

2015 CLEAN WATER RULE

What's different?

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Jurisdiction Subject Matter Expert, Wetlands Specialist

26 October 2018

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DELINEATION



DETERMINATION



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PJD VS. AJD

Preliminary Jurisdictional Determination	Approved Jurisdictional Determination
Not appealable (instead request an AJD)	Appealable
No set expiration date	Expires after 5 years
Cannot use to disclaim jurisdiction	Required to disclaim jurisdiction
Not posted on the web	Posted on the web
Sufficient for permitting	Sufficient for permitting



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AJD, PJD, AQUATIC RESOURCE DELINEATION FAQs

Do I need an AJD or PJD to get a permit?

No, Regulatory Guidance Letter 16-01 makes it clear that a jurisdictional determination is not required to get a permit. An aquatic resources delineation is fine.



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AJD/PJD FAQs

Is the Corps required to coordinate all Approved JDs with EPA?

No, the Corps is not required to coordinate CWR jurisdictional determinations with EPA. Coordination is still required in states where the CWR is enjoined.



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AJD, PJD, AQUATIC RESOURCE DELINEATION FAQs

What does the aquatic resource delineation verification say about jurisdiction?

Absolutely nothing. A delineation is purely about the extent of aquatic resources (streams, ditches, lakes, ponds, wetlands, etc.) within the review area. It will not discuss whether or not those areas are jurisdictional.



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AJD, PJD, AQUATIC RESOURCE DELINEATION FAQs

Can I appeal an aquatic resources delineation verification?

No, but if you have new information you can always ask us to reconsider a delineation verification. You can also request an AJD, which is appealable.



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AJD, PJD, AQUATIC RESOURCE DELINEATION FAQs

I don't have any aquatic resources on my property, will the Corps issue me a "no permit required" letter?

The no permit required letter is not necessary in this case, but what is necessary is an AJD. We cannot say that a review area has no waters of the U.S. without an AJD.



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AJD, PJD, AQUATIC RESOURCE DELINEATION FAQs

If an aquatic resource delineation verification is fine for permitting and only an AJD can disclaim jurisdiction, what is the PJD for?

Hmm...that's a good question. But if you need one maybe for a state or local approval we can do that.



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CLEAN WATER RULE WHAT'S DIFFERENT?

- Guidance
- (a)(3) “Isolated” Waters
- Tributaries, Ponds and Lakes
- Adjacent
- Similarly Situated
- Exclusions



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GUIDANCE

- Preamble (80 Fed. Reg. 37054-37104, 29 June 2015)
- Clean Water Rule Comment Compendium (30 June 2015)
- [Technical Support Document for the Clean Water Rule](#) (27 May 2015)



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CWR COMMENT COMPENDIUM

[Topic 00: Mass Mailing Campaigns](#)

[Topic 01: General](#)

[Topic 02: Traditional Navigable Waters](#)

[Topic 03: Adjacent Waters](#)

[Topic 04: Other Waters](#)

[Topic 05: Significant Nexus](#)

[Topic 06: Ditches](#)

[Topic 07: Non-Jurisdictional](#)

[Topic 08: Tributaries](#)

[Topic 09: Science](#)

[Topic 10: Legal](#)



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CWR COMMENT COMPENDIUM

Topic 11: Economics, [Volume I](#) and [Volume II](#)

[Topic 12: Implementation](#)

[Topic 13: Process and Administration](#)

[Topic 14: Miscellaneous](#)

Topic 17: Non-Technical, [Volume I](#) and [Volume II](#)



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INSTRUCTION & CONTEXT (NOT GUIDANCE)

- This presentation
- AJD Form User Manual
- Fact sheets
- Questions and Answers
- [Environmental Assessment FONSI](#) (27 May 2015)
- [CWR Economic Analysis](#) (20 May 2015)
- [Connectivity of Streams & Wetlands to Downstream Waters](#) (January 2015)



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Bottom line: there's a lot of different places for guidance and instruction. Nothing new about that. What is new is that it's in different places and in a format with which we are less familiar.



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“ISOLATED” OTHER WATERS

- 33 CFR 328.3(a)(3) in the 1986 regulations
- No longer a category; (a)(3) is the territorial seas in CWR
- Under the CWR geographically isolated waters are evaluated for a significant nexus under (a)(7) or (a)(8) along with hydrologically connected wetlands that do not meet the new definition of neighboring



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TRIBUTARIES, PONDS AND LAKES

- Ponds and lakes are no longer (a)(5) tributaries even when they contribute flow to the tributary network
- They can now be (a)(6) adjacent (only wetlands could be adjacent under 1986 regulations)
- They can connect segments of (a)(5) tributaries
- Wetlands that directly abut (a)(6) ponds and lakes are adjacent even if they do not meet the definition of neighboring
- See Comment Compendium [Topic 8 Tributaries](#), 8.2 p. 398-99



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WHAT IS ADJACENT (a)(6)?

Pre-2015 Clean Water Rule tests

Wetlands only...

1. Unbroken surface or shallow sub-surface connection to jurisdictional waters; or
2. Physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like; or
3. Proximity is reasonably close.

Post-2015 Clean Water Rule tests

Any waters...

1. Any portion is within 100' of the OHWM of an (a)(1)-(a)(5) water; or
2. Any portion is within 100-year floodplain of an (a)(1)-(a)(5) water but not more than 1,500' from the OHWM; or
3. Any portion is within 1,500' of the high tide line of an (a)(1)-(a)(3) water or the OHWM of the Great Lakes.
4. But excludes waters being used for established normal farming, ranching and silviculture activities.



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WHAT IS ADJACENT (a)(6) – MAJOR DIFFERENCES

Pre-2015 Clean Water Rule

- Wetlands only
- Case-specific significant nexus test required unless adjacent to TNW or directly abut RPW
- No ag exclusion
- Hydrologic connection regardless of distance
- Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are adjacent wetlands *per se* regardless of size or distance
- Non-adjacent wetlands subject to (a)(3) and the 2003 guidance and were routinely disclaimed

Post-2015 Clean Water Rule

- Includes non-wetland waters
- No case-specific significant nexus test required
- Excludes established ag land use
- Hydrologic connection no longer a factor
- Man-made dikes or barriers, natural river berms, beach dunes and the like now limited by *neighboring*
- Non-adjacent waters subject to (a)(7) or (a)(8) case-specific significant nexus evaluation



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ABUTTING VS. ADJACENT

Pre-CWR

- *Abutting* not in either 1977 or 1986 regulations or preambles
- 2 Dec 2008 guidance discusses a subset of adjacent wetlands that are abutting meaning “not separated by uplands, a berm, dike, or similar feature.”

CWR

- *Abutting* used only in the context of wetlands associated with lakes and ponds which were taken out of the category of tributaries
- *Abut* or *abutting* not defined

Abutting vs. Bordering?



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AJD, PJD, AQUATIC RESOURCE DELINEATION FAQs

What happens with Relatively Permanent Waters (RPWs) in the 2015 Clean Water Rule?

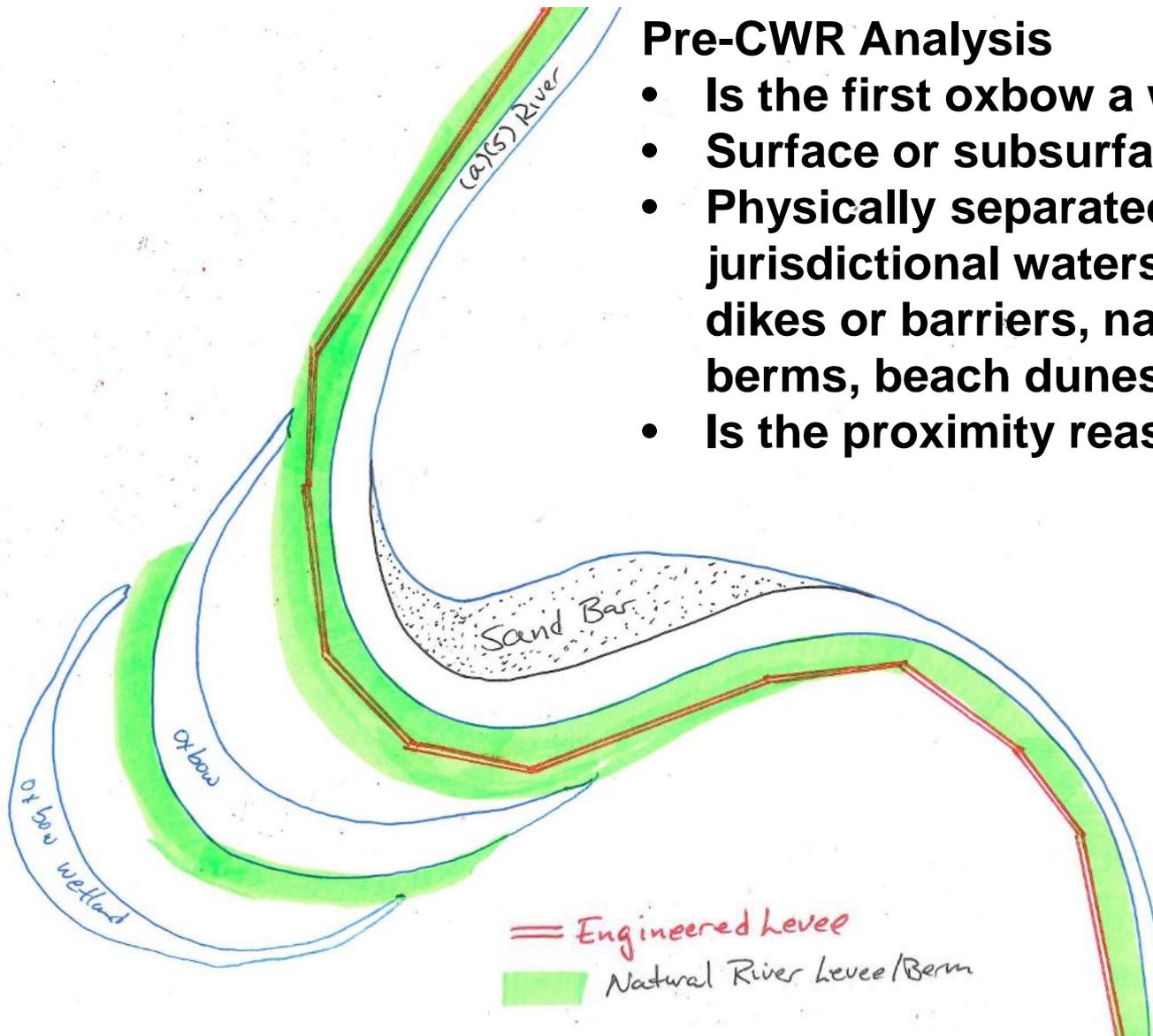
Relatively Permanent Waters are no longer a category. If a water meets the definition of *tributary* it is an (a)(5) water unless excluded. Flow regime factors into some exclusions, but using the terminology ephemeral, intermittent and perennial rather than relatively permanent.



