

Welcome to:

# Arkansas Environmental Federation

2020 Webinar Season

## Section 404 Permitting

May 21, 2020



# **Section 404 Permitting Today & Tomorrow**

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# Agenda

- Section 404 Overview – What is Section 404?
- Section 404 Permitting Process – When do I need a 404 Permit and how do I get one?
- Nationwide Permit 12 (Utility Line Activities) Status
- **WOTUS Rule Changes**



# Section 404 Overview

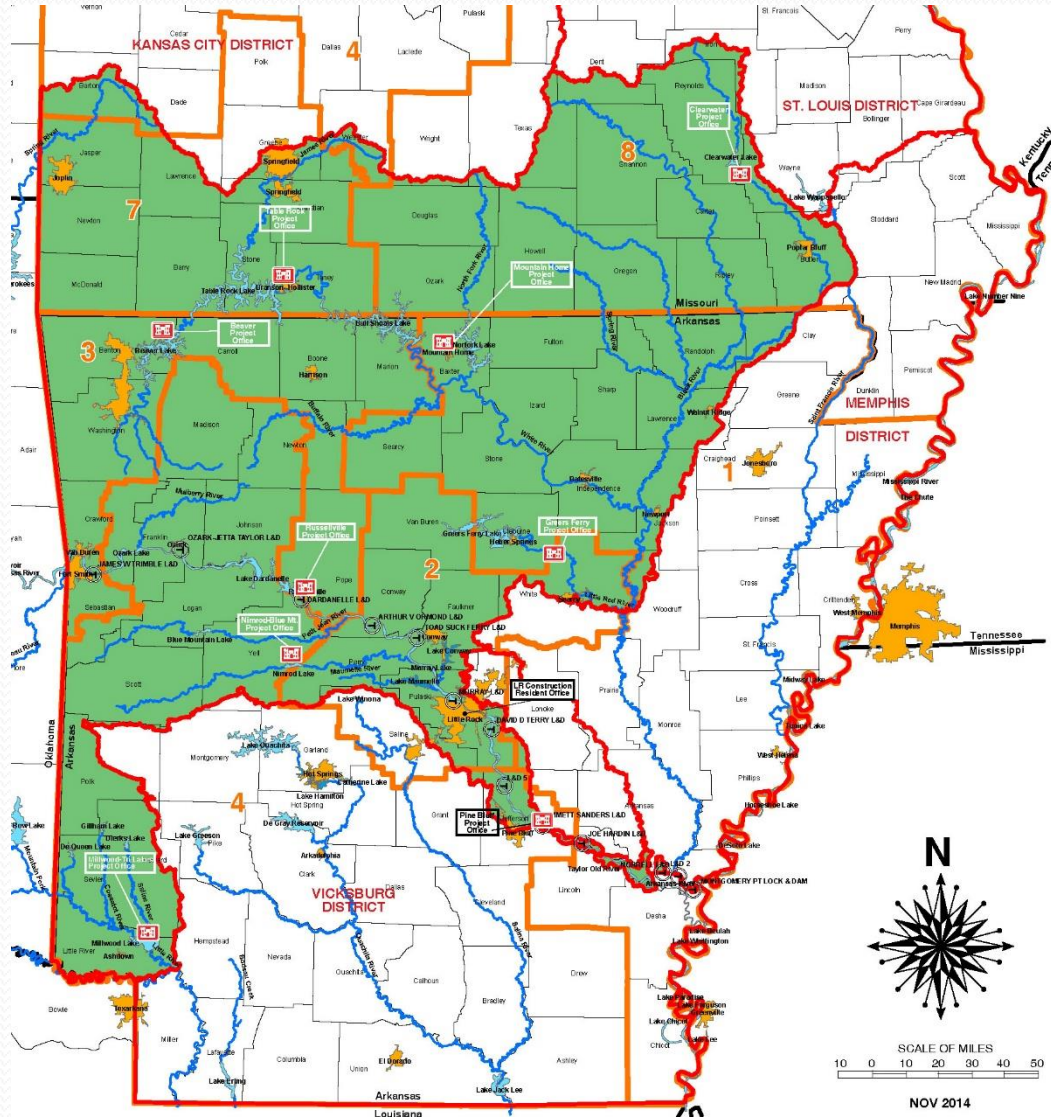
## What is Section 404?

