

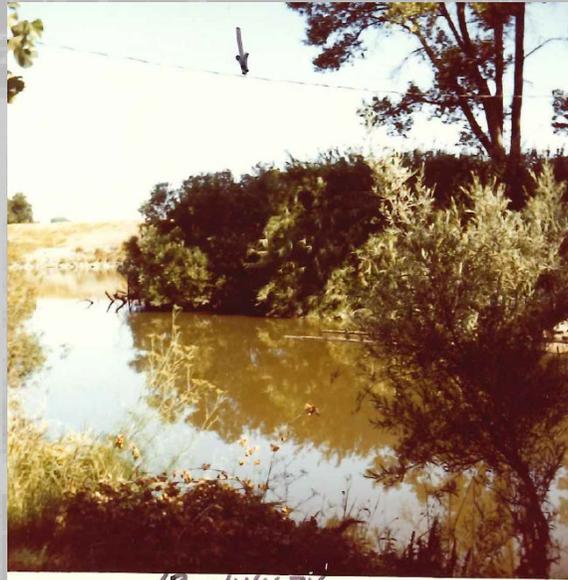
CLEAN WATER ACT JURISDICTION - NAVIGABLE WATERS PROTECTION RULE

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20 February 2020

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US Army Corps
of Engineers®



12 July 74



③ Bridge Across Honker Cuff Looking Upstream

Mar. 1952



INDIAN SC
7-11-84



The 2020 Navigable
Waters Protection Rule
reduces Clean Water Act
jurisdiction.



WHAT'S DIFFERENT?



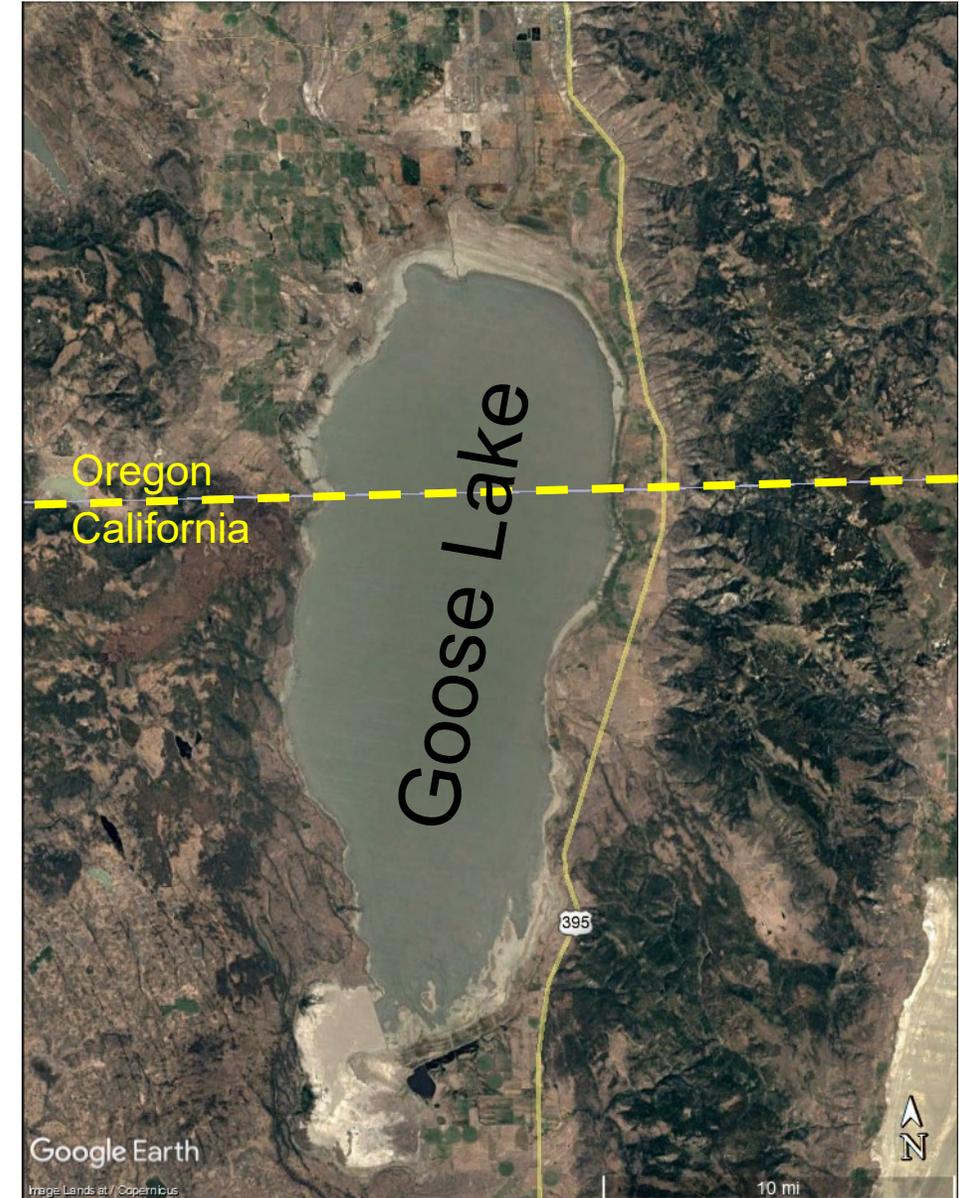
- Interstate waters no longer a category
- Impoundments can sever jurisdiction
- Tributaries
 - Exclusion of ephemeral streams
 - Exclusion of most ditches
- Non-Jurisdictional Connectors
- Narrowing of adjacency definition
- No significant nexus evaluation

...and much more but
lets focus on these
today



INTERSTATE WATERS

- Previously at 33 CFR § 328.8(a)(2)
- No longer a category; (a)(2) now refers to tributaries
- Case-specific analysis under other categories
- Reduces the base waters to which a water can be tributary





IMPOUNDMENTS CAN SEVER JURISDICTION



- No longer a base water for tributaries
- Previously impoundments of waters of the U.S. did not sever jurisdiction even if it stopped all flow
- Now must contribute surface flow in a typical year
- Permitting implications
- Previously at 33 CFR § 328.8(a)(4) now at (a)(3)





EXCLUSION OF EPHEMERAL STREAMS



- ❑ ...surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall) 33 CFR § 328.3(c)(3)
- ❑ May provide connection, without being themselves waters of the U.S., if it provides a surface water connection to another downstream jurisdictional water in a typical year (preamble at III.A.3).