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WHAT IS ADJACENT (a)(6) – MAJOR DIFFERENCES



Pre-CWR Analysis

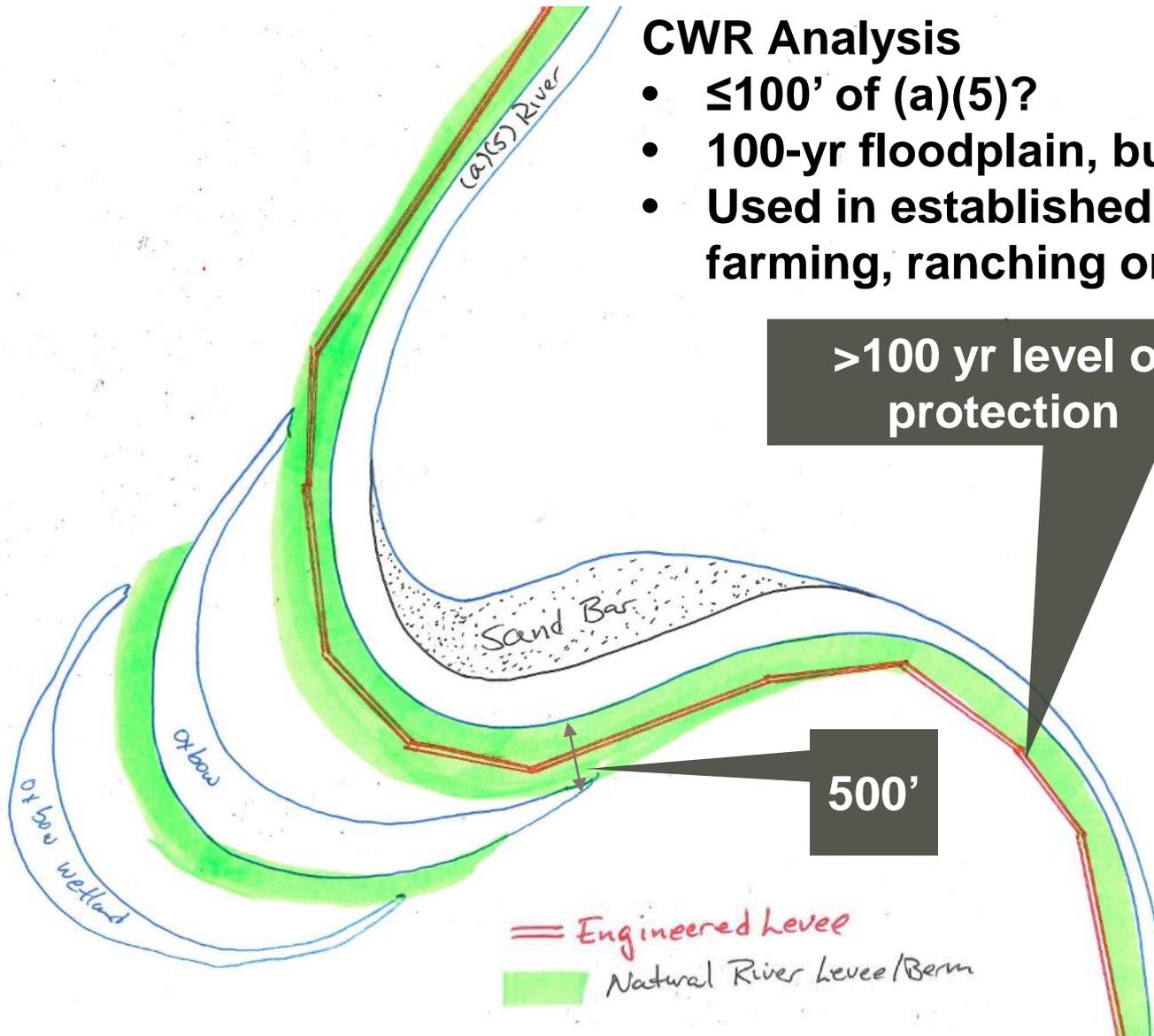
- Is the first oxbow a wetland?
- Surface or subsurface connection?
- Physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like?
- Is the proximity reasonably close?



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WHAT IS ADJACENT (a)(6) – MAJOR DIFFERENCES



CWR Analysis

- $\leq 100'$ of (a)(5)?
- 100-yr floodplain, but $\leq 1,500'$?
- Used in established normal, farming, ranching or silviculture?

>100 yr level of protection

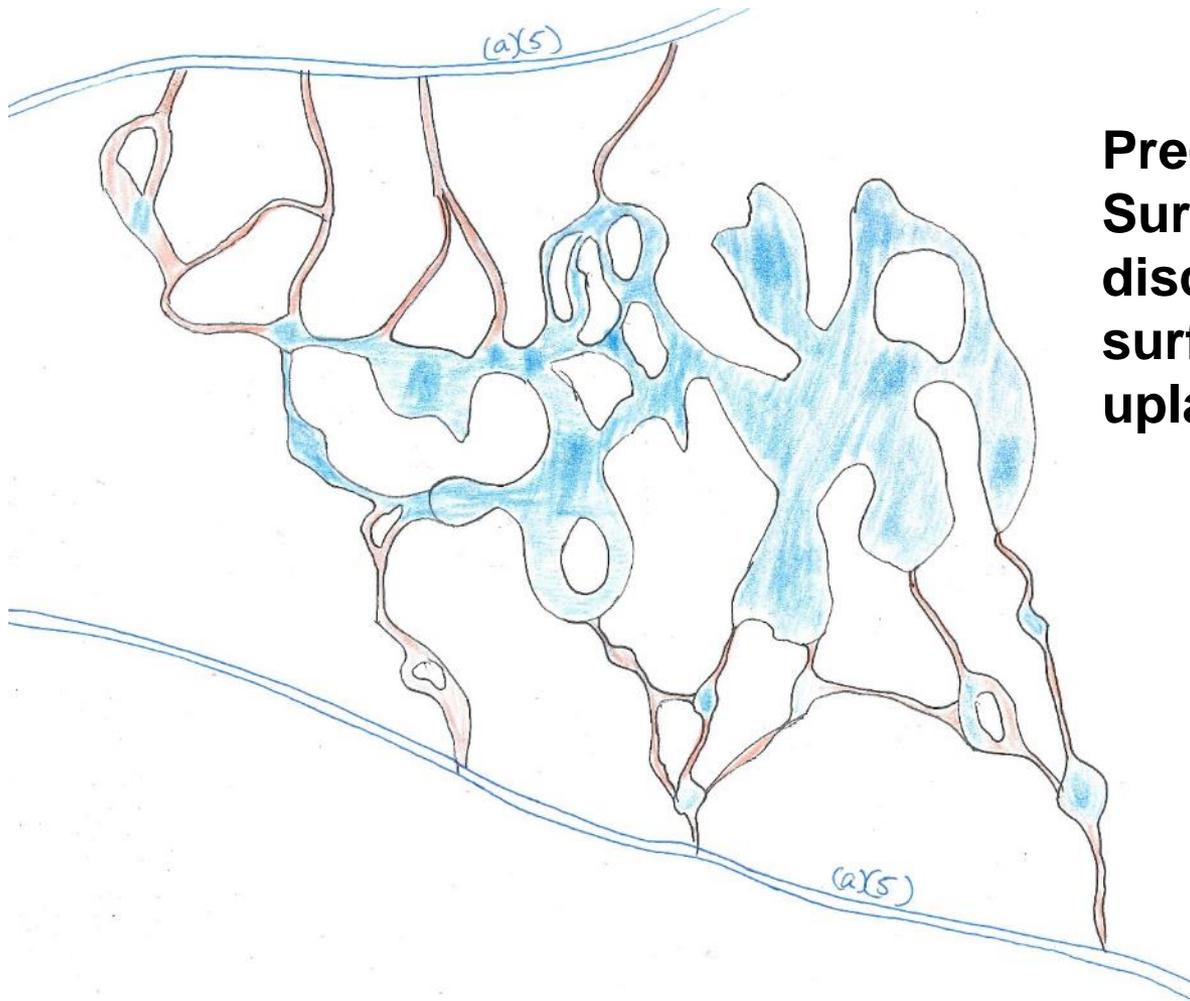
500'



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WHAT IS ADJACENT (a)(6) – MAJOR DIFFERENCES



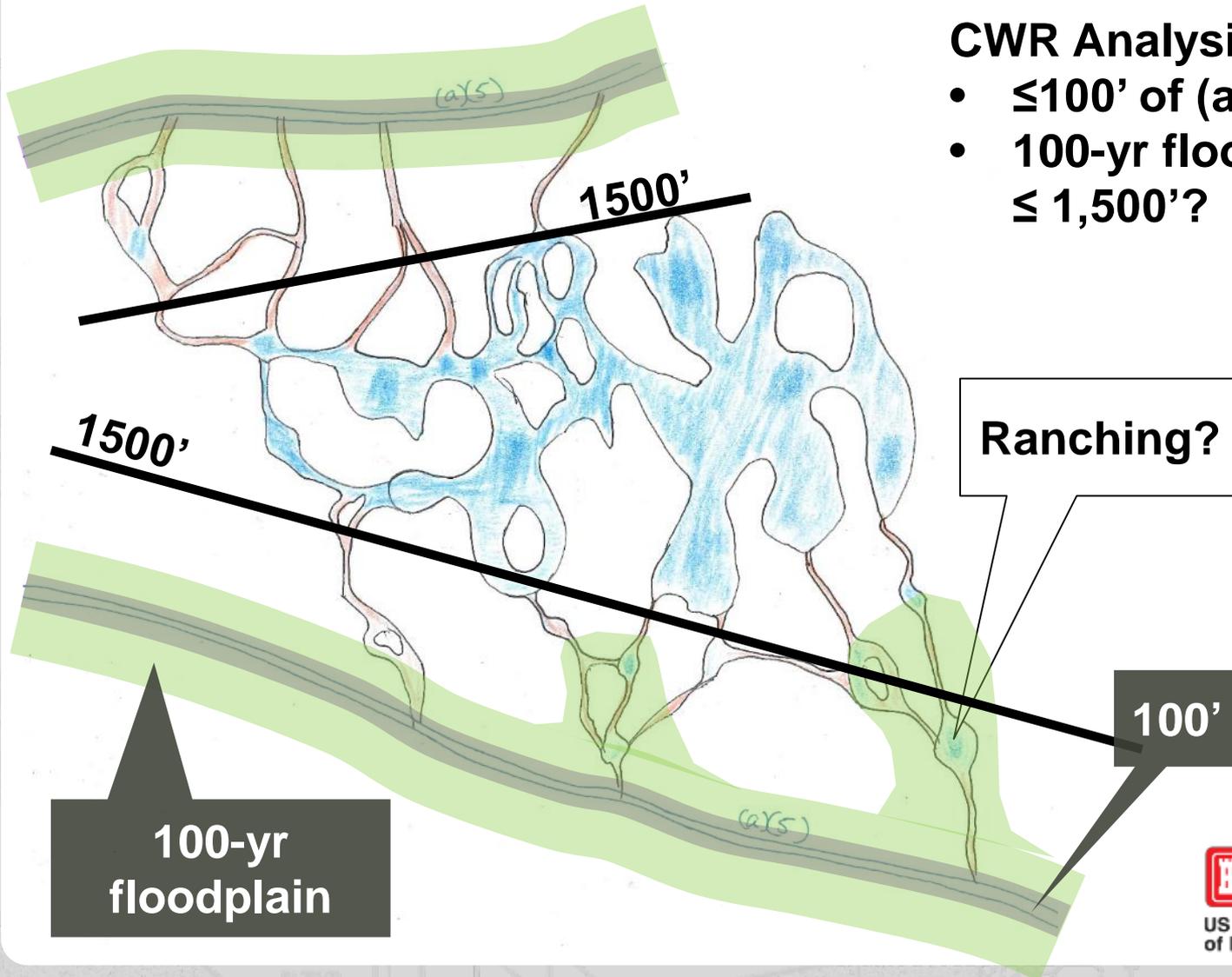
**Pre-CWR Analysis:
Surface connection via
discrete, confined,
surface flows through
upland swales**



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WHAT IS ADJACENT (a)(6) – MAJOR DIFFERENCES



CWR Analysis

- $\leq 100'$ of (a)(5)?
- 100-yr floodplain, but $\leq 1,500'$?

