

# WATERS OF THE US FINAL RULE

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# Overview

- August 28, 2015 Final Rule would apply to all Clean Water Act programs:
  - Section 404 US Army Corps of Engineers Permit Program
  - Section 401 DEQ Water Quality Certification
  - Section 402 National Pollution Discharge Elimination System (NPDES)
  - Section 311 Oil Spill Prevention & Response Program
  - Municipal Stormwater Permits (MS4s)
  - Section 303 Water Quality Standards
  - Total Maximum Daily Loads (TMDLs)
- Draft Rule was proposed on April 24, 2014 and received over 1,000,000 public comments.
- Final Rule provides new definitions for *adjacent* and *neighboring* waters, *tributary*, and *significant nexus*.
- Final Rule will expand federal jurisdiction over stormwater ponds, isolated wetlands and ditches.
- Final Rule will result in additional time-consuming and expensive federal permitting. <sup>2</sup>

# Supreme Court Rulings

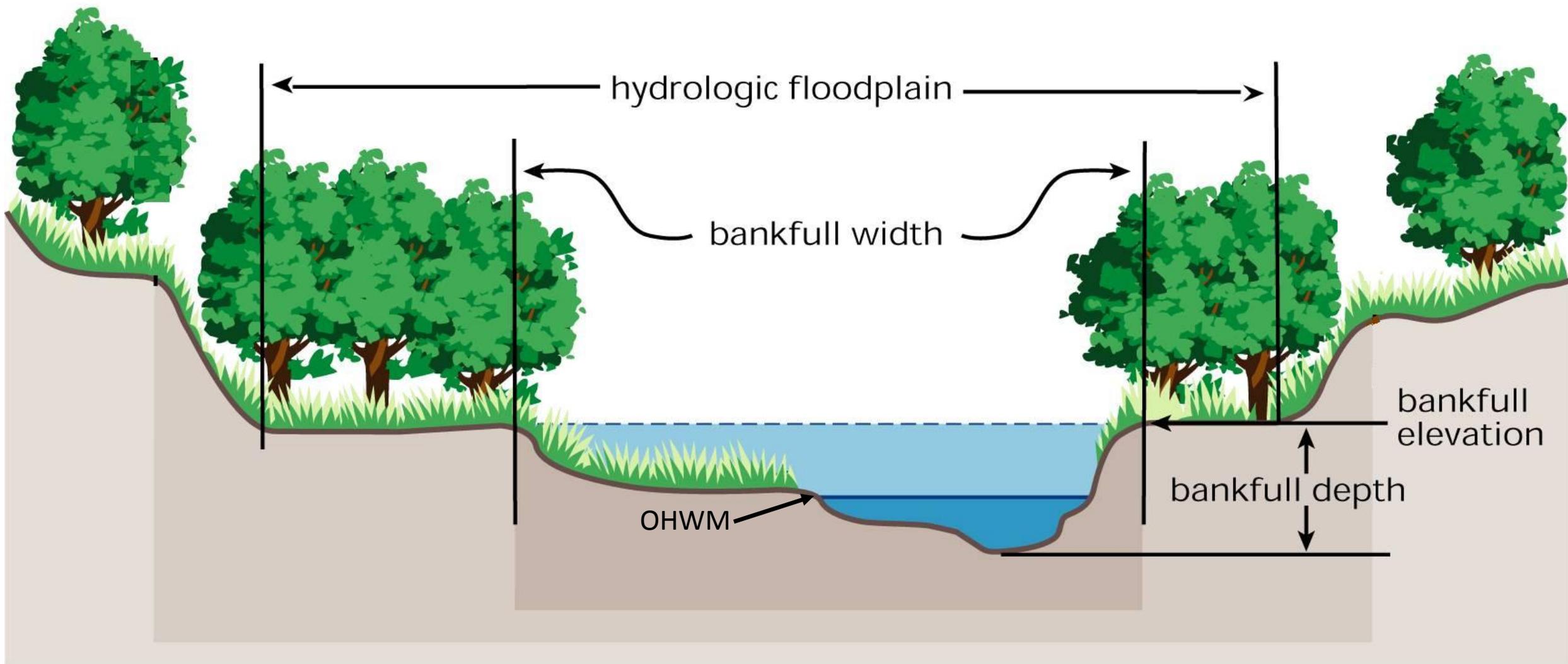
- *United States v. Riverside Bayview Homes* (1985)
  - Waters of the US includes “adjacent wetlands”
- *SWANCC v. US Army Corps of Engineers* (2001)
  - Migratory Bird Rule
- *Rapanos v. United States* (2006)
  - Kennedy Opinion – *Significant Nexus*