- Section 404 of the Clean Water Act
- Regulates impacts to Wetlands and Other Waters of the United States
- 404 Program administered by the United States Army Corps of Engineers (authority delegated by EPA)
- No Net Loss





# Section 404 Overview



# LAKES / PONDS





# WETLANDS



# What Makes it a Wetland?

- Hydrophytic Vegetation - Wetlands must have vegetation cover dominated by hydrophytic species
- Hydrology – Wetlands must show positive indicators of hydrology (e.g., Surface water, drift deposits, soil saturation, high-water table, water stained leaves, drainage patterns, etc.)
- Hydric Soils





# STREAM CHANNELS



# Stream Channel Types

- EPHEMERAL – surface water flowing or pooling only in direct response to precipitation
- INTERMITTENT – surface water flowing continuously during times of typical year, more than in direct response to precipitation (e.g., elevated groundwater)
- PERENNIAL – surface water flowing continuously during a typical year





# Section 404 Permitting Process

## When do I need a 404 Permit and how do I get one?

- Projects impacting Wetlands and Other Waters of the United States may require a 404 Permit
- Delineation – observe presence or absence of Section 404 features
  - Vegetation
  - Hydrology
  - Soils



# Section 404 Permitting Process

- Extent and type of impact to Section 404 features determines type of permit required
- Types of permits:
  - Nationwide Permits
  - Regional General Permits
  - Individual Permits





# Section 404 Permitting Process

- Nationwide Permits
  - For projects with “minor” impacts to 404 features
  - Specific NWP categories (common activities) - partial list:
    - Linear Transportation projects
    - Utility Lines
    - Commercial/Residential Developments
    - Maintenance Activities
  - Commonly take 2-3+ months for issuance
  - Mitigation may or may not be required, depending on extent of impacts

