

Variable Water Laws: What are the Implications for States?



FOCUS ON CLEAN WATER ACT PROGRAMS

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The Great Divides



Water Quantity / Water Quality

Land Use/ Water Resources

East / West

Water Systems / Ecosystems

Federal / State

The Clean Water Act: Cooperative Federalism



“Navigable” Waters: Waters of the U.S., including Territorial Seas



303
Water
Quality
Standard
& TMDLs

311
Oil
Spill
Prevention
Plans

401
State
Certification

402
Pollutant
Discharge
Permits

404
Dredge
and
Fill
Permits

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USACE

Waters of the U.S. – Waters of the State



- Two thirds of all states place some legal constraint on the authority of state and local government officials to adopt aquatic resource protections beyond “waters of the U.S.”
 - Stringency limitations
 - Property-based limitations
 - Combinations of the two
- Half the states have some provisions that extend protections beyond “waters of the U.S.”
 - Some pre-date stringency limitations and may not be retro-active
 - Limitations may only be partial

A Short History of Waters of the U.S.



- CWA (1972): legislative history indicate term should be “construed as broad as the Commerce Clause allows”
- *Riverside Bayview* (1985): “navigable waters” include wetlands adjacent to other jurisdictional waters
- *SWANCC* (2001):
 - presence/habitat for migratory birds not sufficient as sole basis for CWA jurisdiction
 - affected “isolated” waters
 - reasoning suggested some connection to navigability needed

