



The Contentious Definition of WOTUS: Past, Present and Potential Future

TAEP Webinar Series

May 21, 2020

Overview

- **Birth of WOTUS** – Clean Water Act
- **History of WOTUS**
 - Rapanos WOTUS – The Reason for the Mess
 - Obama WOTUS – The Clean Water Rule
 - Trump WOTUS – The Navigable Waters Protection Rule
- **Future of WOTUS** – Litigation, Legislation, and the States



Clean Water Act

- **Federal Water Pollution Control Act Amendments of 1972**
 - Expansion of the **Federal Water Pollution Control Act** of 1948
- Major amendments were enacted in the **Clean Water Act of 1977** and the **Water Quality Act of 1987**
- Act references “Waters of the United States”, a.k.a. WOTUS
- Enduring Question: Just what is a WOTUS?



Needs a Character ...

I am the WOTUS,
I speak for the streams ...

Why am I so important?



WOTUS = CWA Jurisdiction

- CWA, Section 404 – Discharge of dredge/fill material
- CWA, Section 402 – National Pollutant Discharge Elimination System
- CWA, Section 401 – State Water Quality Certification
- CWA, Section 311 – Oil spill prevention and response
- CWA, Section 303 – TMDLs & Water Quality Standards



Past History

- **Riverside Bayview (1985)**
 - WOTUS Defined (1986)
 - Migratory Bird Rule (1986)
- **SWANCC (2001)**
- **Rapanos (2006)**
 - JD Guidance, Guidebook & RGL 07-01 on JD Process (2007)
- **Obama Administration's Clean Water Rule (2015)**
- **Trump Administration's Navigable Water Protection Rule (2020)**



Riverside Bayview (1985)

- *United States vs. Riverside Bayview Homes*, 474 U.S. 121
- Unanimous ruling – Clean Water Act regulates Adjacent Wetlands
- Navigability not considered important
- U.S. Attorney - Isolated Wetlands covered by Commerce Clause
- EPA Defines WOTUS
- Migratory Bird Use = Interstate Commerce
- Birth of EPA “Migratory Bird Rule”



WOTUS Defined (1986) - Summary

- All navigable waters, the territorial seas, *plus...*
- Their tributaries, impoundments, and *adjacent wetlands* and *isolated waters* where the use, degradation or destruction of such waters could affect *interstate or foreign commerce*.
 - *Adjacent wetlands?*
 - *Isolated waters?*
 - *Interstate or foreign commerce?*



The Migratory Bird Rule (1986)

Based on 40 CFR 230.3(s) paragraph 3, EPA's Migratory Bird Rule (51 [F.R.](#) 41217) asserted that CWA jurisdiction could be extended to **isolated, intrastate, non-navigable waters** based on the following:

- Use of the water as habitat by birds protected by the [Migratory Bird Treaty Act](#);
- Use of the water as habitat for [Federally protected endangered or threatened species](#); or
- Use of the water to irrigate crops sold in interstate commerce.
- Justified by the Commerce Clause [United States Constitution](#) ([Article I, Section 8, Clause 3](#)).



Note: In 1993, rule invalidated by Fourth Circuit Court of Appeals and did not apply in WV, VA, MD, NC, SC.



When Life Was Simple



WOTUS = all streams & wetlands

Jurisdictional if:

- Tidal/Navigable
- OHWM present
- All 3 wetland criteria met

Nationwide Permit 26

- Isolated/Headwaters
- 10 acres with no IP (1984 - 1996)
- 3 acres, 500 feet (1996 -1999)
- Retired in 2000

SWANCC (2001)

- ***Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers***, 531 U.S. 159
- Supreme Court dismissed the long controversial “*Migratory Bird Rule*”
- “Isolated waters” no longer jurisdictional based solely on migratory bird use



Now What Do We Do?

- **USACE** = Ponder
 - Which wetlands do we regulate?
 - Pull back on isolated calls
 - Rule of Thumb: 100-year floodplain, connection to tributary system, etc.
- **Developers** = Develop
 - Fill isolated wetlands ASAP
- **Consultants** = Panic
 - Do we still have a job?
- **Mitigation Bankers** = Consider
 - Do we still have a market?
- **Lawyers** = Litigate



Rapanos (2006)

Rapanos v. United States, 547 U.S. 715

- Scalia = Plurality (4 judges*)
- WOTUS limited to waters with:
 - Relatively permanent flow
 - Continuous surface connection

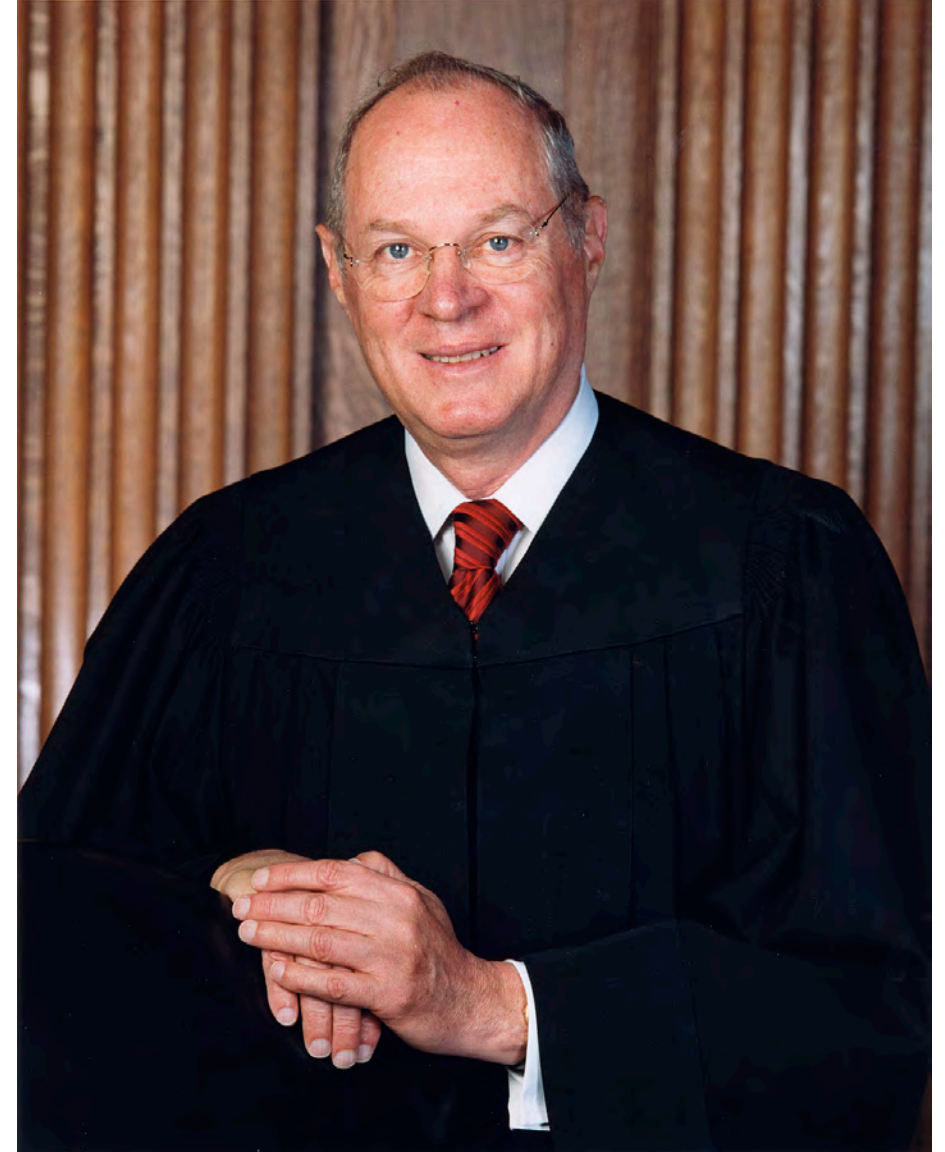
* Antonin Scalia, John Roberts, Clarence Thomas, Samuel Alito



Rapanos (2006)

- Kennedy = Concurrence* (1 judge)
 - “Significant Nexus” (from SWANCC)
 - Wetland or waterbody, either by itself or in combination with other similarly situated sites, that significantly affects the physical, biological, and chemical integrity of the downstream navigable waterway

* - Concurrence was to vacate case back to U.S. District Court.



Rapanos (2006)

- Stevens = Dissent (4 judges*)
 - Agreed with USACE assertion of jurisdiction
 - Jurisdiction = waters that satisfy either Scalia or Kennedy test

* John Stevens, David Souter, Ruth Bader Ginsburg, Stephen Breyer



What the



?



2008 USACE Rapanos Guidance

- **Traditionally Navigable Waters** (TNW)
 - Territorial seas/Great Lakes
 - Most rivers
 - Some perennial streams
- **Relatively Permanent Waters** (RPW)
 - Some perennial or intermittent streams
- Wetlands adjacent to (or abutting) TNWs
- Wetlands abutting RPWs



Significant Nexus Test Needed

- Non-relatively Permanently Waters (some intermittent or ephemeral streams)
- Wetlands adjacent to RPWs
- Wetlands abutting non-RPWs
- Wetlands adjacent to non-RPWs
- Isolated wetlands (except SWANCC)



Jurisdictional Determinations (2007-2008)

- **RGL 07-01**, Documenting Jurisdiction
- USACE Jurisdictional Determination Form Instructional Guidebook (60 pages)
- Post-Rapanos JD Process
- JD Forms (8 pages each)
- **Approved JD vs Preliminary JD**
- Something had to change ...

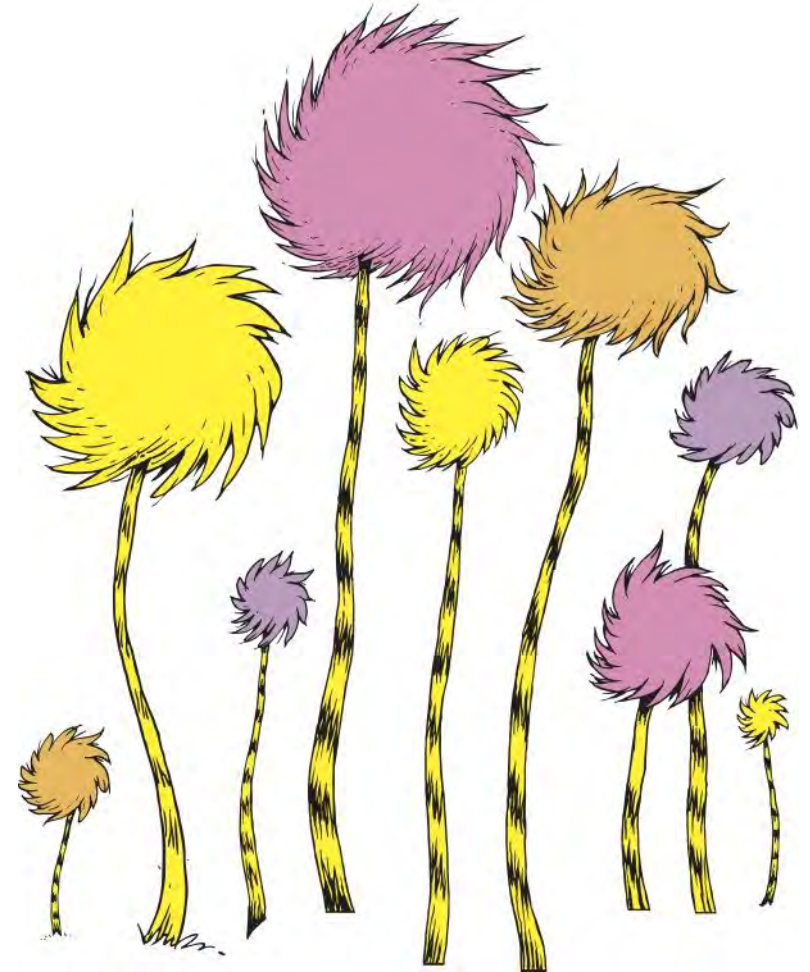


OBAMA WOTUS and the Clean Water Rule

But those streams! Those streams!

Those ephemeral streams!!

All my life I've been searching for
streams such as these!



Clean Water Rule (Obama WOTUS)

- Proposed Rule Issued April 2014
- Purpose = provide simple, clear, consistent approach to determine CWA jurisdiction
- Approach: Science, Agency Experience, Supreme Court Decisions
- Kennedy Test – Significant Nexus
- Connectivity Report (Jan 2015) = 408 Pages
 - Reviewed 1,200 Scientific Studies
- Economic Analysis = 75 Pages
- Public Hearings = 400
- Public Comments = 1,000,000



Clean Water Rule - Eight Categories

1. Navigable waters
2. Interstate waters & wetlands
3. Territorial seas
4. Impoundments of WOTUS
5. Tributaries to 1 – 3 (required both OHWM & bed/banks)
6. **Adjacent waters** to 1 – 5

Adjacent = bordering, contiguous or neighboring

Includes waters separated by constructed barriers (levees, dikes), natural river berms, beach dunes, etc.