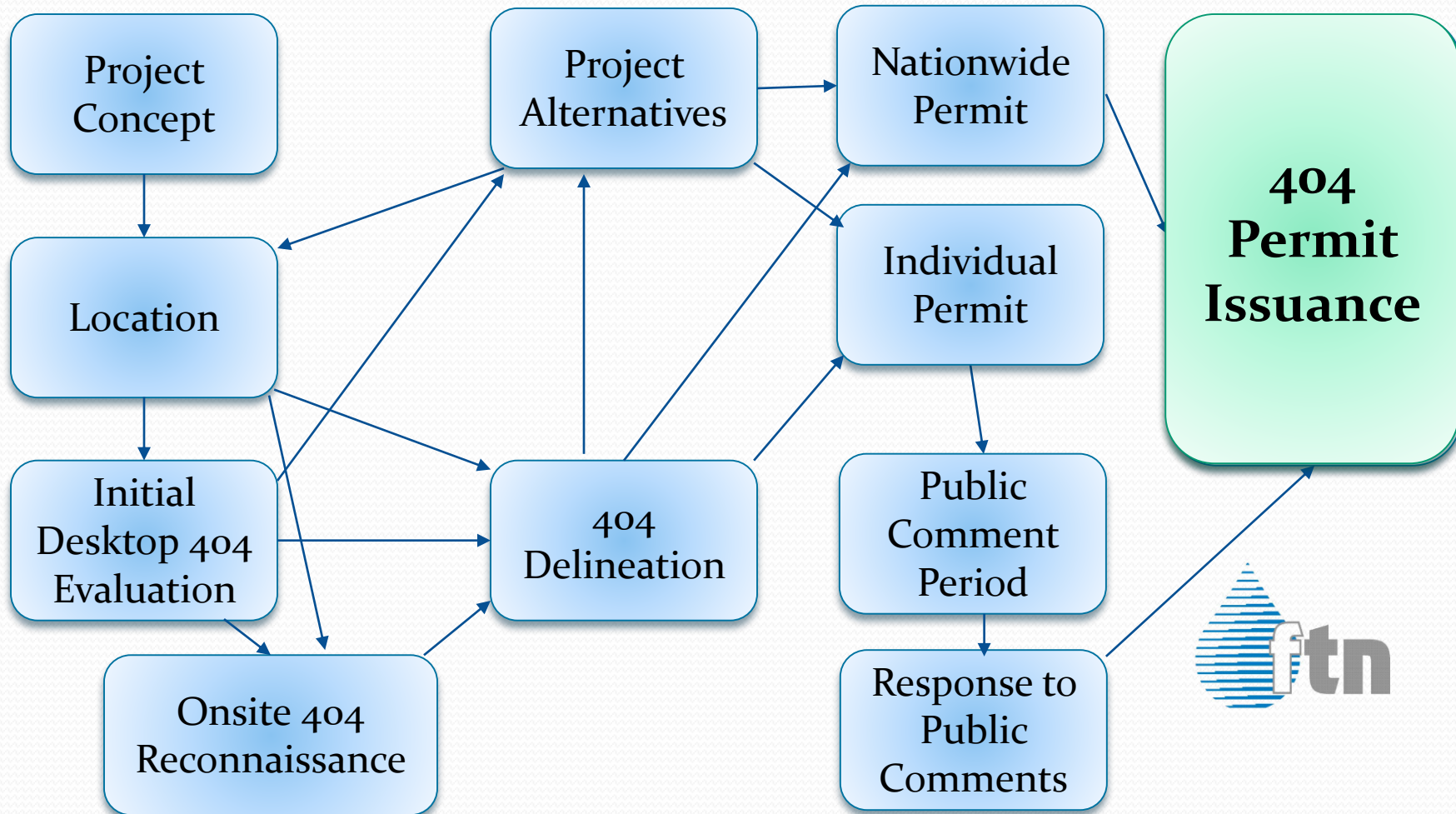


# Section 404 Permitting Process

- Regional General Permits
- Individual Permits
  - For projects with “significant” impacts to 404 features
  - Projects that do not fall under specific NWP categories
  - High level of review
  - Subject to public notice/comments
  - Commonly take 6-12+ months for issuance
  - Mitigation nearly always required



# Section 404 Permitting Process



# Mitigation

- What is Mitigation?
- In-Kind
- Mitigation Vehicles



# Regulatory Changes

- Nationwide Permit 12 (Utility Line Activities) - Vacated
- WOTUS Step 1 Rule Change
- WOTUS Step 2 Rule Change



