

The Newest Waters of the U.S. Rule

What it means for Pennsylvania

Tom Johnston

SKELLY and LOY, Inc. *A Terracon Company*

WOTUS Definitions
have been changing for 40 years

Past 5 years-

4 Different WOTUS Definitions

Not always the same in every state!

Federal Clean Water Act

**Goal of the CWA is to Restore & Enhance
the Physical, Chemical and Biological
of the Nation's "Waters"**

**Waters of the United States (WOTUS)
are defined in 33CFR Part 328.3**

Federal CWA History

- **CWA 1972 & CWA 1977**
- **Scope is WOTUS unclear**
- **Navigable Waters & Tributaries**
- **Supreme Court has defined WOTUS**
- **Obama-Trump-Biden Administrations**

Congress has failed to clarify

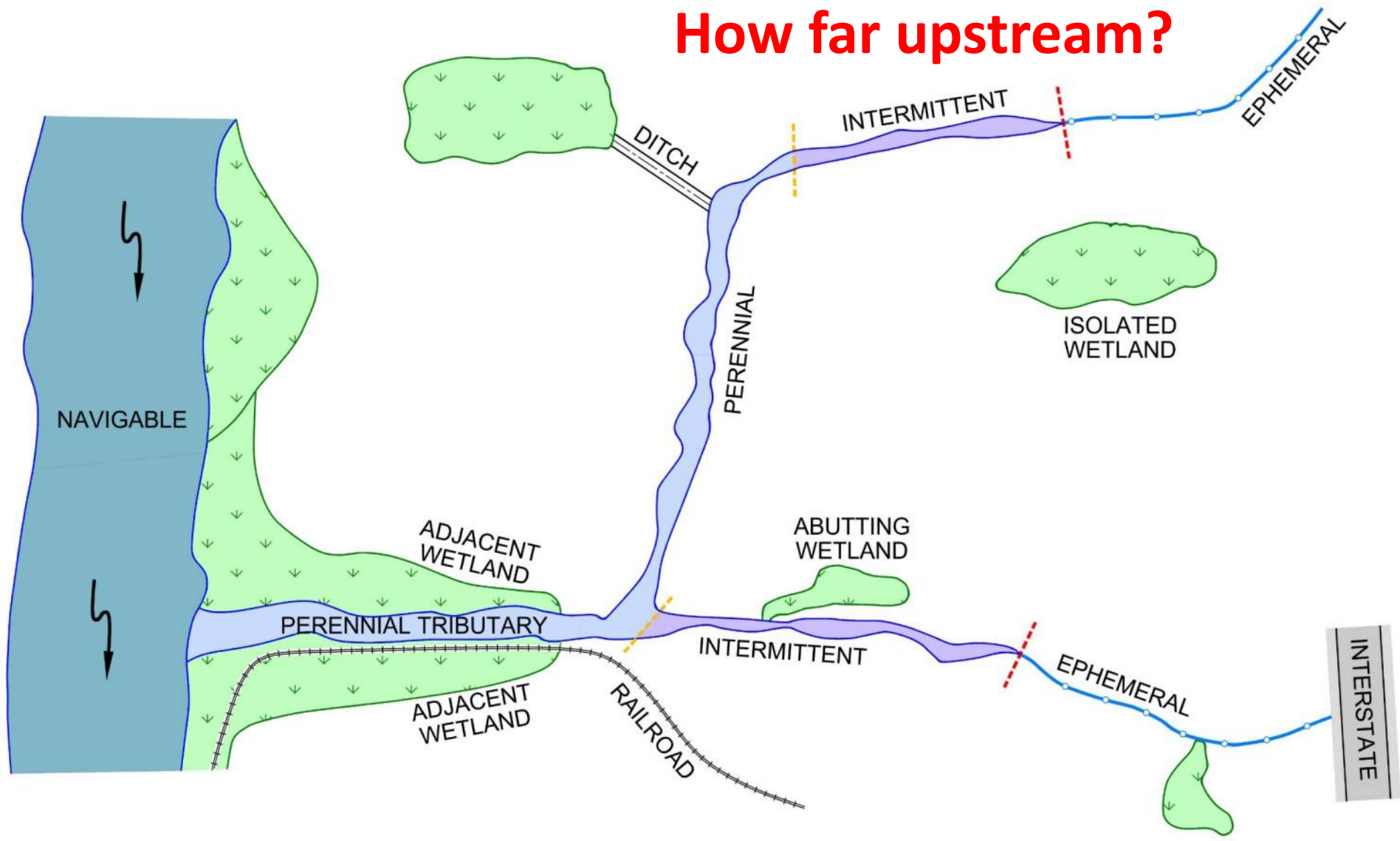
Cycle of Regulation & Litigation

- **1985 Riverside Bayview – Adjacent Wetlands**
- **Migratory Bird Rule Expansion**
- **2001 SWANCC – Limits Isolated Wetlands**
- **2006 Rapanos & Carabell**
- **2008 Rapanos Guidance**

Cycled of Executive Action & Litigation

- **2015 Clean Water Rule – Obama**
- **2019 Navigable Waters Protection Rule - Trump**
- **2023 Revised WOTUS Rule – Biden**

How far upstream?



2023 WOTUS Rule Regulates

A1 Traditional Navigable Waters

A2 Impoundment

A3 Tributaries

A4 Adjacent Wetland

A5 Other Waters that

Significantly Affect A1 and A3 Waters

2023 WOTUS Rule DO NOT Regulates

- 1. Wastewater Treatment systems**
- 2. Prior Converted Cropland**
- 3. Ditches in Uplands**
- 4. Irrigation and Ornamental Ponds**
- 5. Water filled depressions**
- 6. Swales & Erosional Features**

2023 WOTUS Rule DO NOT Regulates

- 1. Wastewater Treatment systems**
- 2. Prior Converted Cropland**
- 3. Ditches in Uplands**
- 4. Irrigation and Ornamental Ponds**
- 5. Water filled depressions**
- 6. Swales & Erosional Features**

2023 WOTUS Rule Regulates

Ephemeral Tributaries & Isolated Wetlands

ONLY if they

Significantly Affect the Chemical, Physical or Biological condition Perennial Tributaries.

What does this mean in Pennsylvania?

PA DEP- Chapter 105

Waters of the Commonwealth (WOC)