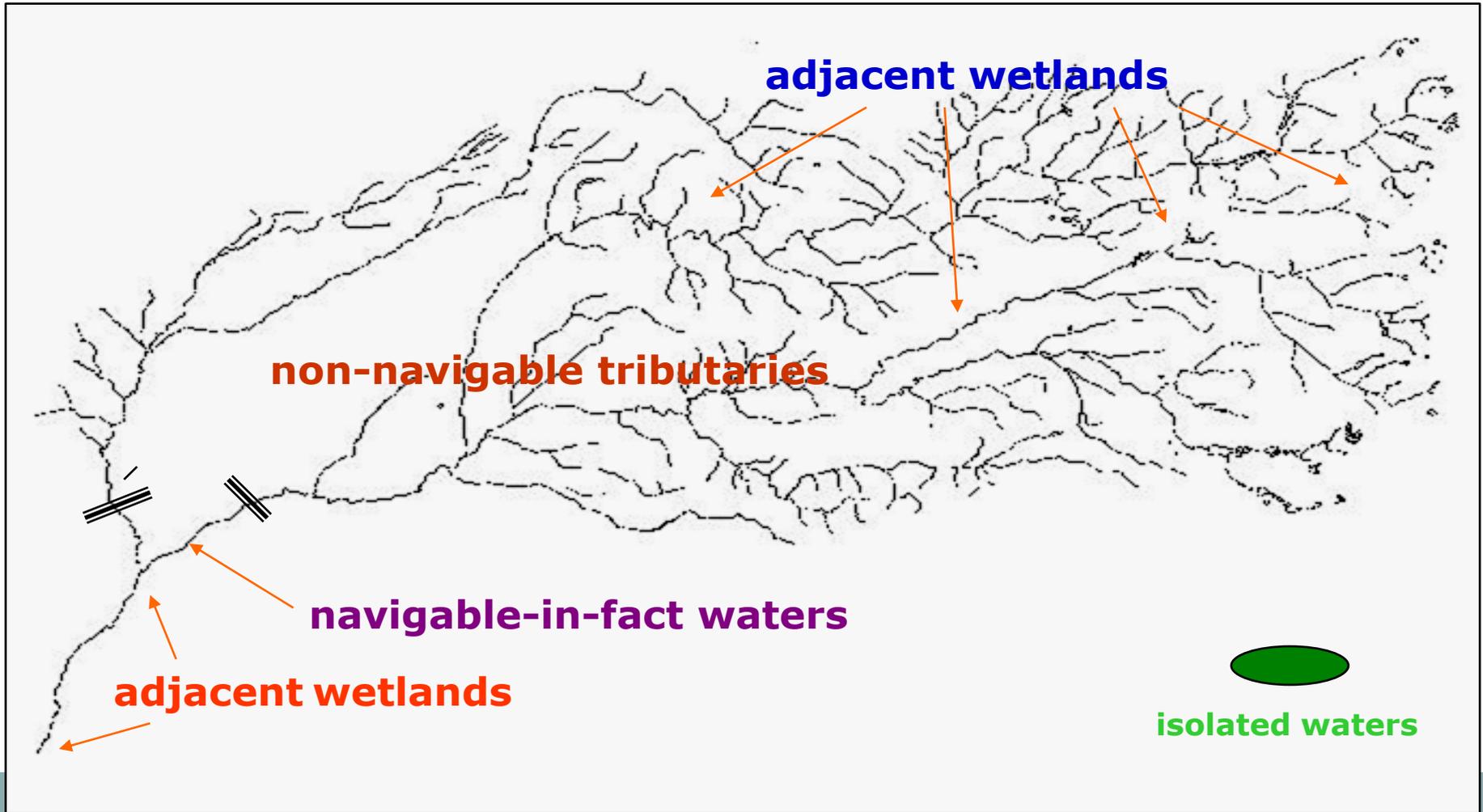


The *Rapanos* Decision (2006)

