



**Arkansas Environmental Federation
2022 Water Seminar**

FTN Associates, Ltd.

Presents

Functional WOTUS Update

June 16, 2022



WOTUS

NWPR

Non-RPW

Significant
Nexus



Rapanos

RPW

Step 1, Step 2



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 (in most states) (authority delegated by EPA)
- No Net Loss



LAKES / PONDS



WETLANDS



STREAM CHANNELS



WOTUS / NWPR Changes



A year ago....

Features NOT regulated:

- Any waters not listed as WOTUS
- Groundwater
- **Ephemeral channels**
- Stormwater
- Ditches (not identified as WOTUS)
- Prior Converted Cropland
- Artificially irrigated areas
- Artificial lakes/ponds
- Stormwater control features
- **Ponds/Wetlands not abutting a tributary**



A year ago....

Features that WERE regulated:

- Territorial seas and Traditionally Navigable Waters
- Tributaries (**Intermittent/Perennial** channels)
- Lakes/Pond/Impoundments of jurisdictional waters
- **Adjacent** wetlands



Regulated Today:

Basically..... Everything

With the court decisions and EPA electing to no longer implement the NWPR, most aquatic features are regulated, including, but not limited to, all features regulated under NRWP plus:

- Ponds, Lakes, Wetlands having at least some (can be minimal) hydrologic connection (surface and in some cases groundwater) to a downstream waterbody
- Ephemeral channels
- Ditches – in some situations
- Artificial water features – when there is a hydrologic connection
- Features within floodplains



What will be regulated next year?



Difficult to see.

Always in motion the future is.

Implementation then Halting Implementation of NWPR

What did this mean for stakeholders?

- Applications submitted prior to NWPR
 - Applications issued under NWPR
- Applications submitted during NWPR
 - Applications issued under NWPR
 - Applications issued after NWPR
- Jurisdictional Determinations



Applications Submitted Prior to NWPR

- Applicants were given an option to be regulated under previous rules (i.e., regulations at time of permit submittal) OR update submittals to be regulated under NWPR
- Most chose to update submittals (or withdraw submittals as some actions were no longer regulated)
- Delay in permit issuance for more favorable permitting/mitigation



Applications Submitted During NWPR

- Applications were processed “normally” (although in many cases the process was longer due to rule change implementation)
- If permit was issued during NWPR, NWPR regulations were used
- If permit was not issued before NWPR was halted:
 - No “grandfathering” for having submitted early
 - Additional information, higher level of permitting, and more mitigation was commonly required



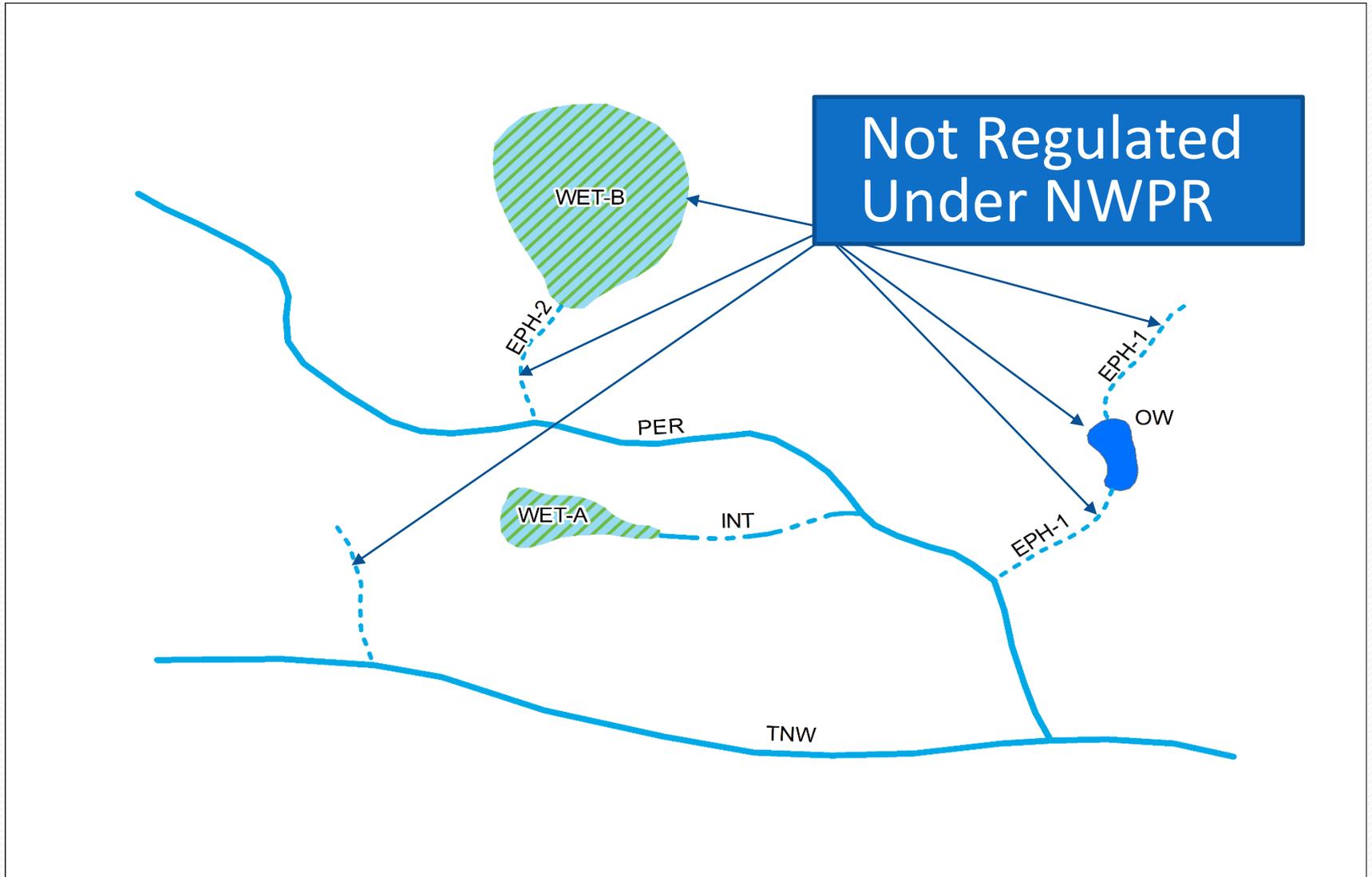
Approved Jurisdictional Determinations (AJDs)

