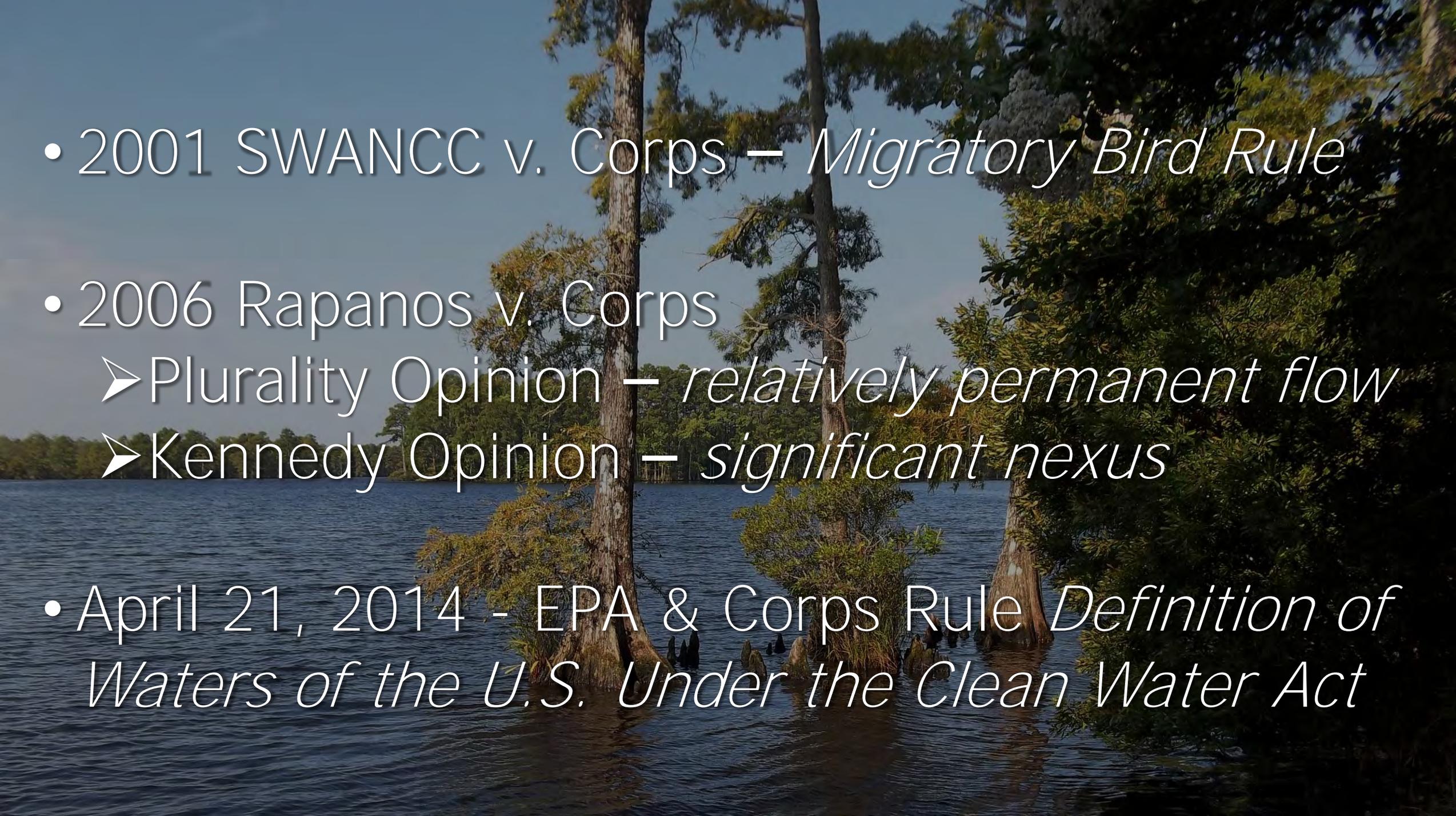


WATERS OF THE US PROPOSED RULE

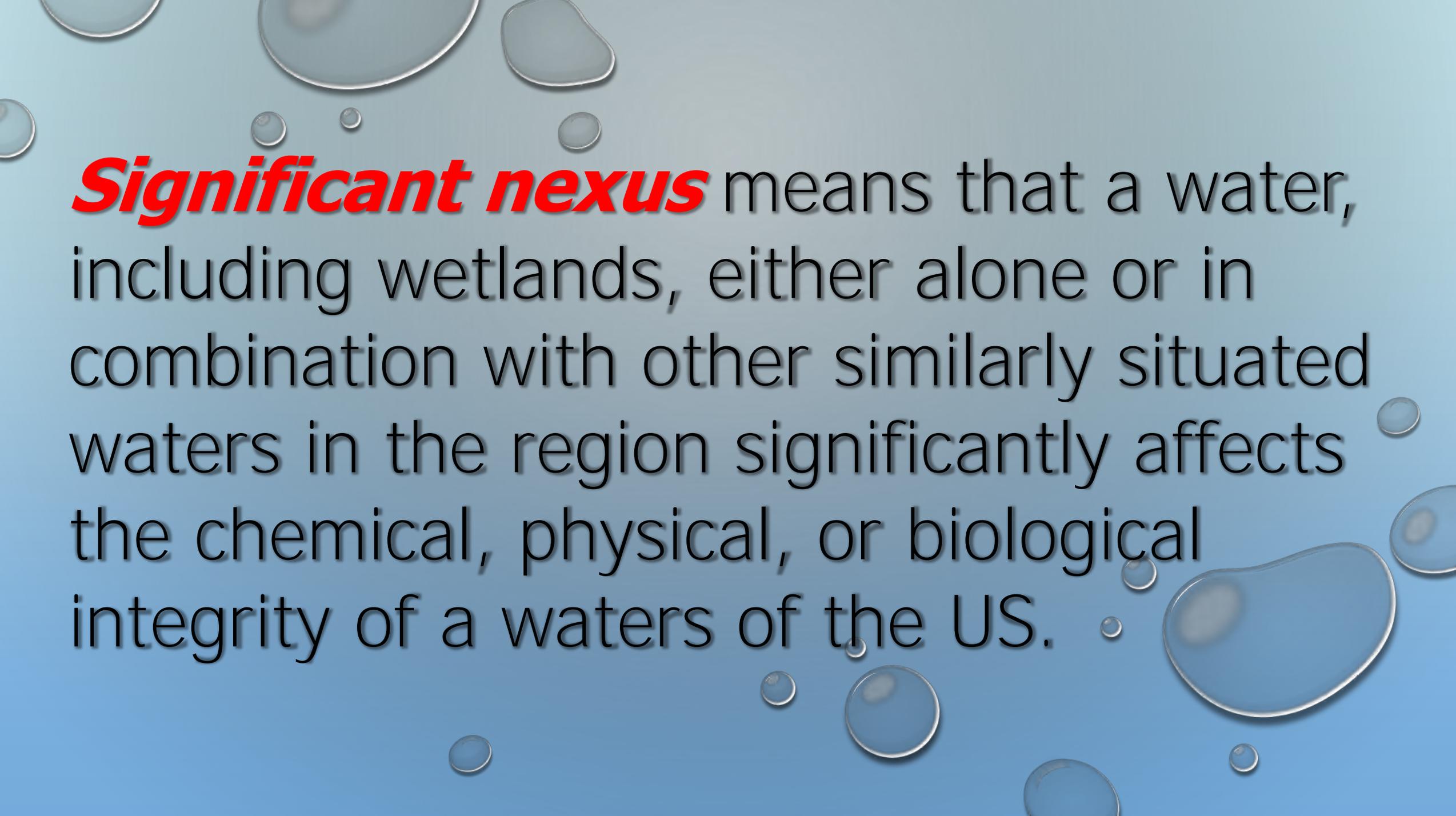
**David E. Mergen, PWS
City of Chesapeake
Dept. of Public Works
May 1, 2014**

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- 2001 SWANCC v. Corps – *Migratory Bird Rule*
 - 2006 Rapanos v. Corps
 - Plurality Opinion – *relatively permanent flow*
 - Kennedy Opinion – *significant nexus*
 - April 21, 2014 - EPA & Corps Rule *Definition of Waters of the U.S. Under the Clean Water Act*



- New Rule would apply to ALL Clean Water Act programs such as Section 402 NPDES (MS4s), Section 303 WQS and TMDLs.
- New Rule may impact local comprehensive land use plans, floodplain regulations, building codes and watershed/stormwater plans.
- New Rule provides interpretation and definitions for *adjacent* waters, *neighboring*, *riparian area*, *floodplain*, *tributary*, *wetlands*, and *significant nexus*.
- New Rule may expand Corps jurisdiction over stormwater management ponds and ditches.
- New Rule may result in additional cumbersome, time-consuming, and expensive federal permitting.