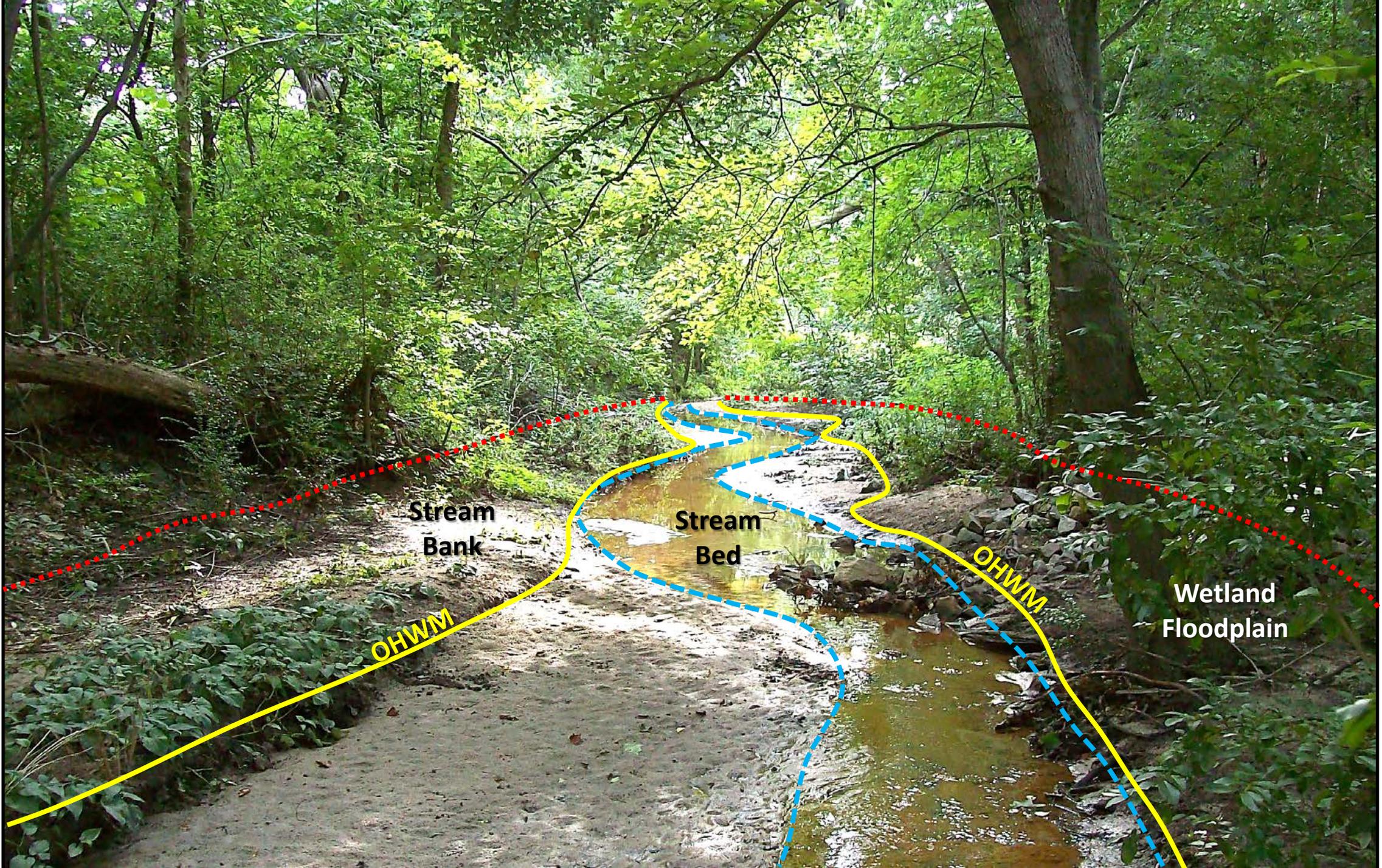
# “Waters of the US”

1. Traditional Navigable Waters (TNW)
2. Interstate Waters
3. Territorial Seas
4. Impoundments of Jurisdictional Waters
- 5. Tributaries**
- 6. Adjacent Waters**

# Tributaries

- Must flow directly to a TNW, interstate water or territorial sea
- Perennial, intermittent or ephemeral flow
- **Must have bed and banks and OHWM**
- Natural, man-altered, or man-made waters
- Rivers, streams, canals and jurisdictional ditches





Stream  
Bank

Stream  
Bed

OHWM

OHWM

Wetland  
Floodplain

Is this a tributary?