Ranching?

100'

100-yr
floodplain



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Are there Corps-approved/accepted GIS datasets for the extent of the 100-year floodplain?

Landscape Scale

- This is not in itself a determination
- What is not adjacent within SPOE for (a)(7) & (a)(8) aggregation?
- Impractical to use DFIRMs for large areas
- Recommend using most recent National Flood Hazard Layer (NFHL)

Local Scale

- For making specific determination rather than landscape scale analysis
- What is adjacent within the review area?
- Most recent FEMA maps, for example DFIRMs and finalized updates
- If FEMA maps are not available for the area follow guidance concerning alternative sources



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SIMILARLY SITUATED



Pre-CWR Analysis

- What is the relevant reach?
- Which wetlands are adjacent to the relevant reach?

Remember adjacent meant:

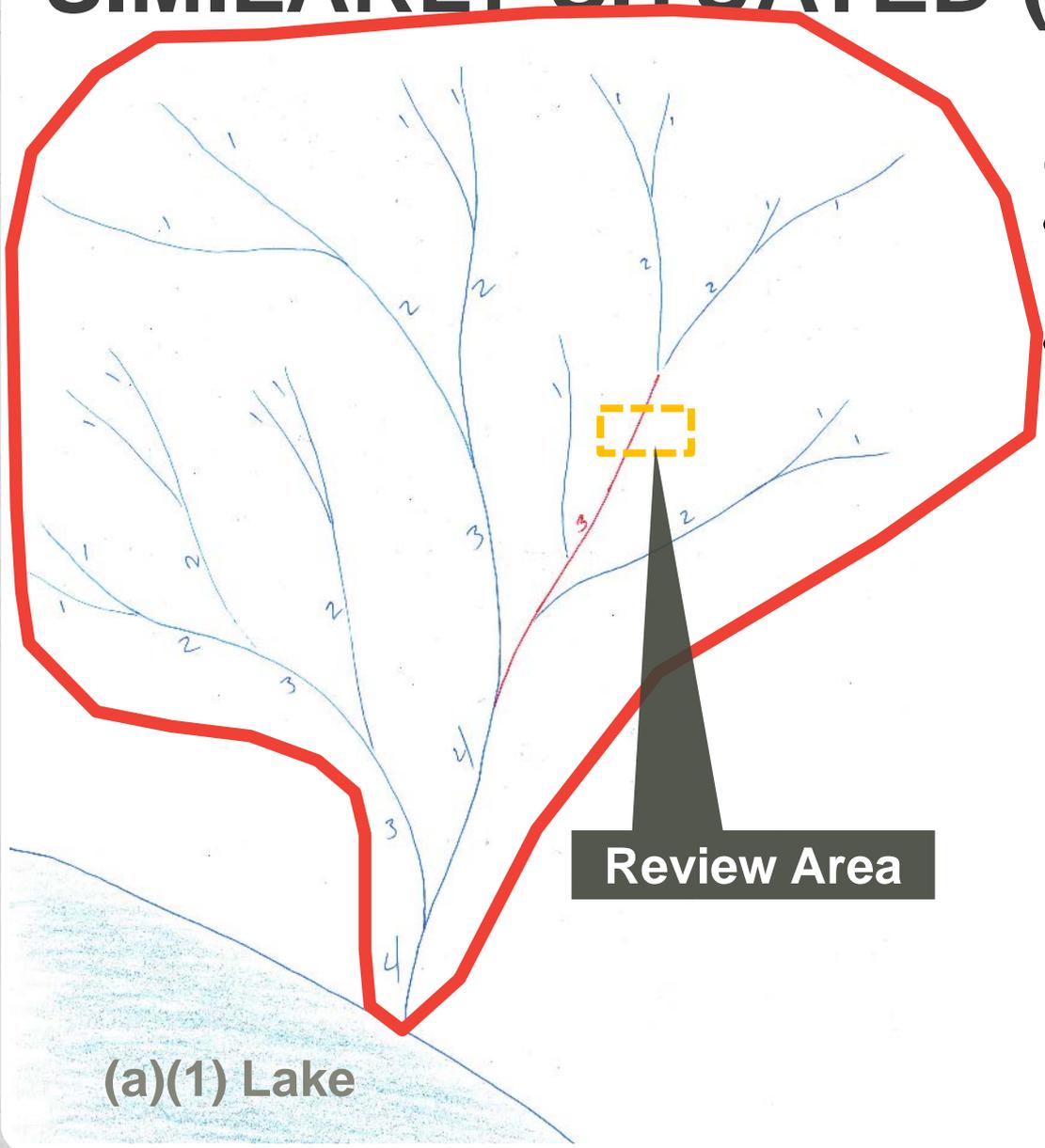
- Surface/shallow subsurface connection; or
- Physically separated by a berm, levee, dune etc.; or
- Reasonably close proximity



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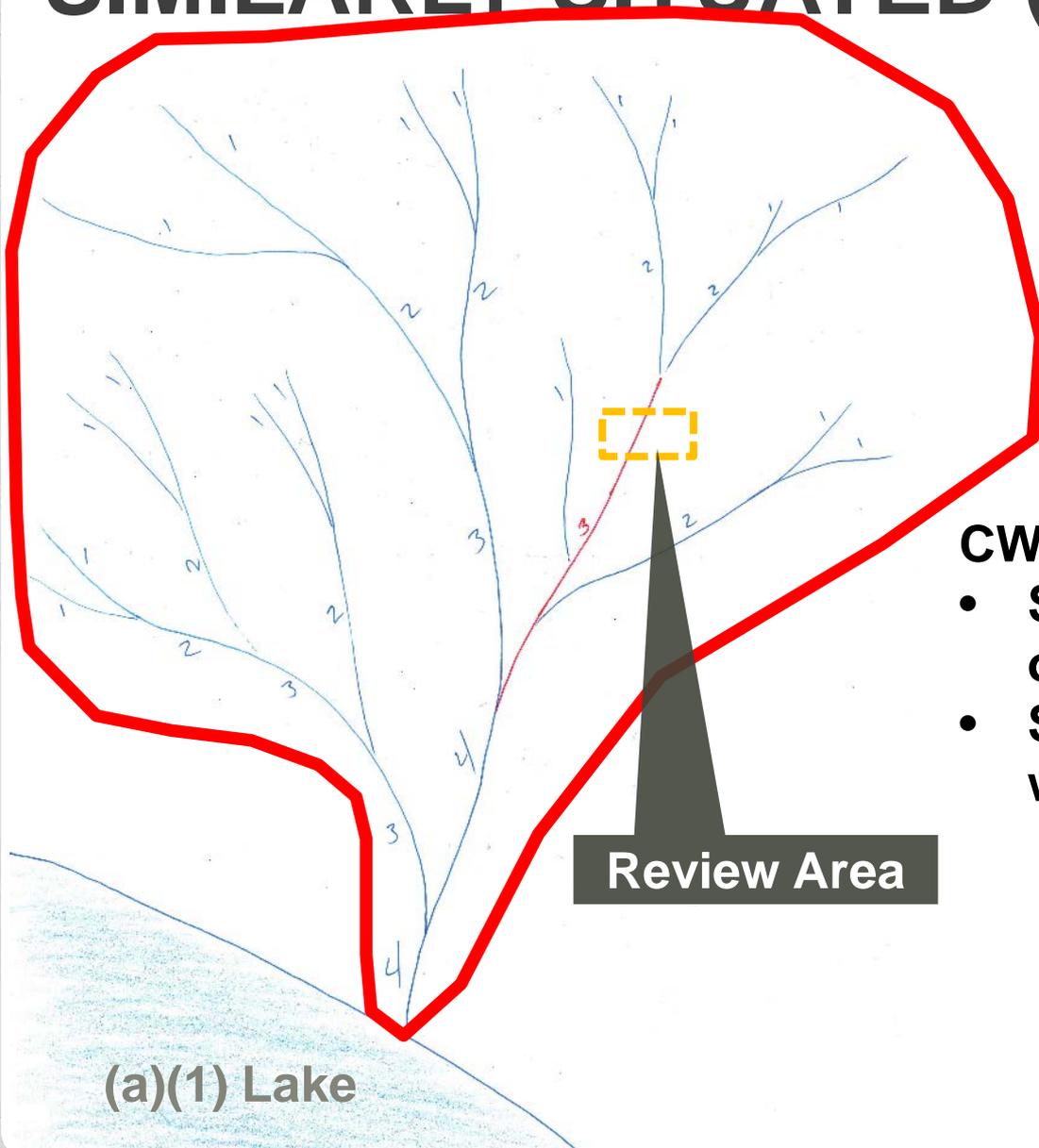
SIMILARLY SITUATED (a)(7)



CWR Analysis

- **Single Point of Entry Watershed (SPOE);**
- **All western vernal pools within the SPOE**

SIMILARLY SITUATED (a)(8)



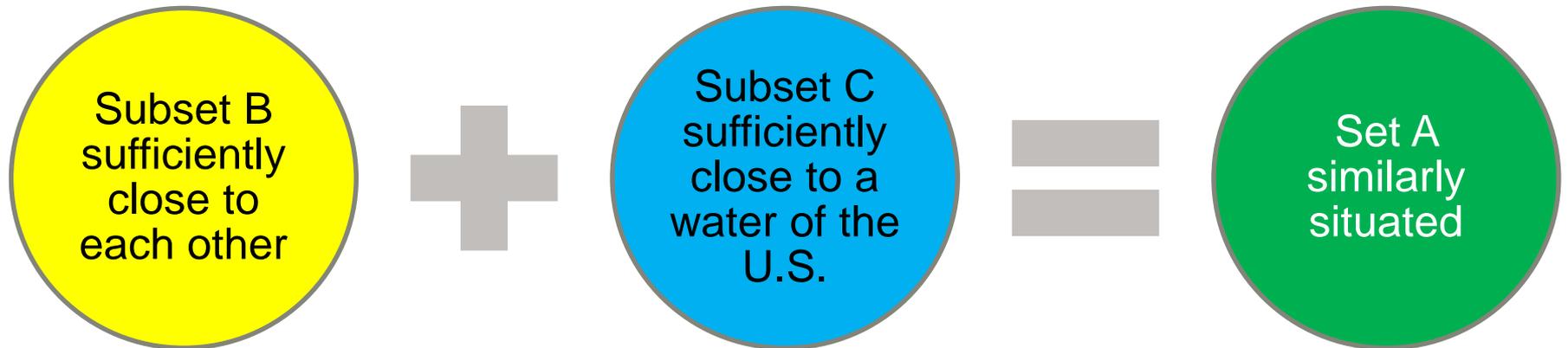
- CWR Analysis – 2 Subsets**
- Sufficiently close to each other, plus
 - Sufficiently close to a water of the U.S.