Other Waters (including wetlands) would only be jurisdictional upon a case-specific analysis that they have a ***significant nexus*** to a traditional navigable water and explicitly excludes some features and waters from case specific determinations.



Significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region significantly affects the chemical, physical, or biological integrity of a waters of the US.

- The proposed rule concludes that a ***significant nexus*** exists between ***tributaries***, the Traditional Navigable Waters (TNW) into which they flow and between ***adjacent*** water bodies and the TNW.
- The term ***tributary*** means a water physically characterized by the presence of bed and banks and an ordinary high water mark (OHWM) which contributes flow, either directly or through another water, to a waters of the US (WOUS).

- Wetlands, lakes, ponds, and ditches are ***tributaries*** (even if they lack a bed and banks or OHWM) if they contribute flow to a waters of the US regardless of perennial, intermittent or ephemeral flow.
- A ***tributary***, including wetlands, can be natural, man-altered, or man-made water and includes waters such as rivers, **lakes, ponds, impoundments, canals and ditches.**

- By Rule, all waters and wetlands that are **adjacent** to a TNW, impoundment or **tributary** are waters of the US.
- **Adjacent** means bordering, contiguous or **neighboring** waters, including wetlands, and can be separated by man-made dikes or barriers or natural berms.
- **Neighboring** includes waters located within the **riparian area** or **floodplain**, and waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to a WOUS.

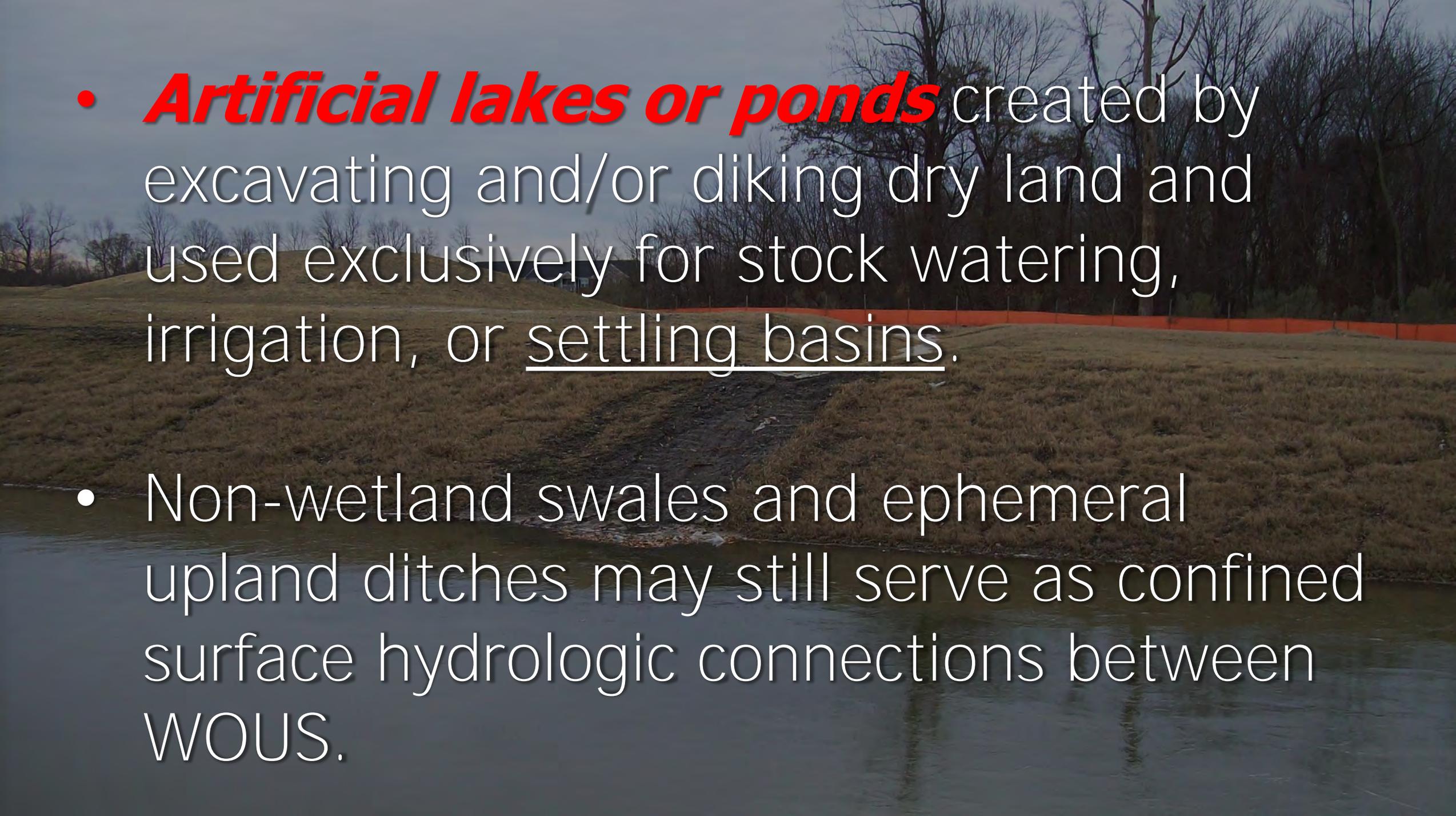
- Waste Treatment Systems
- *Prior Converted Cropland (PC)*
- *Ditches*
- Artificially Irrigated Areas
- *Artificial Lakes or Ponds*
- Artificial Reflecting Pools or Swimming Pools
- Small Ornamental Waters
- Water-Filled Depressions
- *Groundwater*
- *Gullies, Rills & Non-Wetland Swales*