# Adjacent Waters

Bordering, contiguous or **neighboring** waters:

1. All waters located within 100 feet of the OHWM
2. All waters located within the 100-year floodplain and NOT more than 1,500 feet from the OHWM
3. All waters located within 1,500 feet of the high tide line

# Significant Nexus Analysis

1. Prairie Potholes
  2. Delmarva
  3. Carolina Bays
  4. Pocosins
  5. California Vernal Pools
  6. Texas Coastal Prairie Wetlands
- 
- ❖ Waters located within 100-year FEMA floodplain
  
  - ❖ Waters located within 4,000 feet from MHW or OHWM

# Exclusions

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

# Non-jurisdictional Ditches

1. Ditches with ephemeral flow...
  - NOT a relocated tributary
  - NOT excavated in a tributary
  
2. Ditches with intermittent flow...
  - NOT a relocated tributary
  - NOT excavated in a tributary
  - DOES NOT drain wetlands
  
3. Ditches that DO NOT flow through another water or into....
  - TNWs
  - Interstate waters
  - Territorial seas



# Jurisdictional Ditches

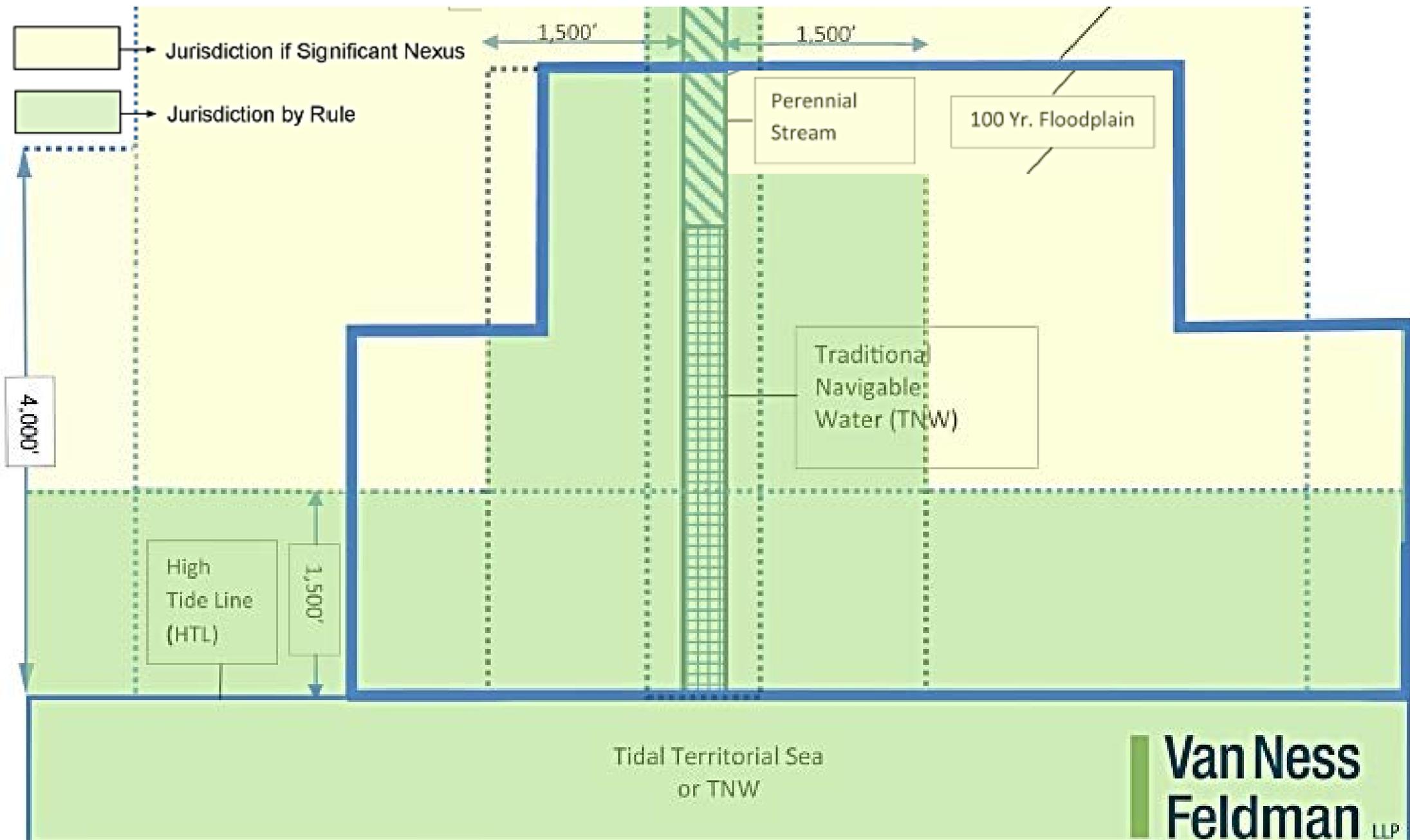
1. Meets definition of “tributary”
2. Ditches with perennial flow
3. Ditches with intermittent flow that...
  - Relocate a tributary
  - Excavated in a tributary
  - Drain wetlands
4. Ditches regardless of flow that....
  - Relocate a tributary
  - Excavated in a tributary