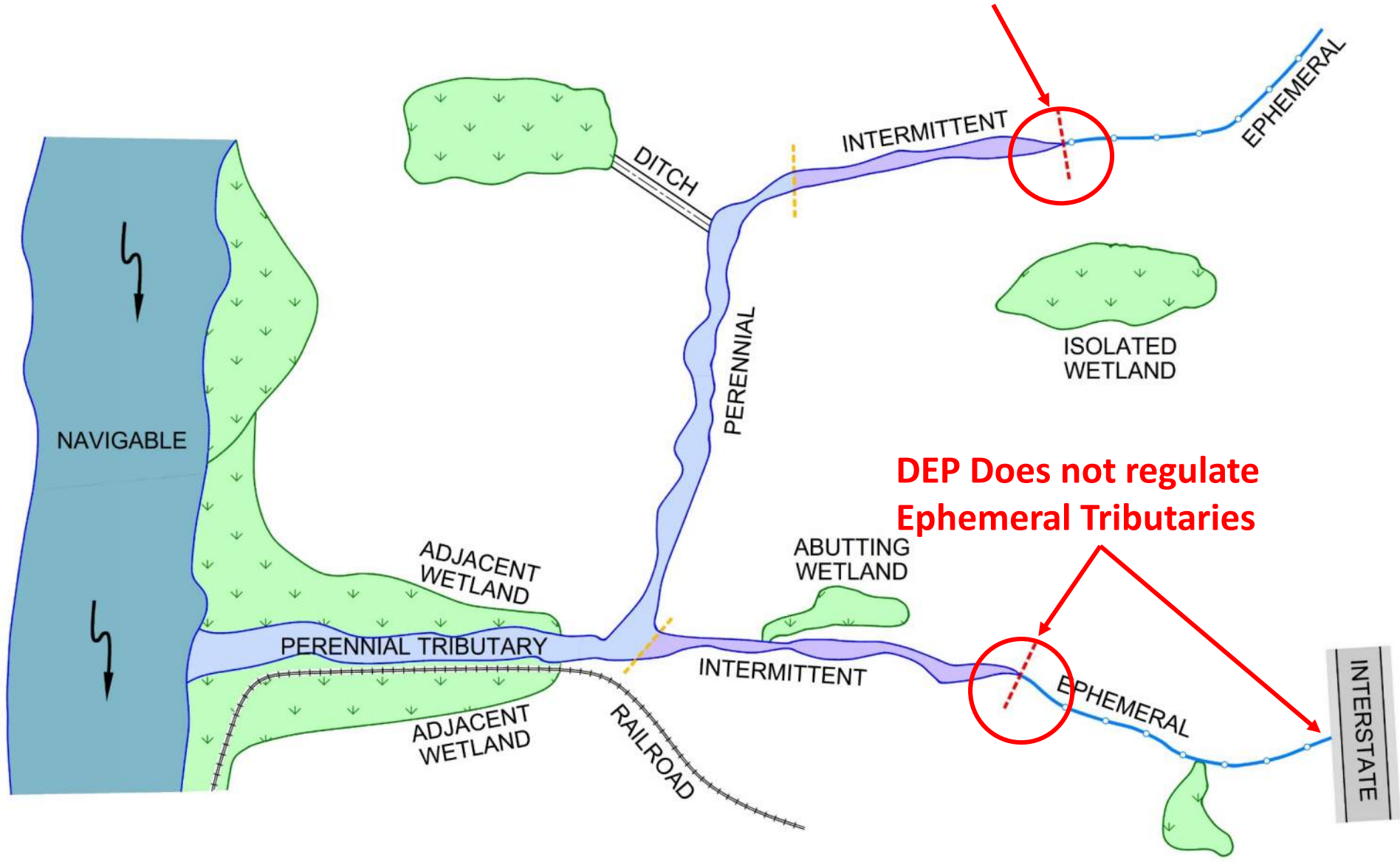
USACE – Section 404

Waters of the United States (WOTUS)