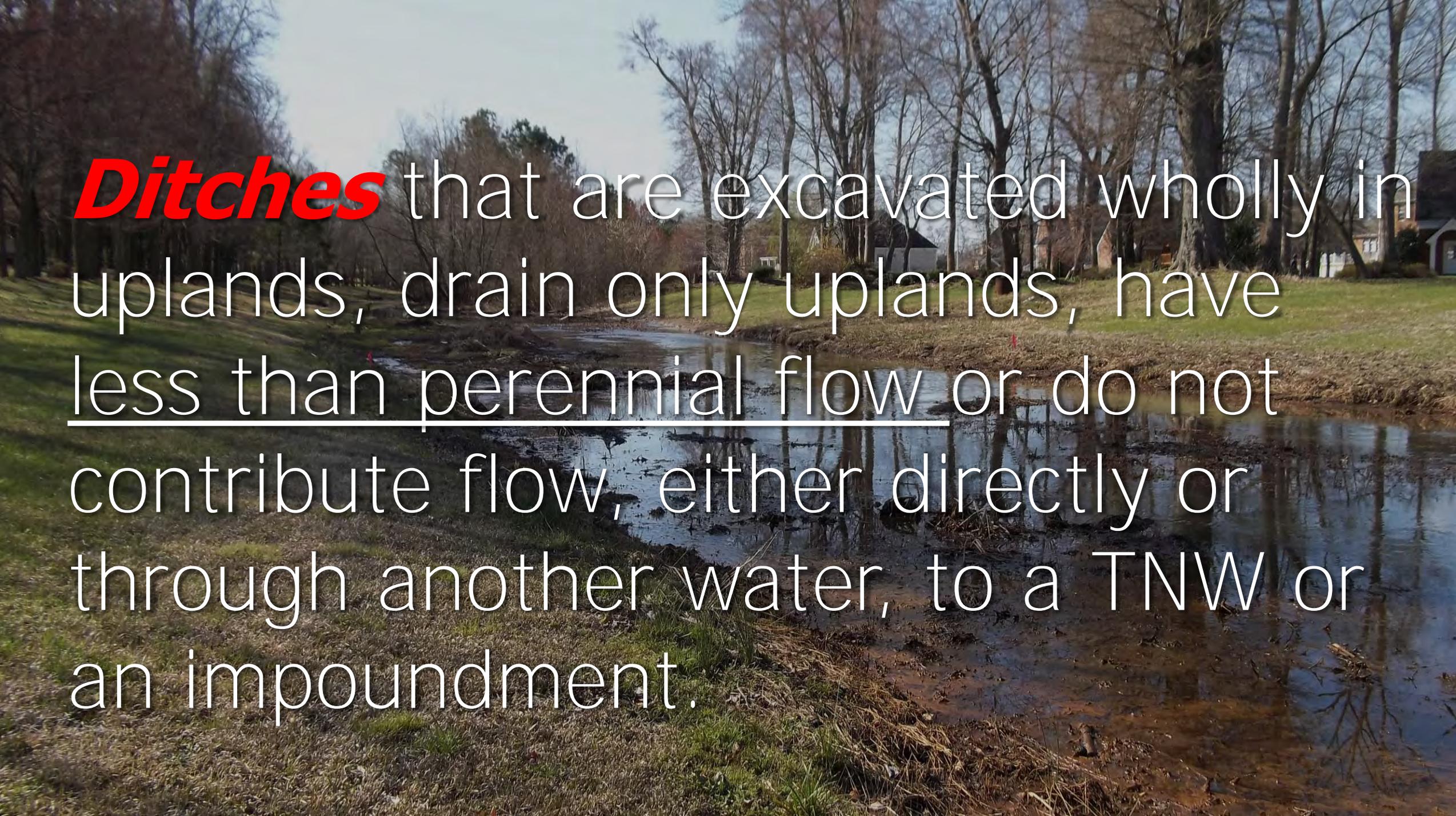


- ***Prior converted cropland ...*** the final authority regarding Clean Water Act jurisdiction remains with EPA.

- *Ephemeral features located on agricultural lands that do not possess a bed and bank are not tributaries even though they may contribute flow during some rain events.*

- What happens when the land use changes?
(New Hope Power v. Corps – *Stockton Rules*)

- 
- A photograph of a rural landscape. In the foreground, there is a small stream or ditch with water reflecting the sky. The middle ground shows a grassy field with a dirt path or road. In the background, there are trees and a house. The sky is overcast.
- ***Artificial lakes or ponds*** created by excavating and/or diking dry land and used exclusively for stock watering, irrigation, or settling basins.
 - Non-wetland swales and ephemeral upland ditches may still serve as confined surface hydrologic connections between WOUS.

A photograph of a ditch in a residential area. The ditch is filled with water and reflects the surrounding trees and sky. The banks are grassy and slightly eroded. In the background, there are several houses and bare trees, suggesting a late autumn or winter setting. The sky is overcast.

Ditches that are excavated wholly in uplands, drain only uplands, have less than perennial flow or do not contribute flow, either directly or through another water, to a TNW or an impoundment.

Jurisdictional Ditches

- Natural channelized or relocated streams
- Ditches excavated from WOUS
- ** Ditches with perennial flow
- Ditches that connect two or more WOUS

*Water that only *stands or pools* in a ditch is not considered perennial flow.

