

Navigable Waters Protection Rule



Home Builders Association of Raleigh-Wake County
July 15, 2020





Summary

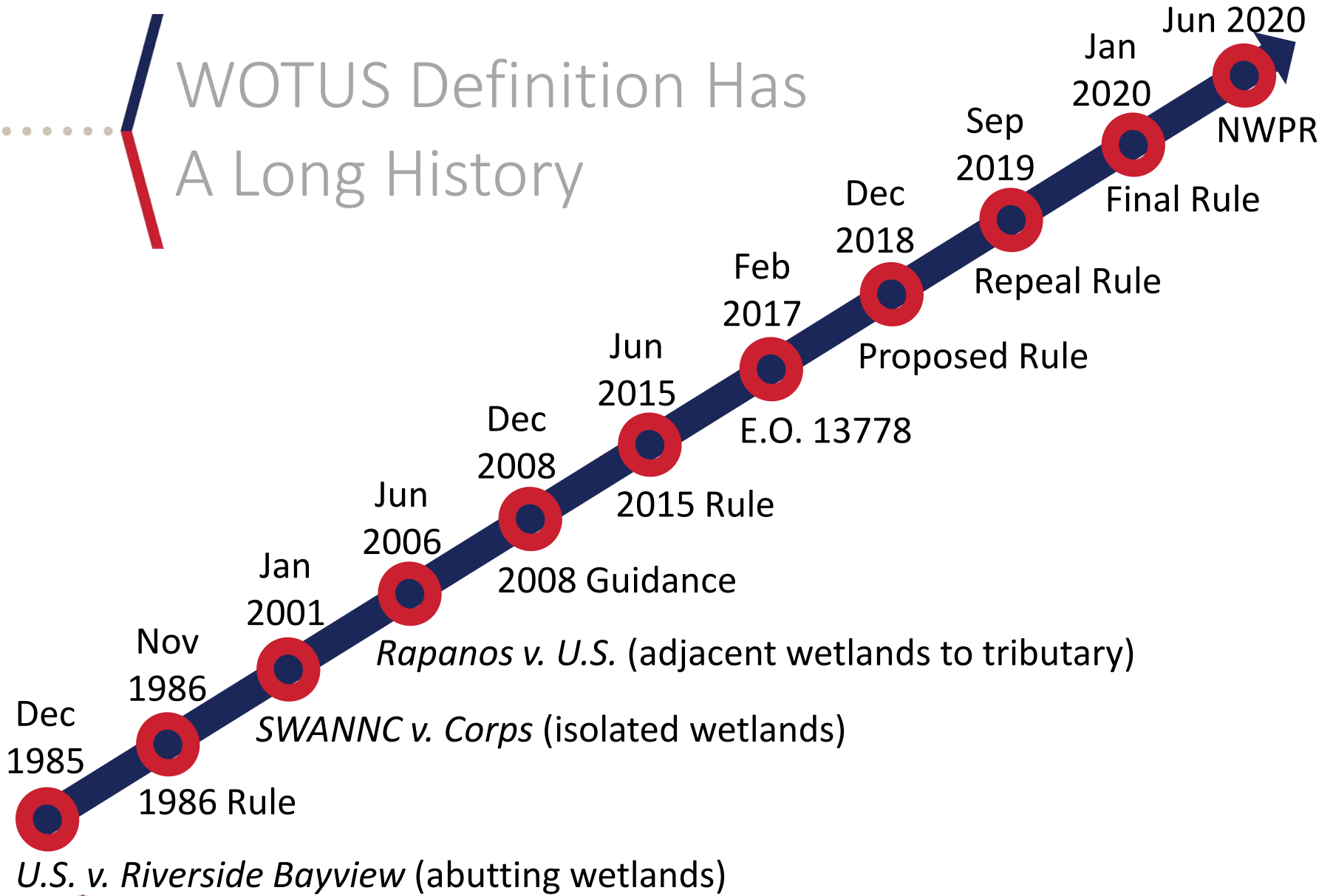
- WOTUS Impacts Many CWA Programs
- WOTUS Definition Has a Long History
- Navigable Waters Protection Rule (NWPR) Provides Vast Improvements Over Prior Rules
- Examples: How NWPR Treats Ditches, Wetlands, and Tributaries
- Clarification is Required for Implementation
- States Could Respond
- Next Steps and Discussion