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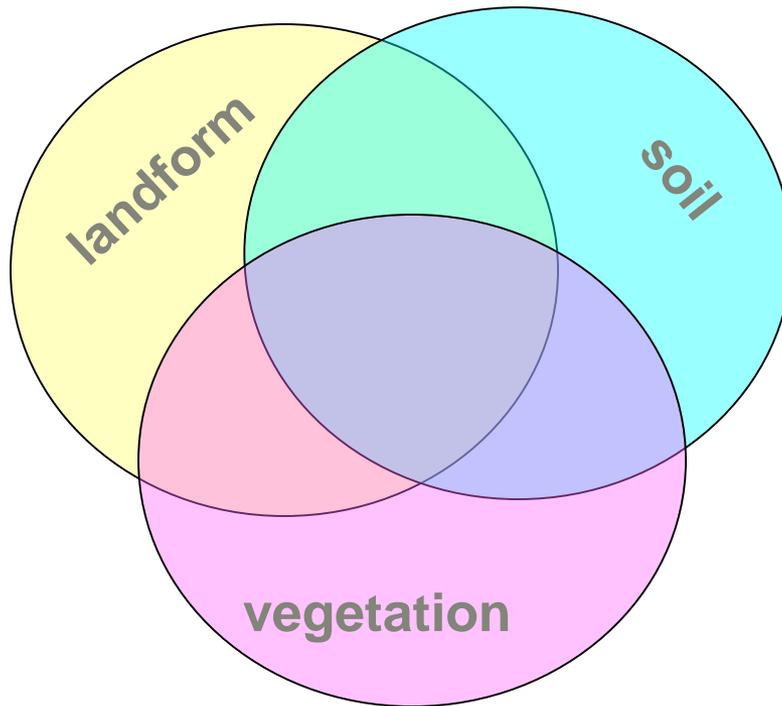
SIMILARLY SITUATED (a)(8)



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SUBSET B – SUFFICIENTLY CLOSE TO EACH OTHER



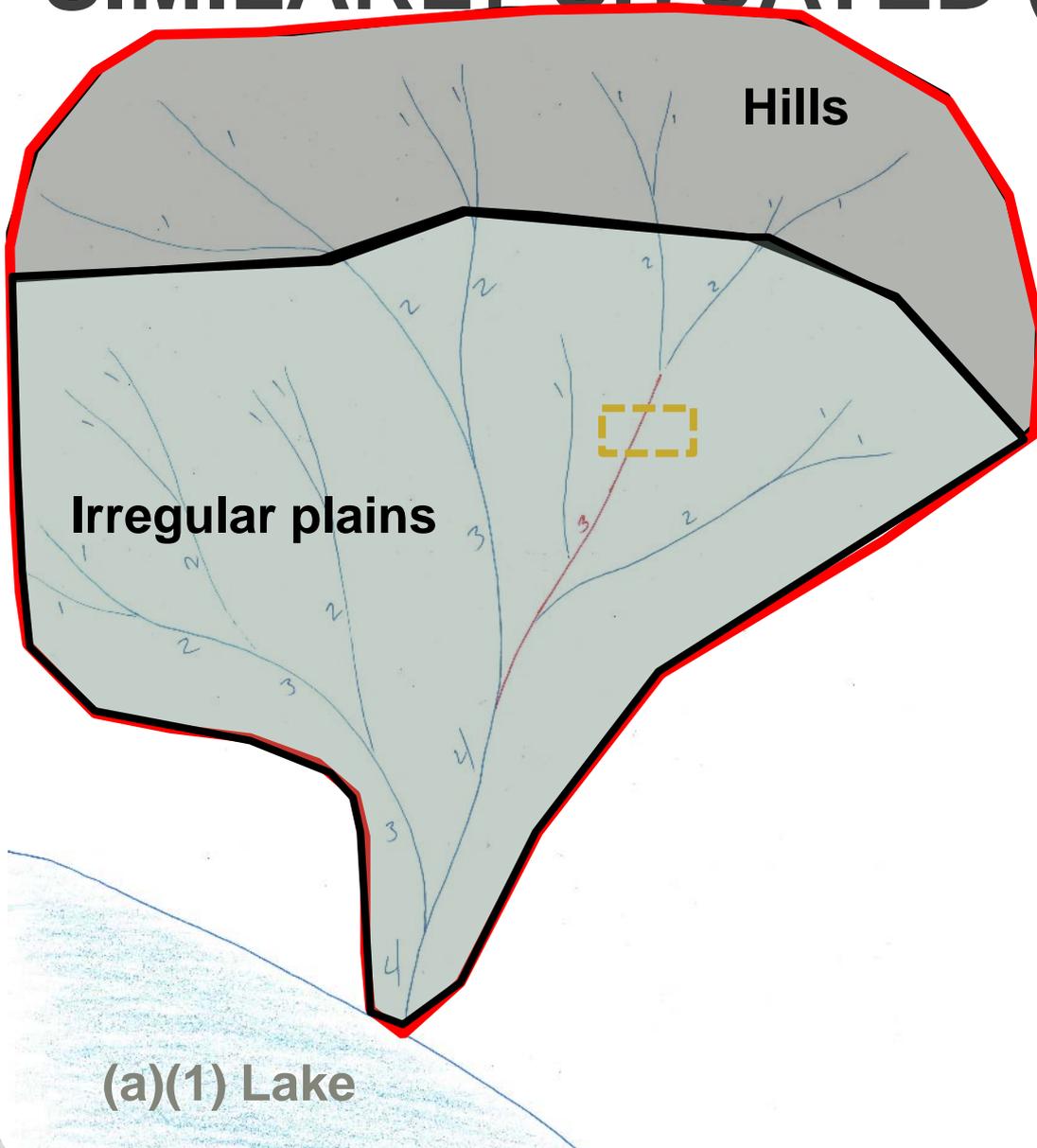
Waters of the same Cowardin System (e.g., palustrine, riverine, lacustrine, etc.) which share similar landform, soils and vegetation are sufficiently close to each other



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SIMILARLY SITUATED (a)(8)



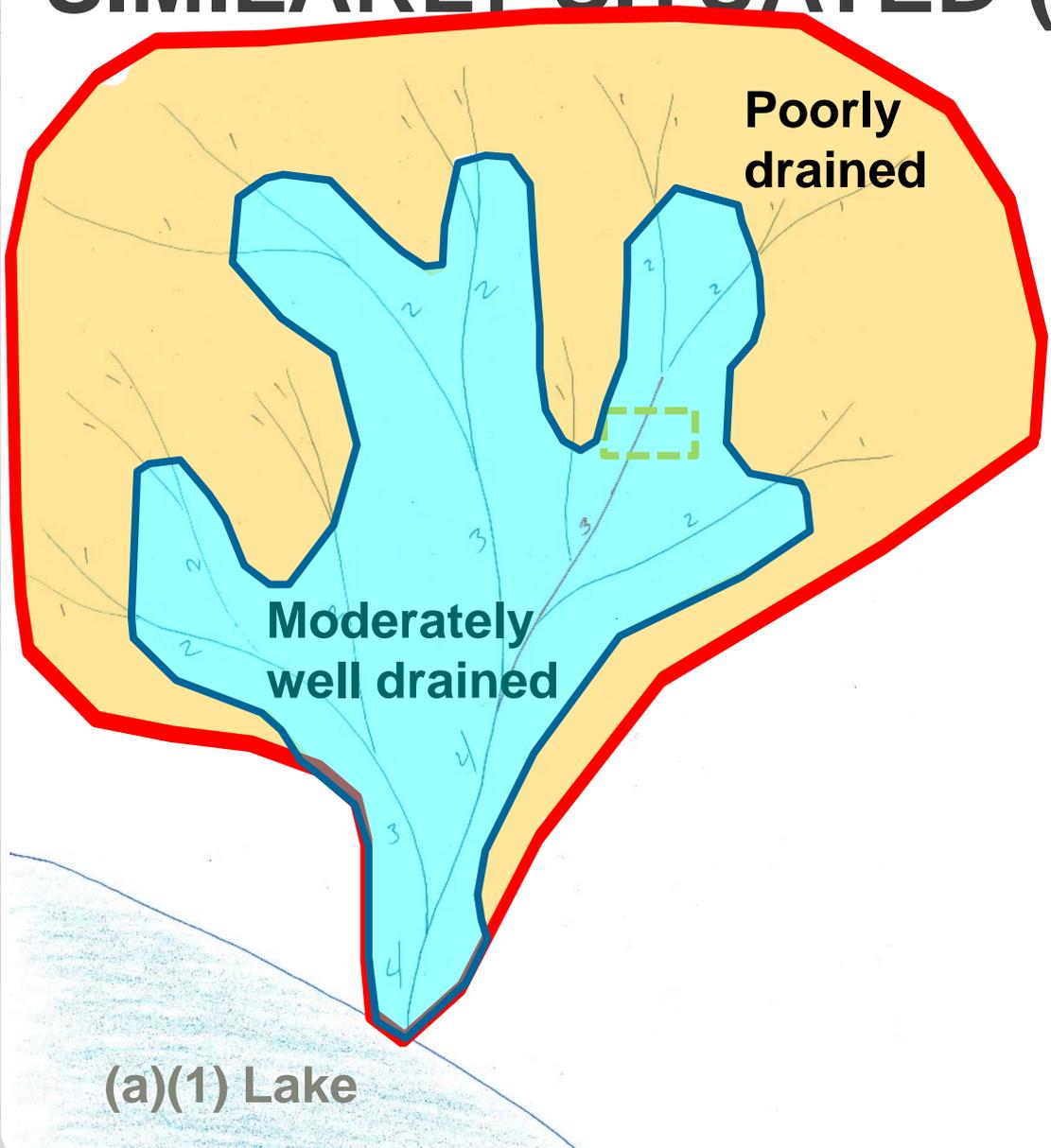
Landform



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SIMILARLY SITUATED (a)(8)