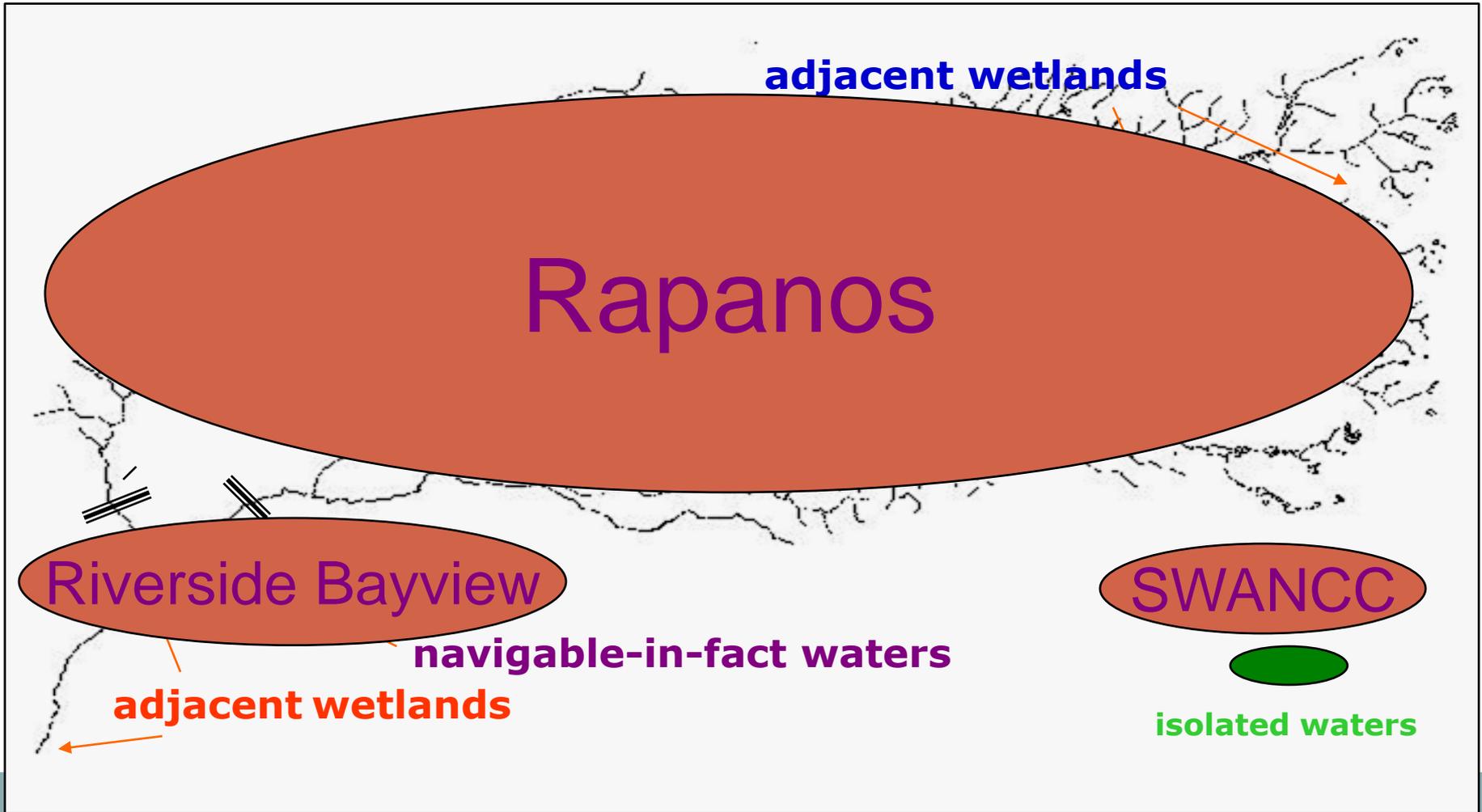


- Issues: does CWA cover non-navigable tributaries and their adjacent wetlands?
- Result: nine justices and five opinions, with none having a majority of votes. Remanded.
 - Plurality/Scalia: Jurisdictional if “relatively permanent” or “seasonal” rivers, or wetlands with “continuous surface connection” to such waters.
 - Kennedy: wetlands and waters are jurisdictional if “significant nexus” to navigable waters (individually or cumulatively), affecting phys/chem/bio of navigable waters.
- EPA/Corps guidance (2008) reflects these principles, although underlying regulation has not changed

What Waters are at Issue?