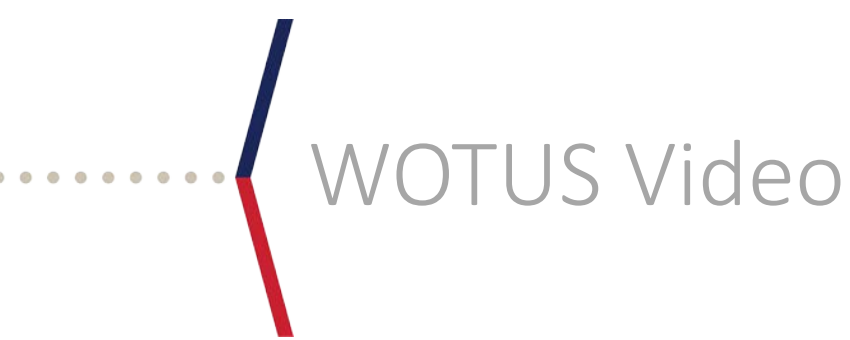
WOTUS Impacts Many CWA Programs

- Clean Water Act (CWA) covers “navigable waters”, defined as “waters of the United States (WOTUS), including the territorial seas”
- WOTUS defines the scope of federally-regulated waters and impacts
 - § 404 dredge and fill permits
 - § 402 pollutant discharge permits
 - § 303 Water Quality Standards and Total Maximum Daily Loads
- CWA § 404 and § 402 can also initiate requirements under the Endangered Species Act and National Historic Preservation Act



WOTUS Definition Has A Long History





WOTUS Video

NAHB.org/WOTUS

NWPR Provides Vast Improvements Over Prior Rules

Feature	NWPR	2015 Rule	1986 Rule
• Territorial seas & TNWs	✓	✓	✓
• Tributaries	✓	✓	⊗
• Lakes and ponds, and impoundments	✓	✓	✓
• Adjacent wetlands	✓	✓	✓
• Adjacent waters	⊗	✓	⊗
• Interstate waters & wetlands	⊗	✓	✓
• Significant nexus & similarly situated	⊗	✓	⊗
• 100-yr floodplain	⊗	✓	⊗
• ¼ mile of OHWM & significant nexus			

Key: ✓ = jurisdictional feature ⊗ = not jurisdictional feature



NWPR Provides Vast Improvements over Prior Rules (cont'd)

- New exemptions

- Diffuse stormwater runoff
- Ditches
- Ephemeral features
- Non-jurisdictional features

- Existing exemptions

- Groundwater
- Stormwater control features
- Prior converted cropland
- Water-filled depressions