Soils

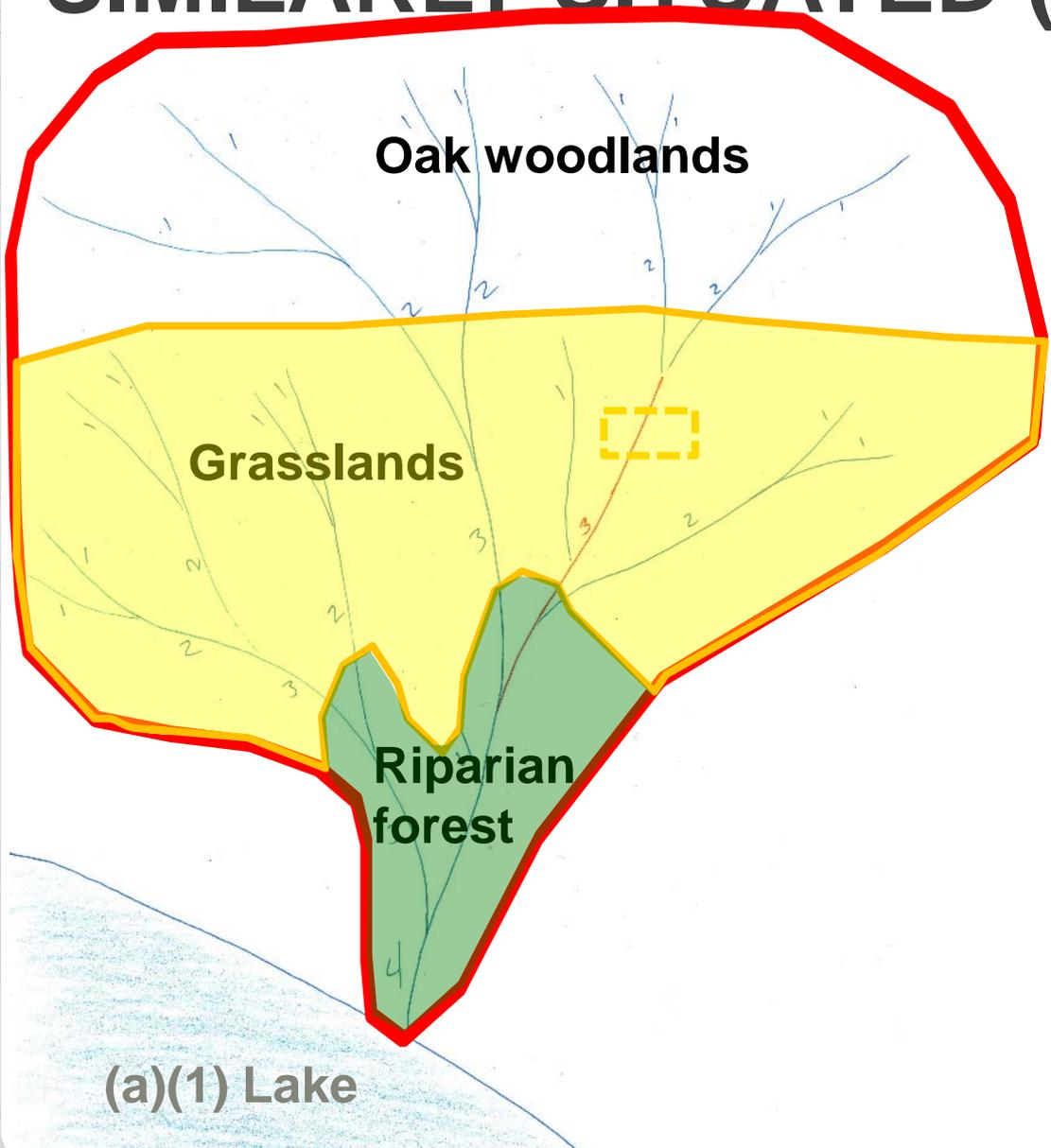
(a)(1) Lake



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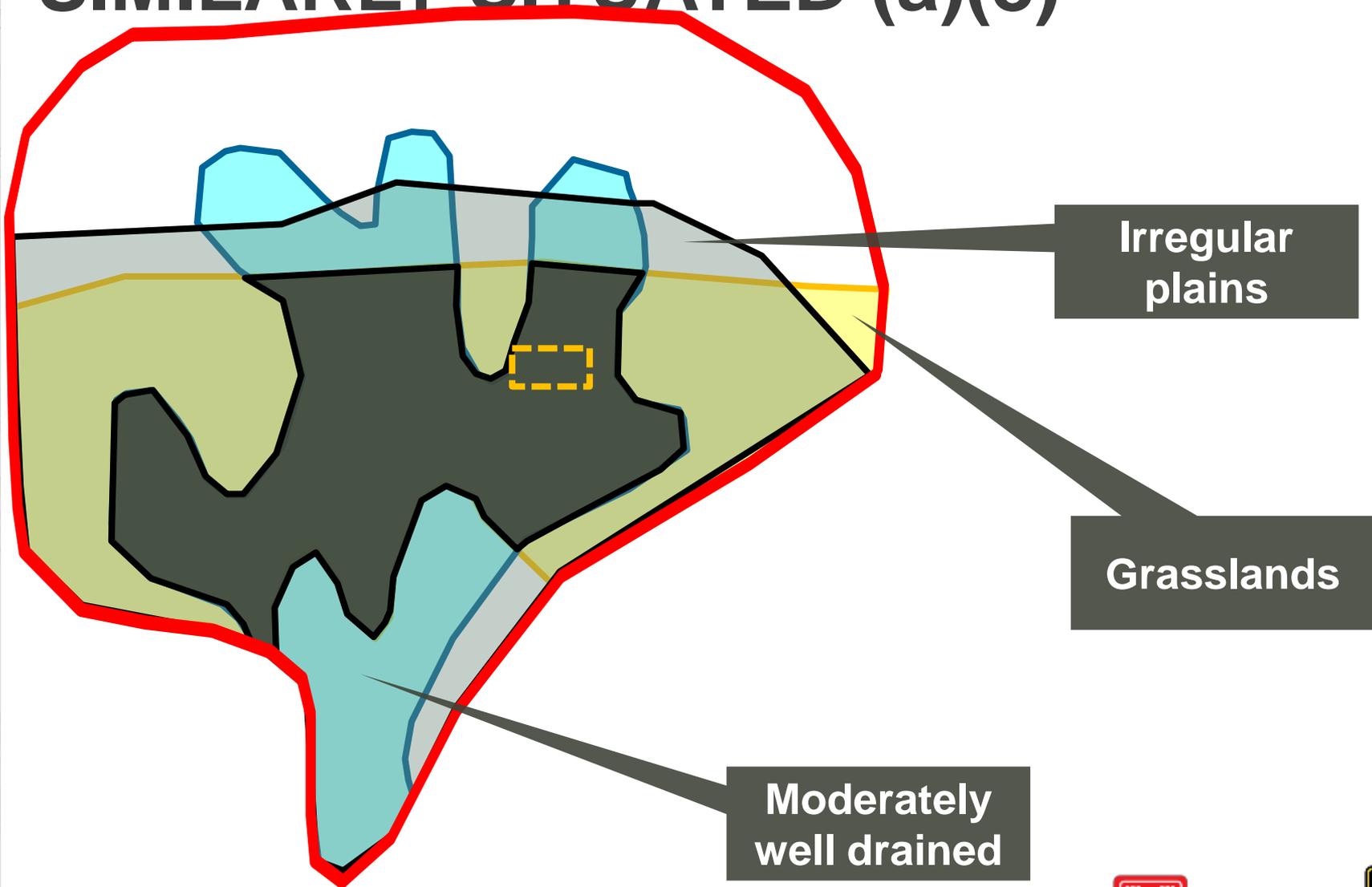


SIMILARLY SITUATED (a)(8)



Vegetation

SIMILARLY SITUATED (a)(8)



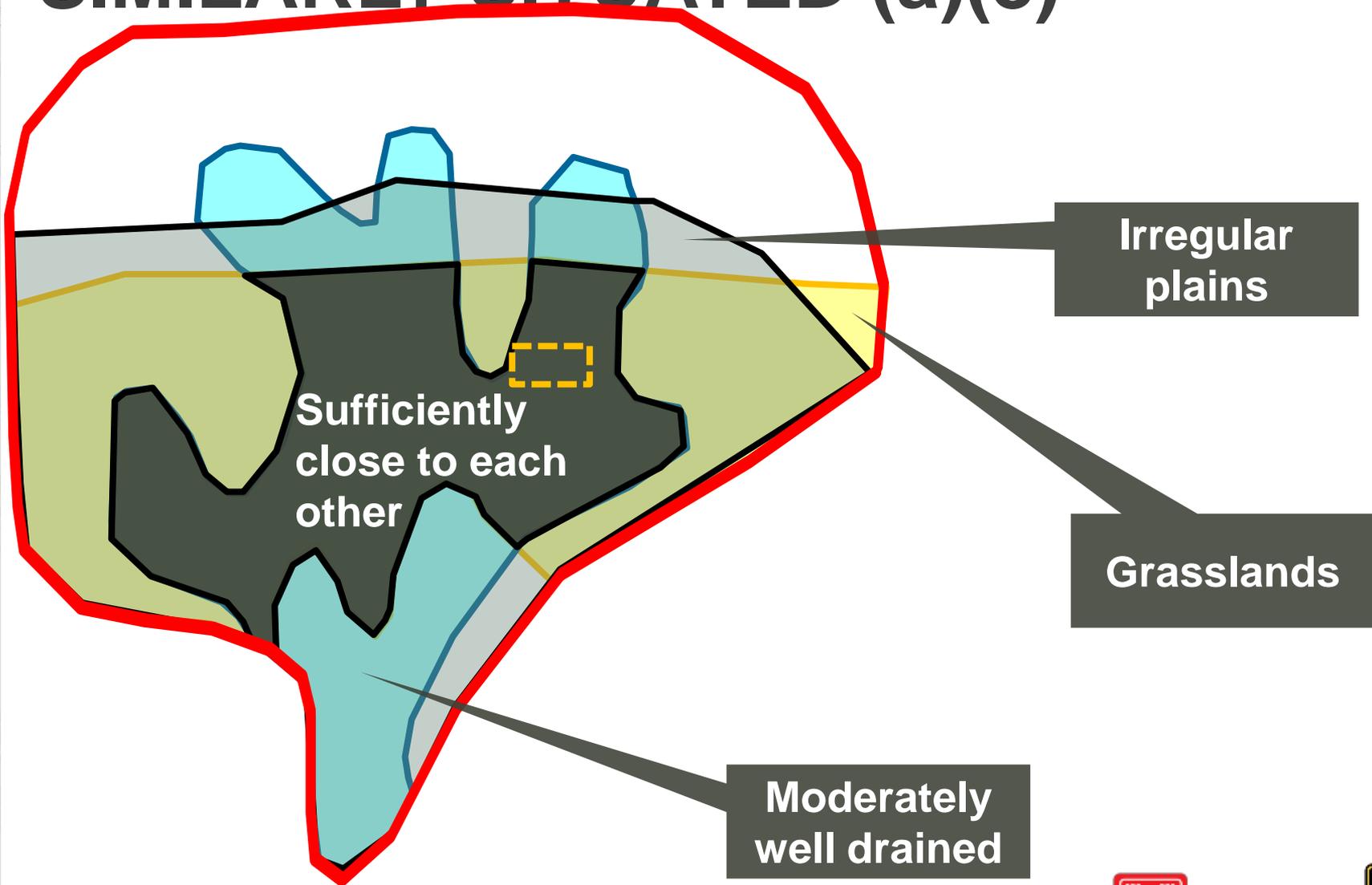
**Irregular
plains**

Grasslands

**Moderately
well drained**



SIMILARLY SITUATED (a)(8)