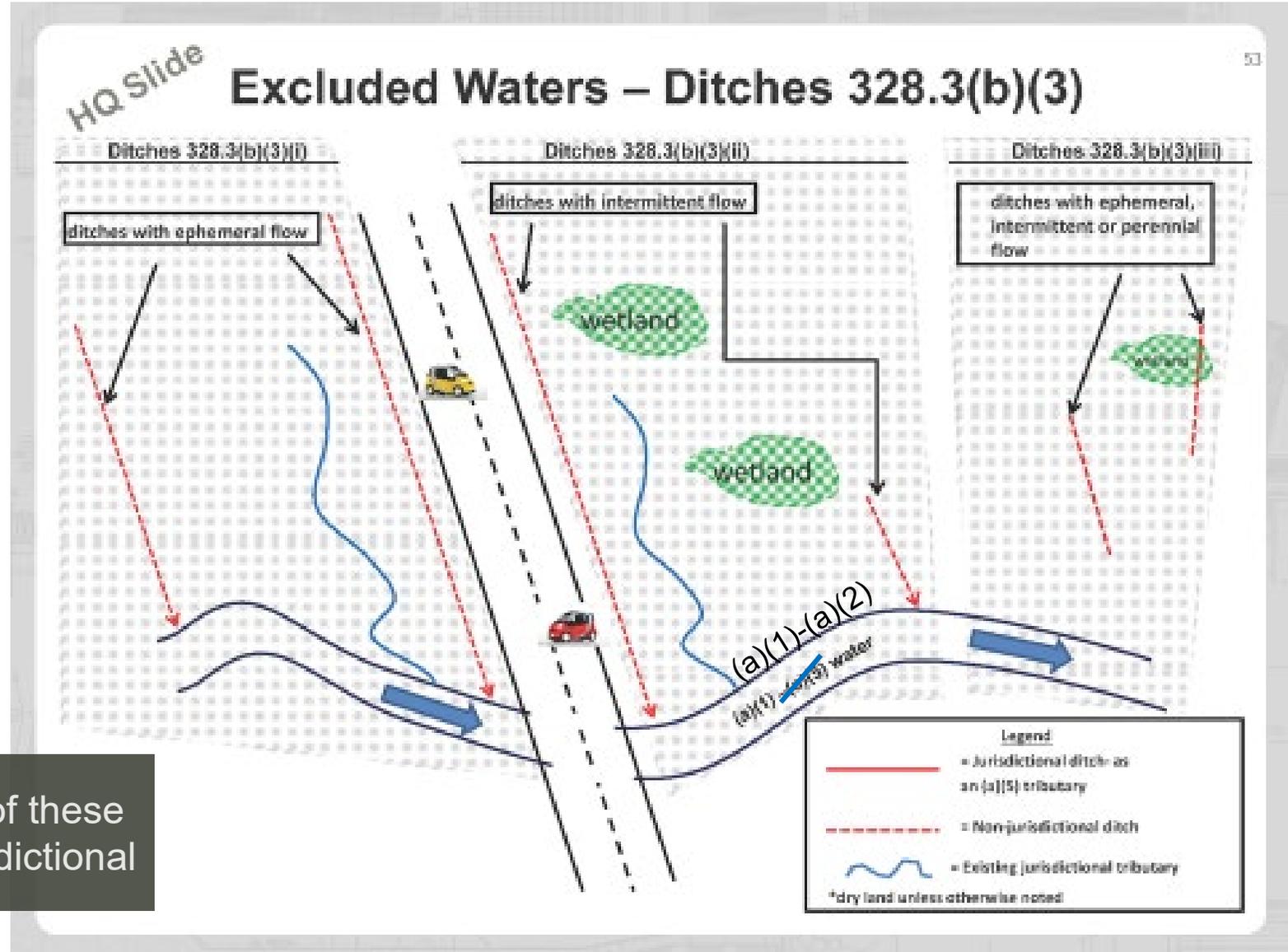




Ordinary High Water
≠
Typical Year



EXCLUSION OF MOST DITCHES

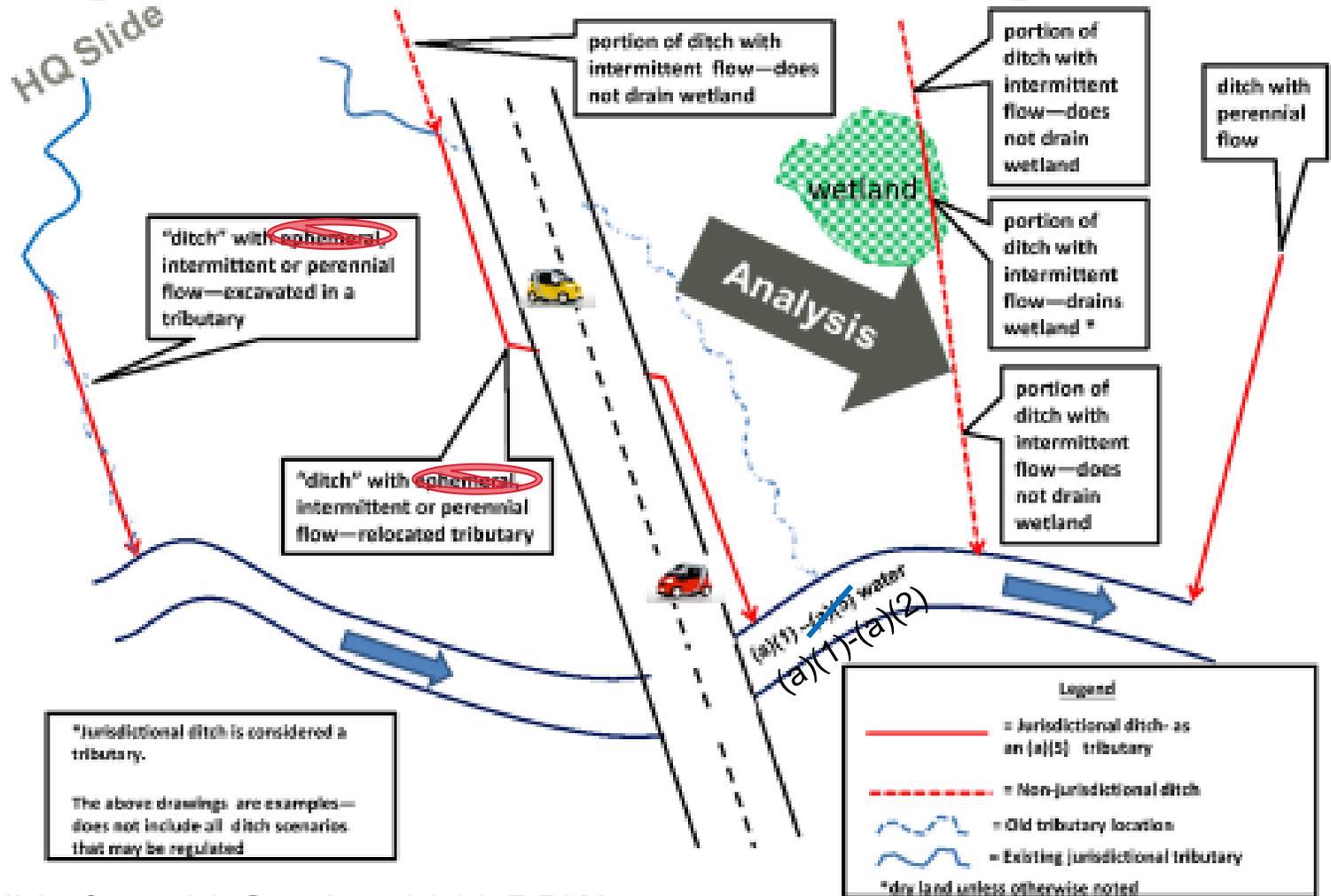




EXCLUSION OF MOST DITCHES



Regulated Ditches – Ditches Not Meeting Exclusions⁵⁴

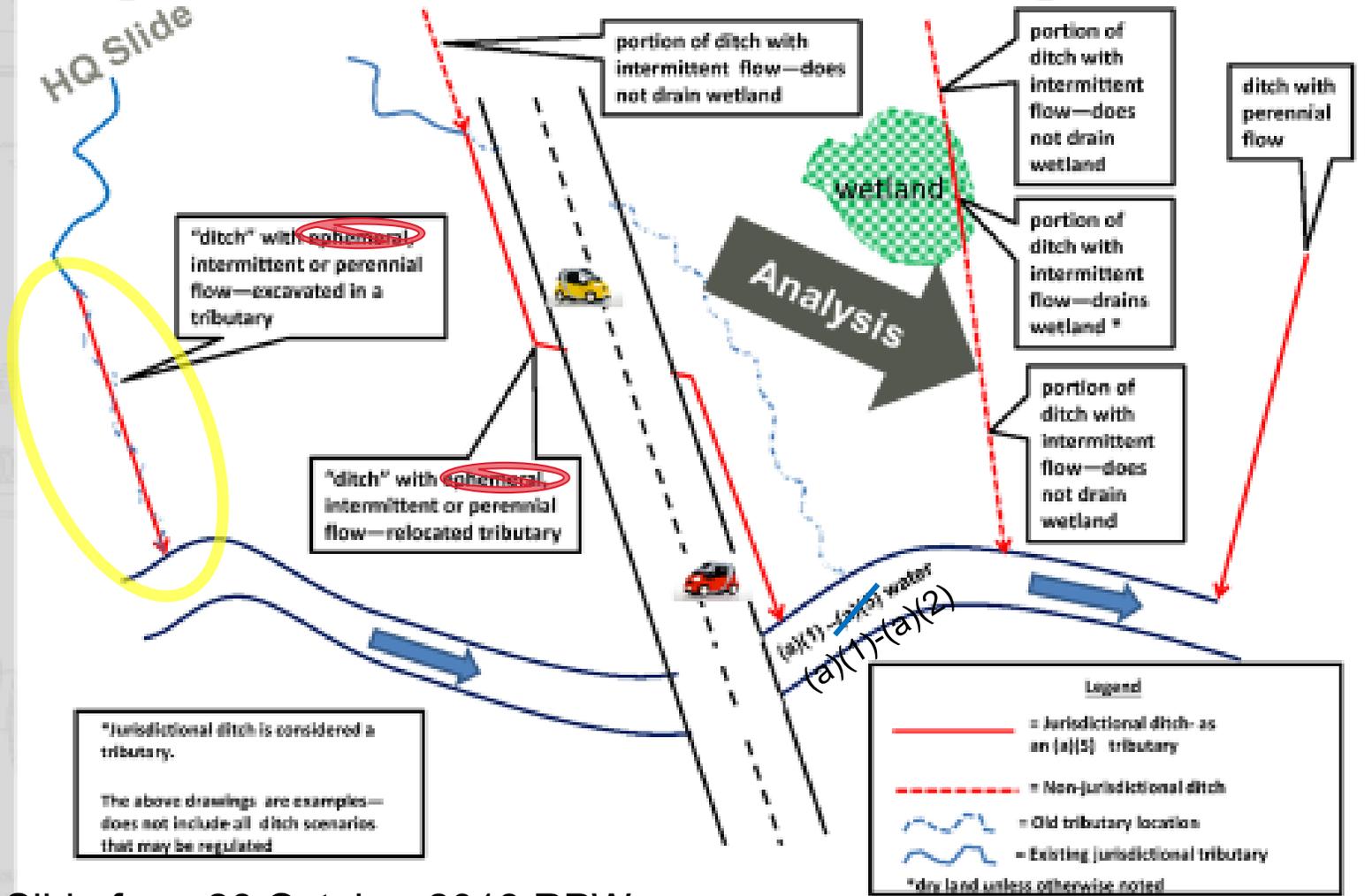


Ephemeral ditches, regardless of whether they relocated or channelized a tributary, are excluded