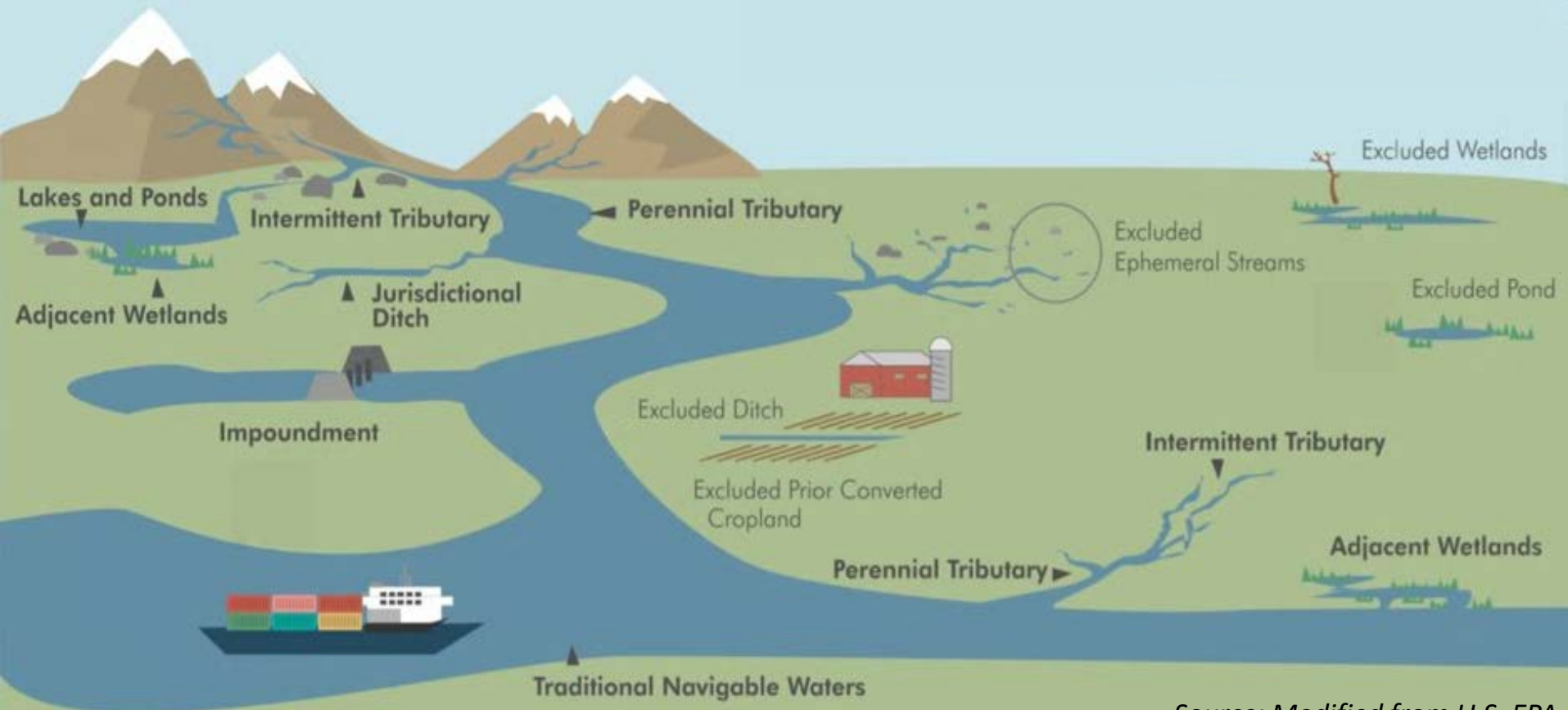


NWPR Provides Vast Improvements over Prior Rules (cont'd)

- New definitions
 - **Typical year:** w/in normal range of precipitation over rolling 30-year period
 - **Adjacent wetlands:** abut, are inundated by, or are physically separated from a jurisdictional water if a surface connection remains in a typical year
 - **Intermittent:** surface water flowing continuously during certain times of the year and more than in direct response to precipitation
 - **Upland:** land area that does not satisfy all three wetland factors

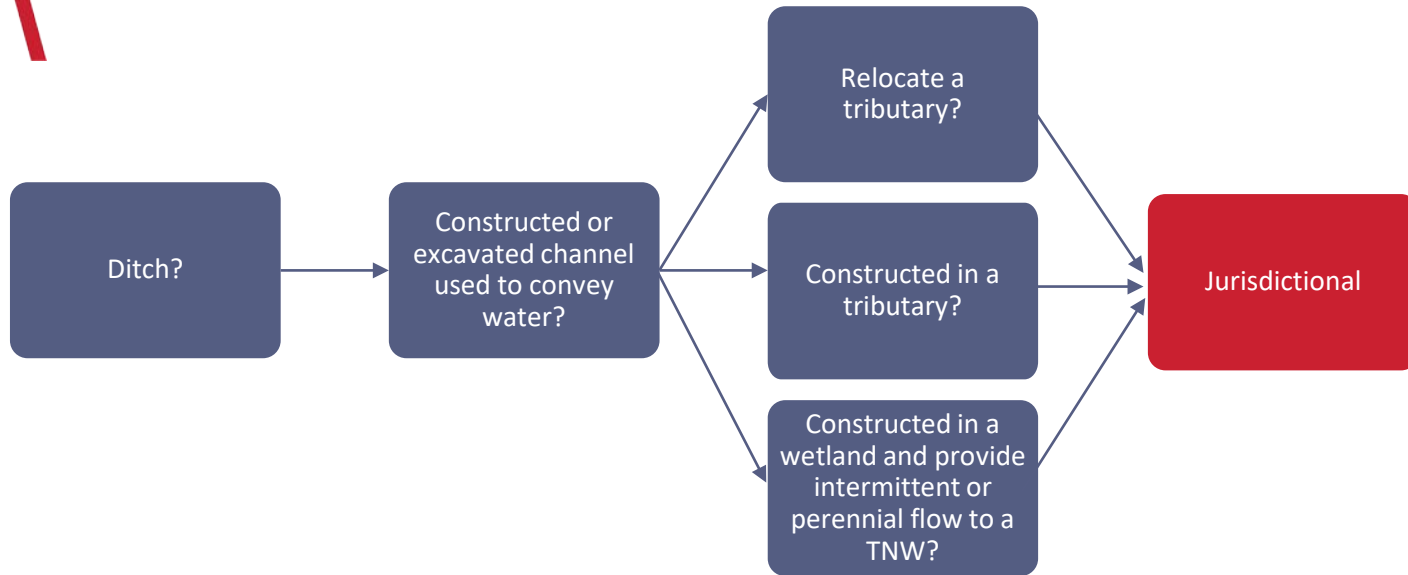
The proposal is a **MAJOR IMPROVEMENT** over prior WOTUS definitions and will **GREATLY BENEFIT** builders and developers