Neighboring = water is at least partially

- *within 100' of OHWM*
- *within 1500' of OHWM and inside 100-year floodplain*
- *within 1500' of HTL or Great Lakes*



Clean Water Rule - Eight Categories

7. Similarly situated waters with *significant nexus*

- Prairie potholes (upper Midwest)
- Carolina bays and Delmarva bays (Atlantic coastal plain)
- Pocosins (Central Atlantic coastal plain)
- Western vernal pools (California)
- Texas coastal prairie wetlands (Texas Gulf Coast)

8. Case-specific waters with *significant nexus*

- Within 100-year floodplain, but > 1,500' from OHWM
- Within 4,000' of OHWM or HTL



Clean Water Rule Implementation

- 6/29/2015 - Final Rule Issued
- 8/28/2015 - Effective Date
- 8/27/2015 - Preliminary Injunction
 - Federal District Court in North Dakota



Clean Water Rule Lawsuits

- Jurisdiction = District or Appeals Courts?
- 18 Federal District Courts Complaints
 - 31 States
 - Hundreds of private stakeholders
- 22 Federal Appellate Courts Petitions
 - Consolidated in 6th Circuit Court of Appeals
- 10/9/2015 – 6th Circuit issued Stay



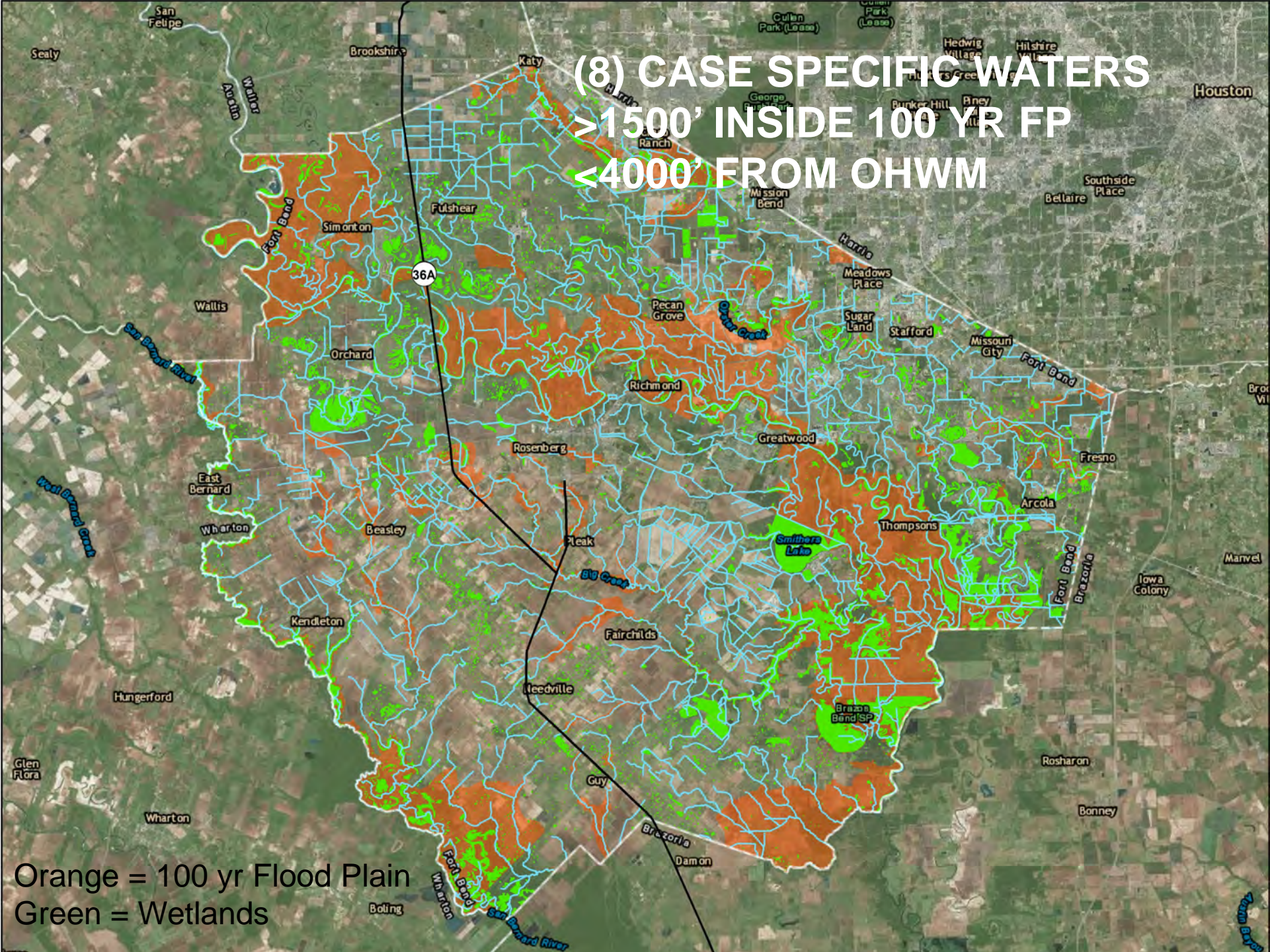
Why all the pushback?

4000' Adjacency Limit for Case-Specific Waters

Distance Limits not included in Draft for Public Comment

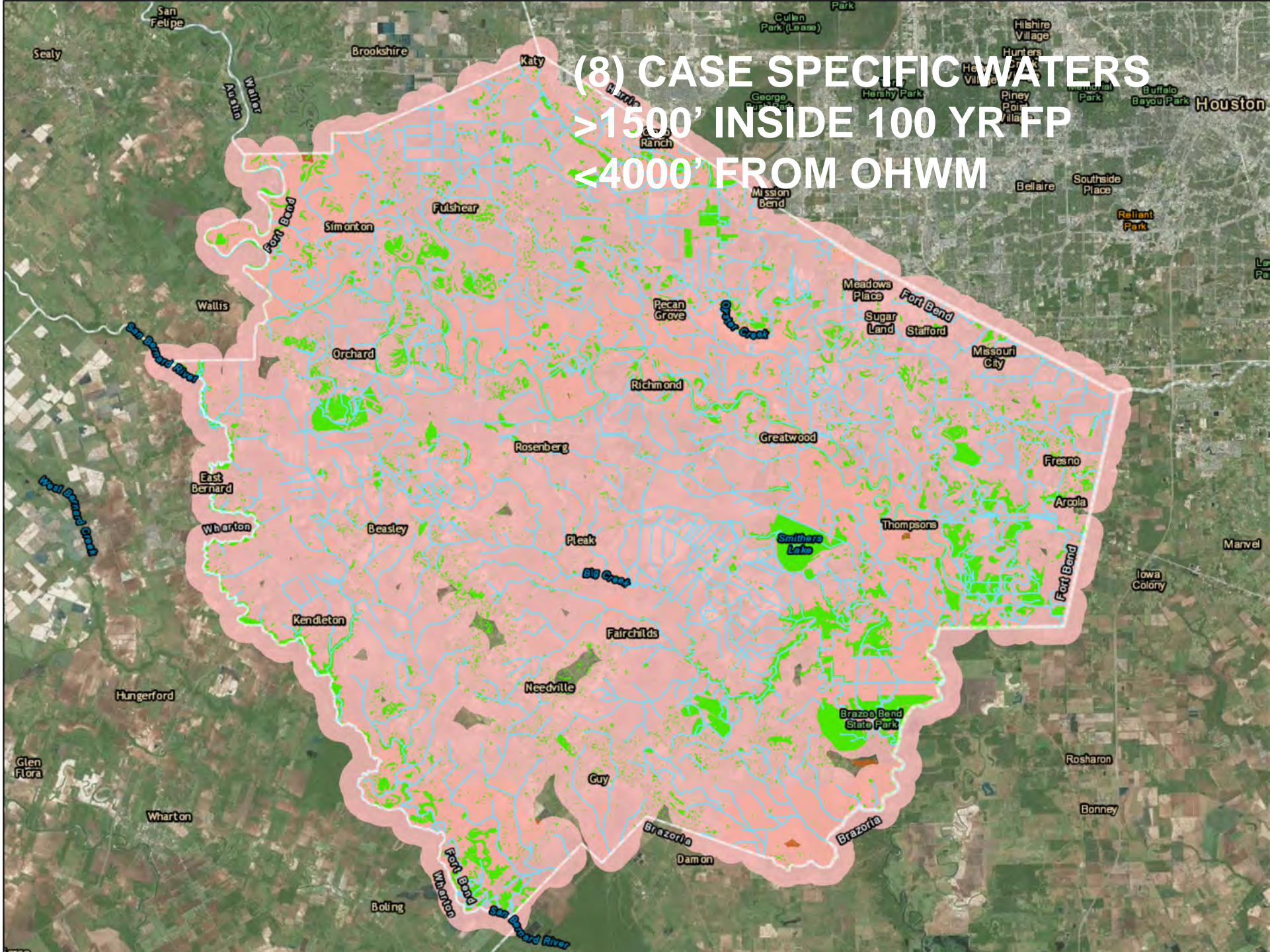


**(8) CASE SPECIFIC WATERS
>1500' INSIDE 100 YR FP
<4000' FROM OHWM**



Orange = 100 yr Flood Plain
Green = Wetlands

(8) CASE SPECIFIC WATERS
>1500' INSIDE 100 YR FP
<4000' FROM OHWM

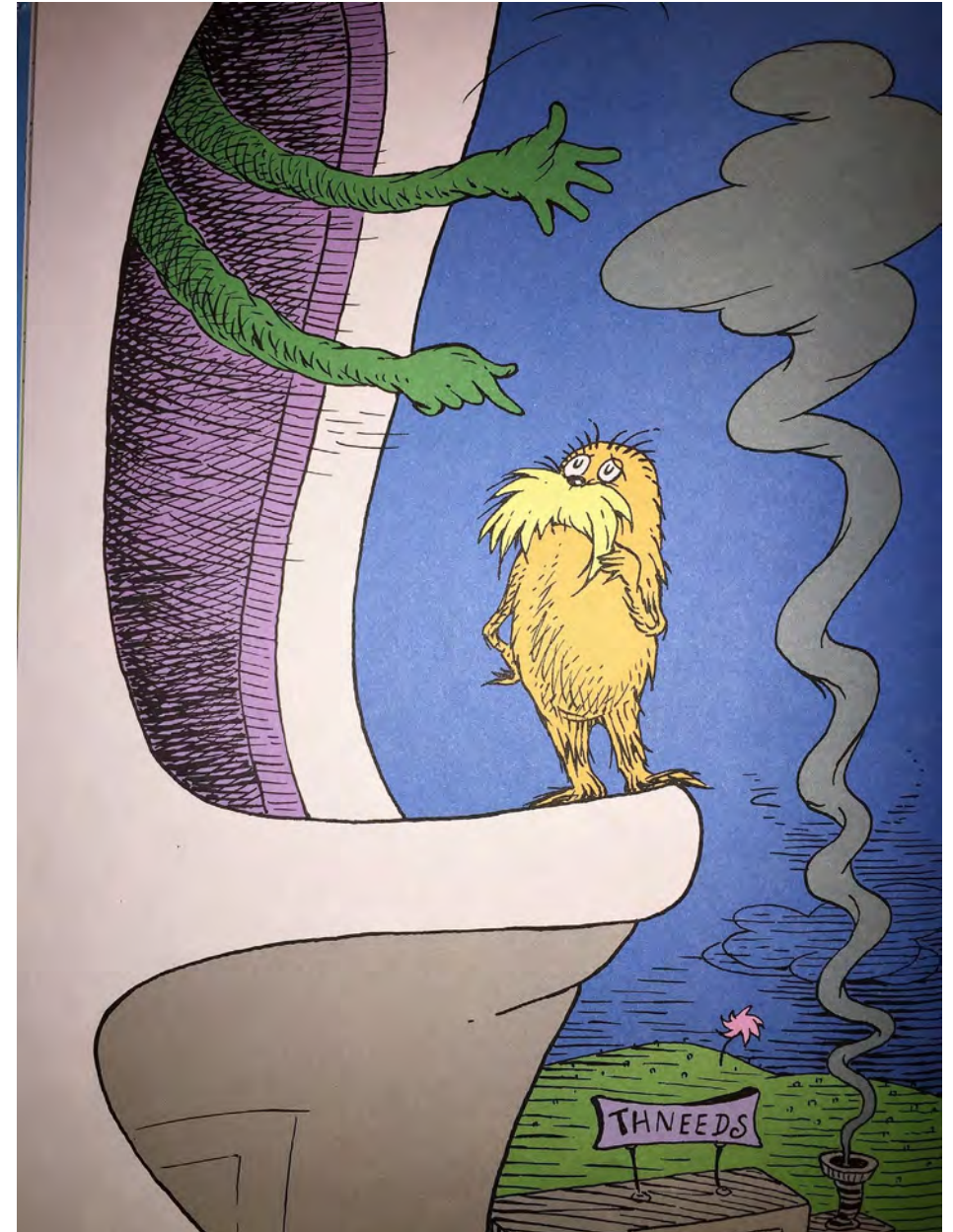


TRUMP WOTUS and the Navigable Waters Protection Rule

And then I got mad.

I got terribly mad.

I yelled at the WOTUS, “Now listen
here, Dad!”



2017 – A New Administration

- 1/13/2017 – **Supreme Court** agrees to **reconsider the 6th Circuit Court of Appeals'** decision to hear legal challenges to 2015 CWR
 - *National Association of Manufacturers vs. DOD*
 - Issue: **Which court** will hear cases that define the term Waters of the United States for the purpose of rule making?
- 1/20/2017 – **Donald Trump** inaugurated as 45th President of U.S.
- 2/17/2017 – **Scott Pruitt** confirmed head of EPA.





2017 – Operation “WOTUS Shrink” Begins

- 2/28/2017 – **Executive Order 13778: Restoring the Rule of Law, Federalism, & Economic Growth by Reviewing the “Waters of the United States” Rule**
 1. Repeal CWR & reinstate *Rapanos* WOTUS definition
 2. Replace WOTUS definition with **Justice Scalia** definition (from *Rapanos*)
- 3/6/2017– **“Intention to Review & Rescind or Revise the Clean Water Rule”**
 - Published in Federal Register



2018 – Clean Water Rule Returns

- 1/22/2018 – **National Association of Manufacturers vs. DOD**
 - Supreme Court rules Courts of Appeals lack jurisdiction
 - **Decisions must be made at District Court level per CWA**
 - **Clock starts ticking on CWR implementation ...**
- 2/6/2018 – **EPA publishes “Delay Rule”** in FR
 - Added CWR Applicability Date of 2/6/2020
 - Attempt to effectively delay CWR implementation nationwide, giving more time to complete Two Step Process
- 8/16/2018 – **South Carolina District Court stays Delay Rule**
 - **CWR goes into effect in approximately half the states**

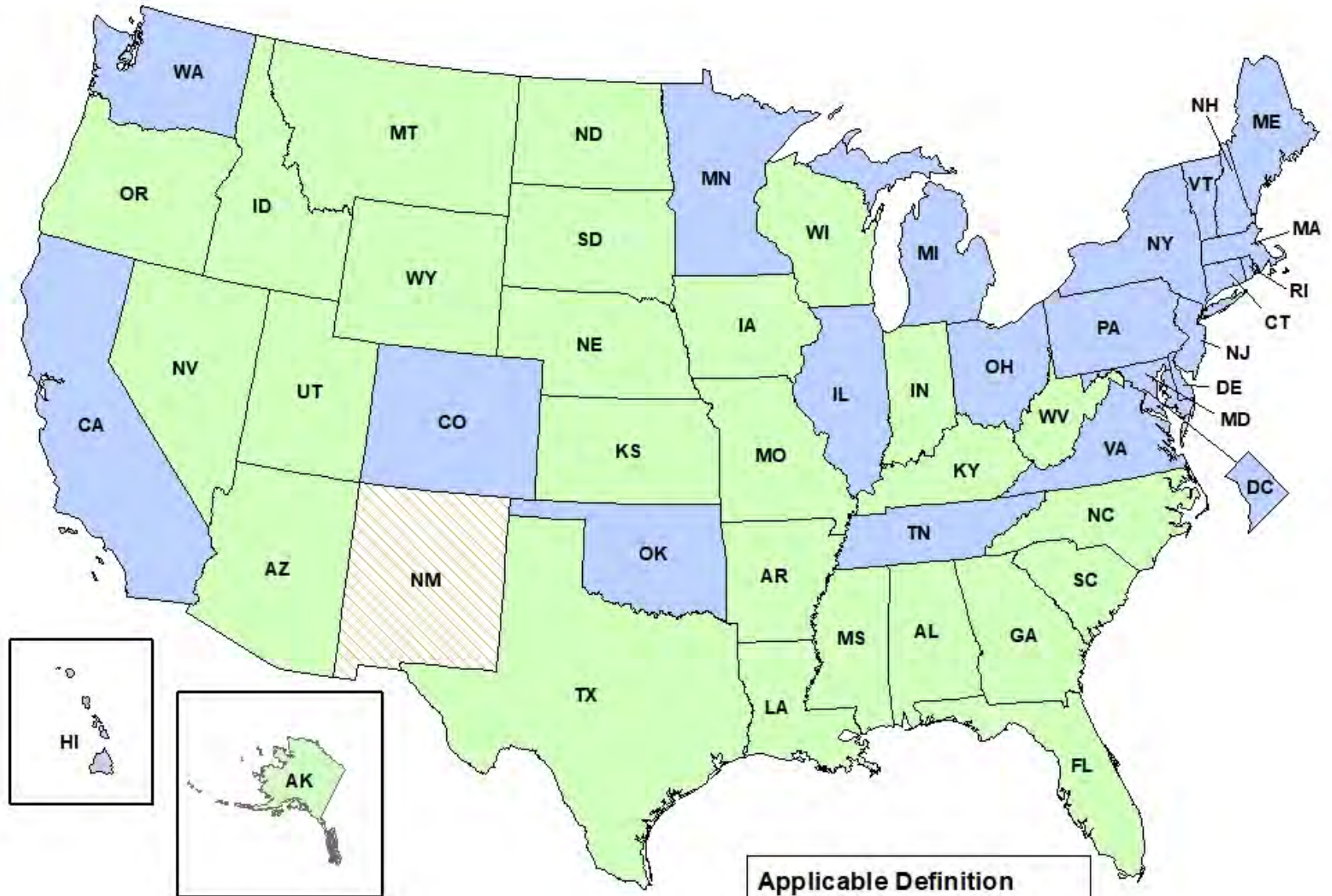


Aug 2018 –
Dec 2019

22 States
Obama
WOTUS

27 States
Rapanos
WOTUS

1 Undecided



The EPA is providing this map for informational purposes only, and it cannot be relied on for specific determinations or other legal purposes. As the litigation continues, the EPA will update the map, when possible, to reflect the most current information that is made available to the EPA and the Army. For specific requests, please contact the Army Corps of Engineers or EPA. This map was updated on July 24, 2019.