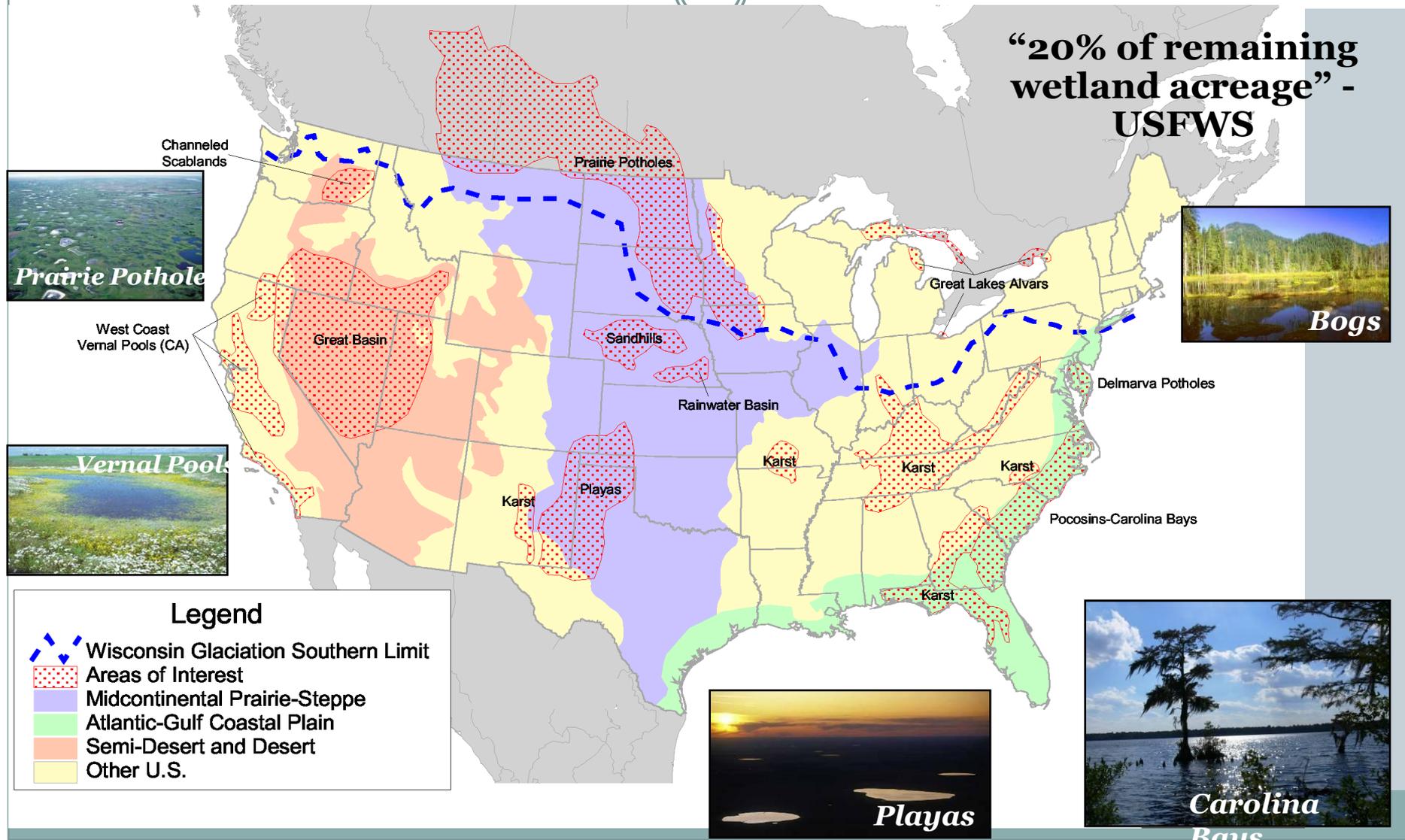


What Waters are at Issue?



Why are They Important?

“20% of remaining wetland acreage” - USFWS



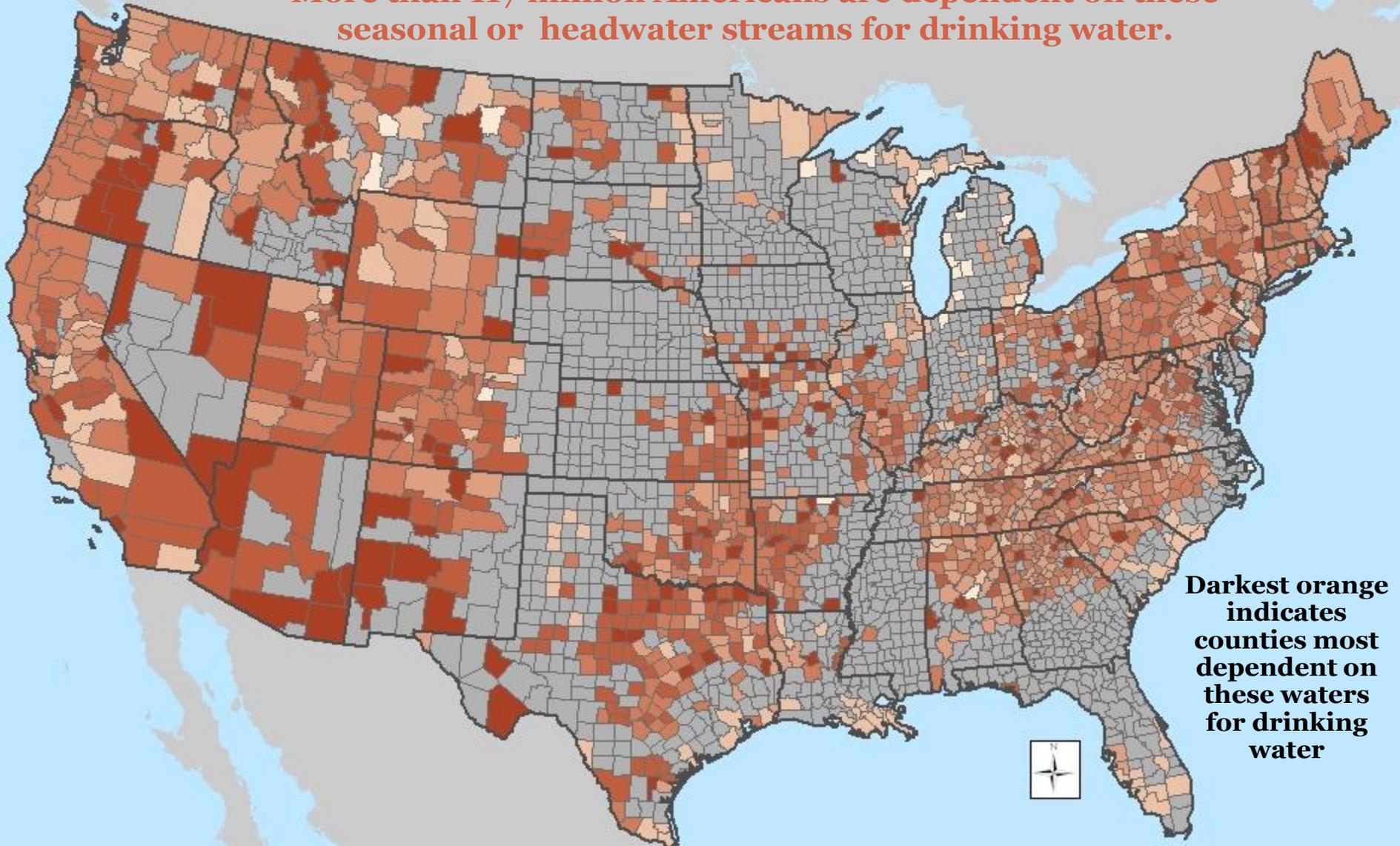
Why are They Important?