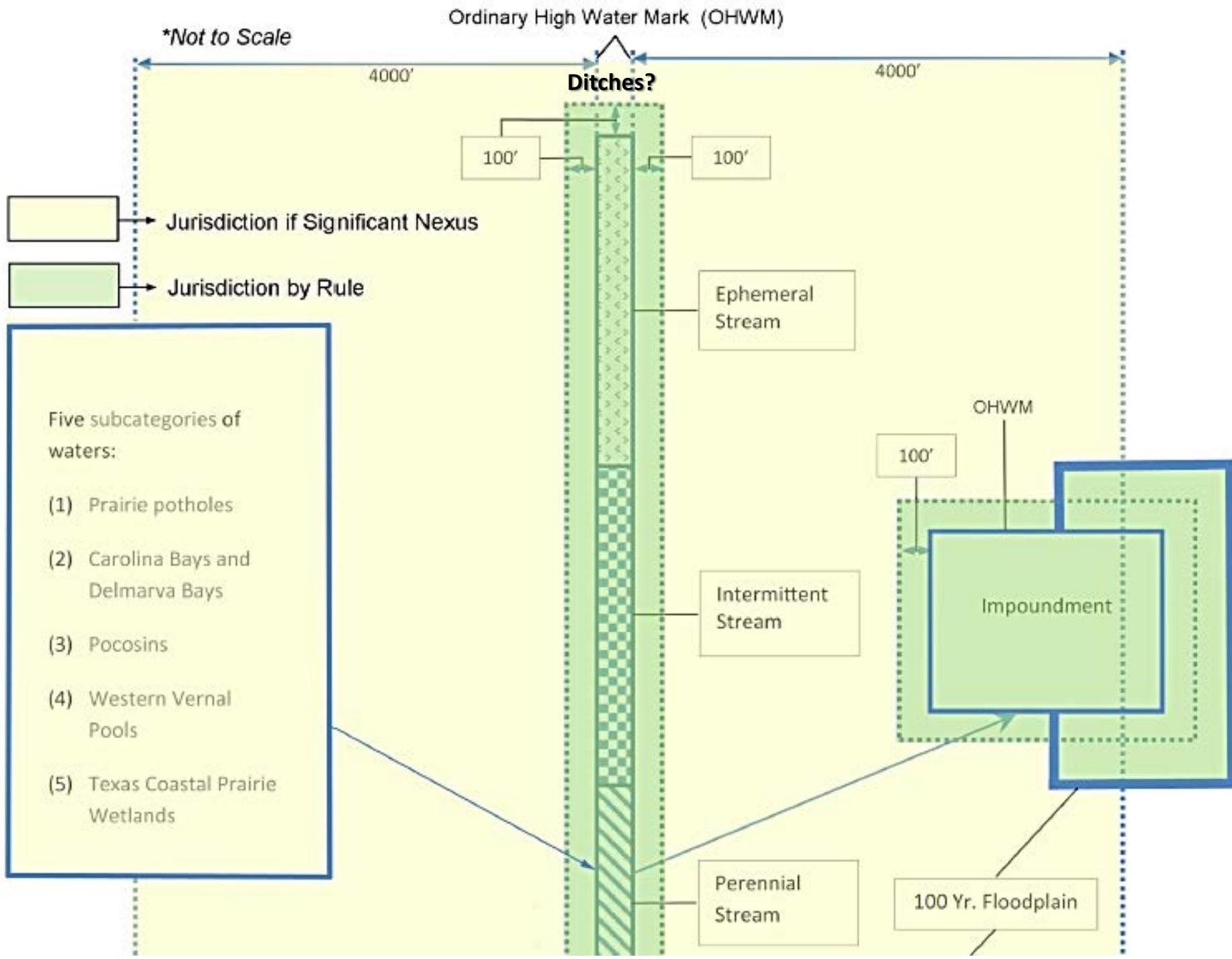


# Non-jurisdictional Stormwater Features

1. Engineered stormwater control structures
2. Constructed to convey, treat, or store stormwater
3. Created from *dry land*
4. Discharge is regulated under a NPDES permit
5. DOES NOT include “transportation ditches”









# Impacts

- Will not impact existing valid jurisdictional determinations or permits.
- Additional time and money will be needed to work through cumbersome regulatory permitting.
- There will be too much reliance on best professional judgment and decisions could vary between Corps staff.
- Stormwater outfalls or “lead” ditches regulated by MS4 permits may increase because each connection to a jurisdictional ditch or *tributary* could be considered an MS4 facility under the new Rule.
- Many more features may become regulated like stormwater ponds, ditches, and isolated wetlands but will have to be evaluated on a case-specific basis providing less certainty and resulting in more cost for the regulated public.