Applicable Definition

- 2015 Clean Water Rule*
- Pre-2015 Regulations and Guidance
- Under Federal Court Consideration

*Also applicable in the U.S. territories

Repeal Rule – Effective December 23, 2019

Reasons for Repeal

1. Did not implement legal limits on agencies' authority under the Clean Water Act (CWA) as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's significant nexus test in *Rapanos*
2. CWA section 101(b) “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and “to plan the development and use . . . of land and water resources.” 33 U.S.C. 1251(b).
3. No clear statement from Congress authorizing encroachments of federal jurisdiction over traditional State land-use planning authority
4. Distance-based limits procedural errors



Replace Rule – Revised WOTUS Definition

- 12/11/2018 - Proposed Draft Rule Issued
- 2/14/2019 – Draft Published in Federal Register
 - Purpose = simplify jurisdiction, ensure clarity & predictability, strike balance between Federal & State Waters
 - Approach: Environmental Federalism
 - Scalia Opinion – Relatively Permanent Water
 - Economic Analysis = 276 Pages
 - Resource & Programmatic Assessment = 114 Pages
 - Public Hearings = 1 (Kansas City, Feb 27 – 28, 2019)
- 4/15/2019 – Over 800,000 public comments
- 1/23/2020 – Proposed Final Rule Issued
- 4/21/2020 – Final Published in Federal Register



Navigable Waters Protection Rule (2020)

Jurisdictional Waters [paragraph (a) Waters]

1. The **territorial seas**, and **waters** which are currently used, or were used in the past, or may be susceptible to use in **interstate or foreign commerce**, including waters which are subject to the **ebb and flow of the tide**;
2. **Tributaries**;
3. Lakes and ponds, and **impoundments of jurisdictional waters**; and
4. **Adjacent wetlands.**



Navigable Waters Protection Rule (2020)

Non-Jurisdictional Waters [paragraph (b) Waters]

1. Waters or water features that are **not identified in paragraph (a)(1)- (4)**;
2. **Groundwater**, including groundwater drained through subsurface drainage systems;
3. **Ephemeral features**, including ephemeral streams, swales, gullies, rills, and pools;
4. Diffuse **stormwater run-off** and directional sheet flow over upland;
5. **Ditches** that are not paragraph (a)(1) or (2) waters, and those portions of ditches constructed in paragraph (a)(4) water that do not satisfy the conditions of paragraph (c)(6) [adjacent wetlands];
6. **Prior converted cropland**;
7. **Artificially irrigated areas**, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease;



Navigable Waters Protection Rule (2020)

Non-Jurisdictional Waters [paragraph (b) Waters]

8. **Artificial lakes and ponds**, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated **in upland or in non-jurisdictional waters**, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet conditions of paragraph (c)(6) [definition of lakes, ponds, etc.];
9. **Water-filled depressions** constructed or excavated **in upland or in non-jurisdictional waters** incidental to mining or construction activity, and pits excavated **in upland or in non-jurisdictional waters** for the purpose of obtaining fill, sand, or gravel;
10. **Stormwater control features** constructed or excavated **in upland or in non-jurisdictional waters** to convey, treat, infiltrate, or store stormwater run-off;
11. Groundwater recharge, water reuse, and **wastewater recycling structures**, including **detention, retention, and infiltration basins** and ponds, constructed or excavated **in upland or in non-jurisdictional waters** and
12. **Waste treatment systems.**



Navigable Waters Protection Rule – Definitions

1. Adjacent wetlands
2. Ditch
3. Ephemeral
4. High tide line
5. Intermittent
6. Lakes and ponds, and impoundments of jurisdictional waters
7. Ordinary high water mark
8. Perennial



Navigable Waters Protection Rule – Definitions

9. Prior converted cropland
10. Snowpack
11. Tidal waters and waters that are subject to the ebb and flow of the tide
12. Tributary
13. Typical year
14. Upland
15. Waste treatment system
16. Wetlands



Navigable Waters Protection Rule – Key Phrases

- Inundated by floodwater*
 - Adjacent wetland
 - Lakes and ponds, and impoundments of jurisdictional waters
- Contributes surface water flow*
 - Lakes and ponds, and impoundments of jurisdictional waters
- Direct hydrologic surface connection*
 - Adjacent wetland separated by artificial structure

* = in a typical year



Navigable Waters Protection Rule – Definitions

Adjacent Wetlands

- i. abut or
- ii. ~~have a direct hydrologic surface connection to*~~ are **inundated by flooding** from a paragraph (a)(1) – (a)(3) water **in a typical year**;
- iii. are physically separated from a paragraph (a)(1) through (3) water only by a natural berm, bank, dune, or similar natural feature;
- iv. Are physically separated from a paragraph (a)(1) – (a)(3) water only by an artificial dike, barrier, or similar artificial structure so long as that structure allows a **direct hydrologic surface connection** between the wetlands and paragraph (a)(1) through (3) water **in a typical year**, such as through a culvert, flood gate, pump, or similar artificial feature.

* Original language in draft version of rule.



Navigable Waters Protection Rule – Definitions

Tributary

- A river, stream, or similar naturally occurring surface water channel that *contributes surface water flow* to a paragraph (a)(1) water *in a typical year* either directly or through one or more paragraph (a)(2) through (4) waters
- Must be perennial or intermittent *in a typical year*
- Alteration or relocation does not modify jurisdictional status *as long as it continues to satisfy the flow conditions*



Navigable Waters Protection Rule – Definitions

Tributary

Does not lose jurisdictional status if it *contributes surface water flow* to a downstream jurisdictional water *in a typical year* through

- a channelized non-jurisdictional surface water feature,
- through a subterranean river,
- through a culvert, dam, tunnel, or similar artificial feature, or
- through a debris pile, boulder field, or similar natural feature.



Navigable Waters Protection Rule – Definitions

- **Ephemeral** – surface water flowing or pooling only in direct response to precipitation (e.g. rain or snowfall).
- **Intermittent** – surface water continuously flowing *during certain times of a typical year* and *more than in direct response to precipitation* (e.g. seasonally when the groundwater table is elevated or when snowpack melts). *Other sources? Artificial sources?*
- **Perennial** – surface water flowing continuously year-round. *Typical year?*



Navigable Waters Protection Rule – Definitions

Lakes and ponds, and impoundments of jurisdictional waters

Standing bodies of open water that *contribute surface water flow* to a paragraph (a)(1) water *in a typical year* either directly or through one or more paragraph (a)(2) through (4) waters.

Also jurisdictional if it is *inundated by flooding* from a paragraph (a)(1) through (3) water *in a typical year*.



Navigable Waters Protection Rule – Definitions

Lakes and ponds, and impoundments of jurisdictional waters

Does not lose jurisdictional status if it **contributes surface water flow** to a downstream jurisdictional water **in a typical year** through

- a channelized non-jurisdictional surface water feature,
- through a subterranean river,
- through a culvert, dam, tunnel, or similar artificial feature, or
- through a debris pile, boulder field, or similar natural feature.



Navigable Waters Protection Rule – Definitions

Typical Year

When precipitation and other climatic variables are within the **normal periodic range** (e.g. seasonally, annually) for the geographic area of the applicable aquatic resource based on a **rolling thirty-year period**.