- Easier to understand — supports observable jurisdiction
- Predictable and consistent — eliminates significant nexus test
- Reduces regulated area — ends regulation based on geographic area and narrows regulated ditches

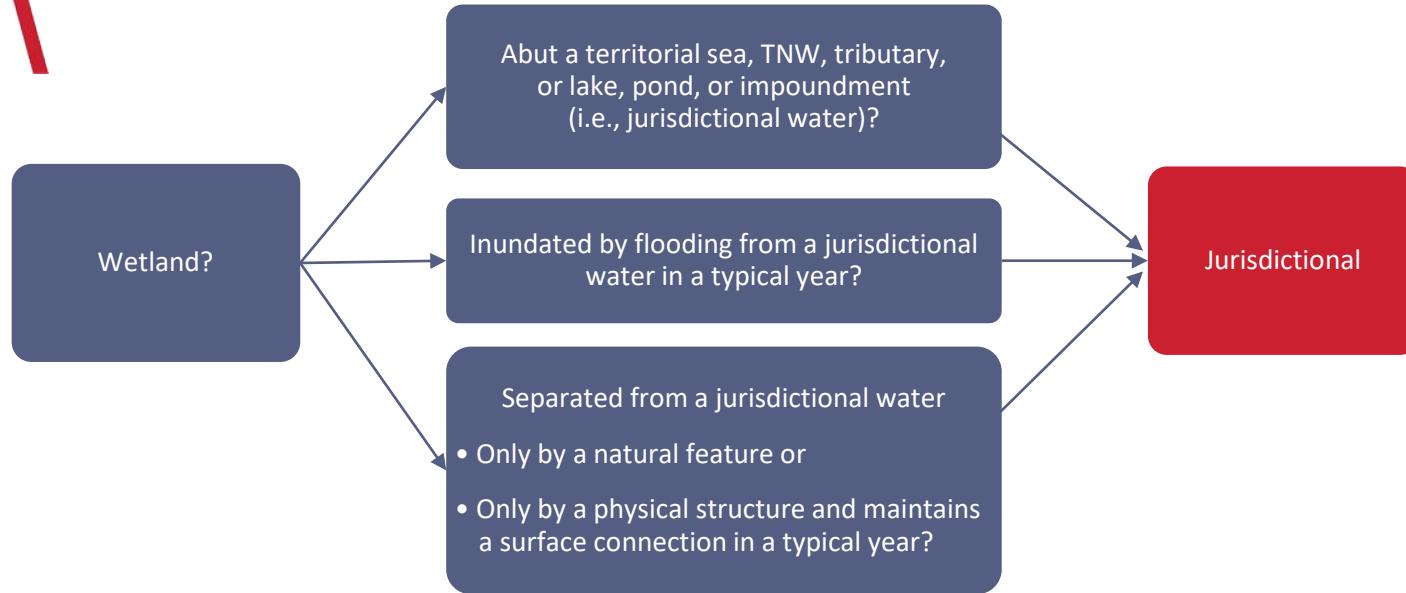


Source: Modified from U.S. EPA

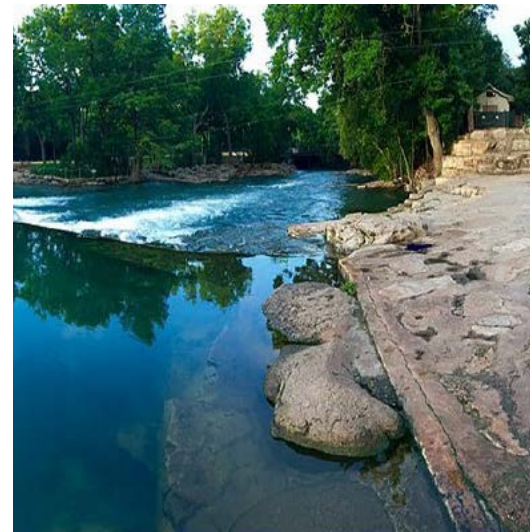
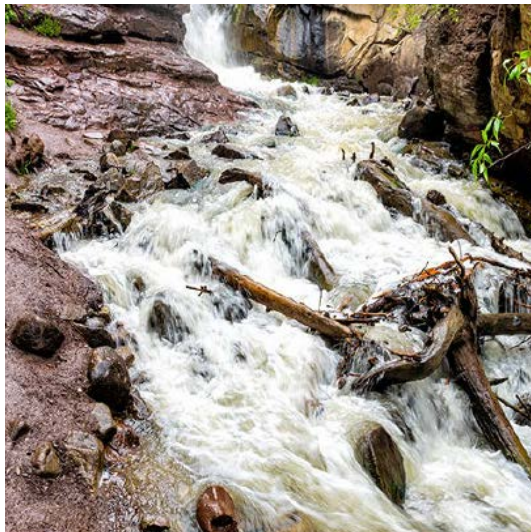
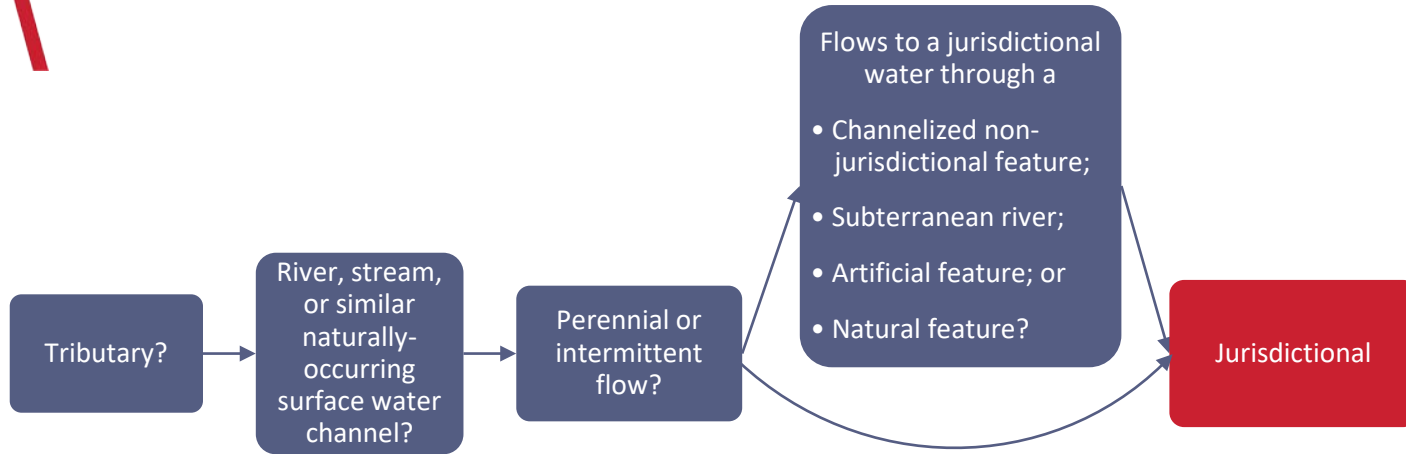
Example: How NWPR Treats Jurisdictional Ditches