- By Rule, all *tributaries* and *adjacent waters* are now regulated.

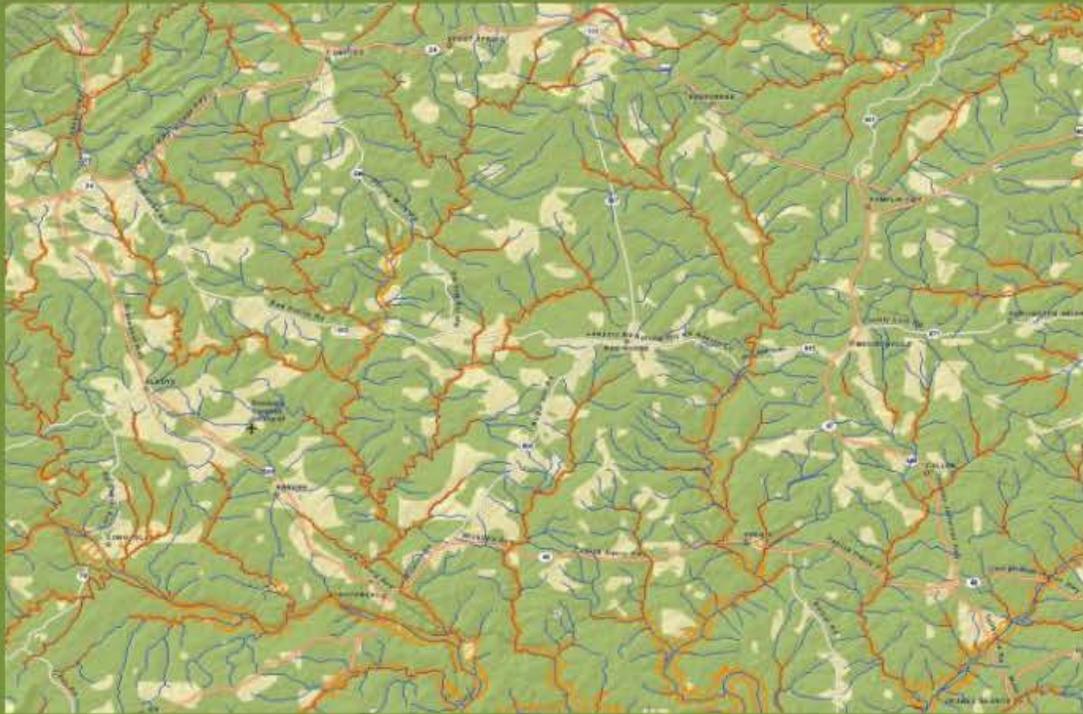


# Impacts

- *Neighboring* includes features within the 100-year floodplain and within 1,500 feet of the OHWM; therefore, many stormwater ponds may now be regulated.
- Ditches with perennial *flow* are now jurisdictional. Many of the ditches in Chesapeake intercept the groundwater and may now be regulated.
- If not exempted, MS4 maintenance activities on ditches and ponds may be delayed by lengthy jurisdictional determinations and wetlands permitting.
- If not exempted, retrofitting stormwater management facilities to comply with VSMP and TMDL requirements could be severely limited.
- Corps staffing levels are already limited so expect additional delays for Jurisdictional Determinations.

