* decisions. (521 F. Supp. 2d 1247 (N. D. Ala. 2007).).
 - Judge stated he was “so perplexed by the way the law applicable to this case has developed it would be inappropriate for me to try it again.”
 - Judge said “he will not compare the [*Rapanos*] ‘decision’ to making sausage because it would excessively demean sausage makers.”
 - Judge concluded “the [Supreme] Court could perhaps recognize that rather than just argue with each other, they should reach clearly established law by at least a majority.”

An aerial photograph showing a landscape with a river, a road, and a wetland area. The river is on the right side, flowing towards the bottom right. A road runs diagonally from the top center towards the bottom right. The wetland area is on the left side, characterized by brownish, muddy water and some vegetation. The background shows a forested area.

U.S. v. Cundiff, 555 F.3d 200 (6th Cir. 2009).

- Drainage of approx. 200 acres of contaminated wetlands into tributaries of navigable Green River in KY.
- Court found wetlands were jurisdictional under both plurality and Kennedy tests and refused to determine what test(s) control.
 - Found that all Justices agreed at least some non-navigable waters are covered.



Cundiff continued....

- SN test:
 - Reiterates that assertion of wetlands adjacent to TNW can be established based on “adjacency alone”.
 - Water storage, pollutant filtration, and habitat provision can establish a SN.
 - Rejected assertion a SN must be proven by “laboratory analysis” or similar tests.
- Plurality test.
 - Requires a “topical flow of water” between wetland and other covered water and a connection requiring “some kind of dampness such that the polluting waterway would have a proportionate effect on a traditional waterway.”
 - Permanent hydrologic connection not required, can be seasonal or periodically interrupted.
 - Such connection can be man-made (e.g., a ditch).

An aerial photograph of a river valley. A river flows through the center, bordered by a low berm. In the distance, there are several large, rectangular buildings, possibly a school or government complex. The surrounding area is a mix of forested hills and open fields. The sky is clear and blue.

SAPS v. Metacon Gun Club, 472 F.

Supp. 2d 219 (D. Conn. 2007) (appeal pending, 2d Cir.).

- Court ruled wetlands adjacent to (but separated by a berm from) navigable Farmington River in Connecticut not protected by CWA.
- Jurisdiction can be established under either *Rapanos* test.
- Plurality test:
 - No continuous surface connection despite evidence of frequent flooding acknowledged by the court.

SAPS continued....

- No “significant nexus”.
 - Court acknowledged Farmington River navigable and wetlands neighbored the river, but no acknowledgement that in such situations adjacency alone equals jurisdiction.
 - Court acknowledges flooding, proximity and physical connection between wetlands and river, but apparently discounted these factors.
 - Ruling ultimately relies on failure of laboratory analysis to conclusively show lead from site contaminated the river.
- On appeal to Second Circuit, decision pending.



Agency Guidance Documents

- 2003 SWANCC guidance effectively removes protections for all “isolated” waters. (68 Fed. Reg. 1991 (Jan. 15, 2003)).
- 2007 EPA and Corps Guidance (72 Fed. Reg. 31,824 (June 8, 2007)).
 - Purports to use both *Rapanos* tests.
 - Protects TNW, RPW, wetlands adjacent to TNW, and wetlands directly abutting RPW.
 - Non-navigable tributaries and their adjacent wetlands must have SN to be protected (no majority in *Rapanos* warranted this result).
 - Cannot aggregate impacts for tributaries (no basis in *Rapanos*).
 - Can only aggregate impacts of wetlands along a single reach (order) of a tributary (contrary to spirit of Kennedy test).
 - Applies only to Sec. 404 permitting.
 - Minor revisions in Dec. 2008 made the Guidance even less protective by limiting definition of TNW (requirement of commercial use).

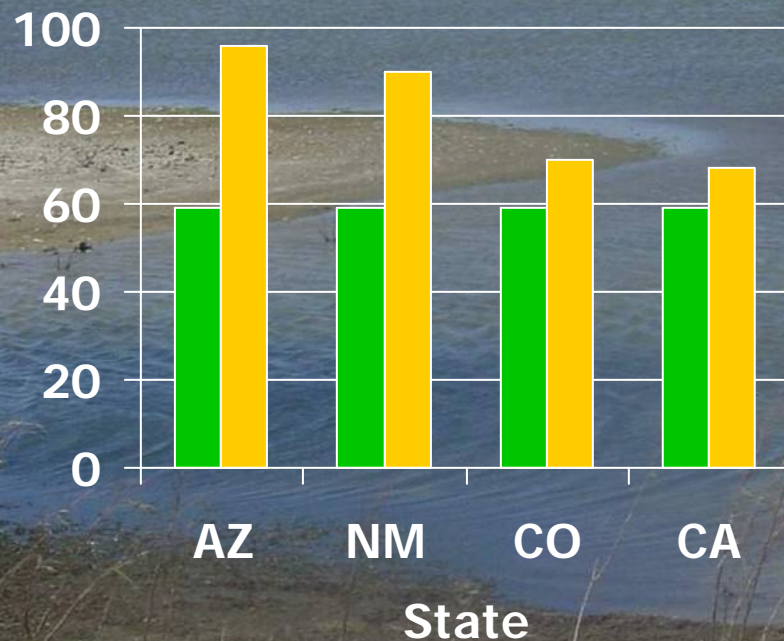
(http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf.)