Waters of the United States



Waters of the United States

TERRITORIAL SEAS



Waters of the United States

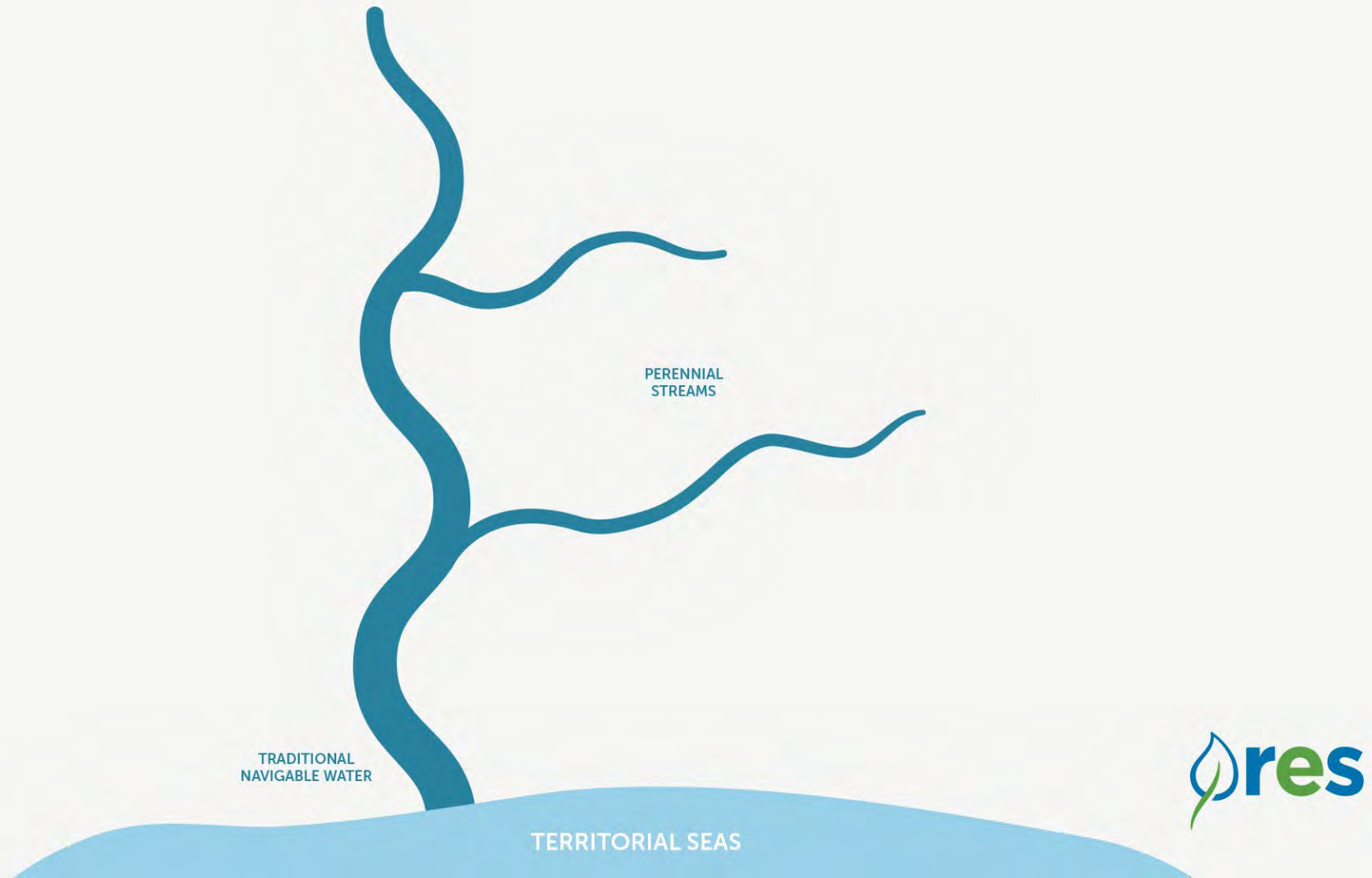


TRADITIONAL
NAVIGABLE WATER

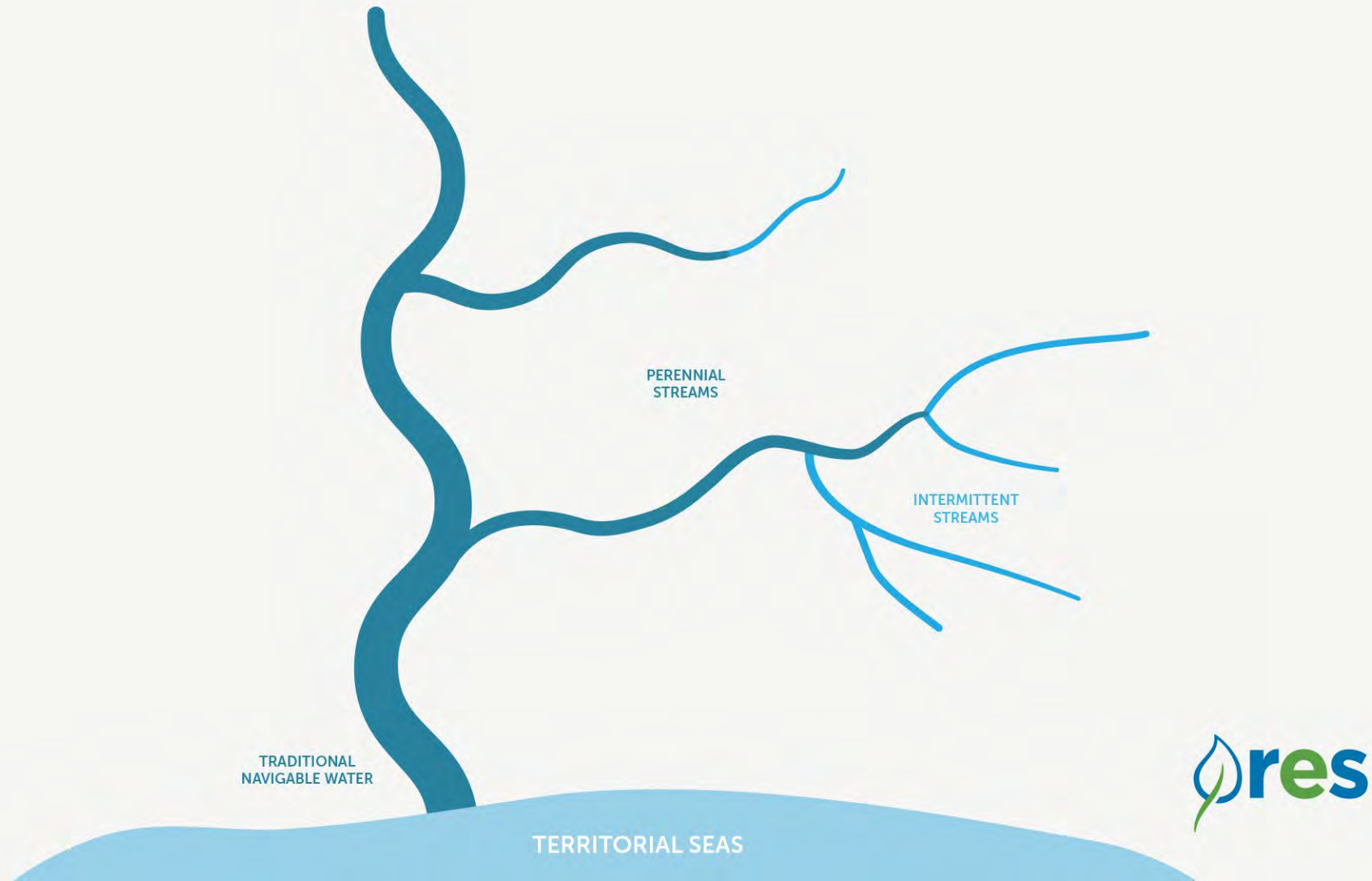
TERRITORIAL SEAS



Waters of the United States



Waters of the United States



Waters of the United States



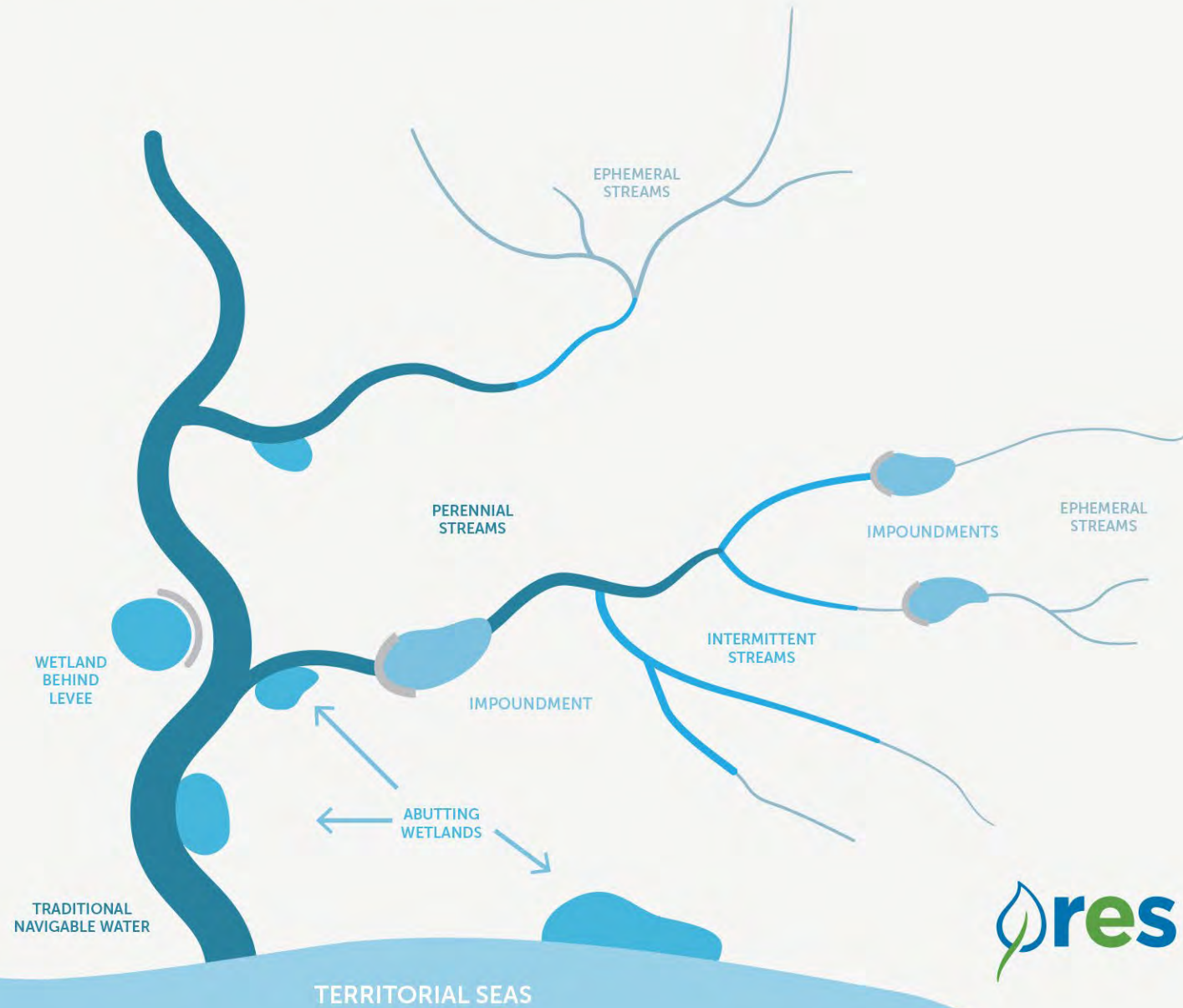
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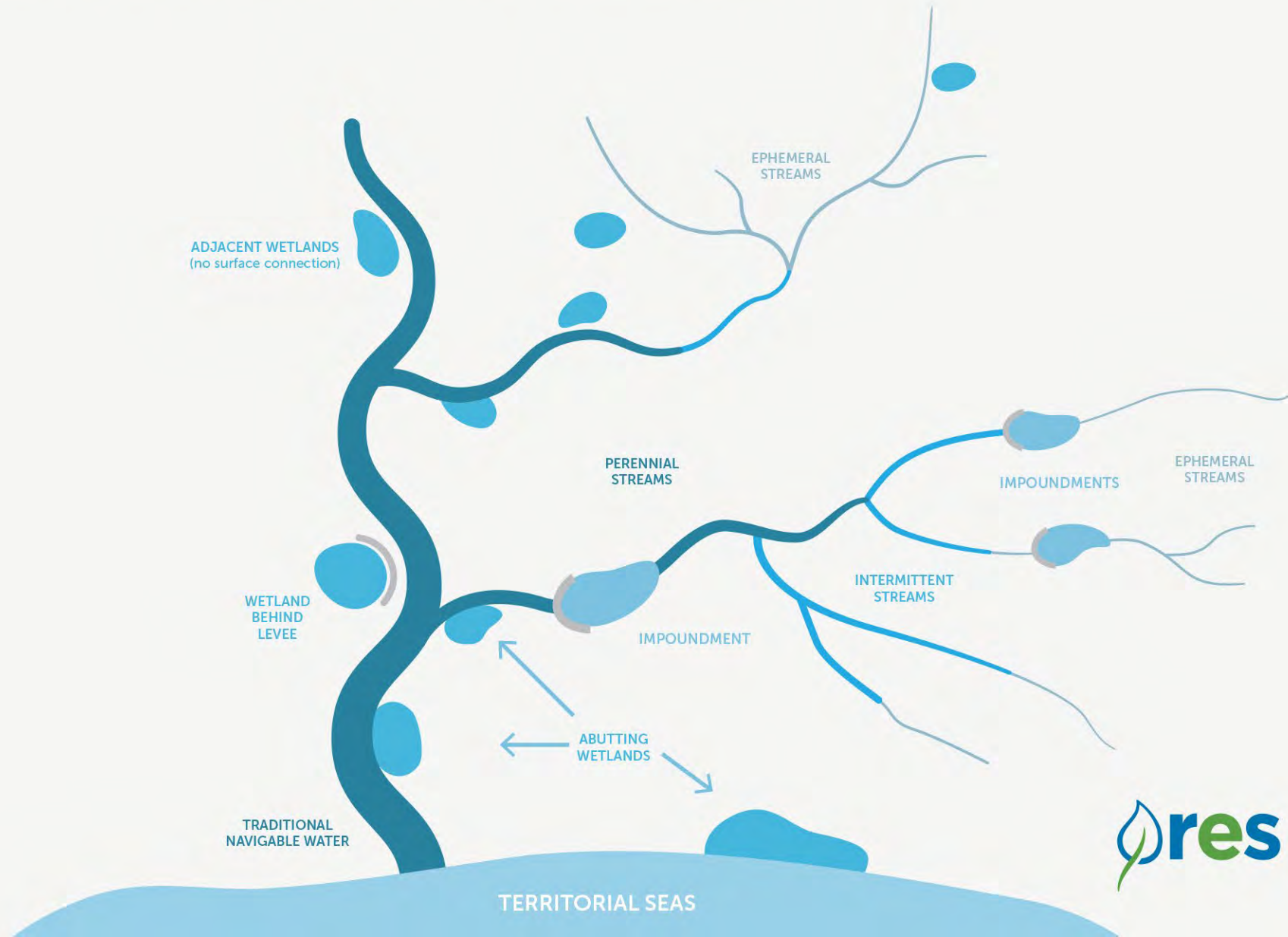
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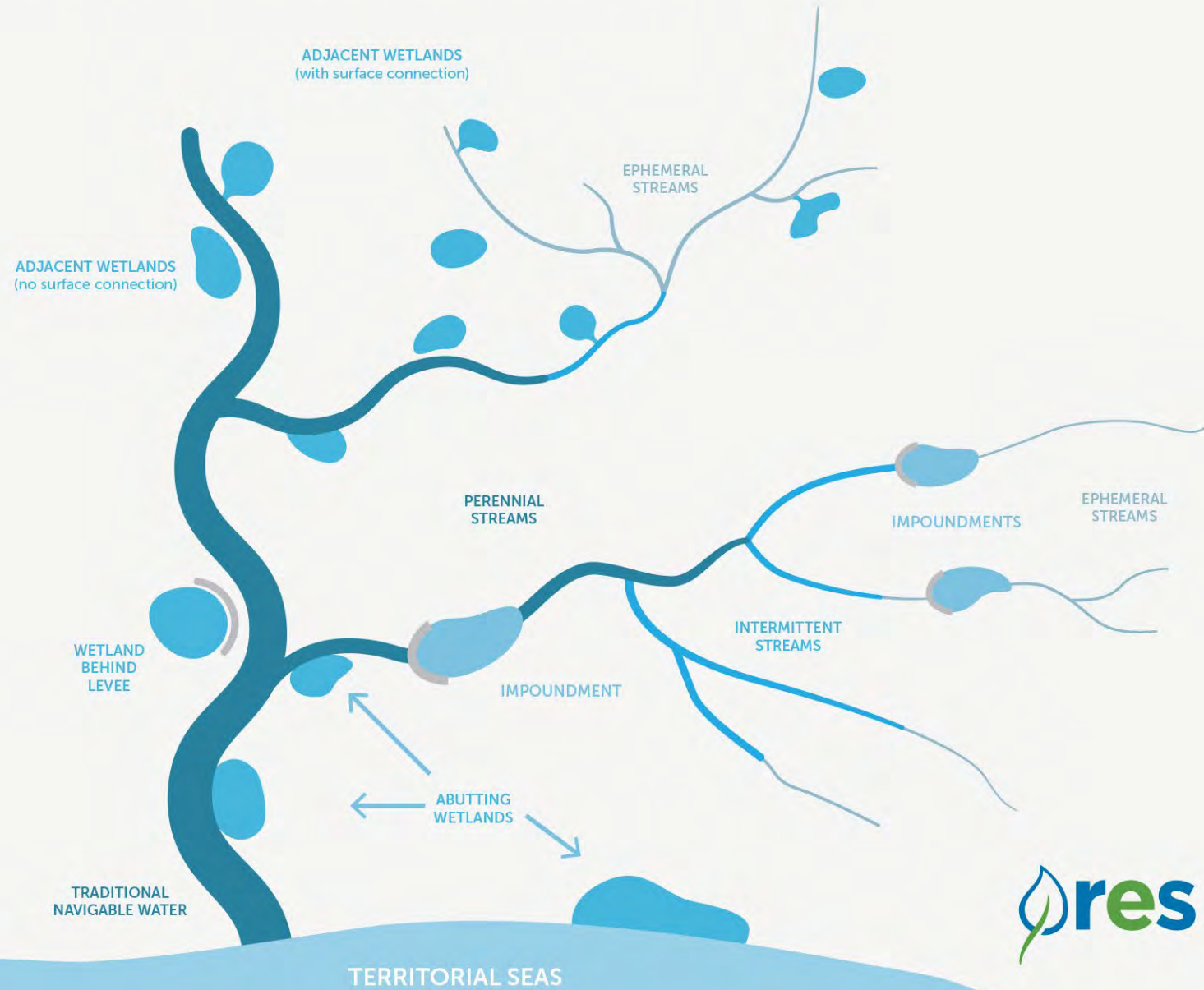