During the period before, during, and after NWPR

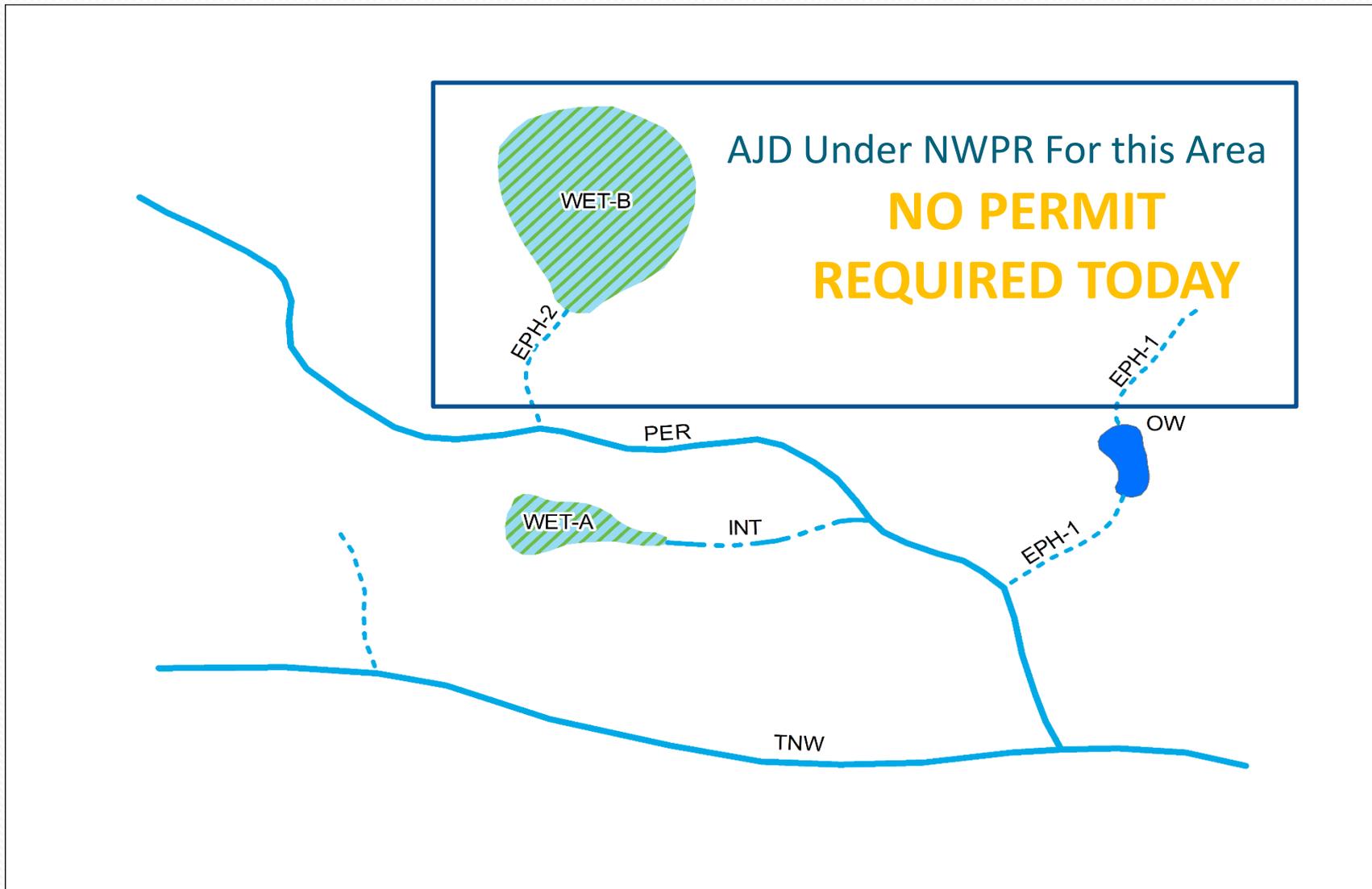
- AJDs issued before NWPR could not be easily/quickly modified
- AJDs issued during NWPR remain valid... sometimes
 - NWPR AJDs were not invalidated
 - AJD's issued during NWPR could only be used if no permit was needed after NWPR that would use the AJD
 - AJDs issued during NWPR that were used in permitting were rejected by the USACE