**Irregular
plains**

Grasslands

**Moderately
well drained**

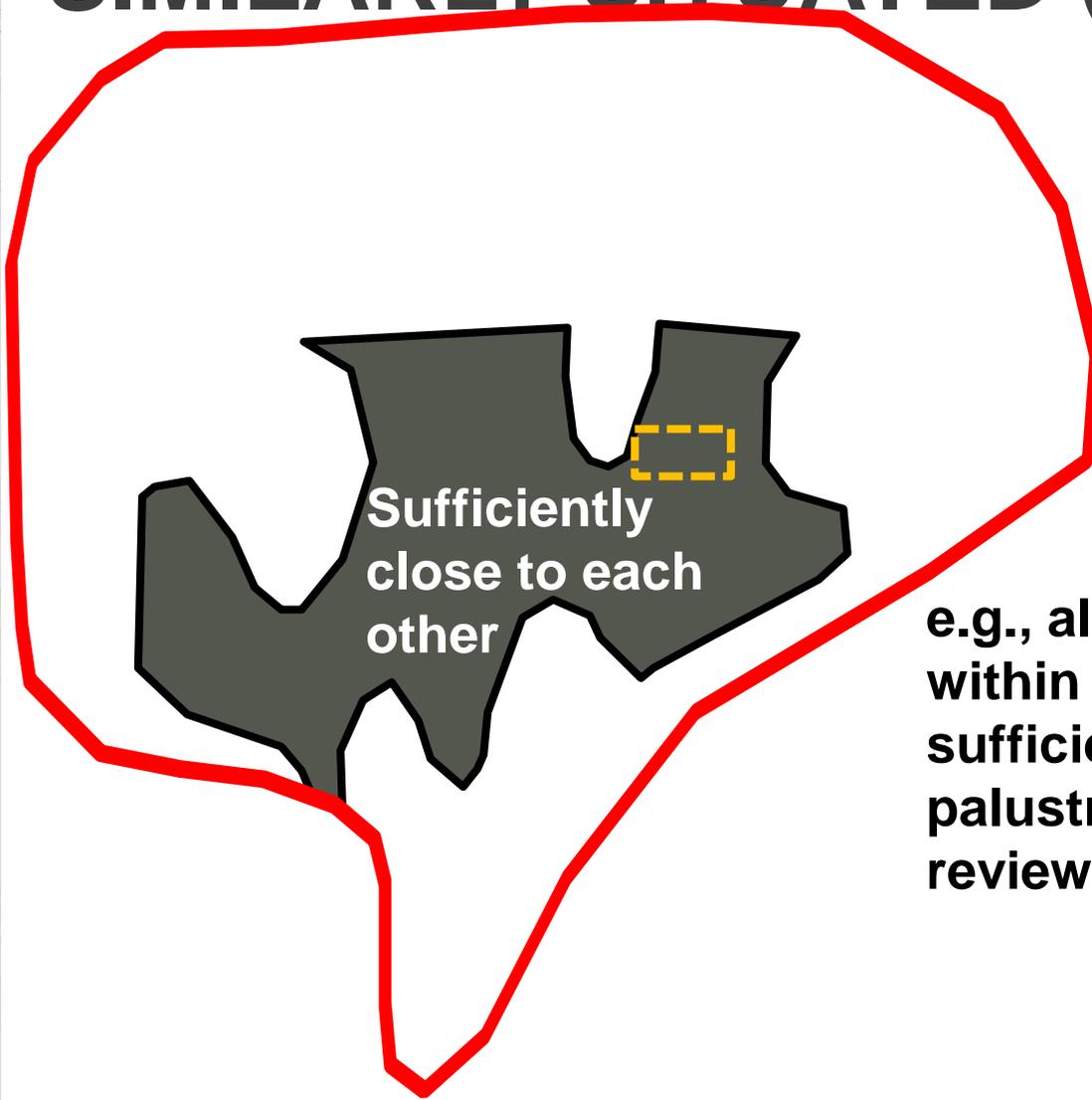
**Sufficiently
close to each
other**



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SIMILARLY SITUATED (a)(8)



**Subset B
sufficiently
close to
each other**

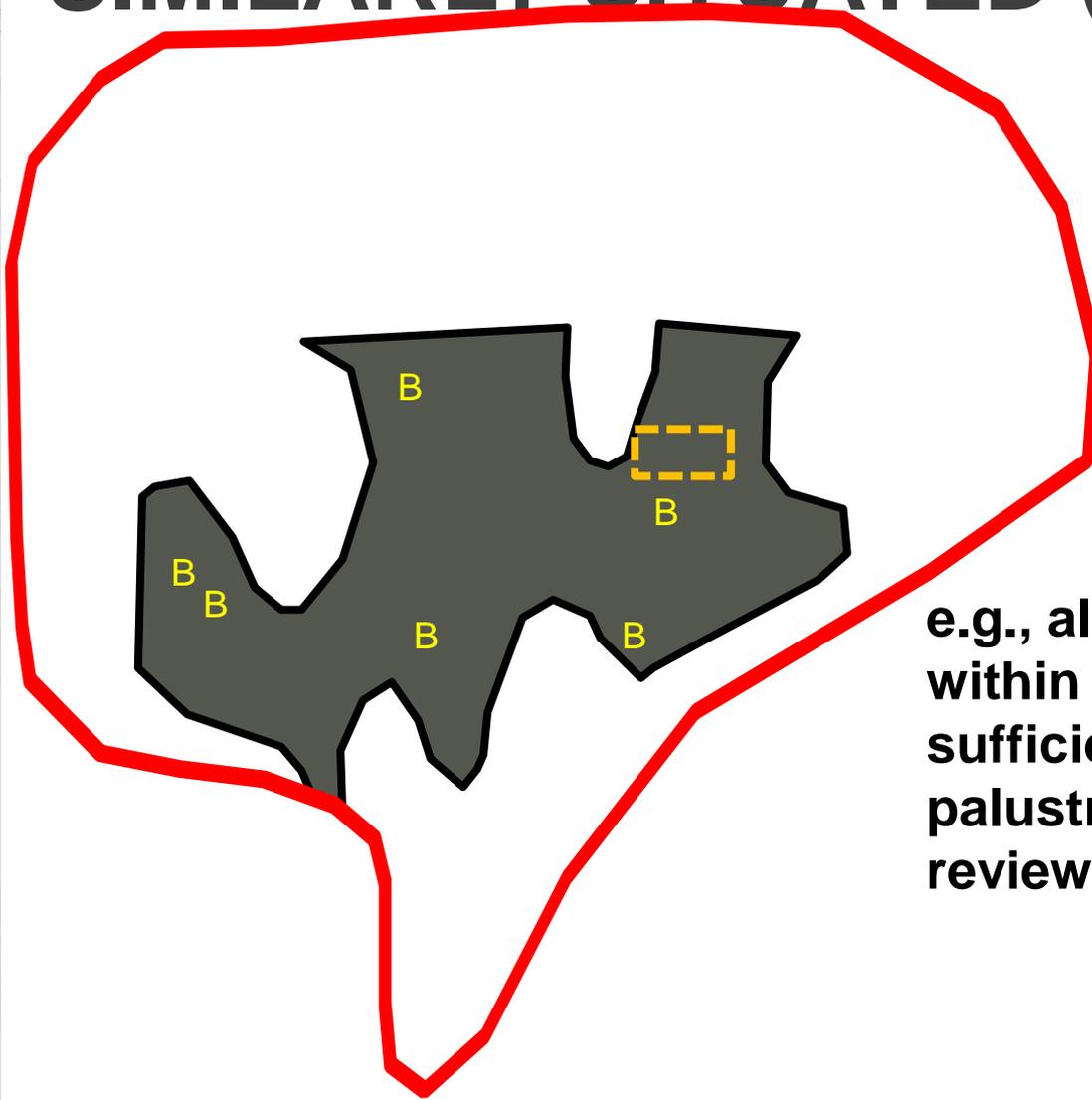
**e.g., all palustrine waters
within this area are
sufficiently close to any
palustrine waters within the
review area**



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SIMILARLY SITUATED (a)(8)



**Subset B
sufficiently
close to
each other**

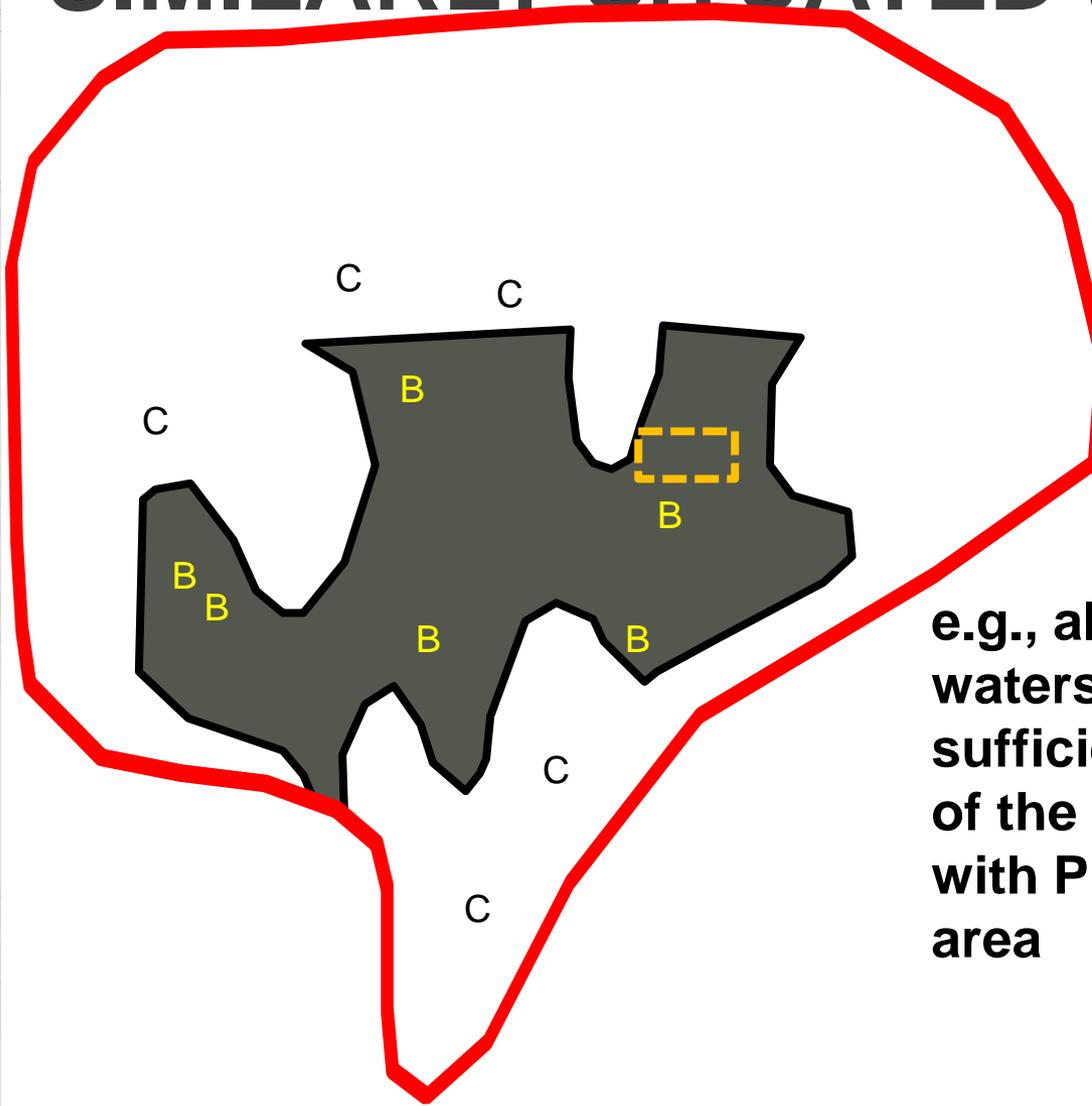
**e.g., all palustrine waters
within this area are
sufficiently close to any
palustrine waters within the
review area**



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SIMILARLY SITUATED (a)(8)



Subset B
sufficiently
close to
each other

Subset C
sufficiently
close to a
water of
the U.S.