EXCLUSION OF MOST DITCHES



Regulated Ditches – Ditches Not Meeting Exclusions ⁵⁴

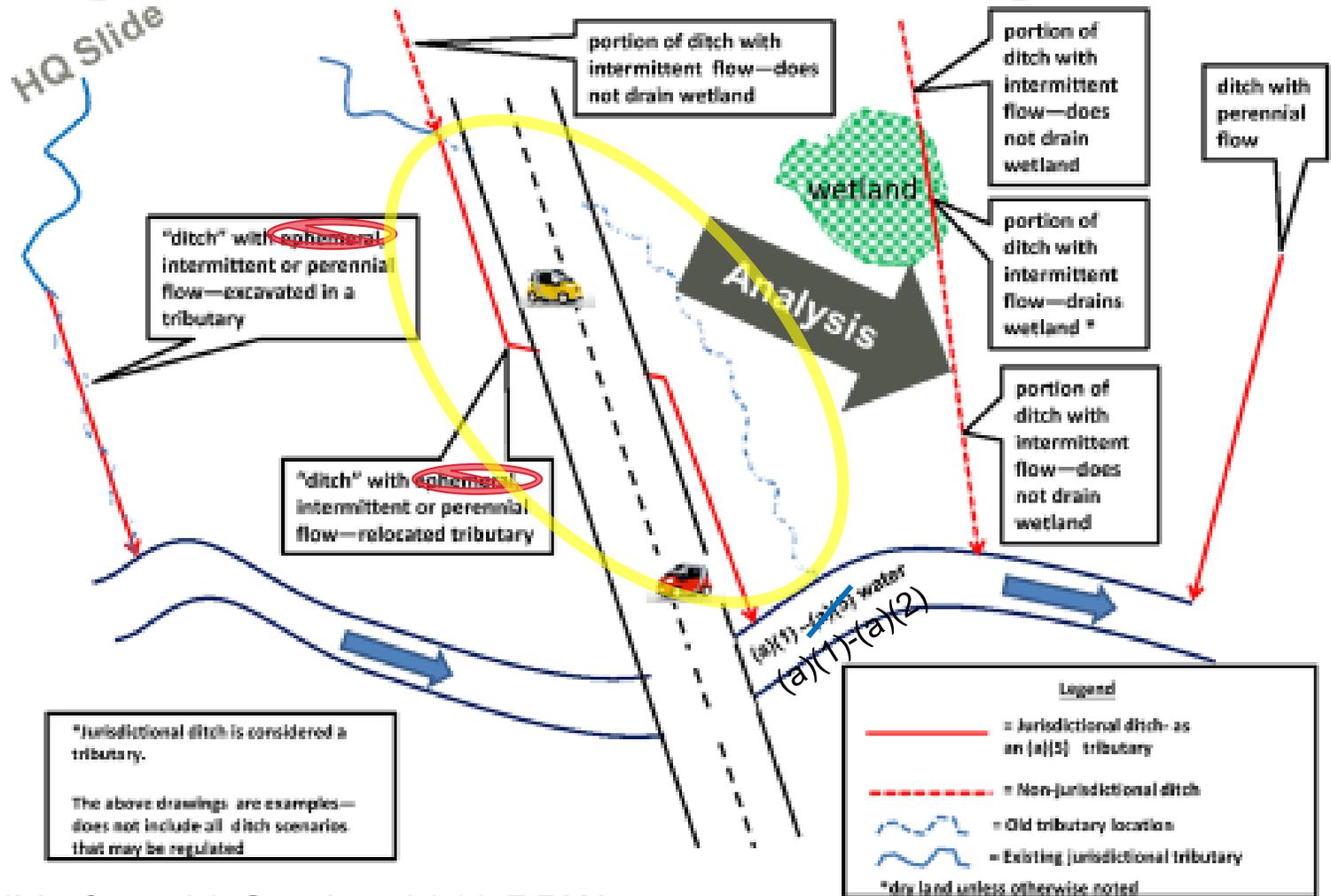


Intermittent and perennial ditches that channelize streams and that contribute to an (a)(1) water remain waters of the U.S.

EXCLUSION OF MOST DITCHES



Regulated Ditches – Ditches Not Meeting Exclusions⁵⁴

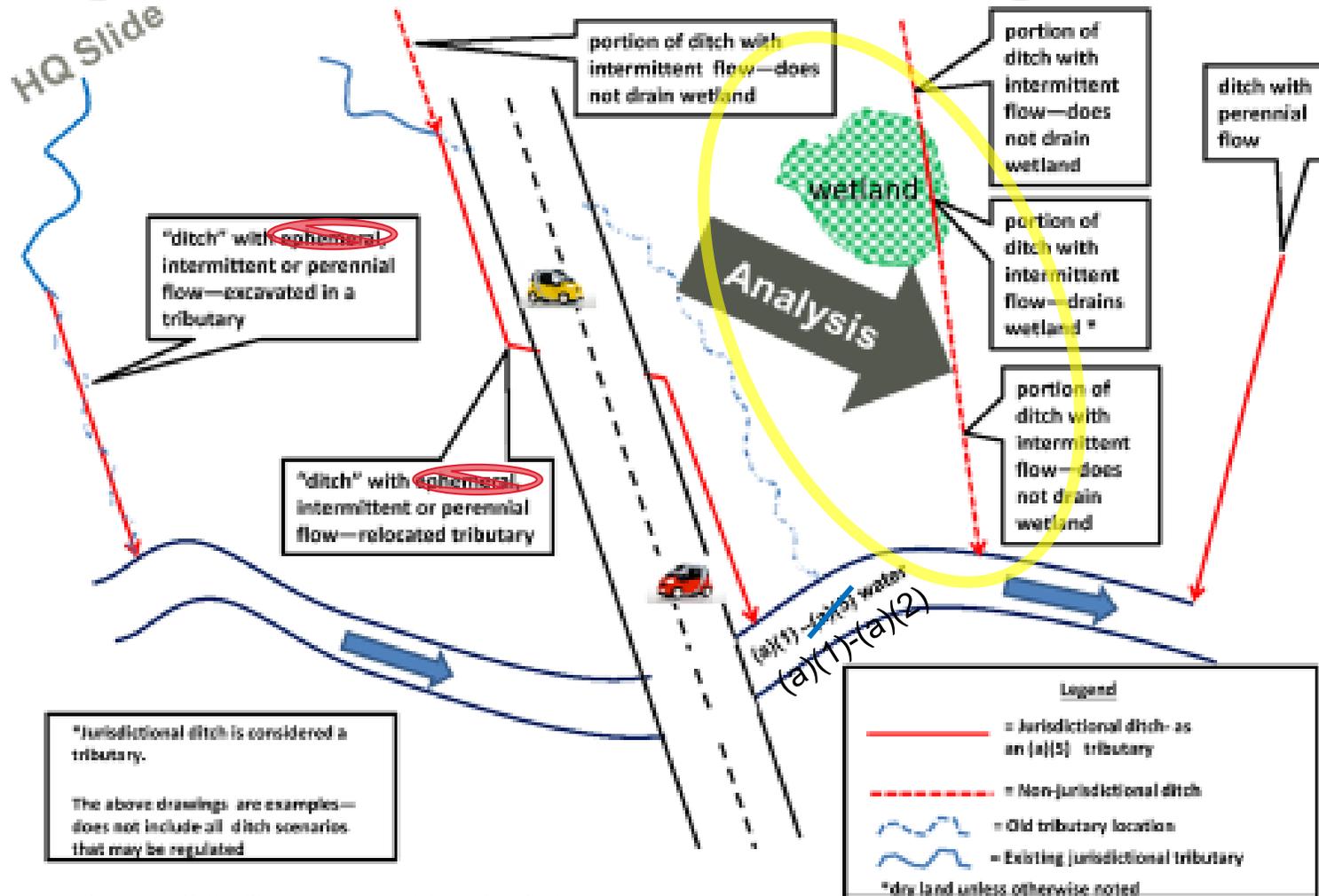


Intermittent and perennial ditches that re-route streams and that contribute to an (a)(1) water remain waters of the U.S.