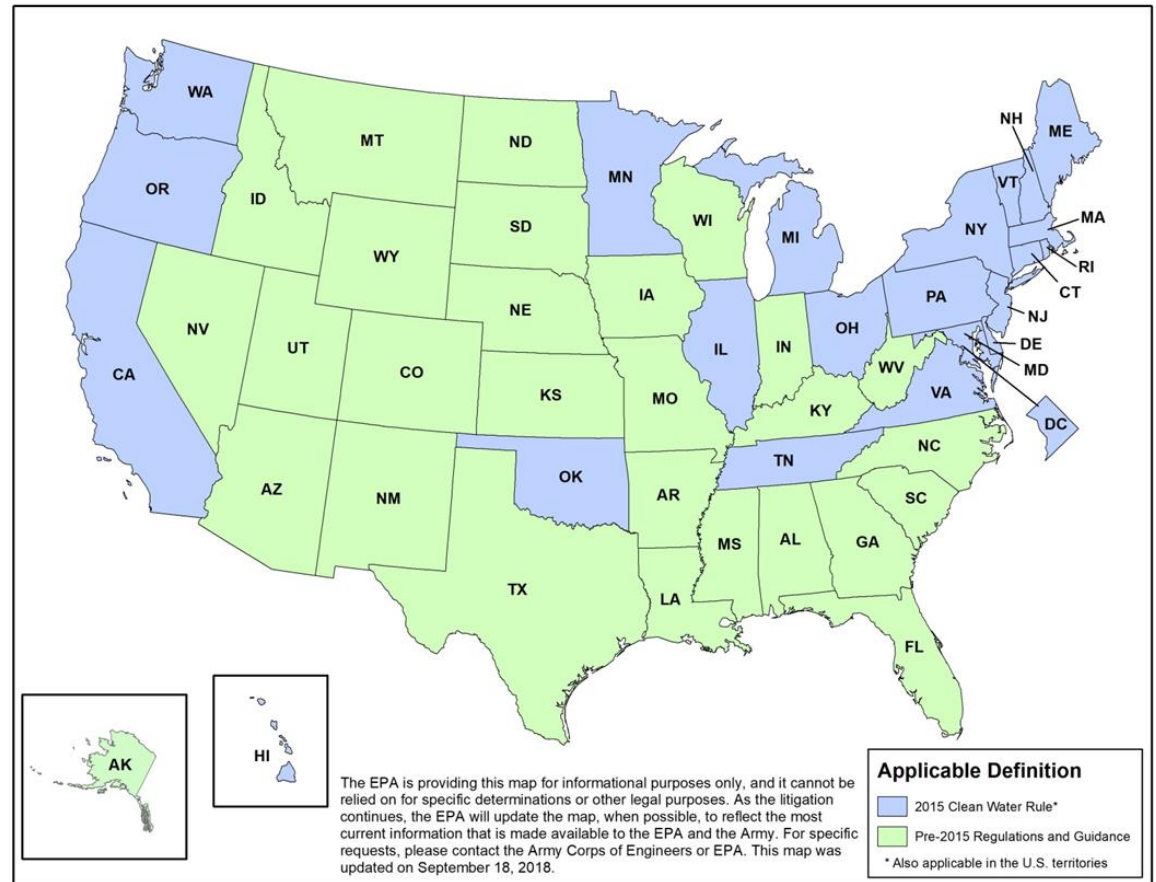
# NWP 12 – Utility Line Activities

- NWP 12 Challenged in Federal Court (District of Montana)
- April 15, 2020 – Court ruled that the NWP 12 (reissued in 2017 along with all other NWP's): Was arbitrary, capricious, and violated the Endangered Species Act.
- April 17, 2020 – USACE directed all districts to stop processing NWP 12's until further notice.
- May 11, 2020 – Scope of ruling reduced
- We are awaiting USACE guidance on how to proceed.



# WOTUS Step 1 Rule Change

- Repeal of the 2015 Rule
- Became effective in December 2019
- No applicability within Arkansas



# WOTUS Step 2 Rule Change

- Revised Definition of “Waters of the United States”
- Final Rule published in the Federal Register on April 21, 2020
- Final Rule Effective Date: June 22, 2020





# Why is there a Proposed Rule?

“...to establish a regulation that would define ‘waters of the United States’ in simple, understandable, and implementable terms to reflect the ordinary meaning of the statutory term, as well as adhere to Constitutional and statutory limitations, the policies of the CWA, and case law, and to meet the needs of regulatory agencies and the regulated community”



# WOTUS Step 2 Rule - Streams

- Only navigable waters and “Tributaries” (i.e., channels with intermittent or perennial flow) would still be considered jurisdictional
- A tributary can be regulated upstream of a non-regulated excluded feature (ditch, treatment system, etc.) or artificial/natural break (culvert, dam, etc.) if intermittent or perennial flow is maintained downstream of the excluded feature/break
- **Ephemeral channels would no longer be regulated**



# Ephemeral Channel





# Ephemeral Channel





# Ephemeral Channel





# “Merest Trickle” – still regulated





# Streams – Potential Issues

- Classifying a channel as Ephemeral
  - More evidence may be required
  - Acceptable Methods not defined
  - Does not have groundwater influence
    - Groundwater influence can be difficult to determine with a single field visit or at certain times of the year