## EPA'S TRADITIONAL JURISDICTION IN VIRGINIA

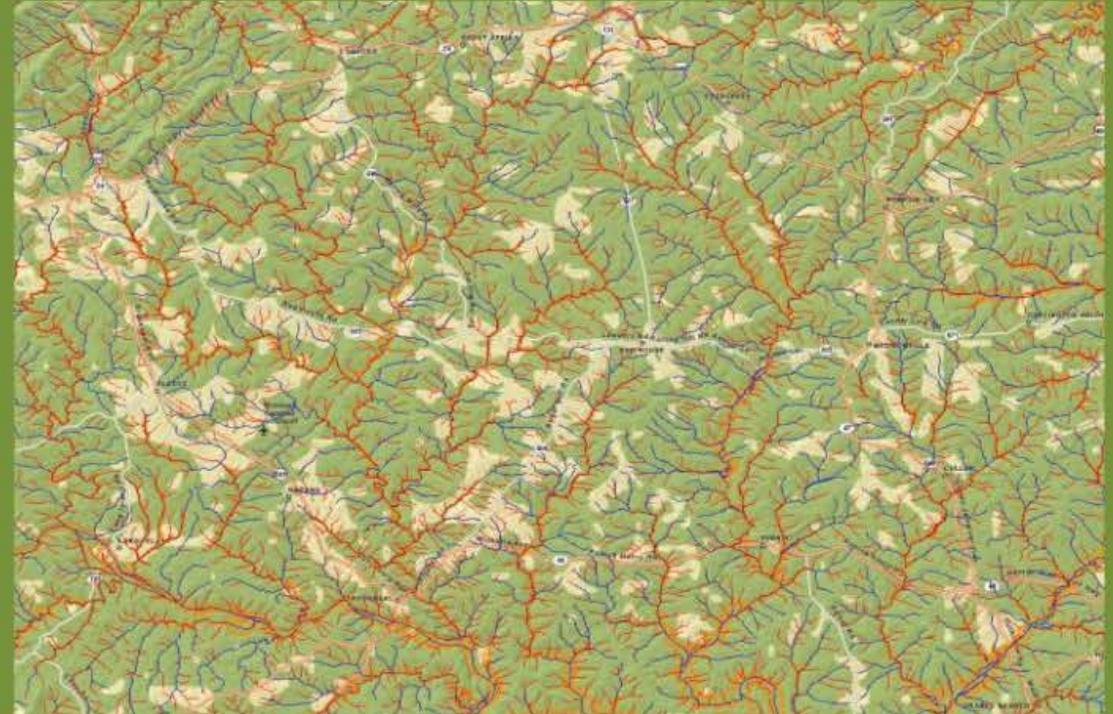
Streams that flow all the time or at least seasonally, rain or not.