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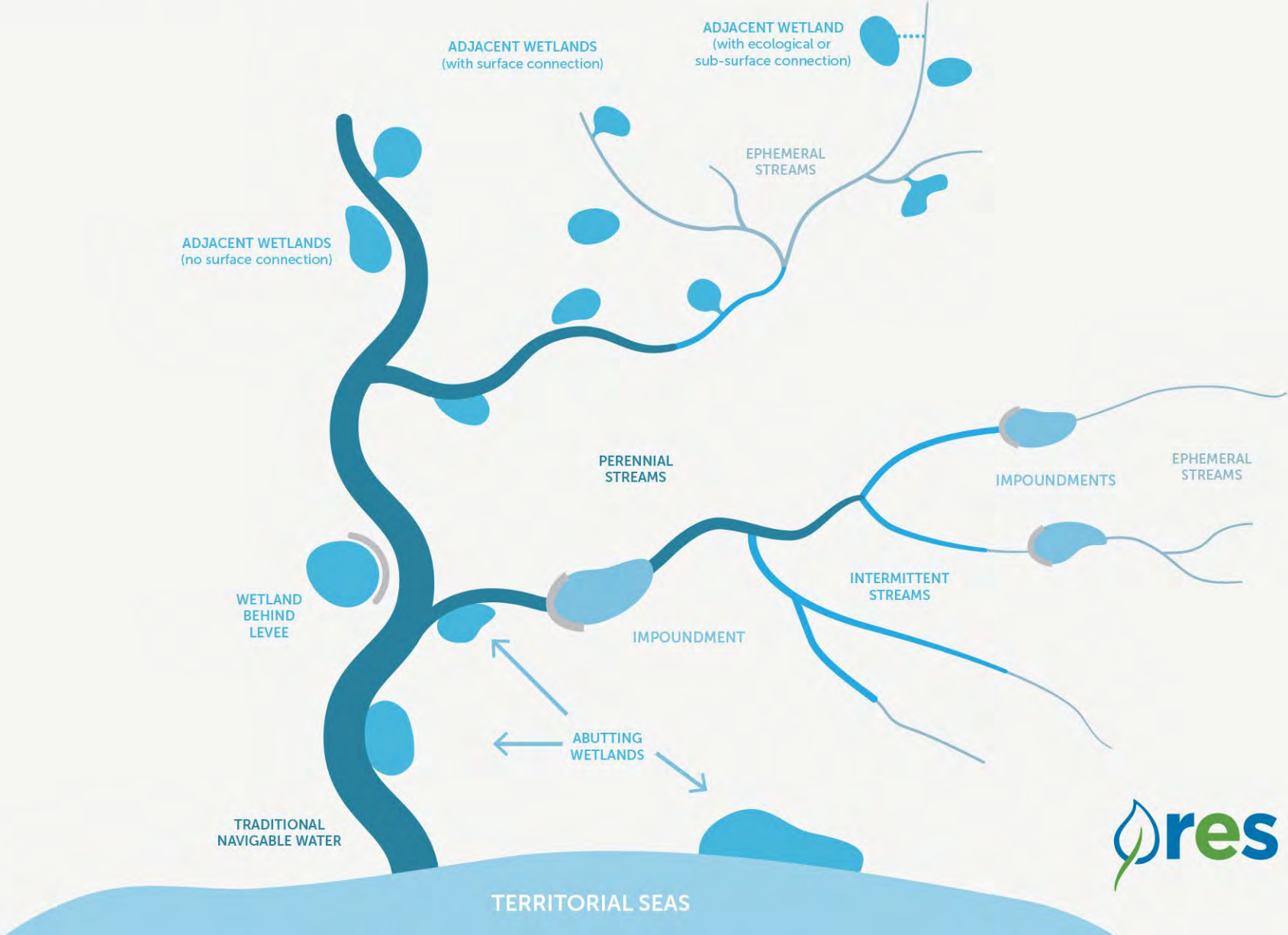
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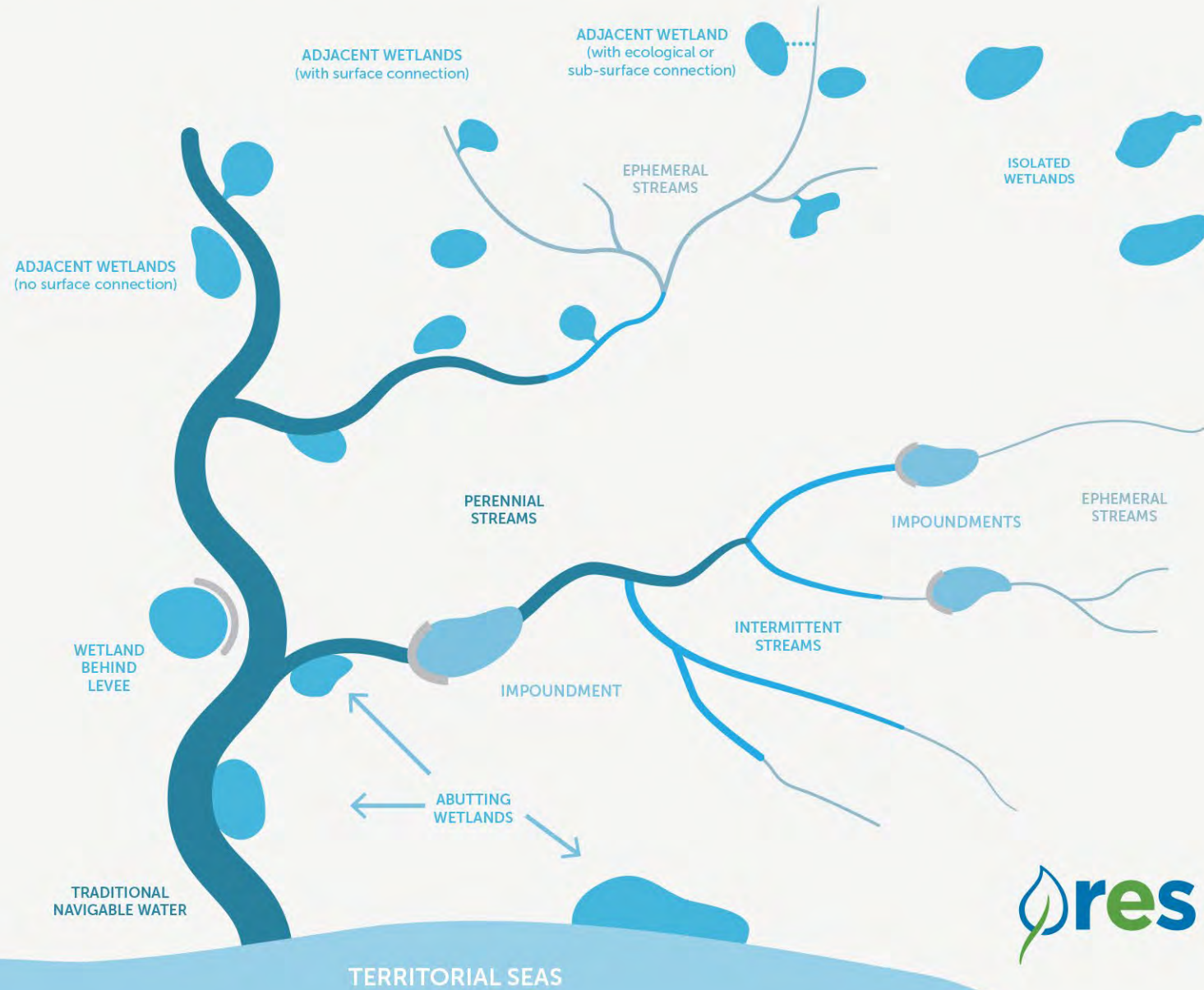
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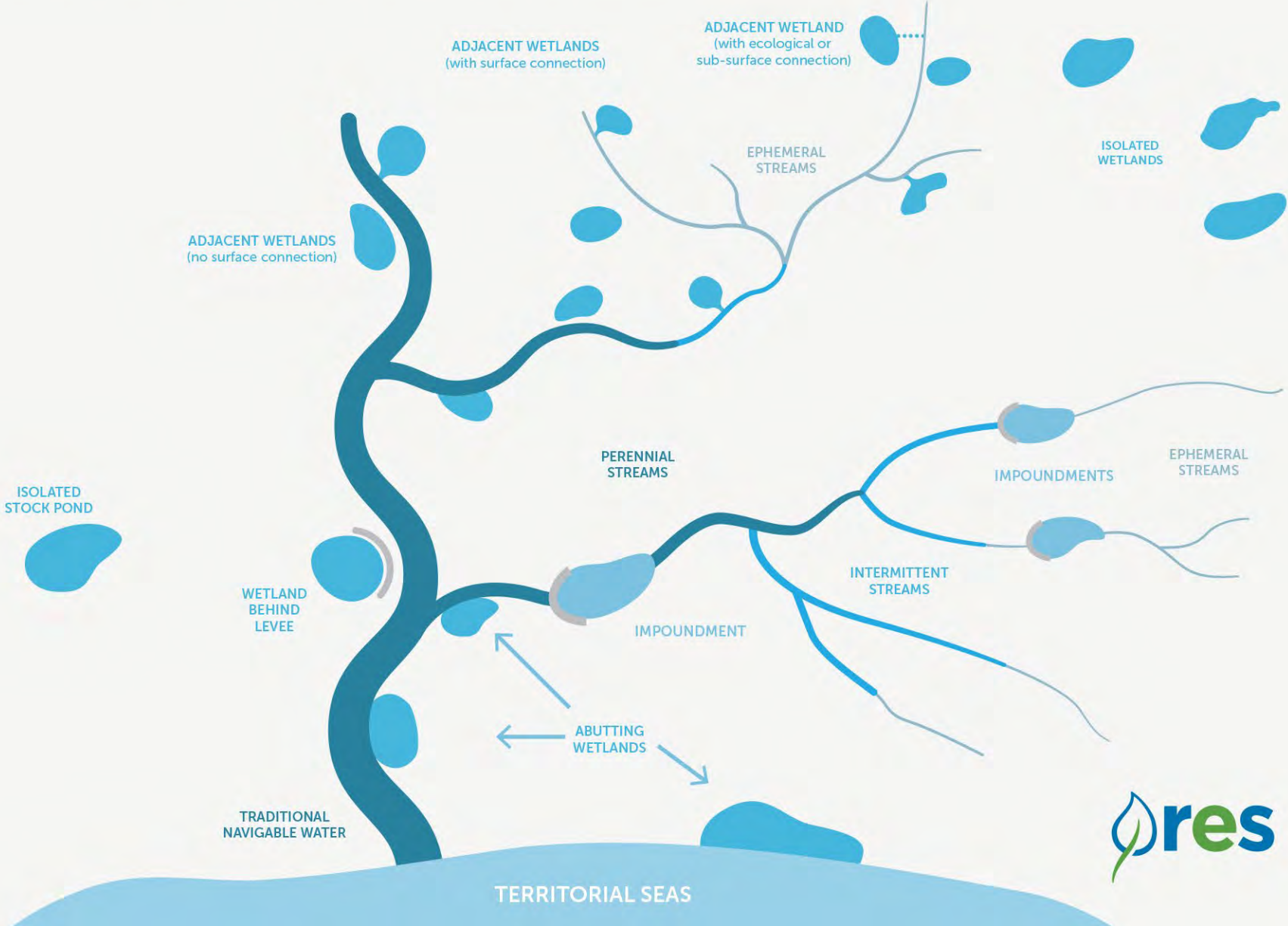
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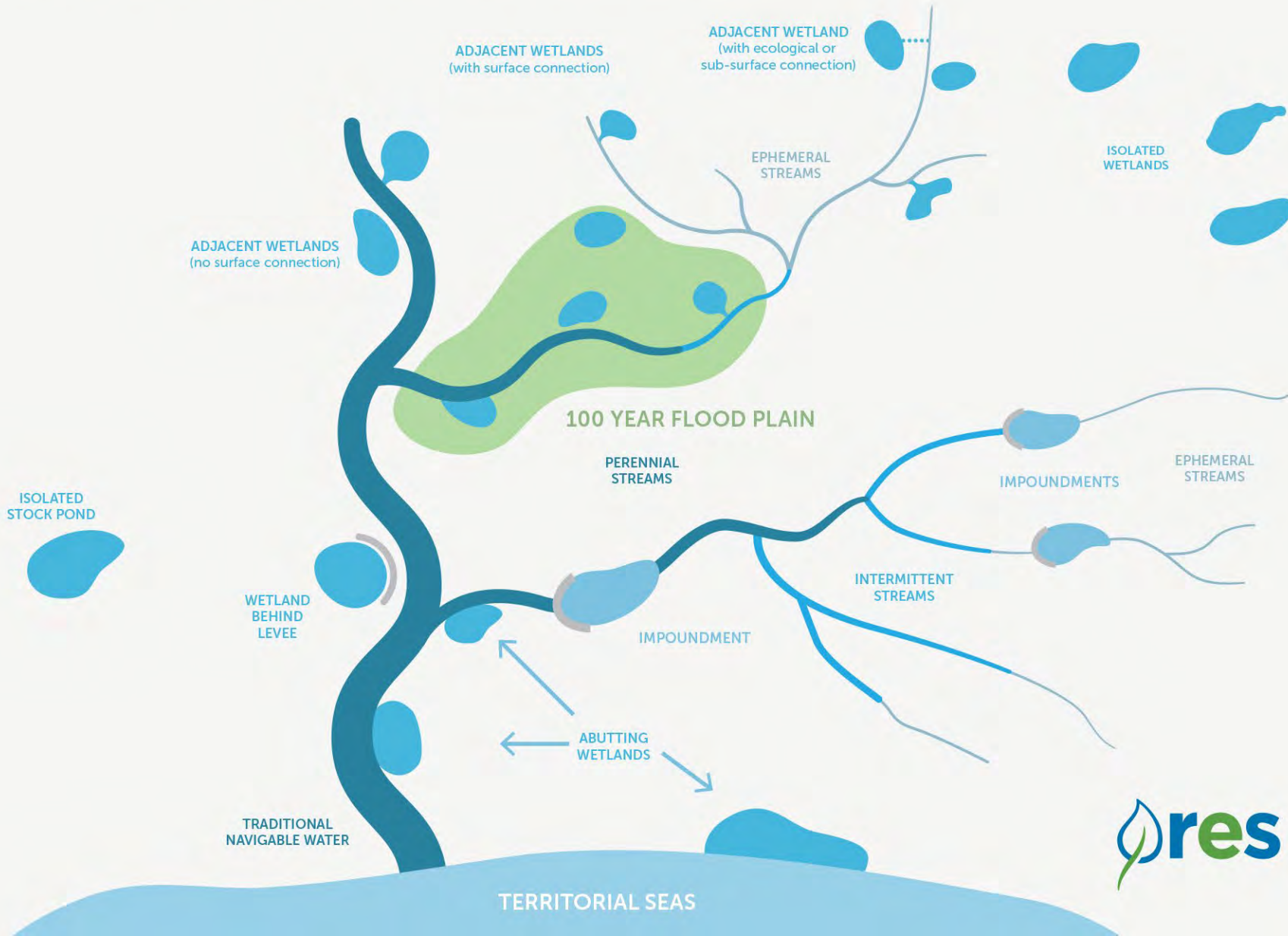
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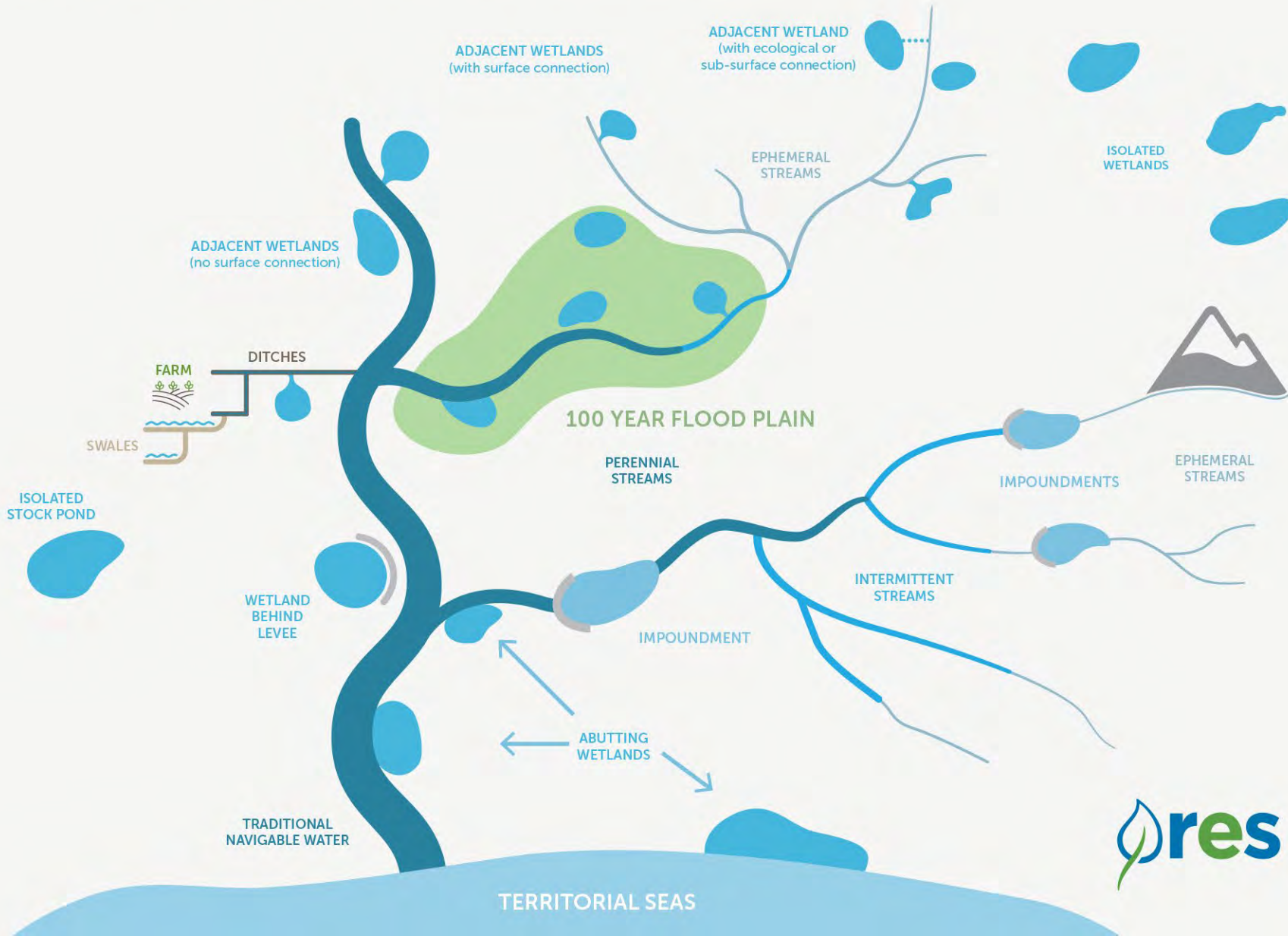
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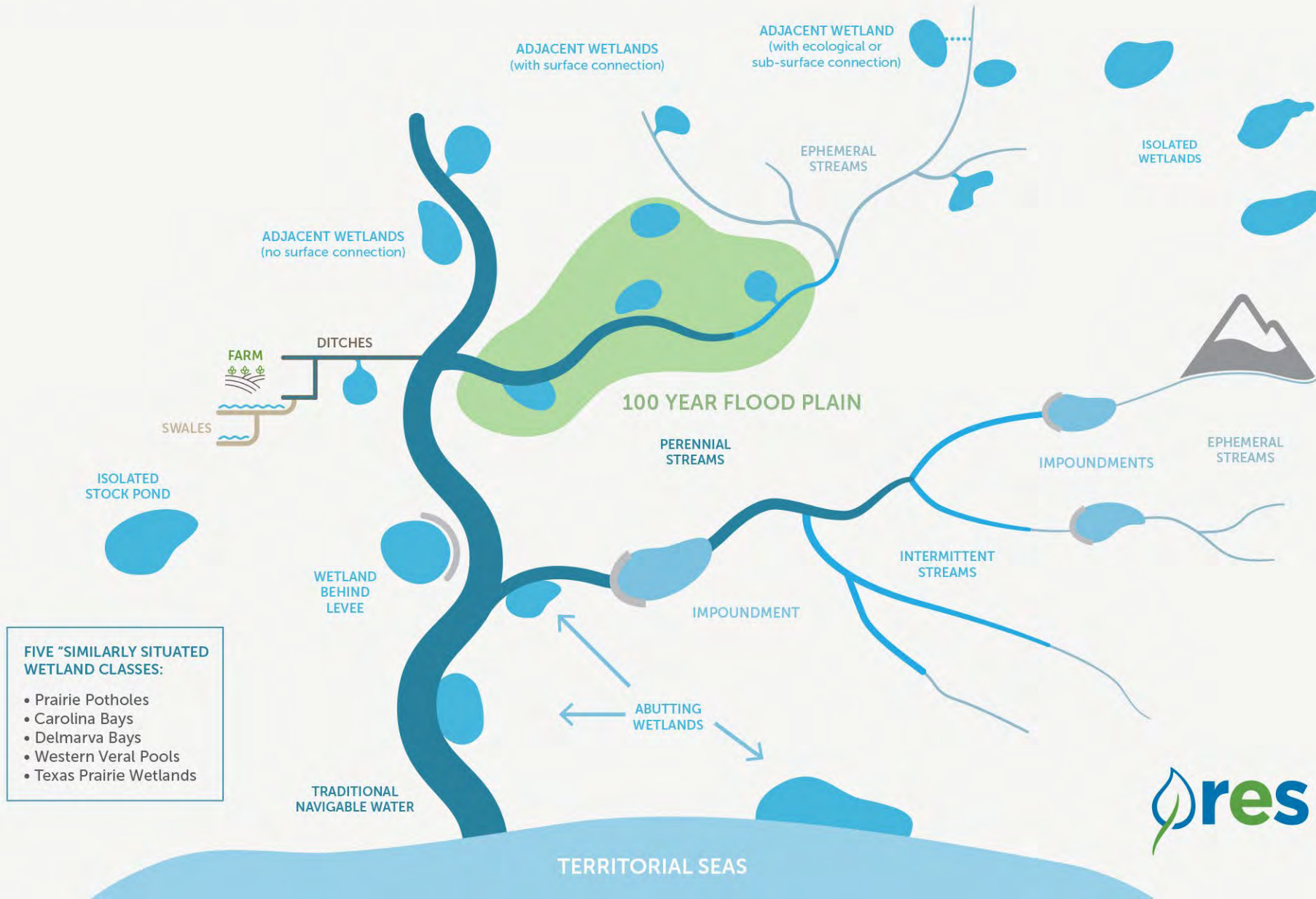
Waters of the United States