EXCLUSION OF MOST DITCHES



Regulated Ditches – Ditches Not Meeting Exclusions ⁵⁴

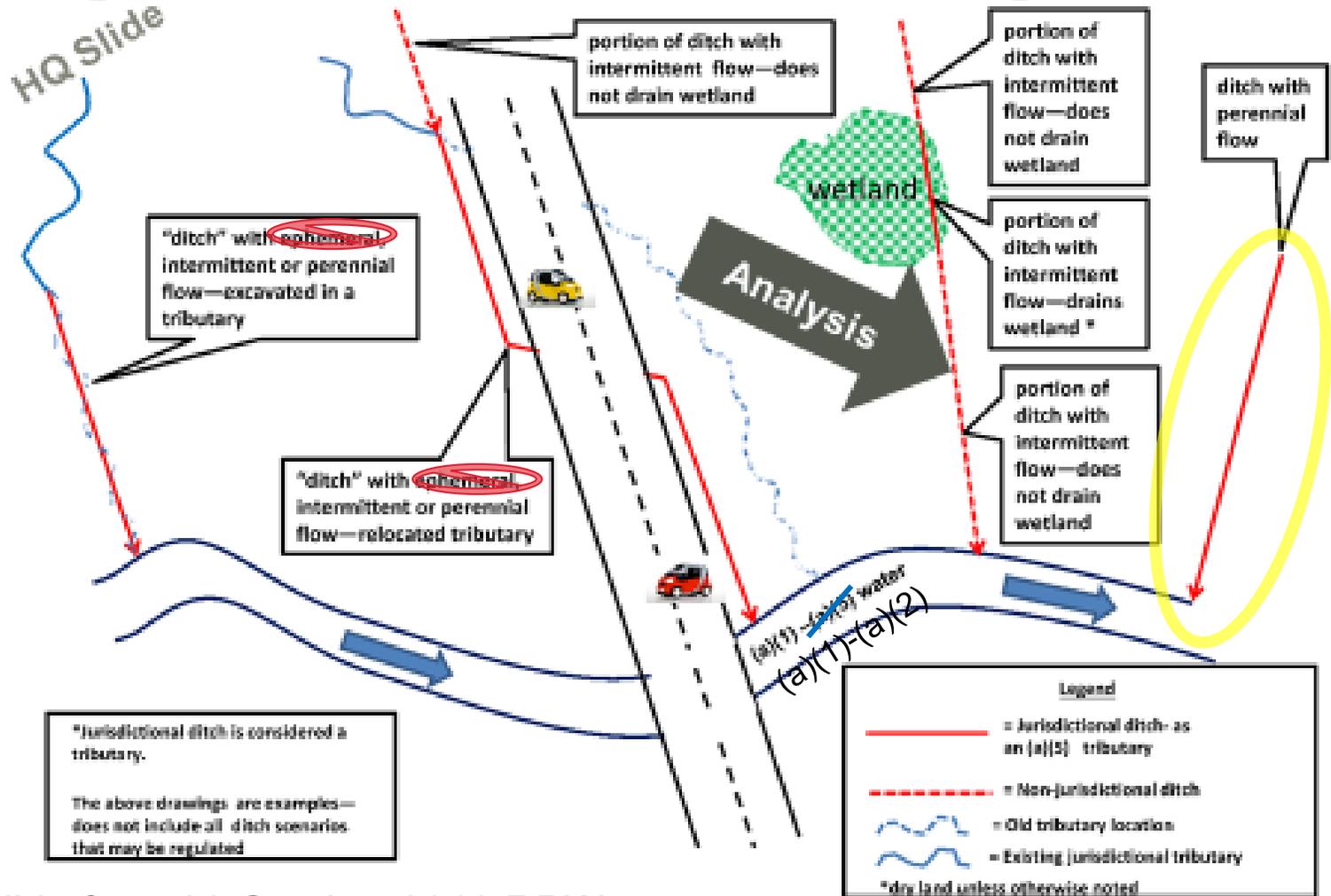


If the wetland were adjacent prior to the ditch then the intermittent ditch would be jurisdictional. If the wetland were not jurisdictional then constructing the ditch makes neither the wetland nor the ditch jurisdictional. (p.181)

EXCLUSION OF MOST DITCHES



Regulated Ditches – Ditches Not Meeting Exclusions⁵⁴

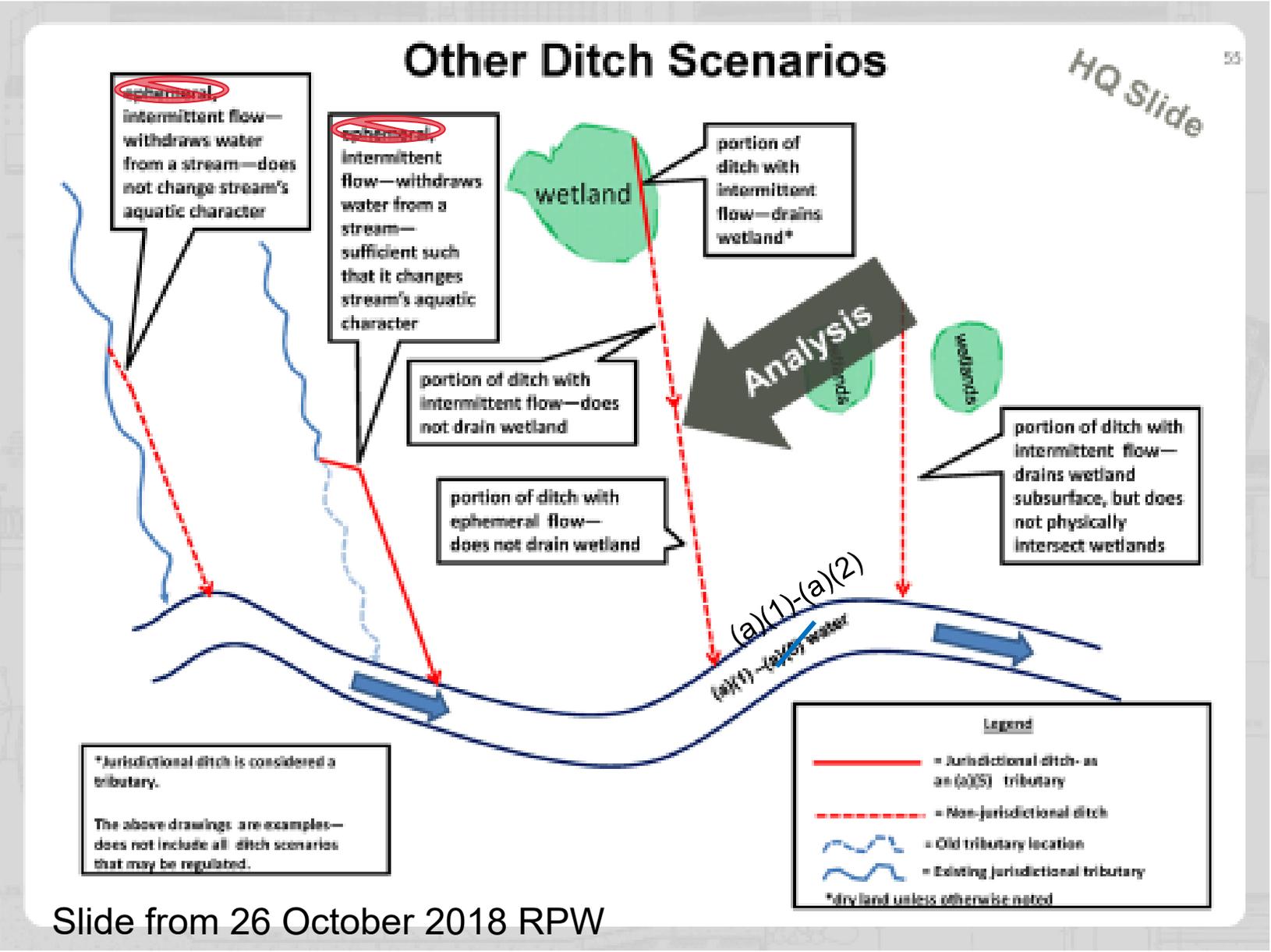


If the ditch does not channelize or relocate a stream and is not constructed in an adjacent wetland then it is excluded regardless of its flow characteristics.