2,373,322 ACRES ■ 54,624 STREAM MILES

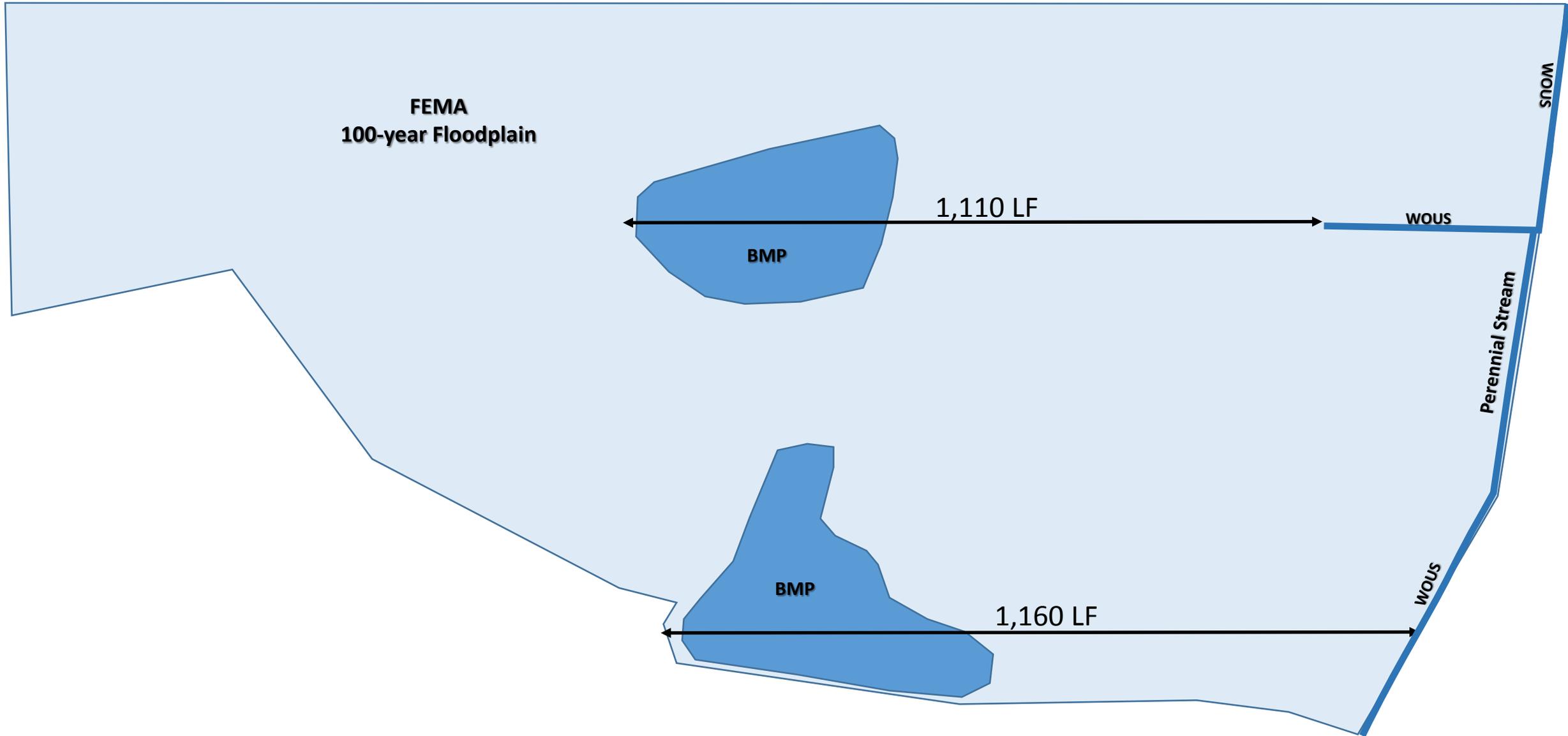
## EPA'S LATEST OVERREACH IN VIRGINIA

All those streams, plus land where surface runoff channels when it rains.