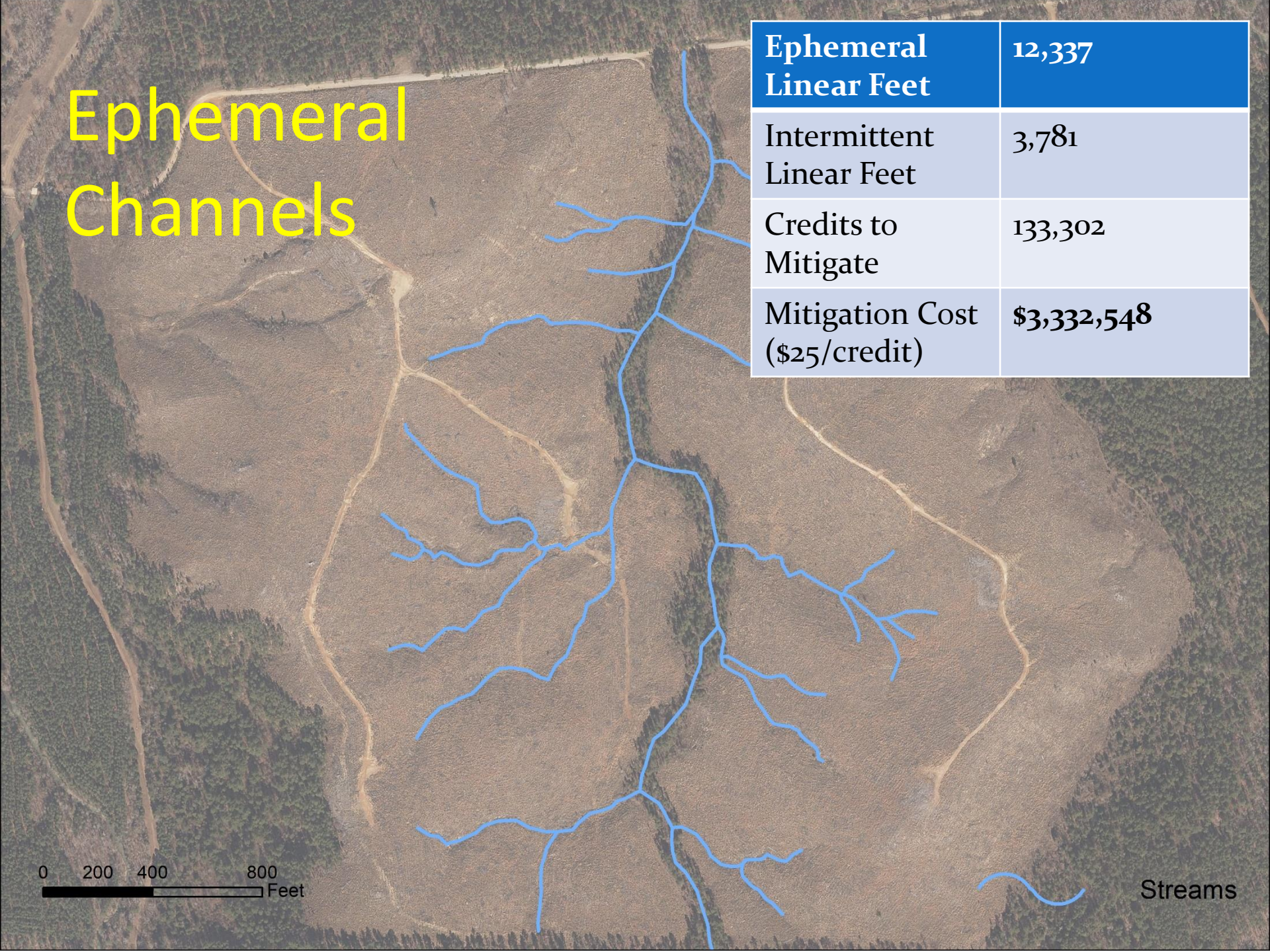


# Ephemeral Channels

Ephemeral Linear Feet	12,337
Intermittent Linear Feet	3,781
Credits to Mitigate	133,302
Mitigation Cost (\$25/credit)	\$3,332,548