EXCLUSION OF MOST DITCHES



Generic “aquatic character” replaced with more specific flow classification. If the diversion results in the stream becoming ephemeral then it is no longer a tributary

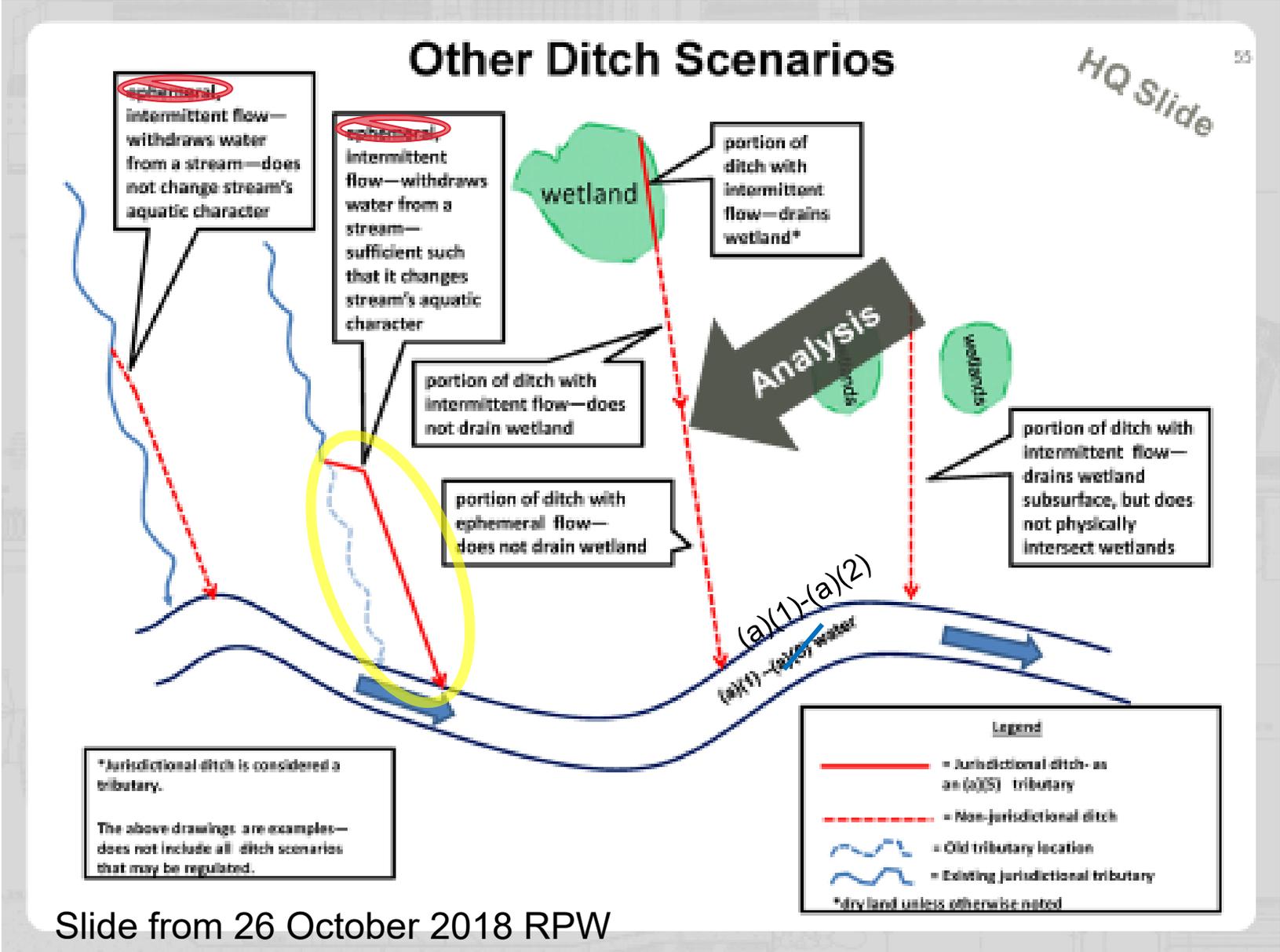


Slide from 26 October 2018 RPW

EXCLUSION OF MOST DITCHES

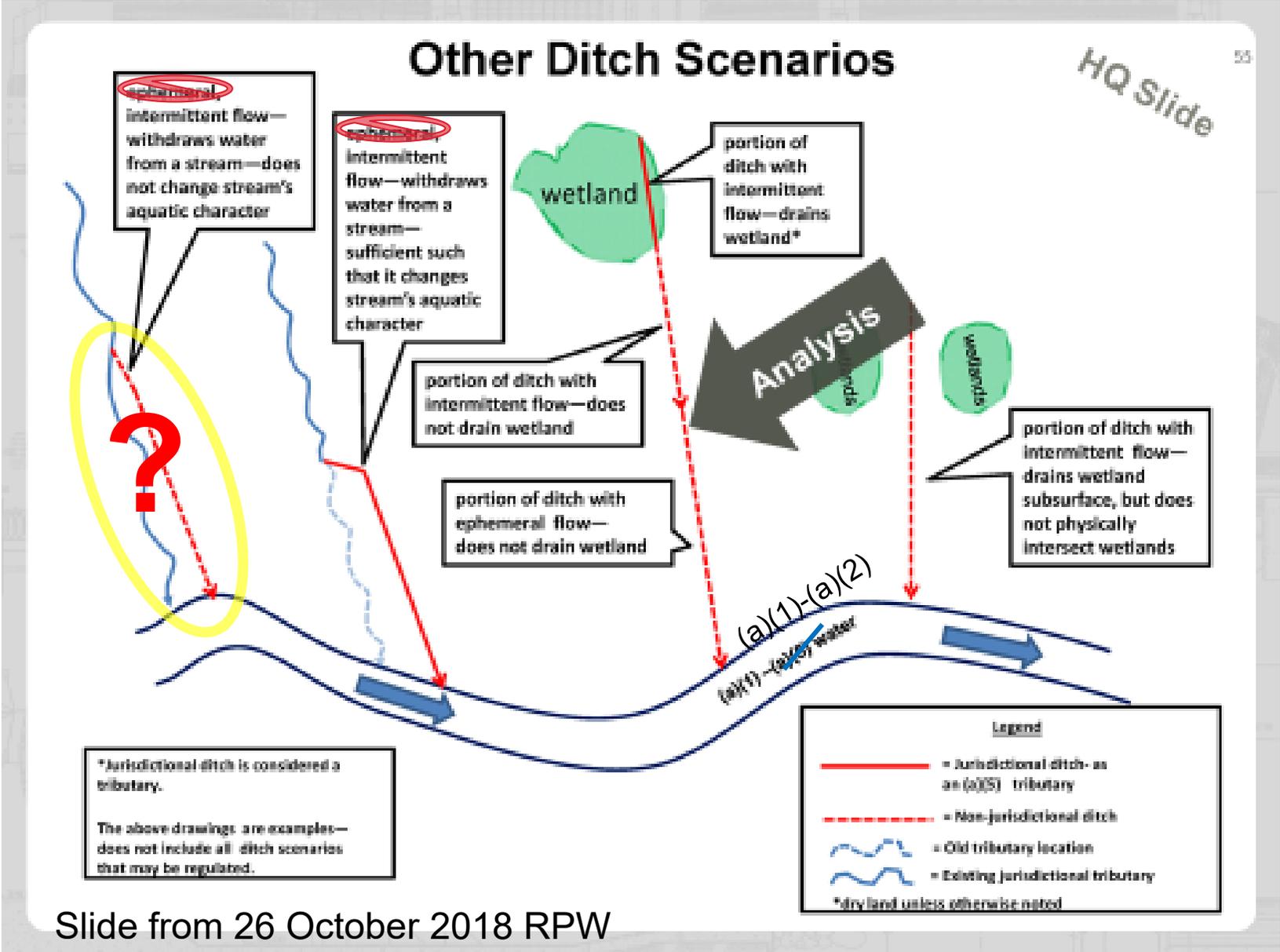


Intermittent and perennial ditches that re-route streams and that contribute to an (a)(1) water remain waters of the U.S. The ephemeral reach below the diversion is no longer a water of the U.S. but could be a non-jurisdictional connector if it flows during a typical year.



