



Recent Developments in Defining WOTUS under the Clean Water Act

**Alaska Resources Conference
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What are “Waters of the United States”?



Why does the “WOTUS” definition matter?

- **CWA § 303 – Water quality standards and Total Maximum Daily Loads (TMDLs)**
- **CWA § 311 – Oil spill programs**
- **CWA § 401 – State/tribal water quality certifications**
- **CWA § 402 – National Pollutant Discharge Elimination System (NPDES) permits**
- **CWA § 404 – Dredge and fill permits**

Rapanos: Competing WOTUS Tests

Scalia

- **Relatively permanent, standing, or continuously flowing**
- Form **geographical features**
- Are **connected** to traditional navigable waters

AND

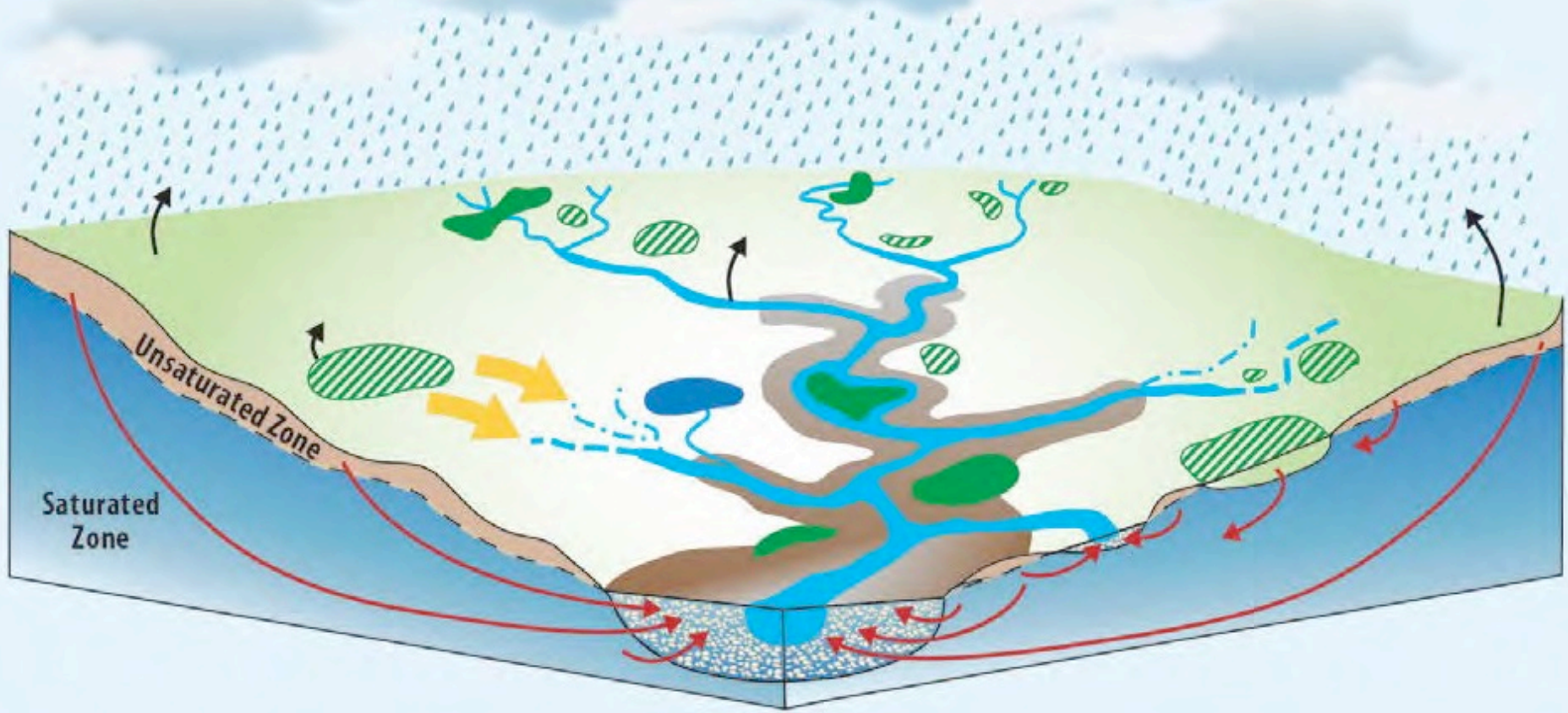
- Wetlands with a **continuous surface connection** to a relatively permanent water