Streams





# Ephemeral Channels

Ephemeral Linear Feet	0
Intermittent Linear Feet	3,781
Credits to Mitigate	22,686
Mitigation Cost (\$25/credit)	\$576,150

0 200 400 800 Feet



Streams



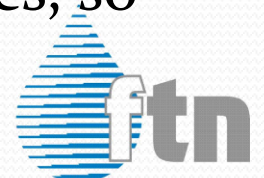
# Wetlands - Proposed Rule

- Proposed rule is less stringent
- The definition of wetland does not change
- Proposed change is in the connectivity needed to make a wetland jurisdictional
- May be able to exclude from Jurisdiction without an “Isolation Determination”
- Prior Converted cropland can undergo use change, with no 404 Permitting



# WOTUS Step 2 Rule - Wetlands

- The definition of wetland does not change
- To be jurisdictional, wetland must be **Adjacent...**
  - must abut regulated water;
  - be inundated by flooding from a regulated water'
  - can be physically separated only by natural berm, bank, or similar; or
  - can be physically separated by artificial structures, so long as structure allows for hydrologic surface connection.



# Wetlands - Connectivity

- Current –
  - Connection via channel (per, int, or eph)
  - Connection via directional sheet flow
  - Connection via diffuse overland flow (“watery thread”)
  - Connection via 100-year FEMA floodplain
- New Rule –
  - Adjacent to or abut other water of the US
  - Direct connect to other water of the US via “tributary” with perennial or intermittent flow
  - (No more “significant nexus” analysis)

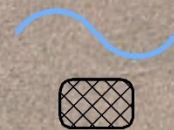




# Proposed Non-Jurisdictional Wetland



0 50 100 200  
Feet



Streams  
Wetlands



# Proposed Non-Jurisdictional Wetland



Zone AE

AREA OF MINIMAL FLOOD HAZARD Zone X

0 50 100 200  
Feet



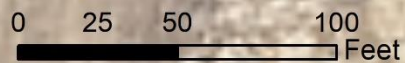
Streams



Wetlands



# Proposed Non-Jurisdictional Wetland



Streams

Wetlands

# Lakes/Ponds - Proposed Rule

- Lakes/Ponds are proposed to be in a separate category under waters of the United States
- Jurisdiction will be similar to that of Wetlands
- Currently regulated ponds that are located on Ephemeral channels will no longer be regulated
- NEW - regulation of off-channel ponds (possibly oxbows) that have connection by flooding
  - Note- no such flooding connection for wetlands





# Proposed Non-Jurisdictional Pond



0 50 100 200 Feet



Streams

Wetlands

# Pond/Wetland on Ephemeral





# Pond/Wetland on Ephemeral





# Proposed Jurisdictional Pond



0 50 100 200  
Feet



Streams  
Wetlands

# Other non-regulated waters

- Groundwater
- Certain ditches
- Prior converted cropland
- Artificially irrigated areas (that would otherwise be uplands)
- Water-filled depressions created in uplands associated with mining or construction
- Wastewater recycling structures
- Wastewater treatment plants





# Other Items

- Individual States have authority to regulate waters
  - States could choose to regulate ephemeral channels or other waters that would no longer be regulated on the federal level
- Potential for future development of datasets that would identify or map regulated waters



# Summary

- Significantly fewer channels in Arkansas would be regulated, i.e., our many Ephemeral Streams
- Many wetlands would no longer be regulated, i.e., those lacking a direct connection (by abutment or direct flow) to a “tributary” (as newly defined)
- Some ponds would no longer be regulated, i.e., those in uplands or built on ephemeral channels.



# What's Next?

- STAY TUNED
- WOTUS Step 2 Rule – NOT YET EFFECTIVE
- Scheduled to be Effective June 22, 2020
- Challenges
- Will this Rule really be “Consistent and Predictable” ?





# Questions/Comments

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