Slide from 26 October 2018 RPW

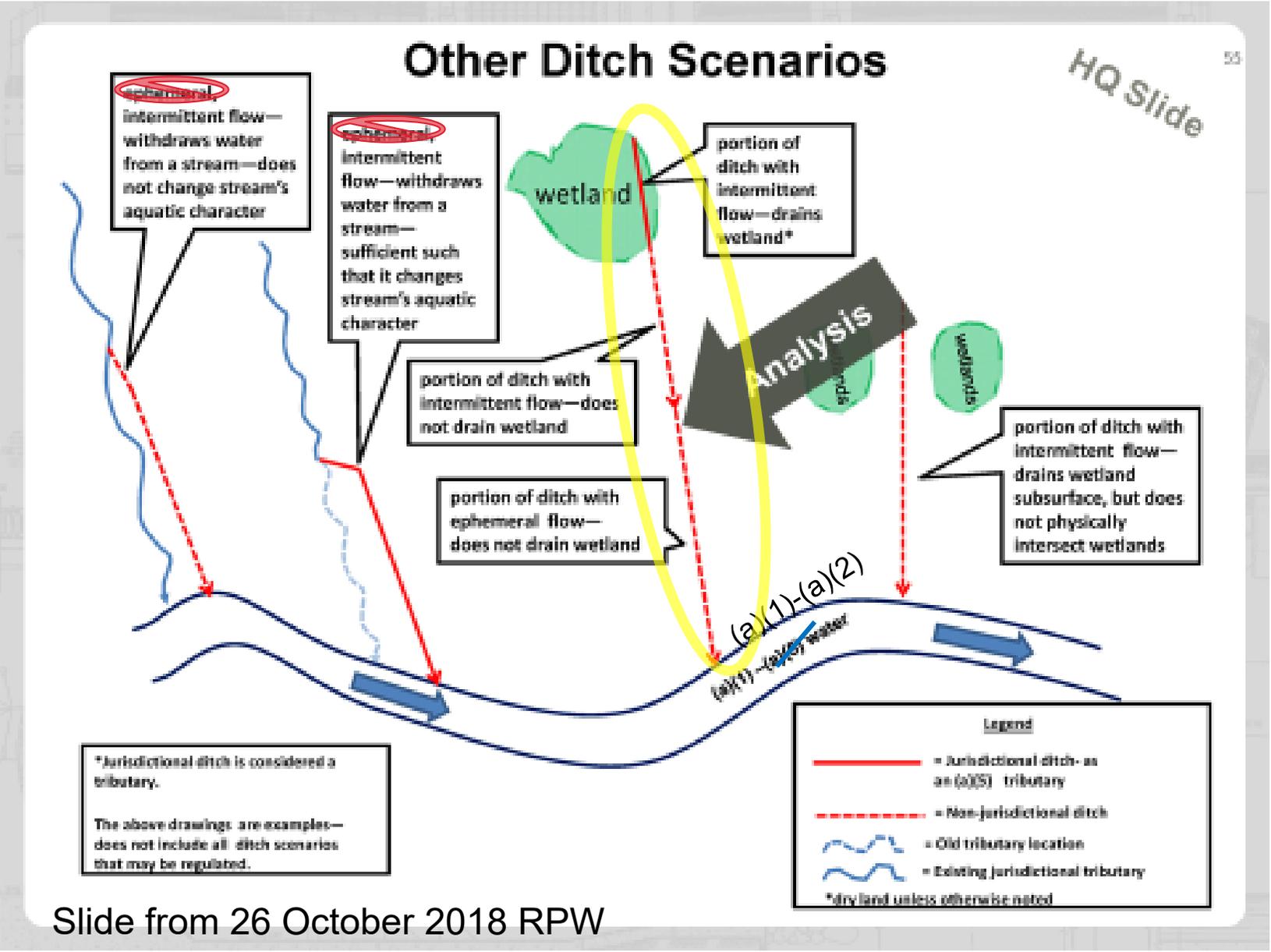
Intermittent and perennial ditches that divert flow from a stream but do not result in the stream becoming ephemeral? What amount of flow constitutes re-routing or relocating the stream?



Slide from 26 October 2018 RPW

If the wetland were adjacent prior to the ditch then the intermittent ditch would be jurisdictional. If the wetland were not jurisdictional then constructing the ditch makes neither the wetland nor the ditch jurisdictional. (p.181).

The ephemeral reach of the ditch would not become jurisdictional but could be a non-jurisdictional connector to the intermittent ditch above it, if it flows during a typical year.



Slide from 26 October 2018 RPW



NON-JURISDICTIONAL CONNECTORS



- Do not become waters of the U.S. themselves
- Connect an upstream water to a downstream water
- Can connect an (a)(4) adjacent wetland through an artificial barrier
- Must be *channelized* (i.e. discrete rather than sheet flow)
- Must flow at least once in a typical year
- Examples
 - Culverts and pipes
 - Excluded ditches
 - Ephemeral streams
 - Pumps





NARROWING OF ADJACENCY



- ❑ Abutting – meaning physically touching whether or not water exchange occurs (p.218)
- ❑ Separated by one natural barrier (p.212)
- ❑ Separated by artificial barriers if there is a surface water connection in a typical year (pp.240-241)
- ❑ Flooded *by* an (a)(1)-(a)(3) water in a typical year (p.240)

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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(a)(4)

WHAT IS ADJACENT ~~(a)(0)~~ – MAJOR DIFFERENCES

Pre-CWR Analysis

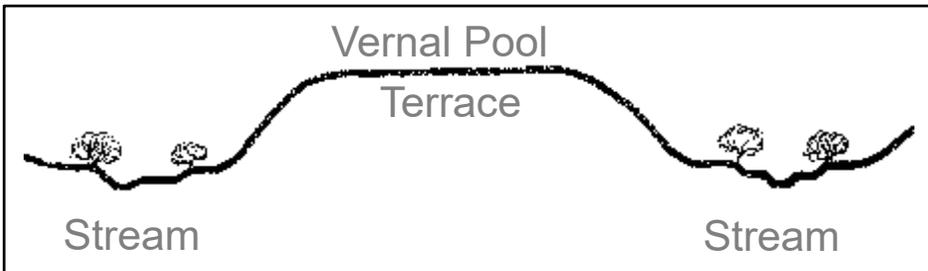
- Is the first oxbow a wetland?
- Surface or subsurface connection?
- Physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like?
- Is the proximity reasonably close?

Legend:
— Engineered Levee
■ Natural River Levee/Berm

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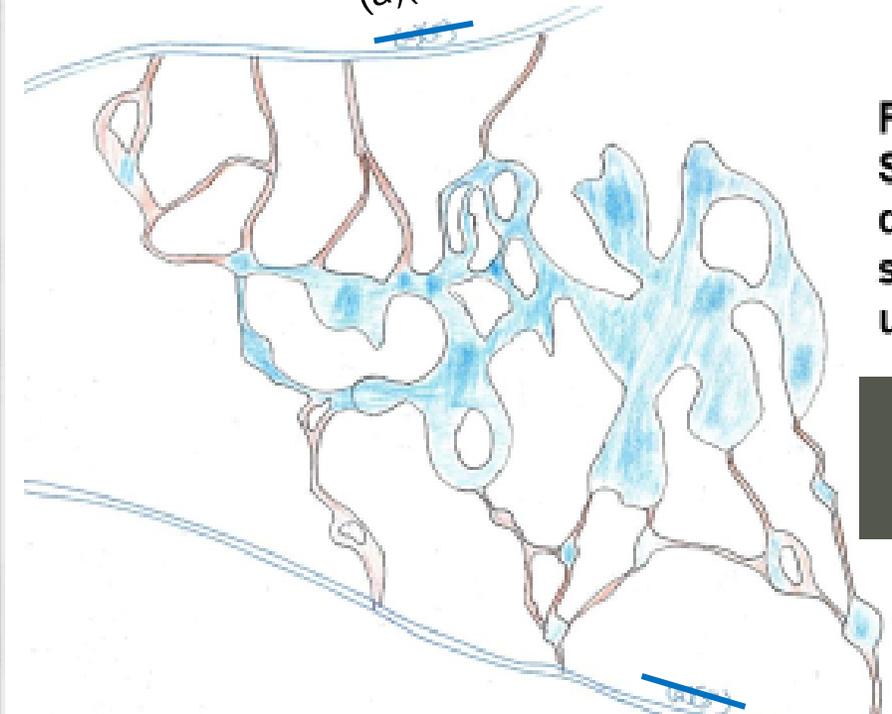
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(a)(4)
WHAT IS ADJACENT ~~(a)(6)~~ – MAJOR DIFFERENCES

(a)(2)



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

See pre-publication preamble at p.226

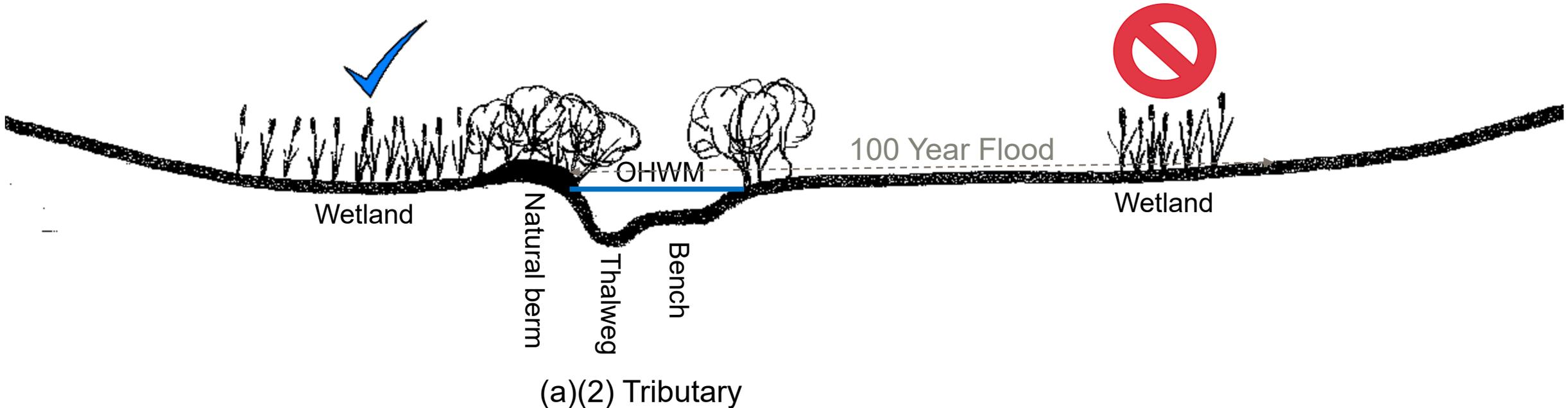
(a)(2)