PA DEP Chapter 105

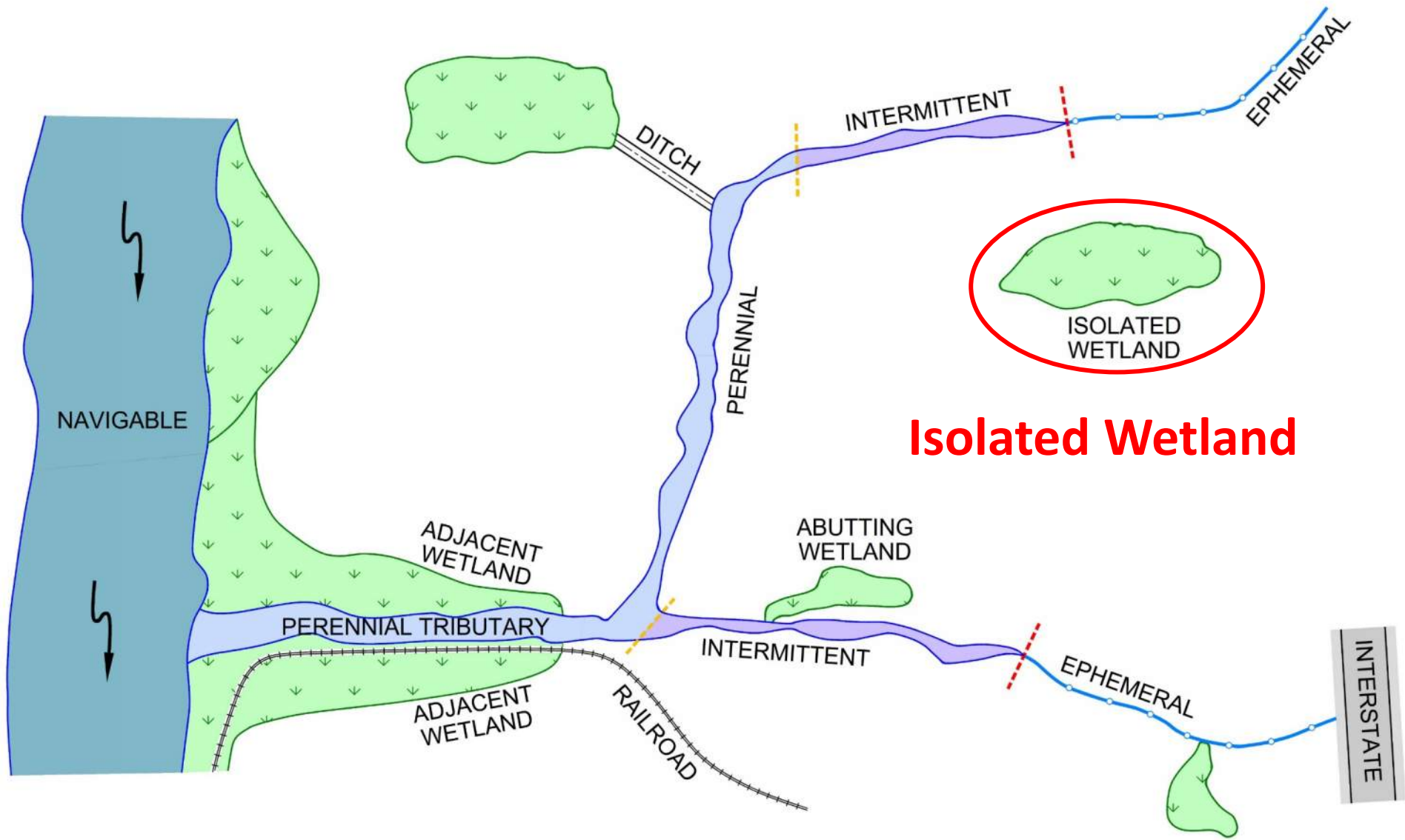
WOC Include:

- 1. Natural and Manmade Watercourses**
 - **Perennial or Intermittent Flow**
- 2. Water Bodies (include Wetlands)**
 - **Regardless Isolation**
- 3. Floodways**

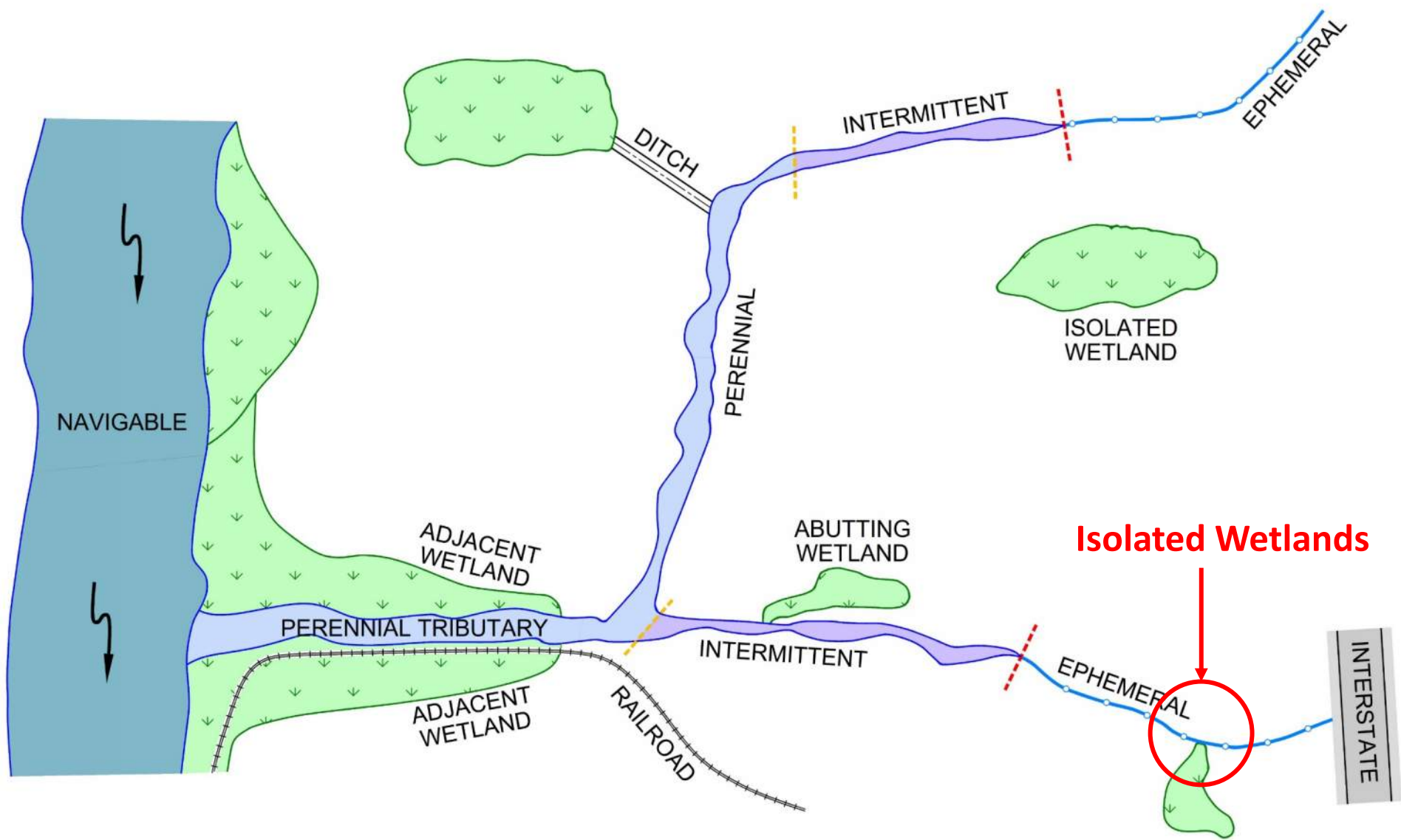


**DEP Does not regulate
Ephemeral Tributaries**

INTERSTATE



Isolated Wetland



USACE Section 404

**Regulates Ephemeral Tributaries
& Isolated Wetlands**

ONLY if they *Significantly Affect* the Chemical,
Physical or Biological condition *Perennial*
Tributaries.

New Regulatory Test – like the 2008 SNE

Significant Affects Test

- 1. Material Influence of the chemical, physical, or biological integrity of the TWW.**
- 2. Alone or in combination with similarly situated waters.**
- 3. Functional Assessment & Hydrologic Contribution Assessment**

What does this mean in PA?

1. It does not change how waters or wetlands are delineated
2. PA DEP still regulates isolated wetlands and waters
3. USACE **may** regulate Ephemeral Tributaries and Isolated Wetlands
4. **WOTUS and WOC may be different**
5. **Can result in Two Impact Tables**

If DEP Regulates anyway, where bother challenging USACE Judication?

1. Make Permitting Easier

- Non-Reporting PA SPGP#6
- Avoid 404 Individual Permit

2. Reduce Mitigation Cost

- Able to use the In-lieu fee Program?

2023 WOTUS Rule Ditch Guidance

Following Ditches Are NOT WOTUS

1. Constructed in Uplands
2. Lack Perennial or **Intermittent** Flow
3. Not Relocated Streams
4. Not Connected to Wetlands