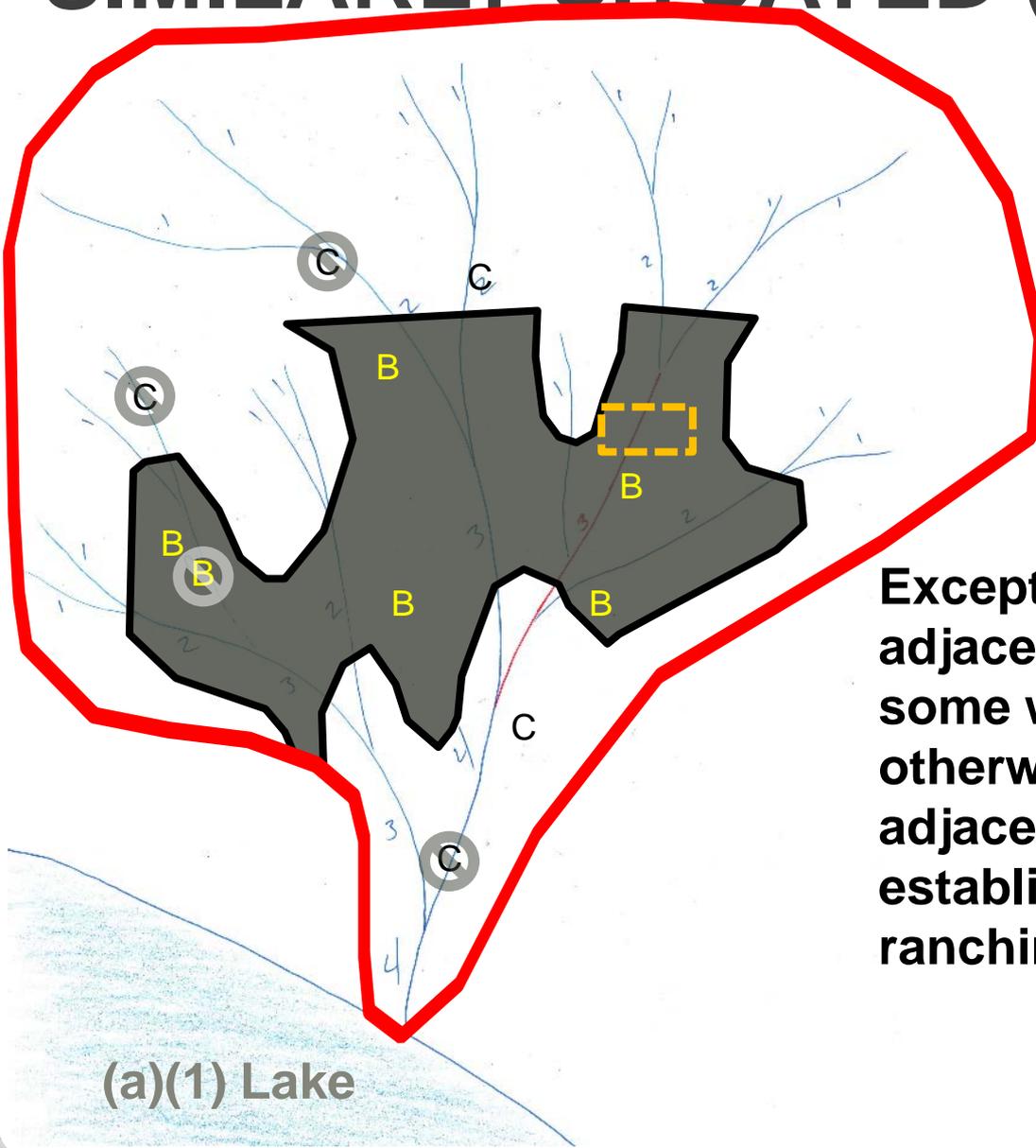
e.g., all palustrine emergent waters within the SPOE are sufficiently close to a water of the U.S. for aggregation with PEMs in the review area



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SIMILARLY SITUATED (a)(8)



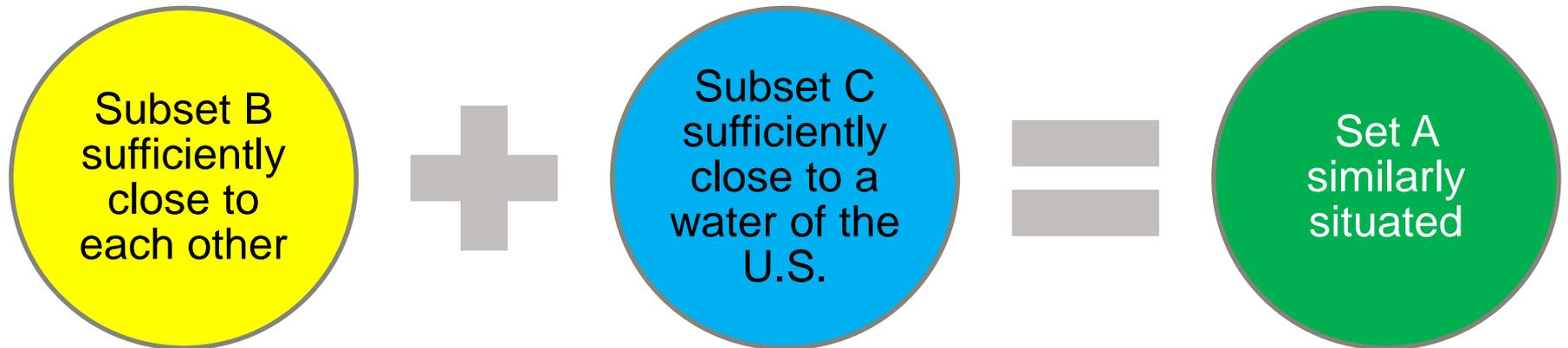
(a)(1) Lake

Subset B sufficiently close to each other

Subset C sufficiently close to a water of the U.S.

Except for any that would be adjacent. But remember than some waters that would otherwise be adjacent aren't adjacent when used in established normal farming, ranching, or silviculture

SIMILARLY SITUATED (a)(8)



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The significant nexus analysis remains essentially the same. What differs is the set of waters that are used in that analysis.

Oh, and there's a new form for documentation!



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EXCLUSIONS

Pre-2015 Clean Water Rule

- Waste treatment systems
- Prior converted cropland

Post-2015 Clean Water Rule

- Waste treatment systems
- Prior converted cropland



1986 Preamble Derived

- Certain ditches
- Artificially irrigated areas that would revert to dry land
- Artificial, constructed lakes and ponds
- Artificial reflecting pools or swimming pools
- Small ornamental waters
- Water-filled depressions



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EXCLUSIONS

Pre-2015 Clean Water Rule

- Waste treatment systems
- Prior converted cropland



2 New CWR Exclusions

- Stormwater control features
- Wastewater recycling features



Not wetlands and no OHWM...but just in case

- Erosion features
- Puddles
- Groundwater



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DITCHES – PRE-CWR

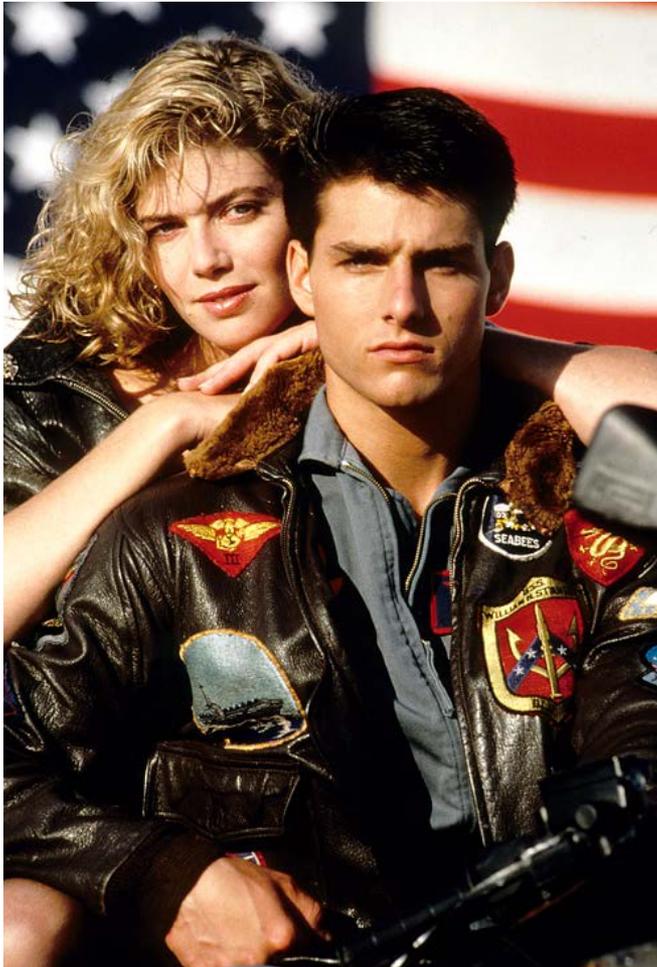
1977 Clean Water Act Amendments exempted certain *activities* in ditches, but did not exclude ditches from waters of the U.S.

- Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance [but not construction] of drainage ditches. 33 U.S.C. § 1344(f)(1)(C).
- See also 1986 regulations at 33 CFR 323.4(a)(3) and RGL 07-02

1977



DITCHES – PRE-CWR



1986 Preamble:

- Non-tidal drainage and irrigation ditches excavated on dry land generally are not waters of the U.S.

1986



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DITCHES – PRE-CWR

2000 NWP Preamble

- A drainage ditch **constructed in a stream, wetland, or other water** of the United States remains a water of the United States, provided an OHWM is still present.
- The statement that non-tidal drainage ditches are waters of the United States if they **extend the OHWM** of an existing water of the United States is consistent with the final rule published in the November 13, 1986, Federal Register and applies to ditches **constructed in waters** or that **connect waters**.
- Drainage ditches constructed in uplands that **connect two waters** of the United States may be considered waters of the United States if those ditches constitute a surface water connection between those two waters of the United States.

2000



DITCHES – PRE-CWR

2004 Sacramento District Guidance

- Toe drains are normally man-made drainage ditches constructed on uplands on the landside of the levee. Accordingly, toe drains are not considered waters of the U.S., unless they were **constructed through wetlands** (or are **channelized streams**). If wetlands exist on both sides of the toe drain, we will assume the drain was constructed in wetlands and is jurisdictional.

2004



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DITCHES – PRE-CWR

2007 NWP Preamble

- To qualify for [NWP 46], those ditches and canals must: (1) Be constructed in uplands, (2) receive water from another water of the United States, (3) divert water to another water of the United States, and (4) be determined to be waters of the United States
- [NWP 46] may authorize discharges of dredged or fill material into roadside ditches, provided those ditches meet all four criteria

2007



DITCHES – PRE-CWR

2008

2008 Post-Rapanos Guidance

- The agencies generally will not assert jurisdiction over...Ditches (including roadside ditches) excavated wholly in and draining only uplands **and that do not carry a relatively permanent flow of water**



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DITCHES UNDER THE 2015 CLEAN WATER RULE



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CWR EXCLUDED DITCHES (b)(3)