NARROWING OF ADJACENCY

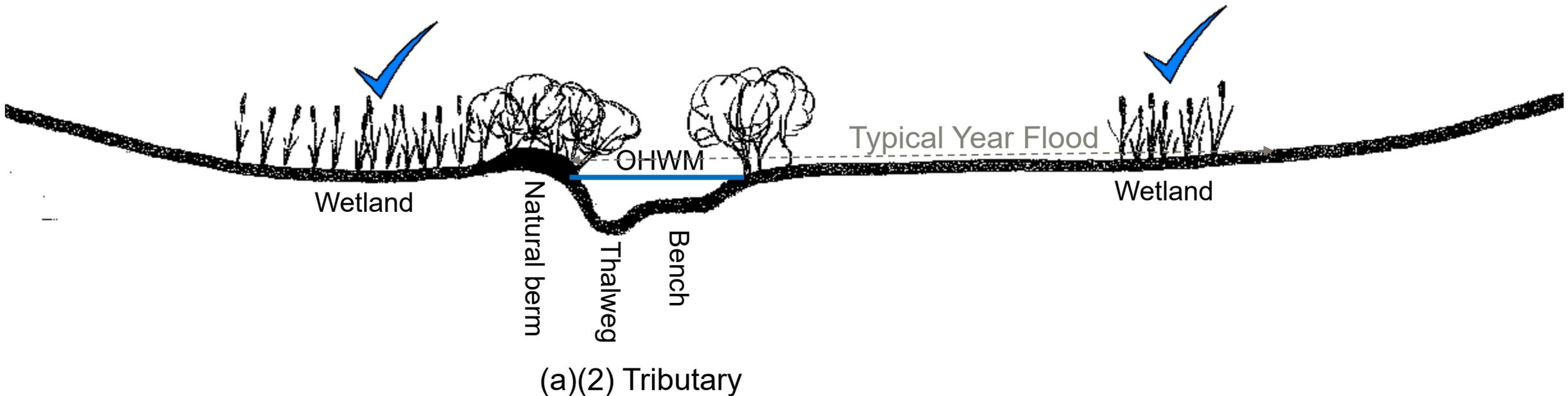
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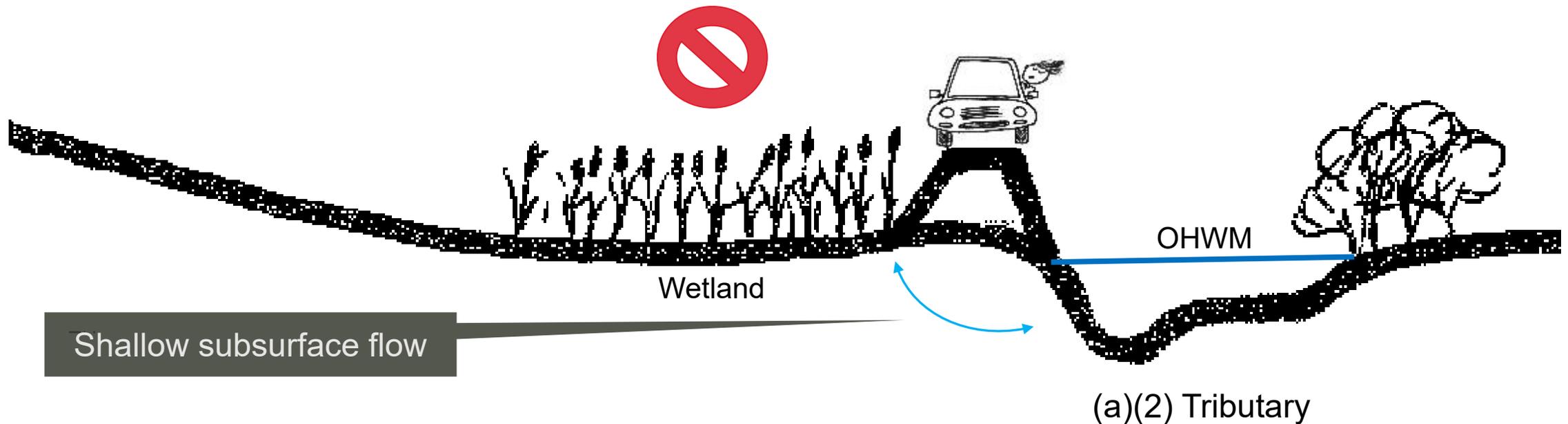




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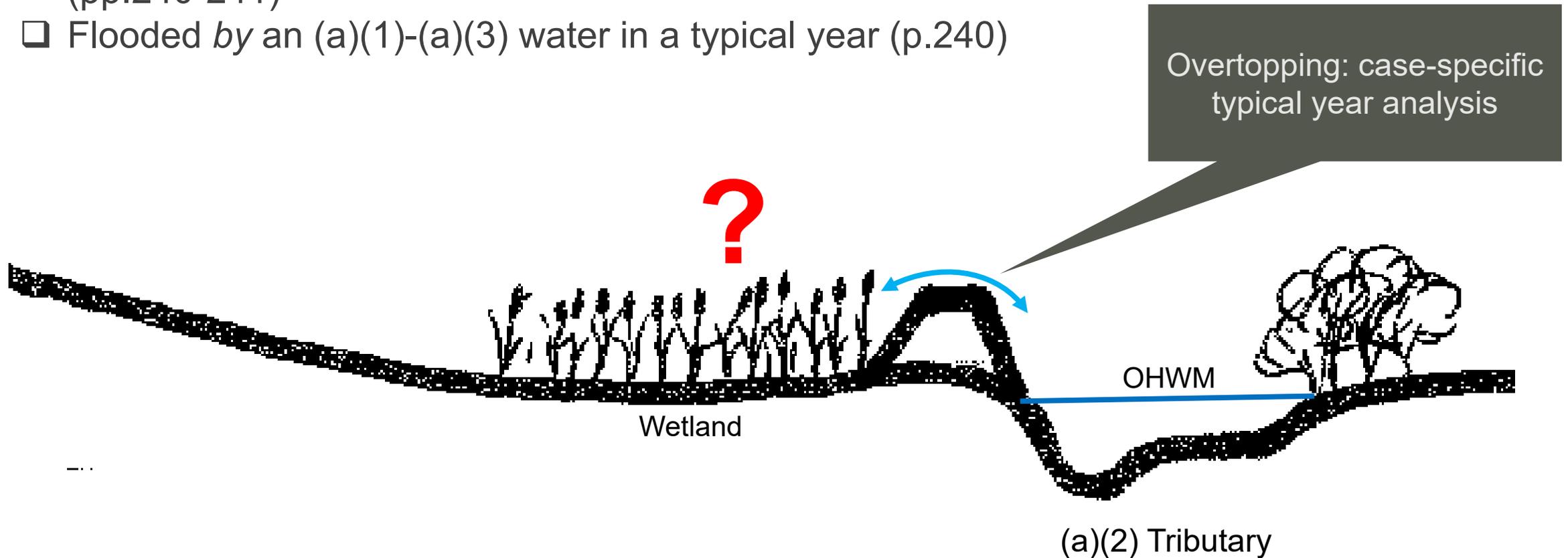




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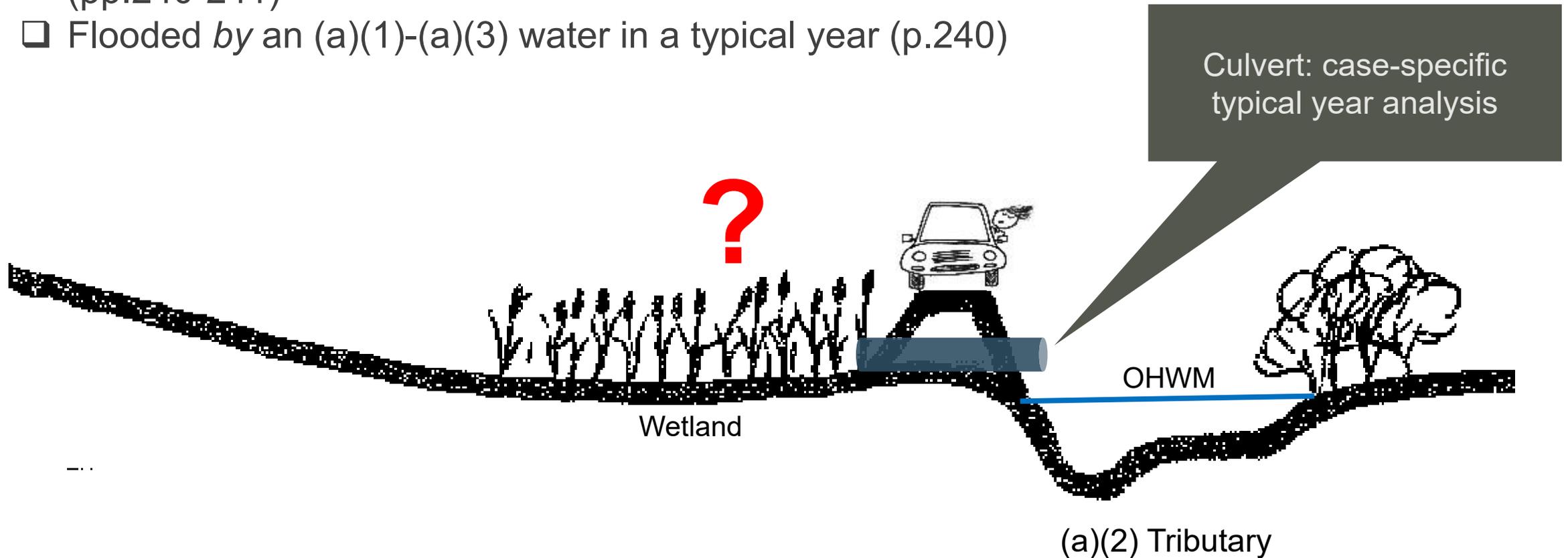