Some Roadside Ditches are WOTUS & WOC



But NOT ALL Roadside Ditches

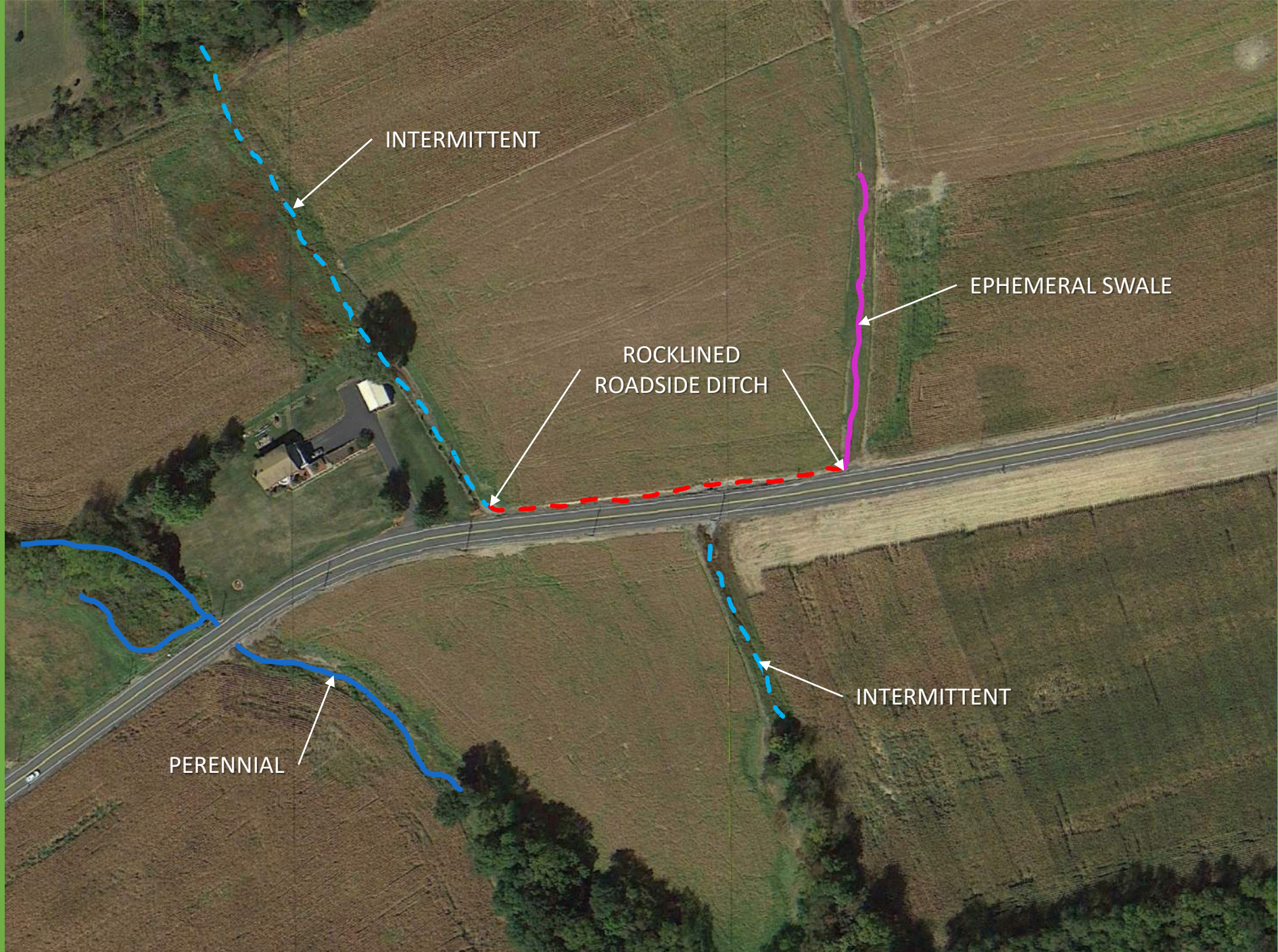


Questions About Roadside Ditches

- 1. Is it a Wetland or Stream (OHWM)?**
- 2. What Flow Regime ?**
- 3. Connect to Upstream Tributary ?**
- 4. Connect to Upstream Wetlands ?**