Kennedy

- Waters (including wetlands) that **significantly affect** the integrity of traditional navigable waters
- Based on **chemical, physical, and biological** effects
- Either “**alone or in combination** with similarly situated lands in the region”

2015 WOTUS Rule

- **Case-by-case**
 - “Significant nexus” waters
- **Automatically jurisdictional**
 - Waters that are “adjacent,” “bordering,” “contiguous,” or “neighboring” to another jurisdictional water
- **“Neighboring” includes all waters that are:**
 - Within 100 feet of the OHWM of a jurisdictional water (non-tidal)
 - Within 1,500 feet from the high tide line of a jurisdictional water (tidal); and
 - Within the 100-year floodplain of a jurisdictional water, plus “not more than 1,500 feet from the OHWM of such water.”

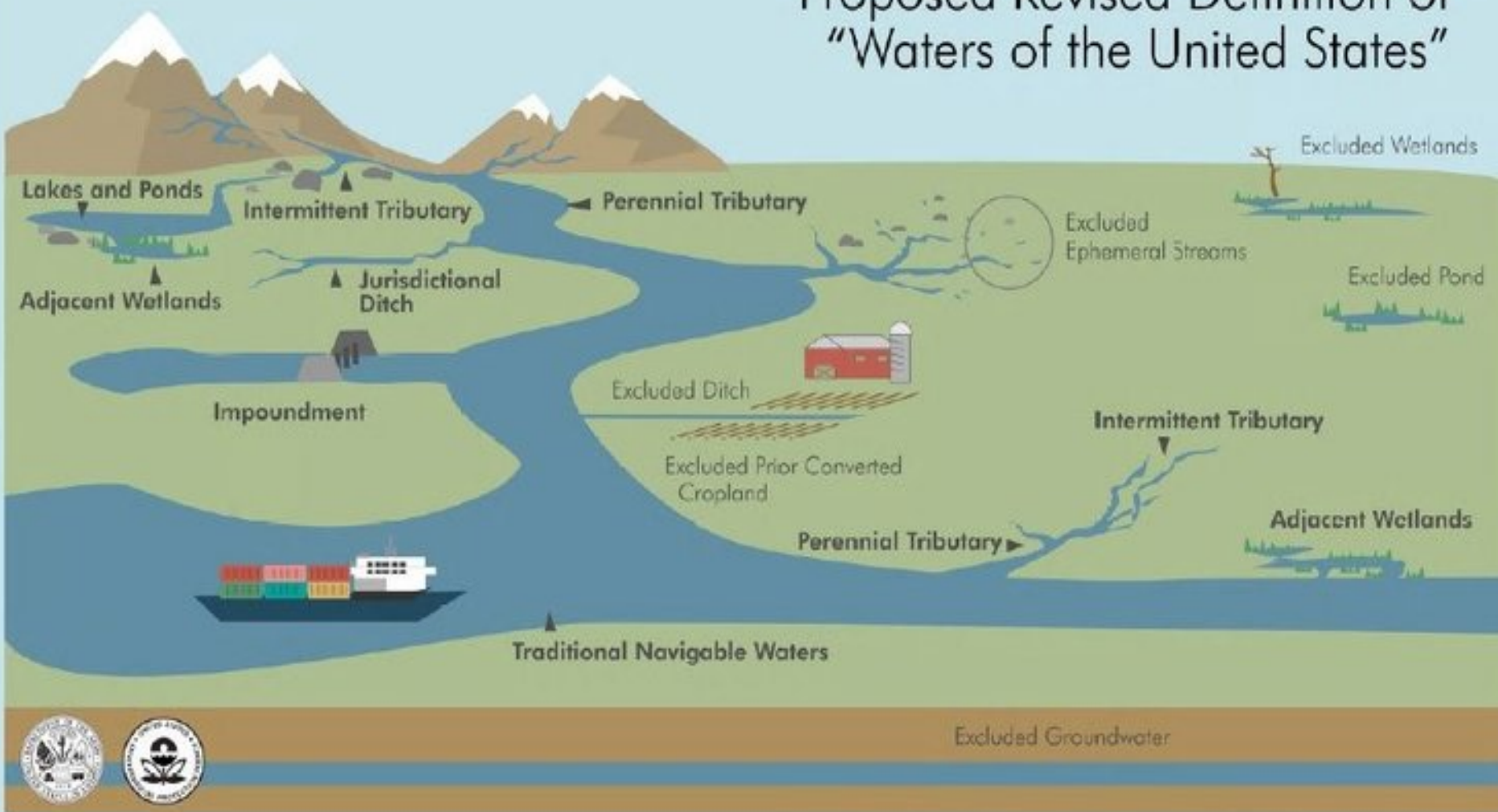


 Perennial stream	 Wetland with surface outlet	 Geographically isolated wetland	 Evapo-transpiration
 Intermittent stream	 Floodplain	 Overland flow (fill-and-spill)	 Subsurface flows
 Ephemeral stream	 Riparian/floodplain wetland	 Hyporheic zone	

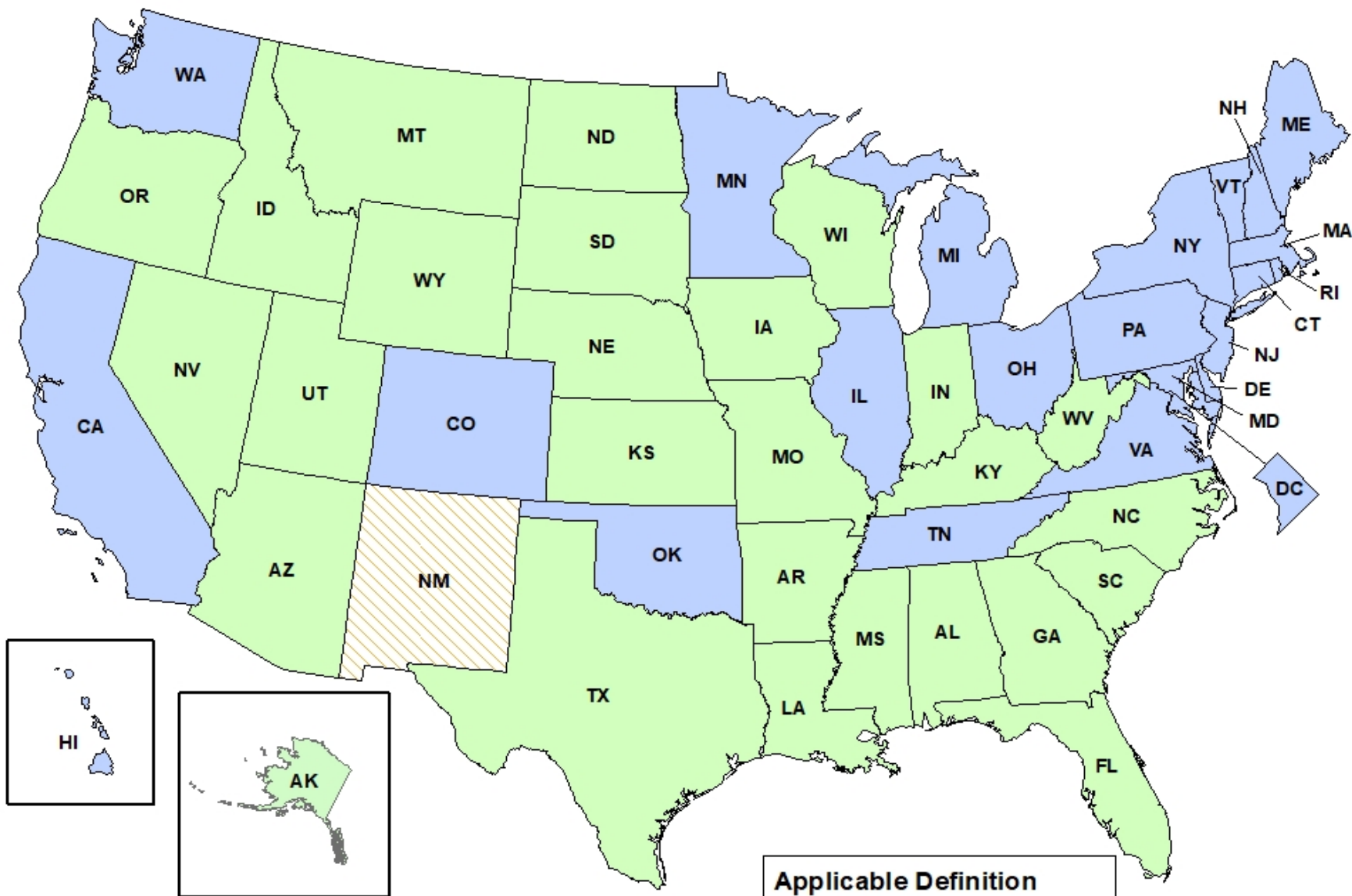
2018 Revised WOTUS Rule (Proposed)