What's At Stake Nationally?

- Removal of protections for at least 20 million acres of “isolated” waters in lower 48 states (EPA estimate).
- Nationally jeopardizes protections for about 60% of all stream miles and their neighboring wetlands.
- Has increased time and delays in permitting, and led to “plummeting” morale and “overwhelming” stress levels at regulatory agencies. Six month to two year waits for jurisdictional determination from Corps not uncommon.
- Has resulted, according to leaked Spring 2008 EPA memo, in about 500 enforcement actions being abandoned, lowered in priority or where the defendant has raised *Rapanos* as a defense.
- Dec. 2008 Congressional memo showed that perhaps hundreds of other pollution problems – such as oil spills – are not being addressed because of *Rapanos*.

Western and Great Plains Impacts

Percent I/E Streams



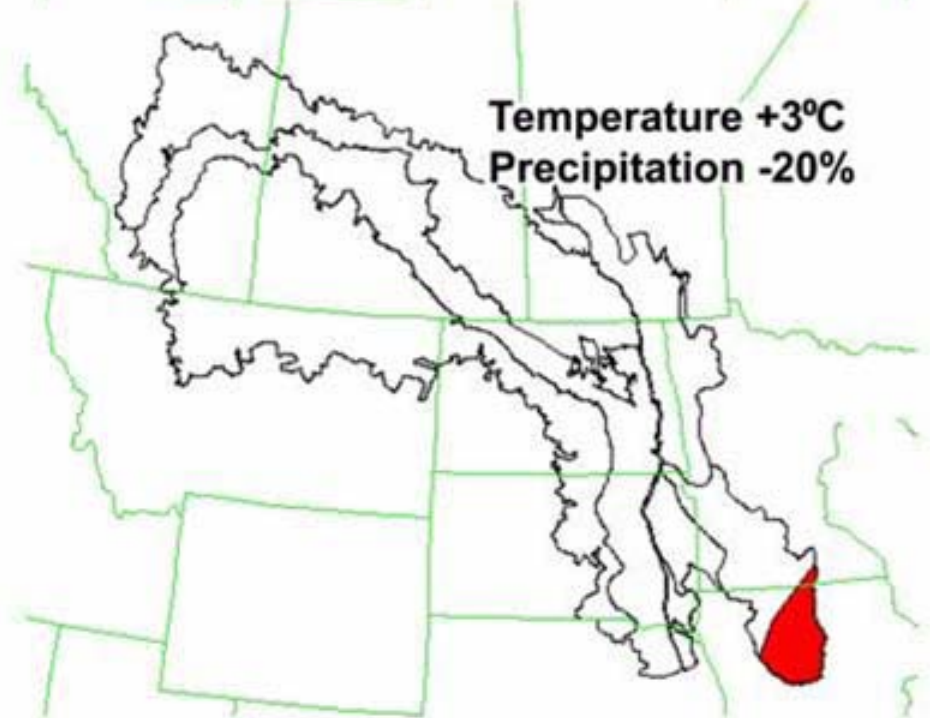
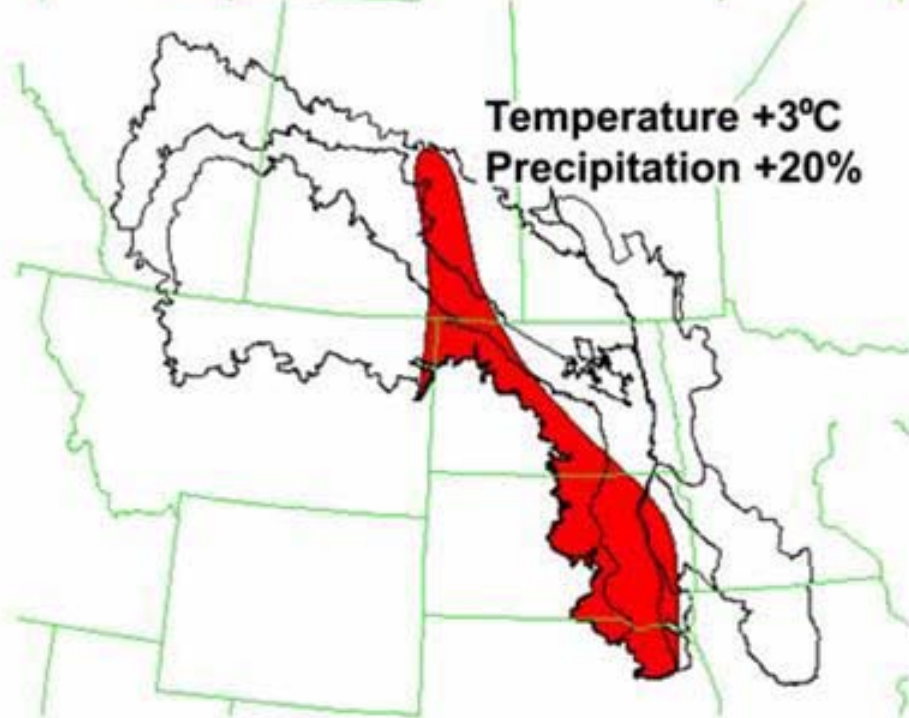
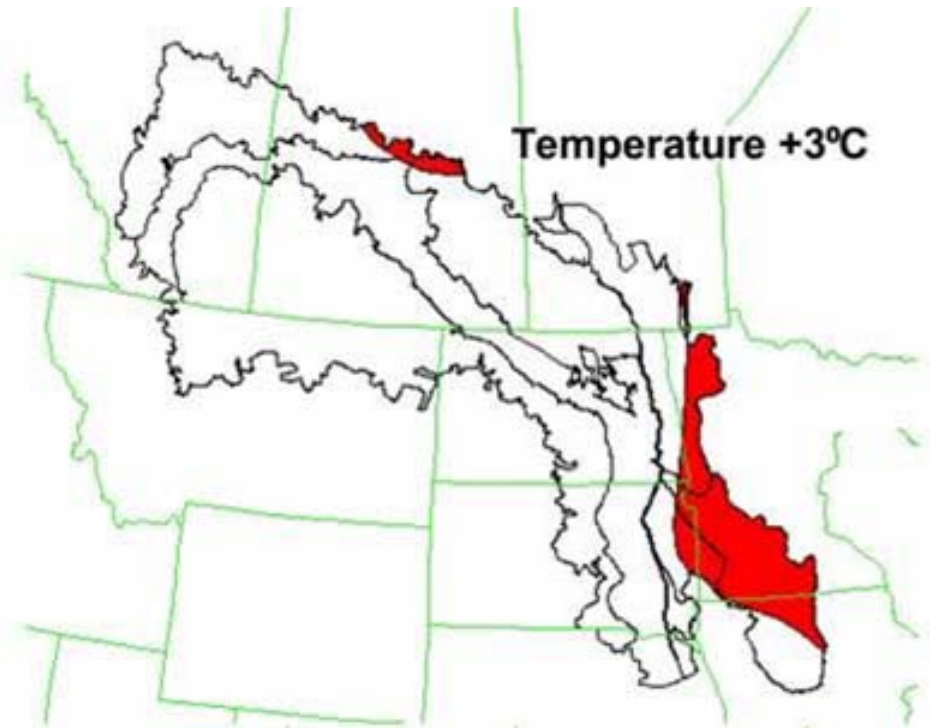
- Western States particularly impacted due to arid conditions:
 - Percent of intermittent/ephemeral streams for some Western states
- Prairie potholes and playas in the plains are no longer being protected post-*SWANCC*
- Attacks on TNW designations by industry.