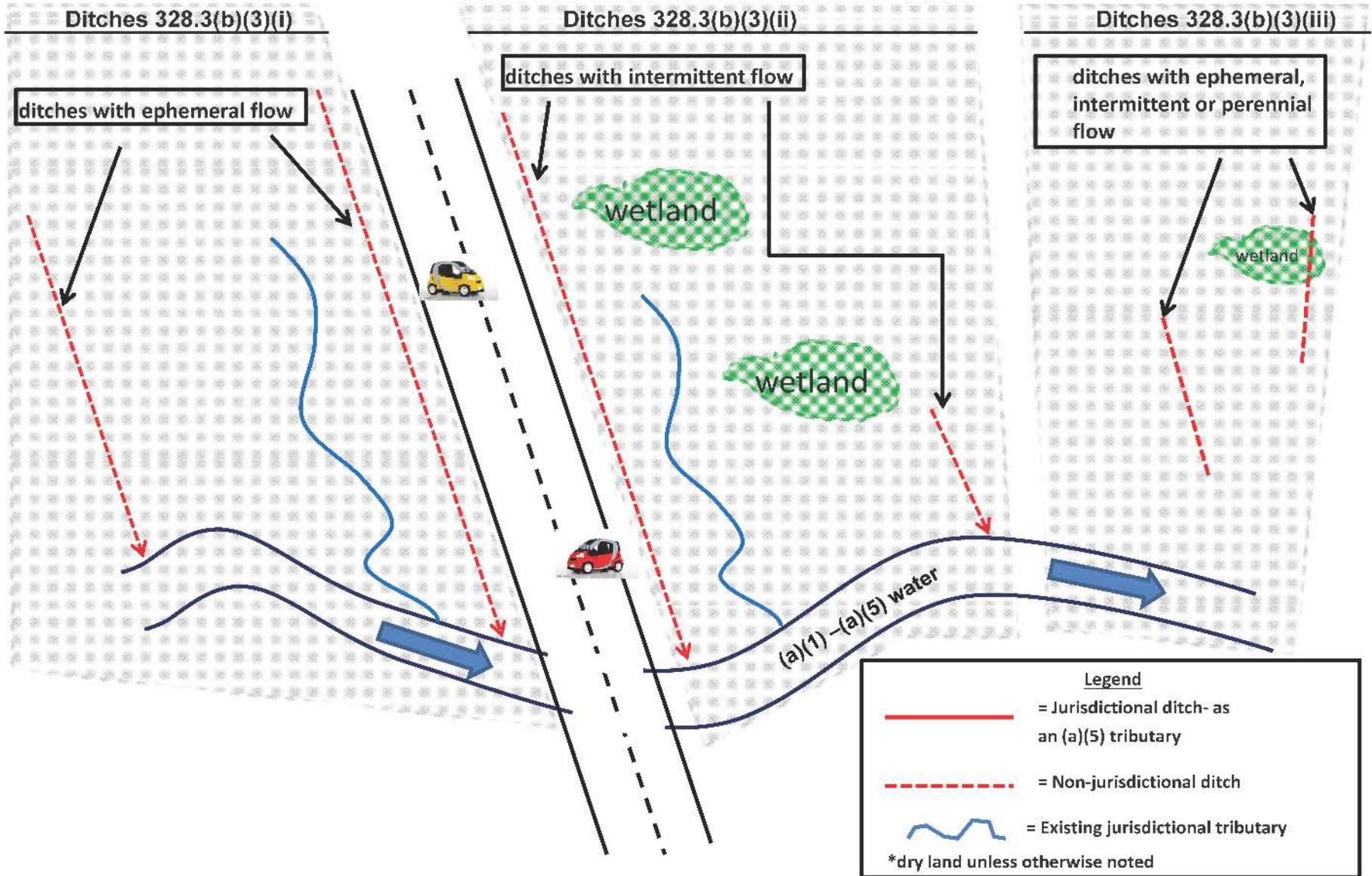
- (i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
- (ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
- (iii) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.



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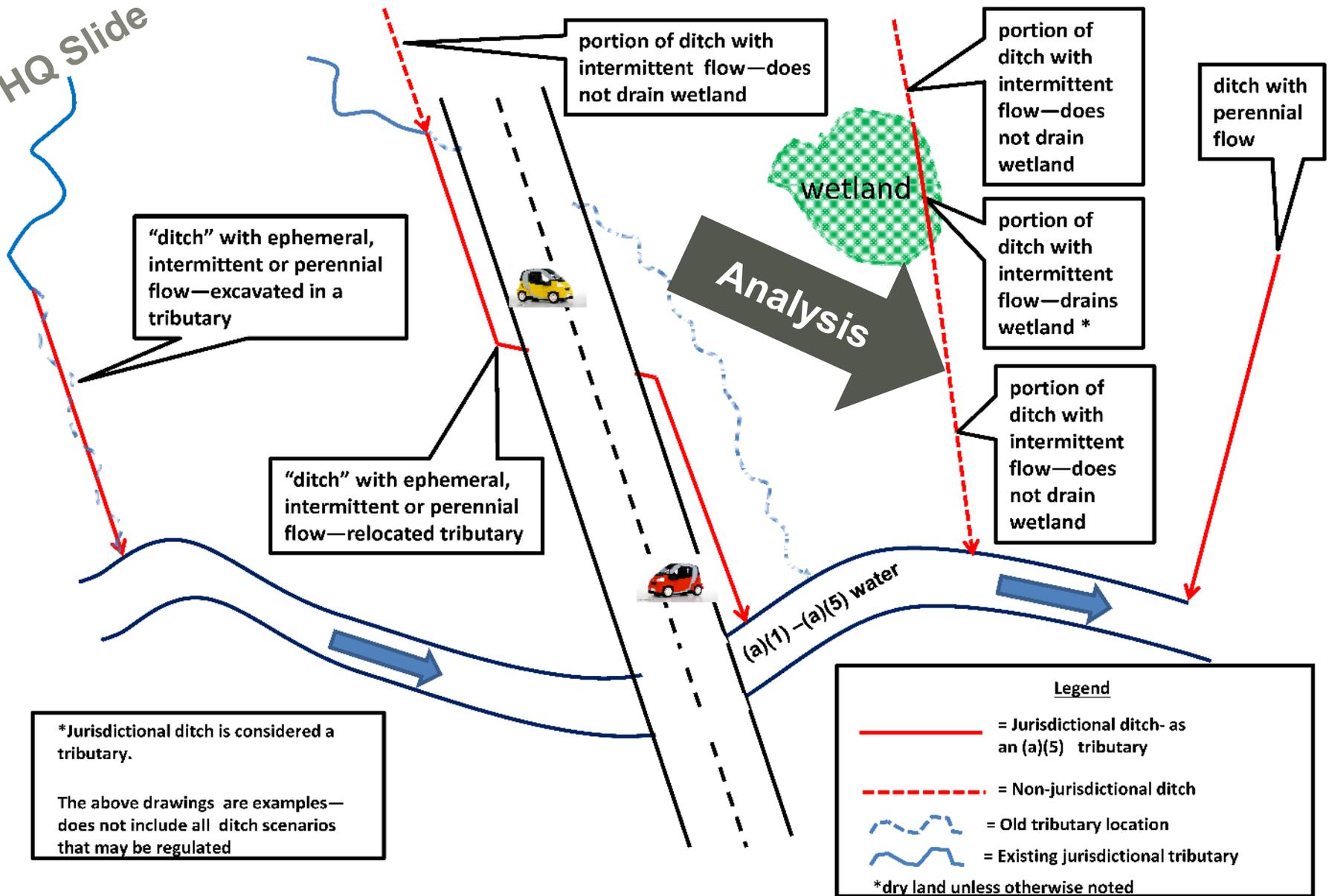


Excluded Waters – Ditches 328.3(b)(3)



Regulated Ditches – Ditches Not Meeting Exclusions

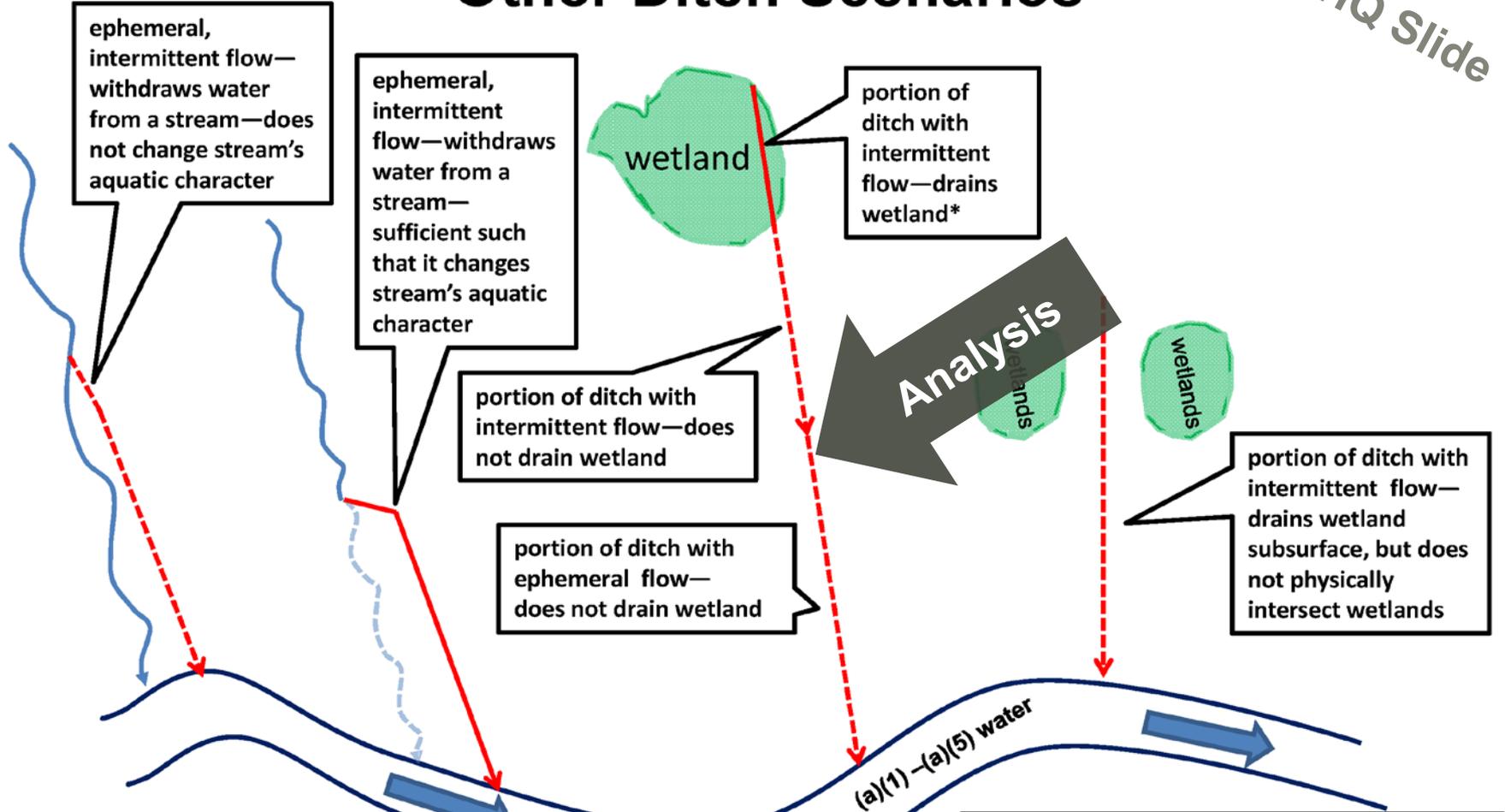
HQ Slide



*Jurisdictional ditch is considered a tributary.

The above drawings are examples—does not include all ditch scenarios that may be regulated

Other Ditch Scenarios



*Jurisdictional ditch is considered a tributary.

The above drawings are examples—does not include all ditch scenarios that may be regulated.

Legend

- = Jurisdictional ditch- as an (a)(5) tributary
- - - = Non-jurisdictional ditch
- - - = Old tributary location
- = Existing jurisdictional tributary

*dry land unless otherwise noted

AJD/PJD FAQs

I have a ephemeral ditch in my review area. Can I just leave it off the map and do a PJD?

No, if it's an aquatic resource it needs to be on the map. If it's an excluded water then the Corps will need to do an AJD to disclaim jurisdiction.



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AJD/PJD FAQs

I have ditch in my review area. I don't think its jurisdictional because it doesn't have an OHWM. Do I ask for an AJD?

Maybe, if it doesn't have an OHWM and doesn't meet the wetland definition then it's not an aquatic resource. You would only need an AJD if there are no aquatic resources in the review area (i.e. dry land AJD)



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AJD/PJD FAQs

What about puddles? The CWR talks about these in the same context as the 1986 preamble excluded waters. Do I need to map those?

No, puddles are not aquatic resources since they do not have an OHWM nor are they wet long enough to meet the definition of wetland.



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AJD, PJD, AQUATIC RESOURCE DELINEATION FAQs

What about rills and gullies? Do I need to map those?

No, rills and gullies are not aquatic resources since they do not have an OHWM nor are they wet long enough to meet the definition of wetland.

We'll see it in the aerials, so take a sample point, describe the situation, take a picture so that I know you didn't just miss it!



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2015 CLEAN WATER RULE

What's different?

James T. Robb, Sacramento District

Jurisdiction Subject Matter Expert, Wetlands Specialist

26 October 2018

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