- **Draws more heavily from Justice Scalia’s test**
- **Excludes ephemeral streams**
- **Wetlands jurisdictional only if they “abut” or have a direct surface connection to a jurisdictional water**
- **Broader exclusions for ditches**

Proposed Revised Definition of "Waters of the United States"



* For illustrative purposes only. Proposed jurisdictional waters in **bold**.



Applicable Definition

- 2015 Clean Water Rule*
- Pre-2015 Regulations and Guidance
- Under Federal Court Consideration

* Also applicable in the U.S. territories

The EPA is providing this map for informational purposes only, and it cannot be relied on for specific determinations or other legal purposes. As the litigation continues, the EPA will update the map, when possible, to reflect the most current information that is made available to the EPA and the Army. For specific requests, please contact the Army Corps of Engineers or EPA. This map was updated on July 24, 2019.

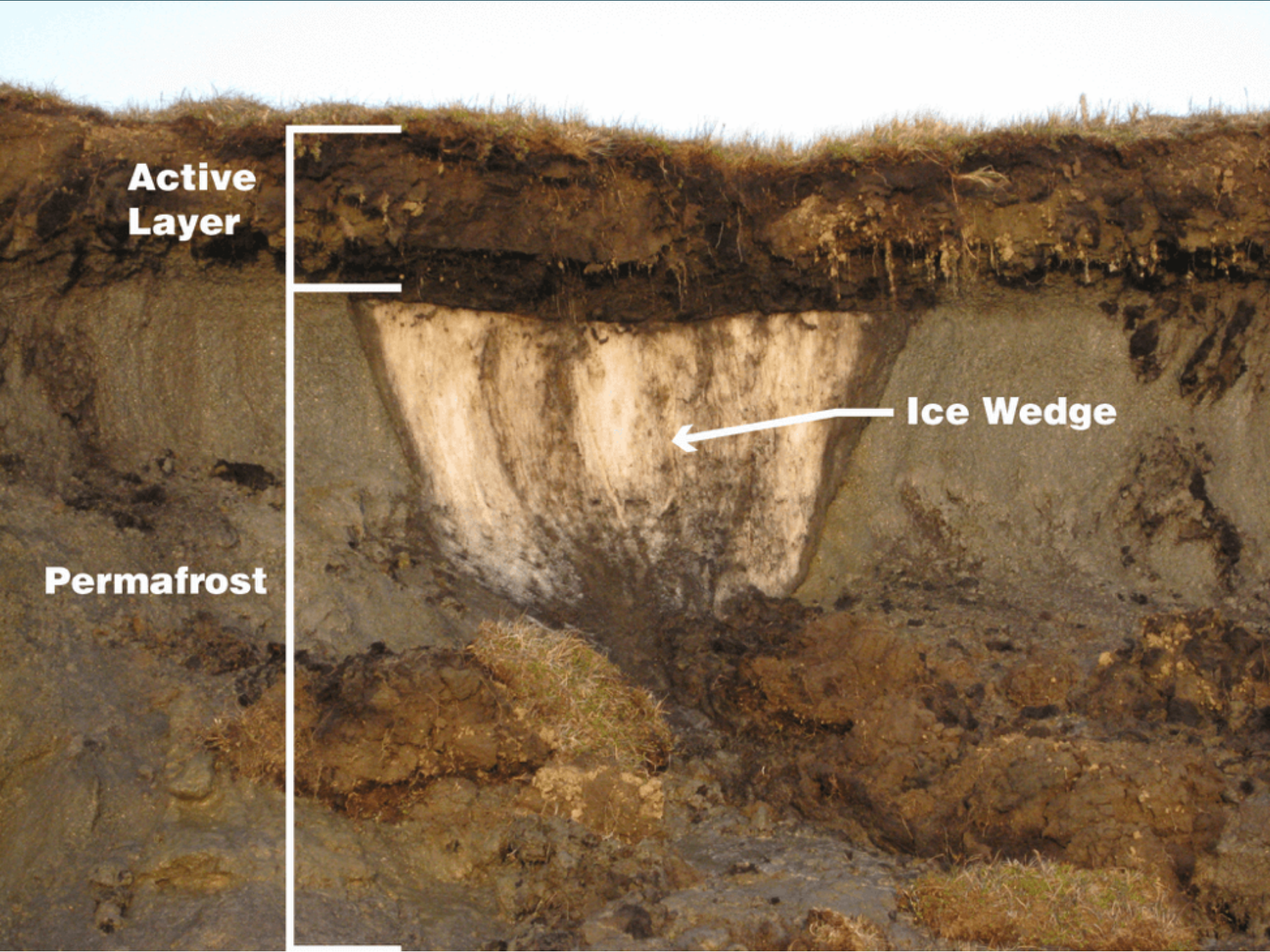
WOTUS in Alaska

- **Status**

- For now, pre-2015 regulations and guidance apply
- 2018 Revised WOTUS rule to be finalized soon