Western and Great Plains Impacts

- In 4/09 EPA OIG Report, EPA Region 8 Reports:
 - That Corps districts in Region 8 (Sacramento, Albuquerque, and Omaha) failed to assert jurisdiction in 72% of jurisdictional calls from 6/07 to 8/08.
 - Less enforcement, especially in oil spill cases
 - Drops in oil spill reporting.
 - Milder settlements in enforcement cases.
 - Vastly increased workloads (e.g., processing of enforcement can take 3 times as long).
 - Certain violators using Rapanos to attempt to get out from under consent decrees.

At Risk Waters and Global Warming

- All waters threatened by global warming
 - Increased flooding
 - Increased drought
 - Increased erosion, scouring
 - Increased pollution levels
 - Increased temperature in waters
 - Disappearance of certain types of waters
 - Changes in types of waters



At Risk Waters Needed to Survive Global Warming

A sunset over a body of water with swans and ducklings. The sun is low on the horizon, casting a warm orange glow across the sky and water. The water is dark with some ripples, and several swans and ducklings are visible in the foreground. The overall scene is serene and natural.

- Provide valuable habitat and migration corridors
- Provide flood storage
- Provide water flow recharge in dry times
- Provide sources of cool water
- Store carbon

Clean Water Restoration Act (S. 787, House Bill Pending)

- Defines waters protected under CWA using long-standing regulatory definition.
- Removes word “navigable” from definition to make clear Congress’s intent to regulate pollution, not navigation.
- Findings provide ample constitutional bases for Congress to regulate all important water bodies, including geographically “isolated” bodies.
- Retains long-standing exemptions for agricultural and ranching activities contained. (*See* § 404(f)).