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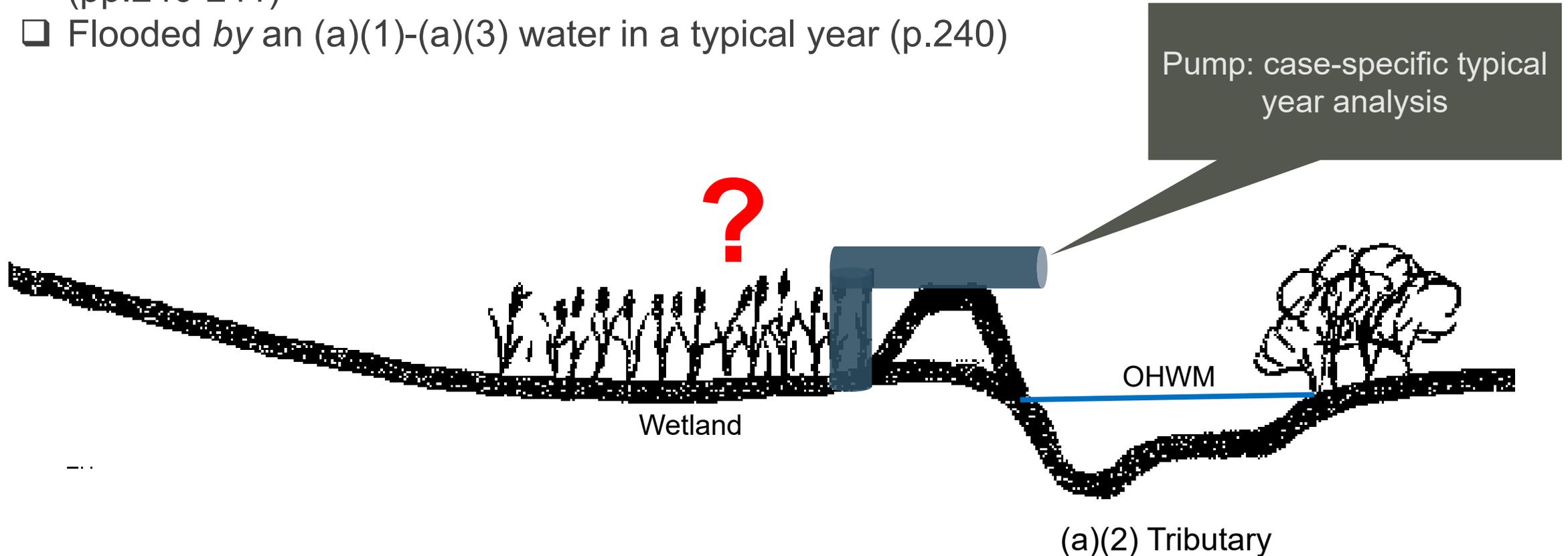


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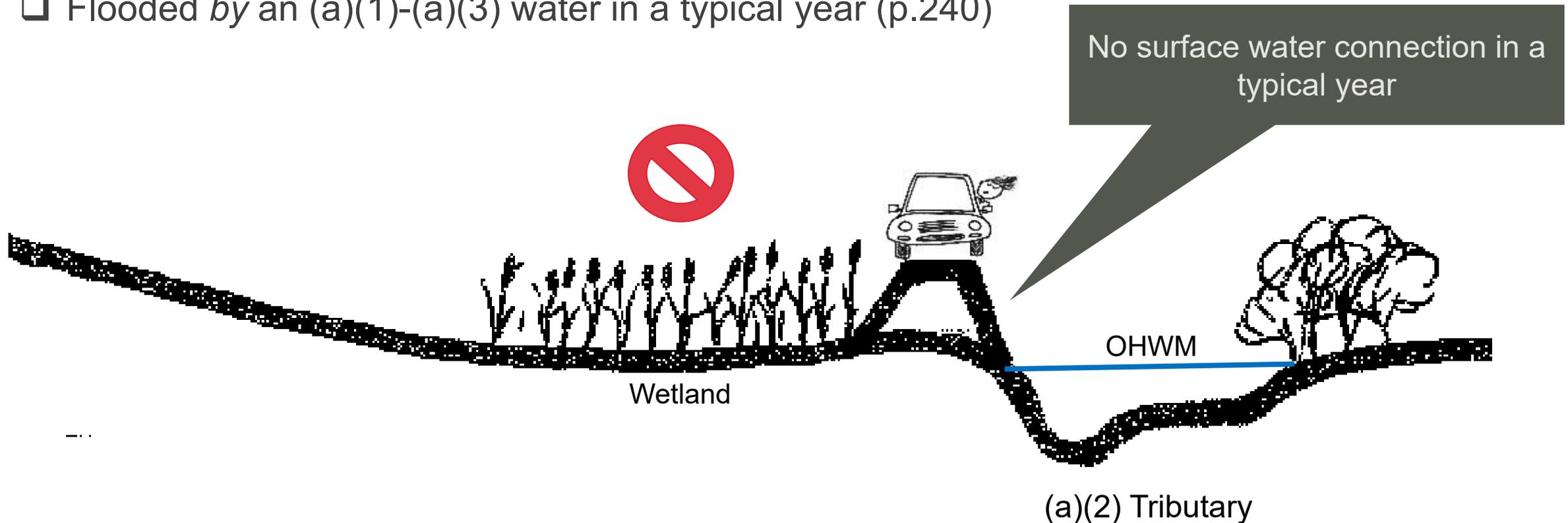
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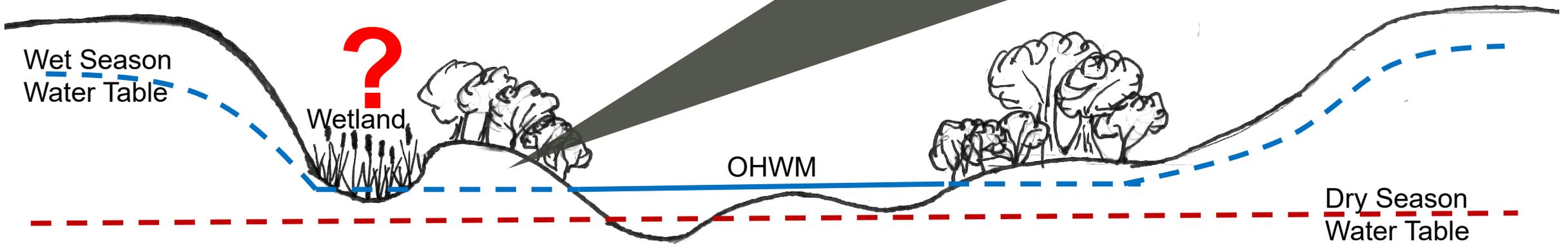


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Water table is no longer relevant. The analysis now is whether the intervening uplands are a natural or artificial barrier and whether or not the wetland is reached by flooding in a typical year



(a)(2) Tributary



NO SIGNIFICANT NEXUS EVALUATION



SIMILARLY SITUATED

27

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

(a)(1) Lake

Review Area





MORE INFO

- [Navigable Waters Protection Rule: Definition of Waters of the United States” – pre-publication version](#)
- [Overview of the Navigable Waters Protection Rule – Fact Sheet](#)
- [Mapping and the Navigable Waters Protection Rule – Fact Sheet](#)
- [Implementing the Navigable Waters Protection Rule – Fact Sheet](#)
- [Rural America and the Navigable Waters Protection Rule – Fact Sheet](#)
- [“Typical Year” and the Navigable Waters Protection Rule – Fact Sheet](#)
- [Navigable Waters Protection Rule Photo Appendix](#)



Questions about the Regulatory Program?

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<https://www.spk.usace.army.mil/Missions/Regulatory.aspx>

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

<https://www.epa.gov/nwpr/final-rule-navigable-waters-protection-rule>

<https://www.epa.gov/nwpr/navigable-waters-protection-rule-factsheets>