- **Unique issues**

- Permafrost wetlands
- Wetland mosaics
- Forested wetlands



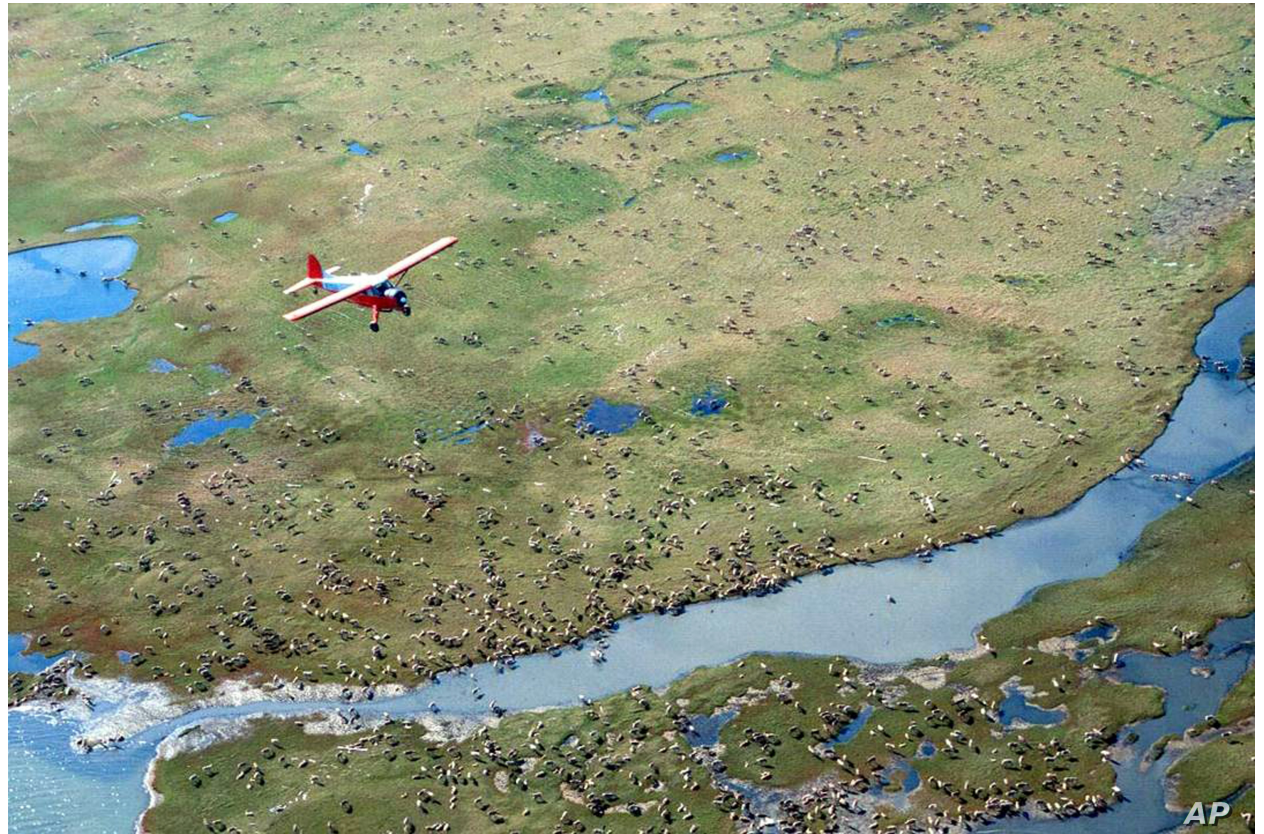
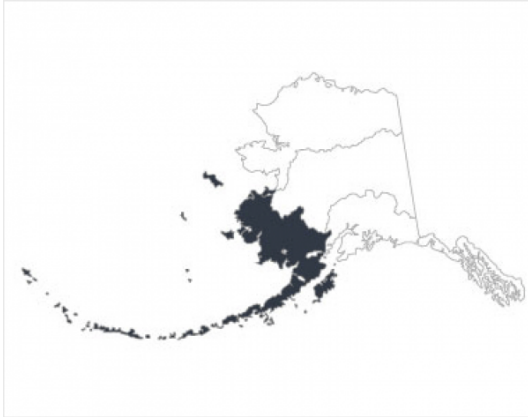
Active Layer

Permafrost

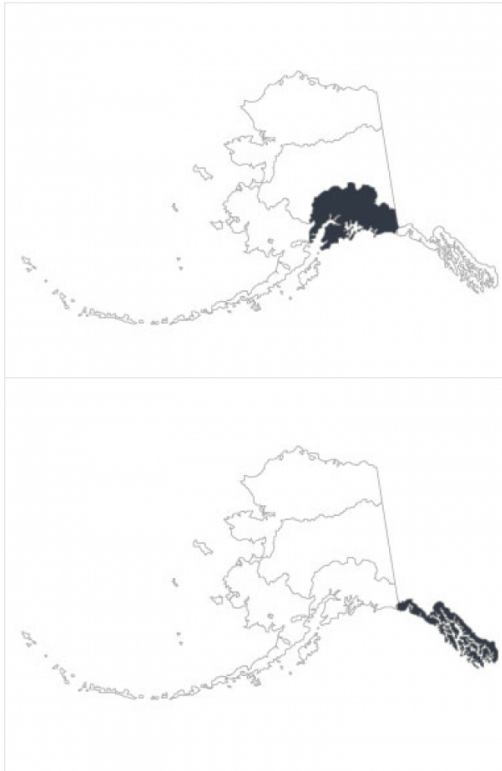
Ice Wedge



Wetland Mosaics in Arctic and Western AK



Forested Wetlands in SE and Coastal AK



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RESOURCES

- **2008 *Rapanos* guidance**

- <https://www.epa.gov/cwa-404/2008-rapanos-guidance-and-related-documents-under-cwa-section-404>

- **2018 Revised WOTUS Rule (Proposed)**

- <https://www.epa.gov/wotus-rule/wotus-step-two-revise>

- **Latest VNF WOTUS Alert**

- <http://www.vnf.com/federal-judge-limits-the-reach-of-the-wotus-rule>