Connects to Upstream Wetland





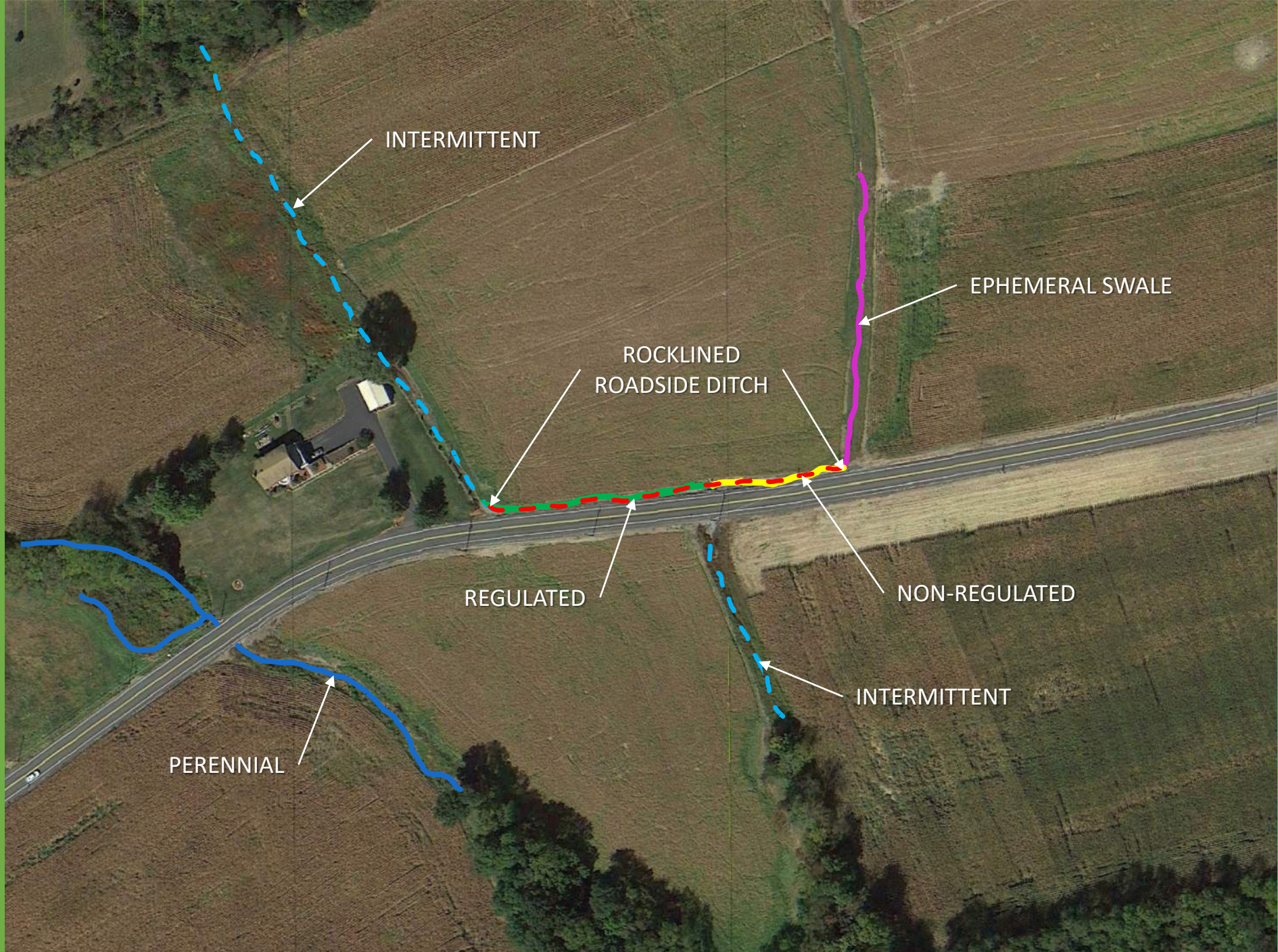
INTERMITTENT

EPHEMERAL SWALE

ROCKLINED
ROADSIDE DITCH

PERENNIAL

INTERMITTENT



INTERMITTENT

EPHEMERAL SWALE

ROCKLINED
ROADSIDE DITCH

REGULATED

NON-REGULATED

INTERMITTENT

PERENNIAL

Strategies to Manage Roadside Ditches

1. Conclude Not WOC or WOTUS

2. Waiver (No Permit Required) Water

3. Regulated Waters

➤ **Waters of the Commonwealth (WOC)**

➤ **Waters of the United States (WOTUS)**

Management Recommendation

**Applicant Needs to be Proactive
And Challenge Jurisdiction**

- 1. Is the Ditch a WOTUS and/or WOC ?**
- 2. Is the Ditch Eligible for Waiver #6 ?**

Management Recommendation

**Applicant Needs to be Proactive
And Challenge Jurisdiction**

USACE & DEP are reluctant to make a call, but generally agree with well documented “Non-Jurisdictional” case.

Ask for JD Field View

I am from the Government: I am here to HELP!



STAY OUT OF JAIL

Questions?