Example: How NWPR Treats Wetlands



Example: How NWPR Treats Tributaries

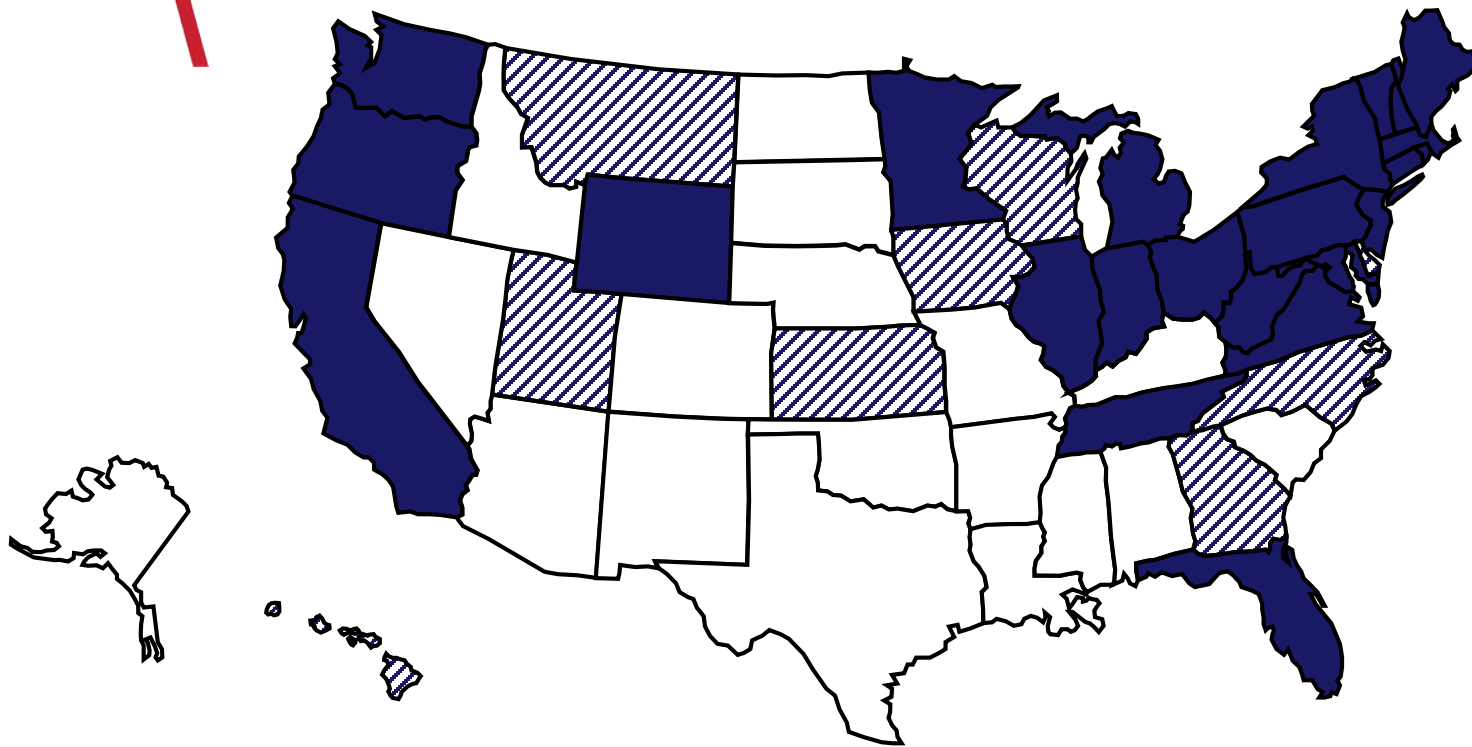







Clarification Is Required for Implementation

- Explain how to identify natural berms, banks, or dunes
 - Natural berms, banks, or dunes do not sever the jurisdiction of adjacent wetlands but NWPR does not explain how to identify them
- Distinguish ephemeral from intermittent tributaries
 - NWPR exempts ephemeral features that form only in response to rainfall but identifying such features can be challenging (e.g., melting snow fall vs. pack)
- Apply the “upland” definition
 - NWPR distinguishes uplands from wetlands but Regional Supplements allow the Corps to assume presence of non-observed wetland factors

States Could Respond



-  Regulate beyond proposed NWPR & likely to continue current permitting practices
-  May change state programs to provide some coverage of non-WOTUS features under NWPR
-  Unlikely to increase practices due to federal regulation changes



Note: Analysis based on proposed rule and applies only to dredged/fill permitting

Source: Economic Analysis for the Navigable Waters Protection Rule: Definition of "Waters of the United States". U.S. EPA



Next Steps and Discussion

- Final rule became effective on June 22, 2020 in all states except Colorado
- Litigation could affect implementation
 - *California, et al. v. Wheeler*, 20-cv-3005 (N.D. Cal.) – DENIED
 - *Colorado v. U.S. EPA et al.*, 1:20-cv-01461 - ENJOINED
 - *Conservation Law Foundation, et al. v. EPA*, No. 20-cv-10820 (D.Mass.)
 - *Chesapeake Bay Foundation & ShoreRivers v. Wheeler*, No. 1:20-cv-01064 (D. Md.)
 - *SC Coastal Conservation League v. Wheeler*, No. 20-cv-1687 (D. S.C.)
 - *New Mexico Cattle Growers' Ass'n v. EPA*, 19-cv-988 (D.N.M. 2019)



More Information

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