Waters of the United States



Waters of the United States



Waters of the United States

Post-Rapanos 2008



Waters of the United States

Obama EPA 2015 - Clean Water Rule



- FIVE "SIMILARLY SITUATED WETLAND CLASSES:
- Prairie Potholes
 - Carolina Bays
 - Delmarva Bays
 - Western Vernal Pools
 - Texas Prairie Wetlands



Waters of the United States

Trump EPA 2020 – Navigable Waters Protection Rule



Perennial & Intermittent Waters & Adjacent Wetlands Only?

- Is that really all Congress intended to protect?
- Is that really all that contribute to clean water?
- What would we lose if we adopt that standard?



Potential Effects

Figure IV-9: Overview of potential environmental impacts to selected CWA programs from proposed changes in CWA jurisdiction for certain waters.

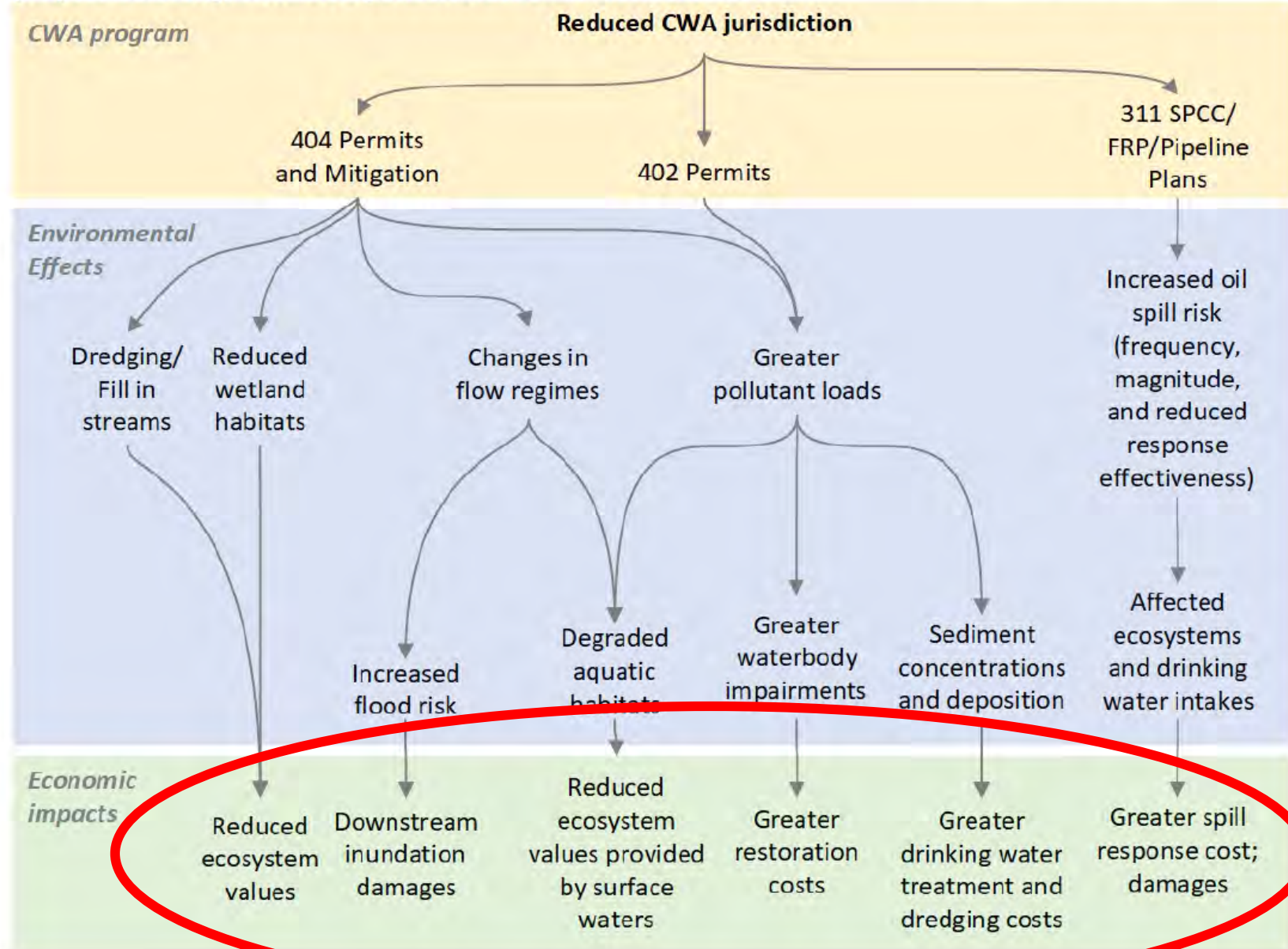


Figure from Economic Analysis for the Proposed Revised Definition of WOTUS, EPA & USACE, 12/14/2018

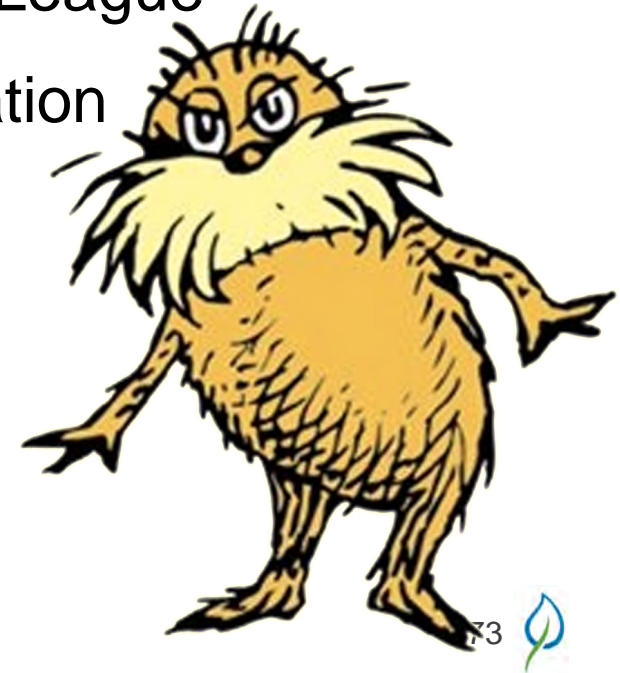
What happens next?

- NWPR Effective Date = **June 22, 2020**
- Litigation
- Legislation
- States



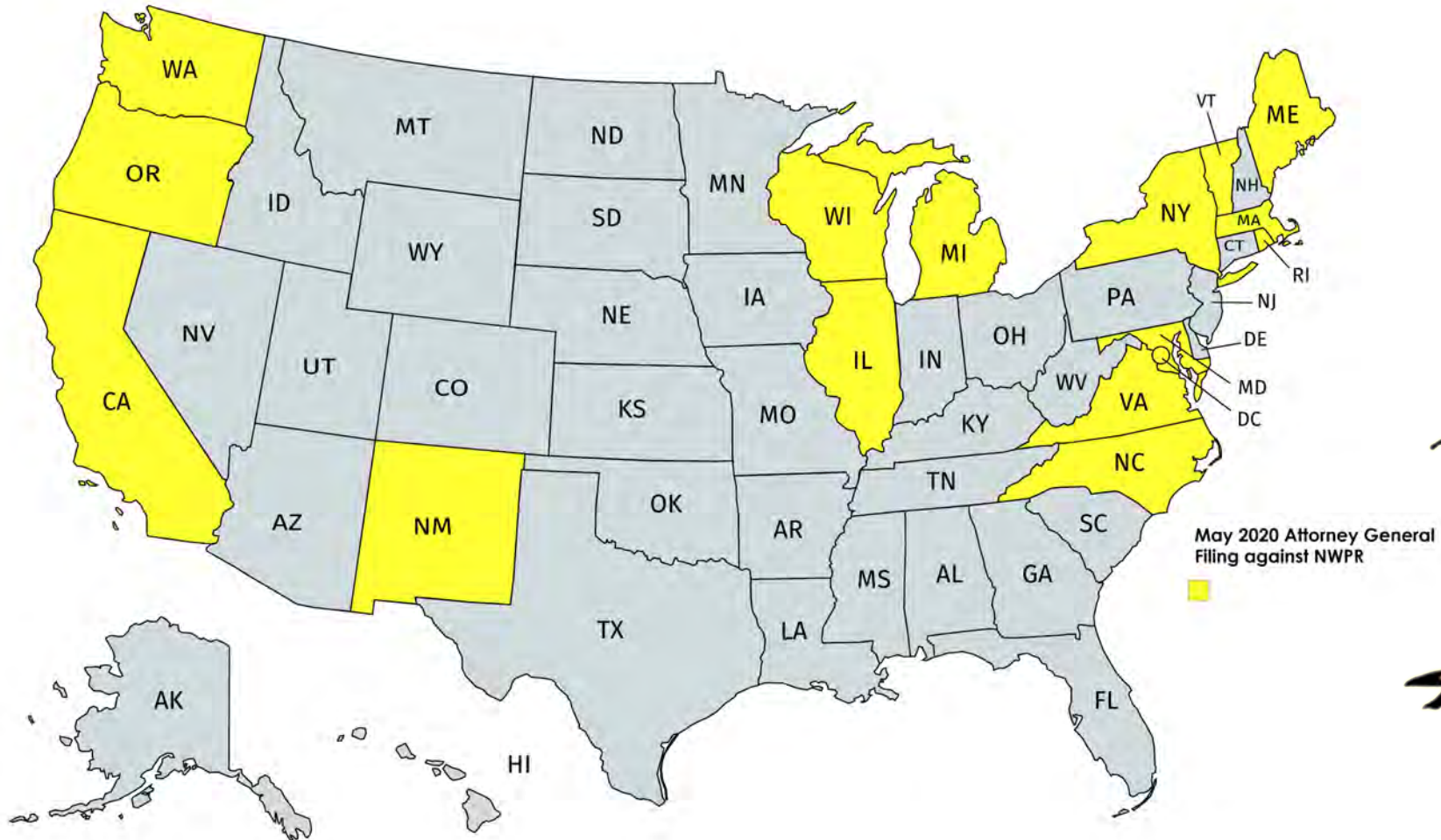
Litigation

- 2/19/2020 – Center for Biological Diversity et al NOI to Sue
- 2/27/2020 – Sierra Club et al NOI to Sue
- 4/27/2020, Baltimore Chesapeake Bay Foundation
- 4/27/2020, South Carolina – Southern Environmental Law Center
- 4/29/2020, South Carolina – SC Coastal Conservation League
- 4/29/2020, Massachusetts – Conservation Law Foundation
- 5/1/2020, N.D. of California – **17 Attorneys General**



Litigation

- 5/1/2020, Northern District of California – 17 Attorneys General



Litigation - Arguments

- Administrative Procedures Act
- Endangered Species Act Section 7 Compliance
- Economic Analysis
- Scientific Analysis
- CWA Objectives
- “Arbitrary and Capricious” Protections
- Kennedy’s Significant Nexus Test
- No Explanation for Change
- Downstream States Water Quality
- State Water Protection Programs Burden



Litigation

- All must be tried initially in District Courts
 - more likely to overturn rules
- Nationwide Stay or Patchwork?
- End up back in SCOTUS?