Streams that flow for only part of the year comprise 59% of the nation's stream miles; they are the "workhorses of the watershed."



Why are They Important?

More than 117 million Americans are dependent on these seasonal or headwater streams for drinking water.



Darkest orange indicates counties most dependent on these waters for drinking water

EPA-Corps Proposed Guidance (April 2011)



- Interstate Waters – affirms protection of smaller tributaries and wetlands that cross state lines
- Adjacent Wetlands – clarifies as including ecological and/or hydrologic connections; riparian area, watershed, and flood plain concepts
- Significant Nexus – promotes watershed-scale aggregation of similarly situated streams, adjacent wetlands, or physically proximate waters (e.g., some “isolated” waters)
- Tributaries – changes likely to result in assertion of jurisdiction over almost all tributaries and their adjacent wetlands
- Exclusions – maintains all previous exclusions, such as for waste treatment systems

Impacts of Implementing the Guidance



Compared to a 2009-2010 baseline, if the proposed guidance is followed in all instances:

- 3% increase in waters addressed by the 404 program, affecting a few thousand waters each year
- 5% increase in wetlands mitigation acres
- 2% increase in stream mitigation miles
- 4% increase in total mitigation costs, representing an increment between \$80-150 million per year on an annual baseline of between \$2-4 billion
- An additional \$8-20 million per year administrative costs to the Corps and applicants
- Benefits from incremental wetland mitigation alone worth between \$160-370 million per year

What We Have Heard from States



- Rulemaking or legislation will be necessary to fully identify the scope of our nation's waters (acknowledges the need to clarify scope of jurisdiction)
- Regional technical guidance necessary to account for regional differences (e.g., stream channel structure in east versus west)
- Limits of jurisdiction needs to be more directly addressed (especially tributaries)
- Economic analysis should address state costs (303, 401, 402)
- Should not exclude waters that citizens would obviously find important, or include areas not intended to be regulated like stormwater detention basins

Moving Forward



- EPA and Corps will consider all comments, including calls for rulemaking
 - Court cases will continue to work through the system
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- States will continue to take the lead in developing water quality standards and issuing 402 permits
 - Effective coordination among federal and state agencies and legislatures will improve implementation and avoid problems