** Ditches that do not contribute flow to a TNW are not WOUS, even if the ditch has perennial flow.



LOST

CONFUSED

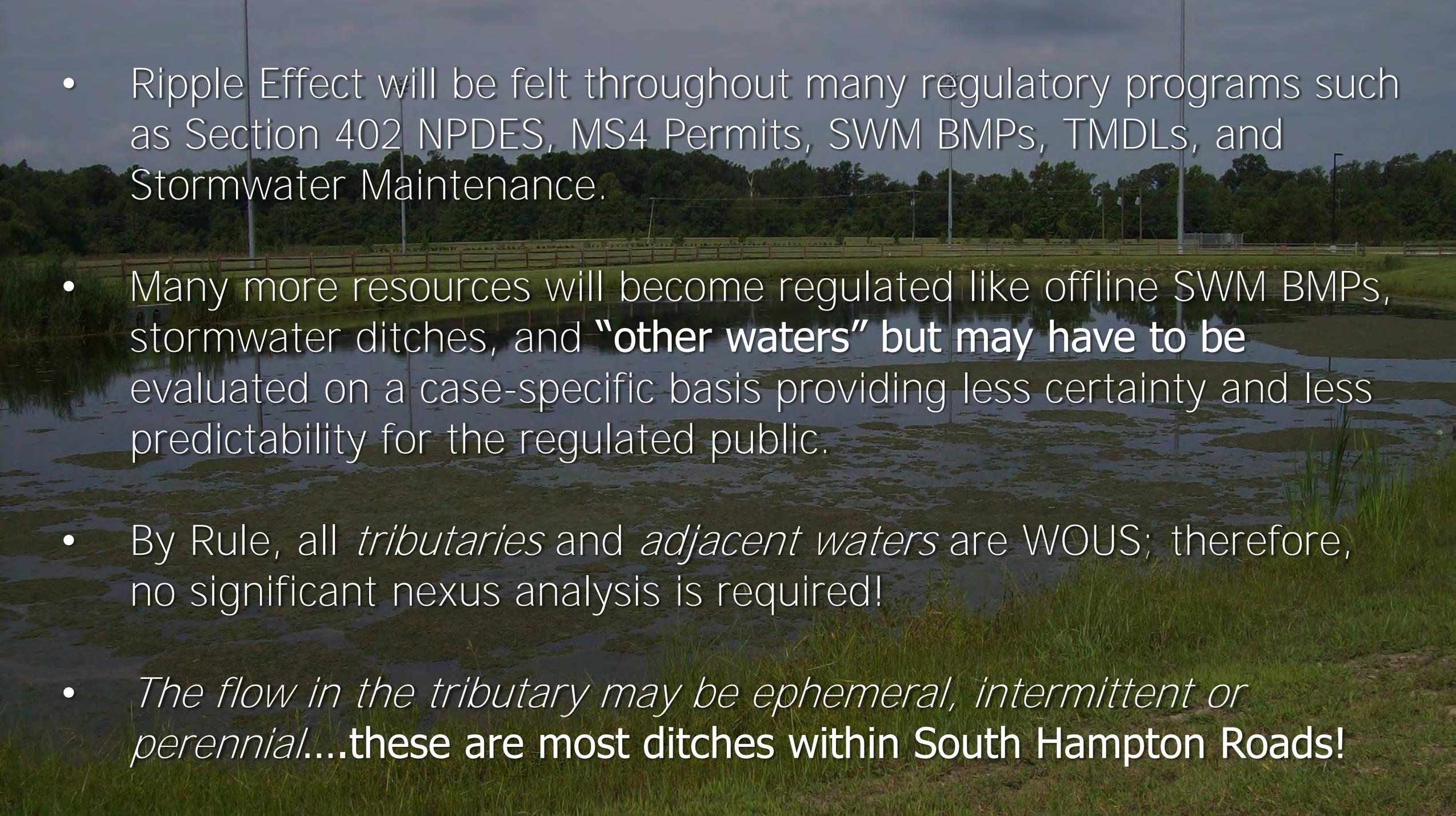
UNSURE

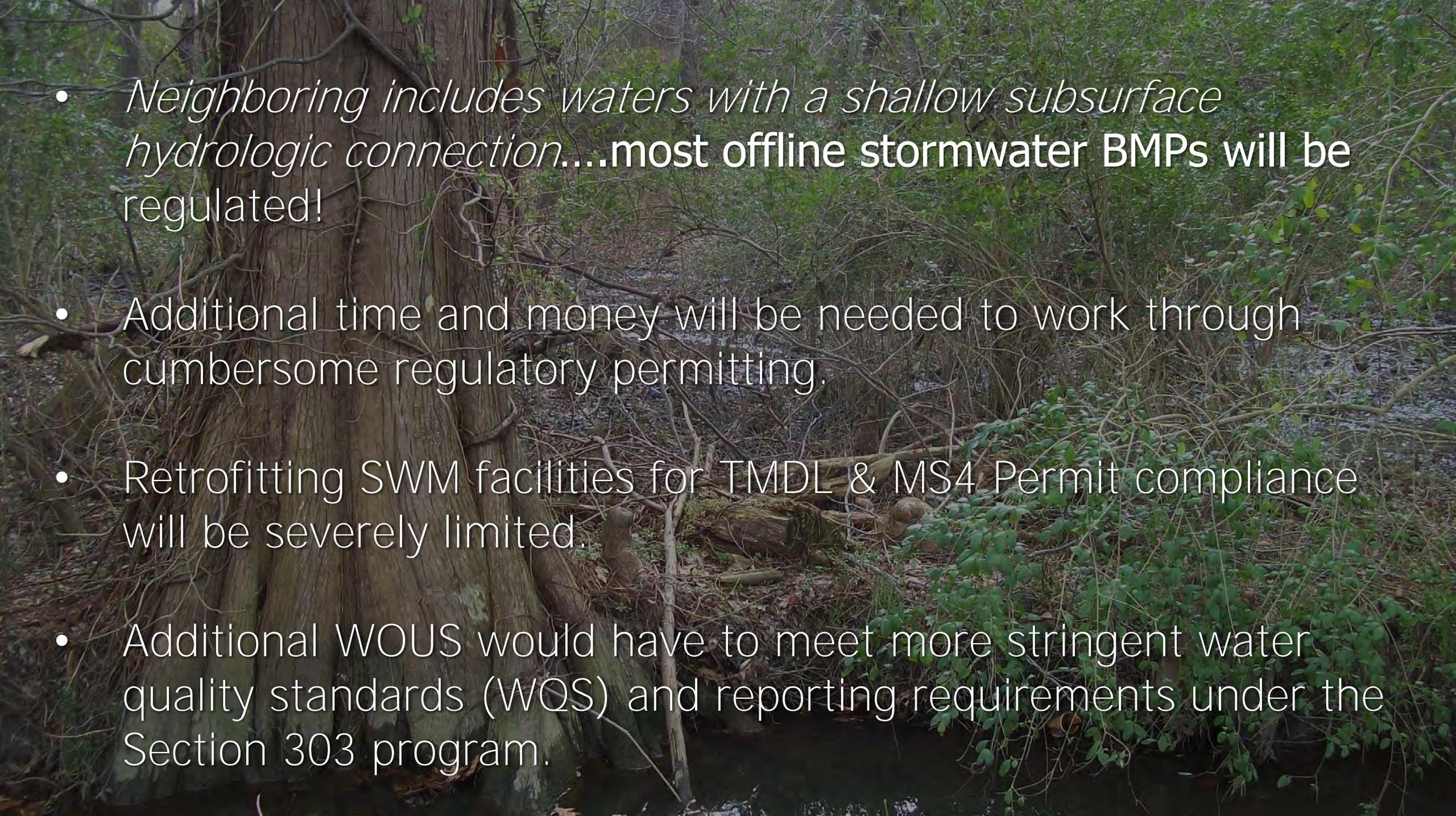
UNCLEAR

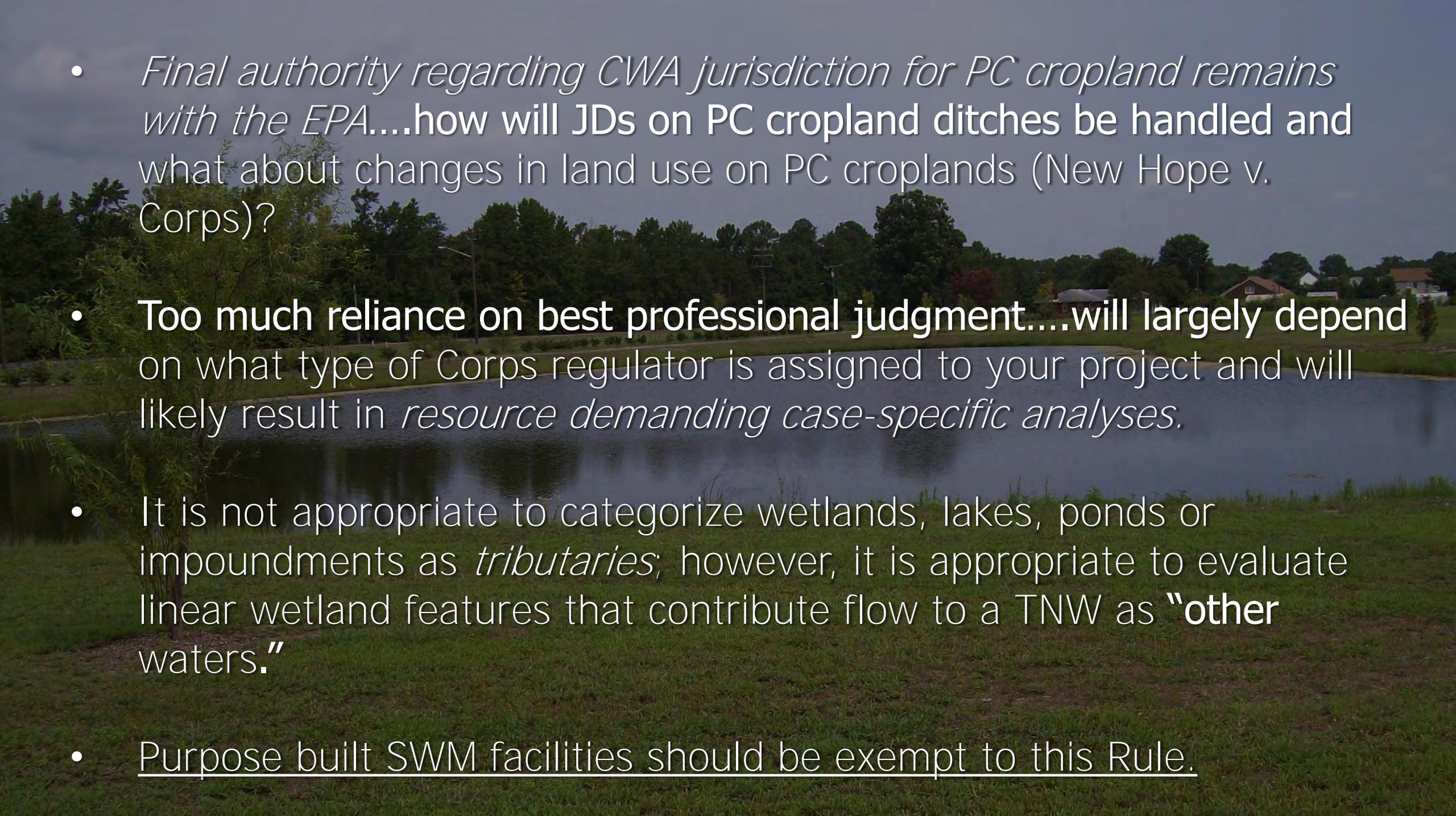
PERPLEXED

DISORIENTED

BEWILDERED

- 
- Ripple Effect will be felt throughout many regulatory programs such as Section 402 NPDES, MS4 Permits, SWM BMPs, TMDLs, and Stormwater Maintenance.
 - Many more resources will become regulated like offline SWM BMPs, stormwater ditches, and **“other waters” but may have to be** evaluated on a case-specific basis providing less certainty and less predictability for the regulated public.
 - By Rule, all *tributaries* and *adjacent waters* are WOUS; therefore, no significant nexus analysis is required!
 - *The flow in the tributary may be ephemeral, intermittent or perennial....***these are most ditches within South Hampton Roads!**