SCOTUS WOTUS - Potential End Game?

5 Republican Presidential Appointees

- *John Roberts*
- *Clarence Thomas*
- *Samuel Alito*
- *Neil Gorsuch*
- *Brett Kavanaugh*

4 Democratic Presidential Appointees

- *Ruth Bader Ginsburg*
- *Stephen Breyer*
- *Sonia Sotomayor*
- *Elena Kagan*

Judges in italics participated in 2006 Rapanos Case



Litigation

County of Maui v. Hawaii Wildlife Fund

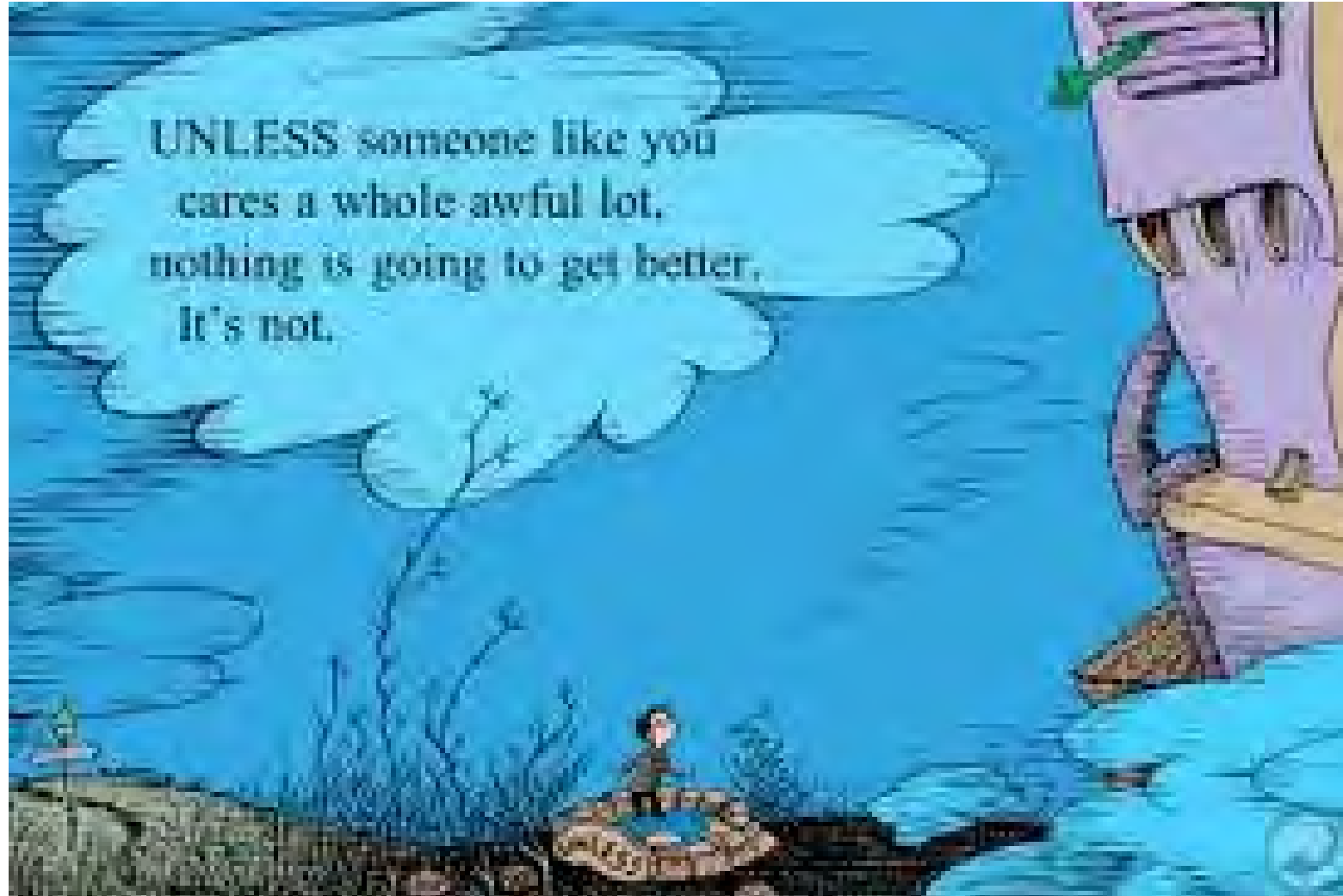
- 6-3 Opinion decided April 23, 2020
 - Majority led by Justice Beyer
 - Joined by conservatives **Roberts** and **Kavanaugh**
- Groundwater contamination that contaminates a WOTUS can be regulated by Clean Water Act
- “Functionally equivalent” to point source discharge
- Requires NPDES Permit under Section 402
- Implications for NWPR?



Legislation

- House Bill – “Clean Water for All”
 - Rep. Peter DeFazio, D-OR
 - chair of the House Committee on Transportation and Infrastructure
 - Rep. Grace Napolitano, D-CA
 - chair of the Subcommittee on Water Resources and Environment
- Prohibit Navigable Water Protection Rule from going into effect
- Require EPA and USSACE to start over with new science-based regulations to protect rivers, streams and wetlands
- Supporters: Earthjustice, the Environmental Law and Policy Center, the League of Conservation Voters, the National Wildlife Federation, the Natural Resources Defense Council, the Sierra Club, Trout Unlimited

What about the States?

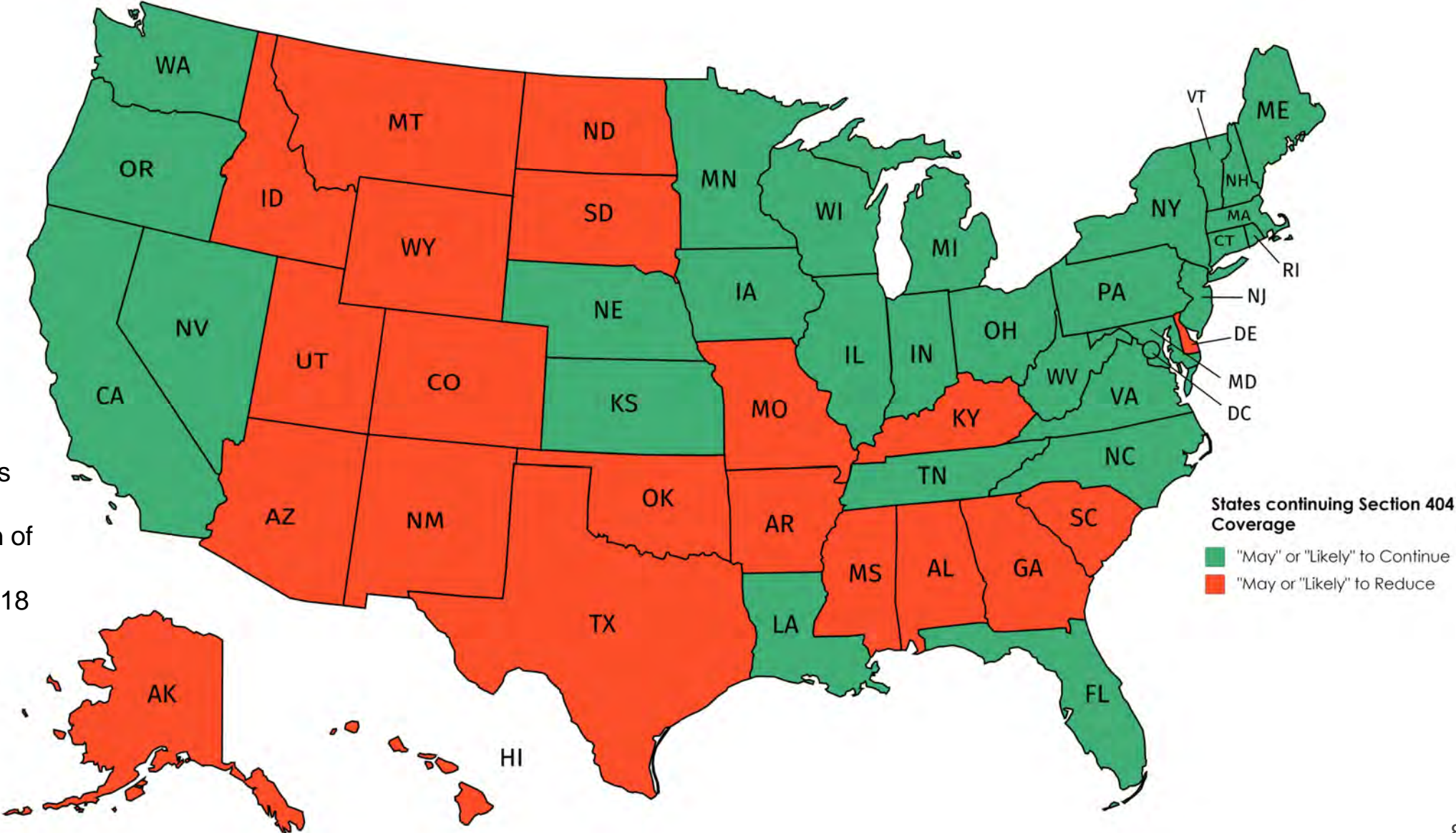


Can States Fill the Gap?

- Complicated issue due to legal and budget constraints
- 30 have some form of 404-like program; 21 rely solely on 401 WQC
- Approximately ½ regulate at least some waters beyond WOTUS
- At least 20 regulate all or some isolated wetlands
- 13 have laws requiring environmental regulations parallel federal
 - 5 still allow regulation of some waters beyond WOTUS
 - 8 don't allow regulation of beyond WOTUS
- 23 require extra steps to impose state regs beyond WOTUS
- 22 do not have restrictive laws
 - 11 currently regulate waters beyond WOTUS
 - 11 do not currently regulate waters beyond WOTUS

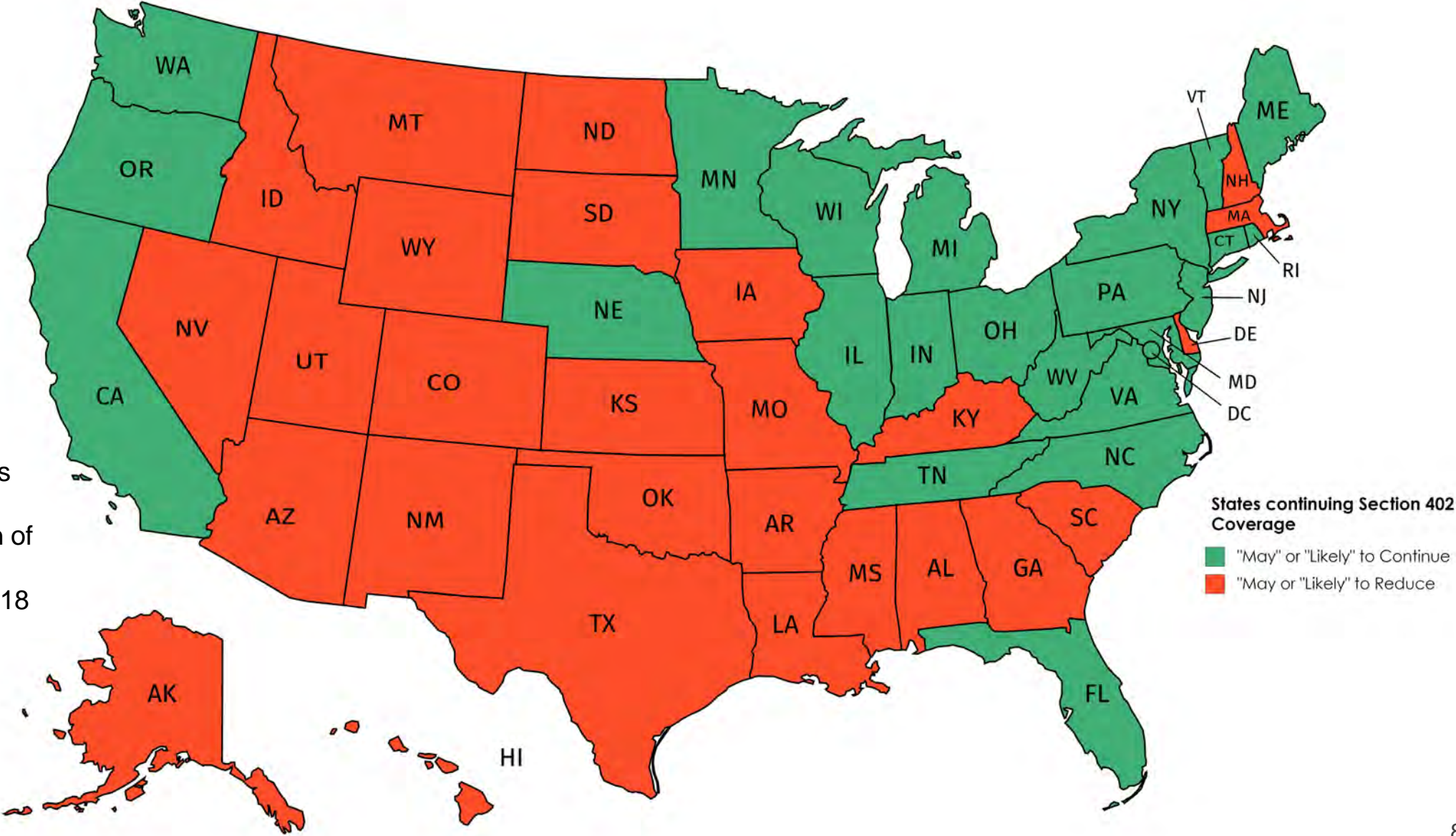


States that may fill Section 404 gap



Based on p. 41
Economic Analysis
for the Proposed
Revised Definition of
WOTUS, EPA &
USACE, 12/14/2018