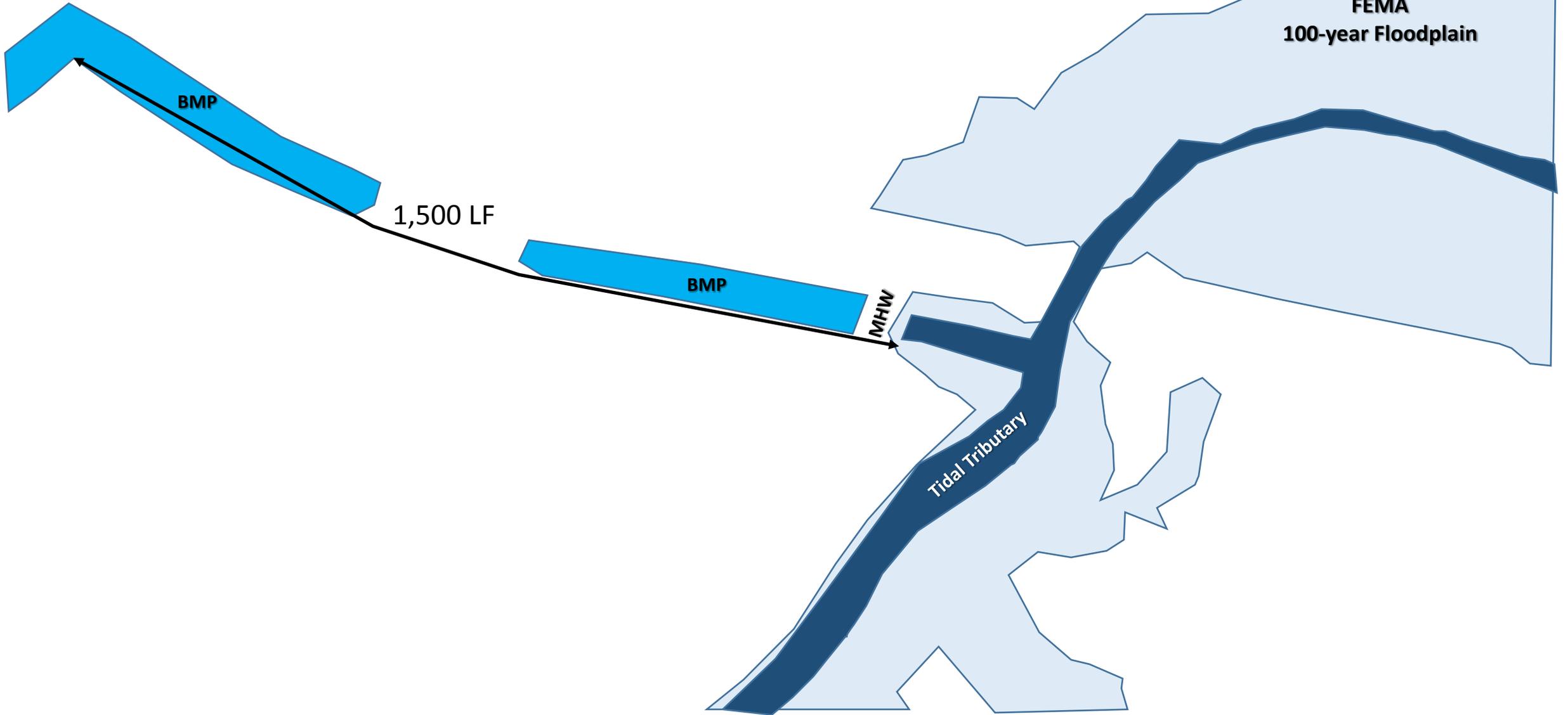


2,763,702 ACRES ■ 106,359 STREAM MILES

Adjacent waters located within the 100-year floodplain and NOT more than 1,500 feet from the OHWM.



Adjacent waters located within 1,500 feet of the high tide line.





US Army Corps  
of Engineers®  
Engineer Research and  
Development Center

Wetlands Regulatory Assistance Program

**Regional Supplement to the Corps of  
Engineers Wetland Delineation Manual:  
Atlantic and Gulf Coastal Plain Region  
(Version 2.0)**

U.S. Army Corps of Engineers

November 2010



- Keystone plants are wetter
- Soils are wetter
- Limited *growing season*
- Dry season approach

## Northern long-eared Bat (*Myotis septentrionalis*)

**\*\*Threatened Status & 4(d) Rule Effective May 4, 2015\*\***

### Non-Federal Project Exemptions:

1. Expansion of a transmission corridor or right-of-way by up to 100-feet from the edge of an existing cleared corridor or right-of-way
2. Minimal tree removal of one acre of contiguous habitat or one acre in total within a larger tract that would not significantly change the overall nature and function of the local forested habitat
3. Activity occurs more than 0.25 miles from a known, occupied hibernacula
4. Activity avoids cutting or destroying known, occupied roost trees during pup season (June 1<sup>st</sup> to July 31<sup>st</sup>)

### Federal Projects:

1. Informal consultation required with FWS
2. April 15<sup>th</sup> to September 15<sup>th</sup> time-of-year restriction
3. Bat surveys required if winter tree clearing not feasible
4. Habitat assessments (tree *snags*, loose bark, 10-20 trees, 3" dbh)
5. Emergence "Twilight" survey (10 trees)
6. Acoustical or Mist-Net Survey (May 15<sup>th</sup> to August 15<sup>th</sup>)



# WATERS OF THE US FINAL RULE

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North Dakota Attorney General Wayne Stenehjem, center, speaks June 29, 2015 at the state Capitol in Bismarck, the state joining attorneys general from 11 other states in a lawsuit against the Environmental Protection Agency and the U.S. Army Corps of Engineers over the EPA's new rule defining "Waters of the United States" under the Clean Water Act. Second from the left is North Dakota Agriculture Commissioner Doug Goehring. Mike McCleary / Bismarck Tribune

**ND takes lead in lawsuit against EPA over Waters of the U.S. rule**