- 
- *Neighboring includes waters with a shallow subsurface hydrologic connection...most offline stormwater BMPs will be regulated!*
 - Additional time and money will be needed to work through cumbersome regulatory permitting.
 - Retrofitting SWM facilities for TMDL & MS4 Permit compliance will be severely limited.
 - Additional WOUS would have to meet more stringent water quality standards (WQS) and reporting requirements under the Section 303 program.

- 
- *Final authority regarding CWA jurisdiction for PC cropland remains with the EPA....how will JDs on PC cropland ditches be handled and what about changes in land use on PC croplands (New Hope v. Corps)?*
 - **Too much reliance on best professional judgment....will largely depend on what type of Corps regulator is assigned to your project and will likely result in *resource demanding case-specific analyses.***
 - It is not appropriate to categorize wetlands, lakes, ponds or impoundments as *tributaries*; however, it is appropriate to evaluate linear wetland features that contribute flow to a TNW as “**other waters.**”
 - Purpose built SWM facilities should be exempt to this Rule.

<http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>

<http://www.naco.org>

Comments are due to EPA by **July 21, 2014**. Submit your comments, identified by Docket ID No. EPA-HQ-OW-2011-0880 by one of the following methods:

1. *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
2. *Email:* ow-docket@epa.gov. Include EPA-HQ-OW-2011-0880 in the subject line of the message.
3. *Mail:* Send the original and three copies of your comments to: Water Docket, Environmental Protection Agency, Mail Code 2822T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, Attention: Docket ID No. EPA-HQ-OW-2011-0880.