States that may fill Section 402 gap



Based on p. 44
Economic Analysis
for the Proposed
Revised Definition of
WOTUS, EPA &
USACE, 12/14/2018

<https://www.epa.gov/nwpr/navigable-waters-protection-rule-step-two-revise>

- Final Rule: The Navigable Waters Protection Rule: Definition of “Waters of the United States” pre-publication version
- Press Release: EPA and Army Deliver on President Trump’s Promise to Revise Definition of “Waters of the United States”
- Fact Sheets:
 - Navigable Waters Protection Rule Overview
 - “Typical Year” and the Definition of “Waters of the United States”
 - **Implementing the Final 2020 “Waters of the United States” Definition**
 - Mapping Fact Sheet
 - Rural America Fact Sheet
- Supporting Documents:
 - Economic Analysis
 - Resource and Programmatic Assessment
 - Access All Supporting Documents



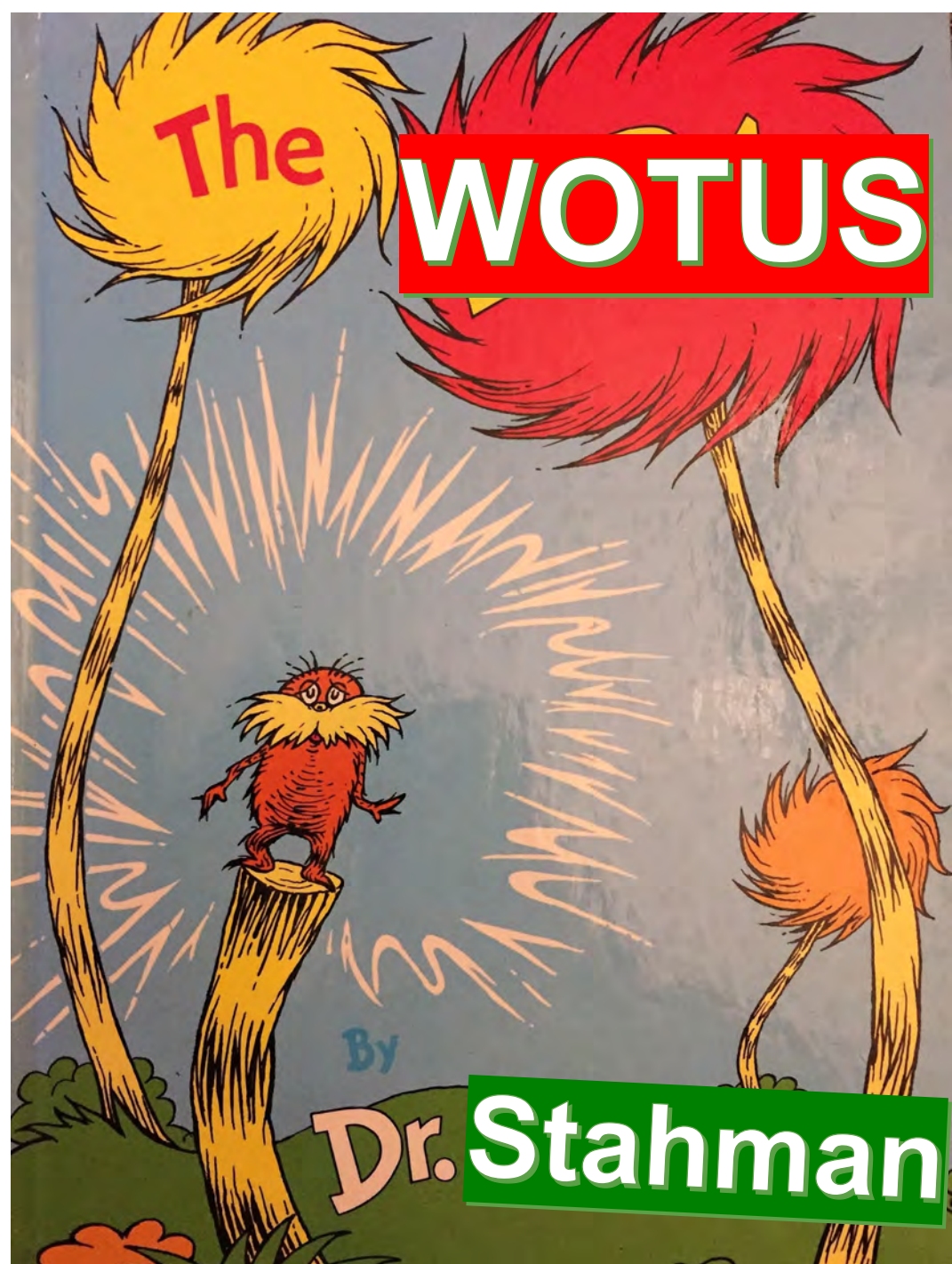
Implementing the Final 2020 WOTUS Definition - Determining Inundation by Flooding

“To determine whether a waterbody is inundated by flooding during a typical year one may use, for example,

- on-site visual observations and field-based indicators of recent inundation (e.g., the presence of water marks, sediment and drift deposits, water-stained leaves, or algal mats), or
- remote tools and datasets such as USGS stream gage records, recurrence intervals of peak flows, wetland surface water level records, flood records, aerial photography and satellite imagery,
- inundation modeling techniques and tools (e.g., tools available from the USGS Flood Inundation Mapping (FIM) program).
- A site-specific modeling tool that may be used to evaluate inundation is the Hydrologic Engineering Center’s River Analysis System (HEC-RAS) software”



Questions?



Acknowledgments

- SWCA Environmental Consultants – Kenny Carothers and many others
- BioWest – Matt Chastain
- Society of Wetland Scientists – 2015 Workshop
- Association of State Wetland Managers – Roy Gardner, Stephen Samuels
 - <https://www.aswm.org/aswm/aswm-webinarscalls/10105-2018-past-aswm-s-hot-topics-webinar-series#feb9webinar>
- Association of State Wetland Manager – Roy Gardner, Andy Robertson, Les Lem
 - <https://www.aswm.org/aswm/aswm-webinarscalls/584-2019-past-aswm-s-hot-topics-webinar-series#wotus02>
- U.S. Army Corps of Engineers – David Olson
- EPA – Ellen Gilinsky
- Dawson & Associates – Larry Leibesman



“UNLESS someone like you cares a whole awful
lot nothing is going to get better. It's not.”
—Dr. Seuss, from **THE LORAX**

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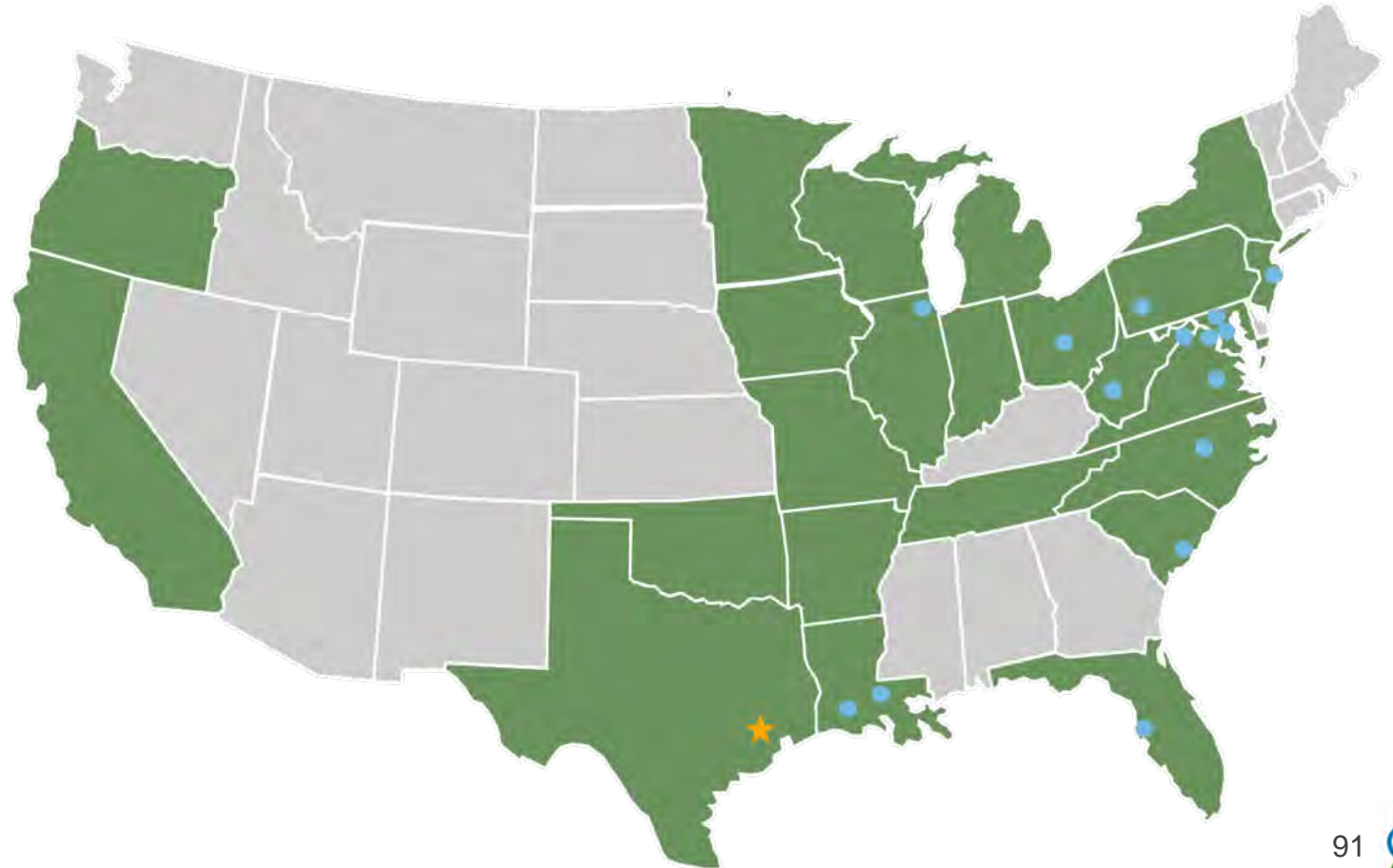
National coverage – Local focus



Founded in Baton Rouge in 2007, RES is the nation's leading provider of ecological and water resource solutions.

RES creates solutions to support economic development and long-term environmental sustainability.

With nearly 400 dedicated individuals across the country – RES employees are directly invested in the quality of their work.



11M

restorative trees
planted



78.9%

tree survival
rate



45,540

acres of restored and
protected lands



6,100

acres of endangered
species habitat
preserved



225

mitigation sites,
completed or
in-process



1,850+

federal and state permits
received using RES-
supplied solutions



240+

tons of water quality
nutrients



180+

miles of streams
restored and conserved

Clean Water Act Section 401 Revision

- Section 401 requires that any applicant for a federal license or permit which may result in a discharge into WOTUS must obtain a water quality certification from the State that the discharge complies with all applicable water quality requirements enumerated in the statute.
- Revisions published in Federal Register August 22, 2019
- Public comment period deadline is October 21, 2019
- Proposed Changes
 - Timeline – 1 Year from Receipt of Complete Application
 - Scope of 401 Conditions – Limited to Water Quality
 - Information Relevant to 401 Review – Limited to Permit Application



Still many questions to be consider ...

- District Courts – Are nationwide injunctions legal?
- Administrative Procedures Act – Was it properly considered?
- Scientific & Economic Analyses – Were they sufficiently considered?
- Tribal Considerations – **Winters Doctrine**?
 - In 1908, established Tribal Water Rights on Federally reserved lands
 - In the Winters opinion, Justice McKenna wrote, “in furthering and advancing the civilization and improvement of the Indians. . . it is essential and necessary that all of the waters of the river flow down the channel uninterruptedly and undiminished in quantity and **undeteriorated in quality,**”
- Chevron Doctrine - Administrative Deference?
- Fractured Supreme Court Decisions
 - No Courts have said Scalia is controlling test.
 - Can Kennedy’s Significant Nexus Test be ignored in Trump WOTUS Replacement Rule?
 - What to do when one concurring opinion (Kennedy) is not subset of another (Scalia)?
 - Hughes v. United States (3/27/2018) – Which opinion should control?

Still questions to be answered...

- Will we end up with a confusing “checkerboard” of inconsistent federal & state wetlands regulations?
- Will the Trump WOTUS Replacement Rule result in disincentives for private sector investment in mitigation banking and ecological restoration?
- Will decreased federal jurisdiction undermine physical, chemical & biological integrity of our nation’s waters?
- Will this new normal decrease resiliency of our nation’s watersheds and population centers to extreme weather events?

Future Possibilities

- Executive Branch
 - 2020 Elections?
- Judicial Branch
 - Nationwide Injunction or Checkerboard?
 - Another Supreme Court Case?
- Legislative Branch
 - Congressional Review Act?
 - Will Congress step in and define WOTUS?
- States
 - Which will fill jurisdictional gaps, which won't?



Clean Water Rule: What's NOT a WOTUS?

- Waste treatment systems
- Prior converted cropland
- Artificially irrigated areas
- Man-made lakes/ponds constructed in dry land
 - Includes stock ponds, rice fields, settling basins, irrigation, etc.
- Swimming pools, reflecting pools & ornamental waters constructed in dry land



Clean Water Rule: What's NOT a WOTUS?

- Water-filled depressions incidental to construction & mining
- Erosional features - gullies, rills, non-wetland swales
- Lawfully constructed grassed waterways
- Puddles (*my personal favorite*)
- Groundwater
- Stormwater control features constructed in dry land
- Wastewater recycling structures constructed in dry land



Navigable Waters Protection Rule – Definitions

Adjacent Wetlands

An adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure divides the wetland, as long as the structure allows for a *direct hydrologic surface connection* through or over that structure *in a typical year*.



Navigable Waters Protection Rule – Definitions

Tributary

Includes a ditch that either

- relocates a tributary,
- is constructed in a tributary, or
- is constructed in an adjacent wetland

as long as the ditch **satisfies the flow conditions** of this definition.



<https://www.epa.gov/ogc/notices-intent-sue-us-environmental-protection-agency-epa>

- Lists all current NOIs to sue EPA (currently 352 entries)
- Center for Biological Diversity, Waterkeeper Alliance, Center for Food Safety, et al.
- Formal Notice of Intent to Sue for Violations of the **Endangered Species Act**; 2020 Revised Regulatory Definition of “Water of the United States”