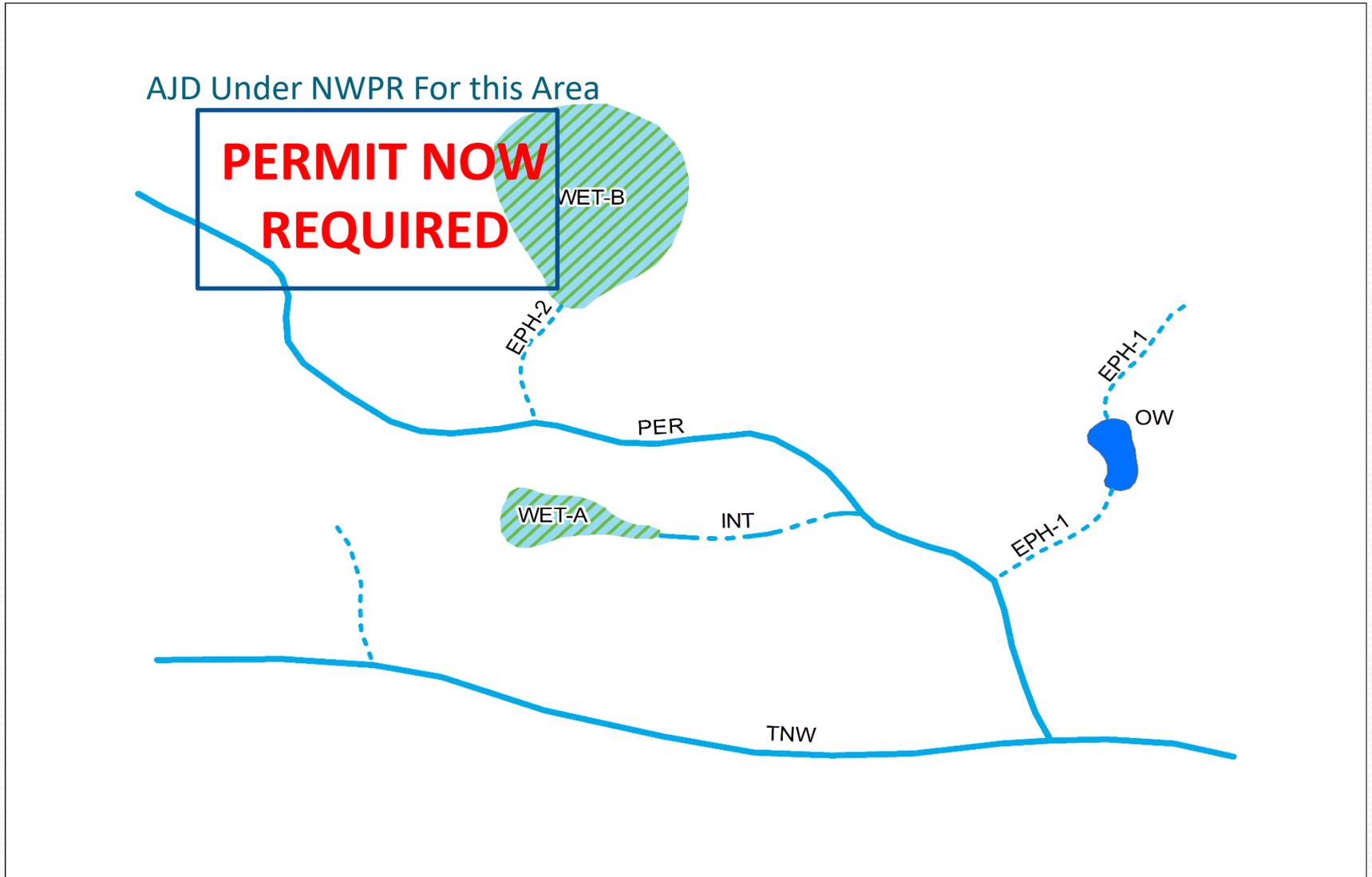
Examples



Examples



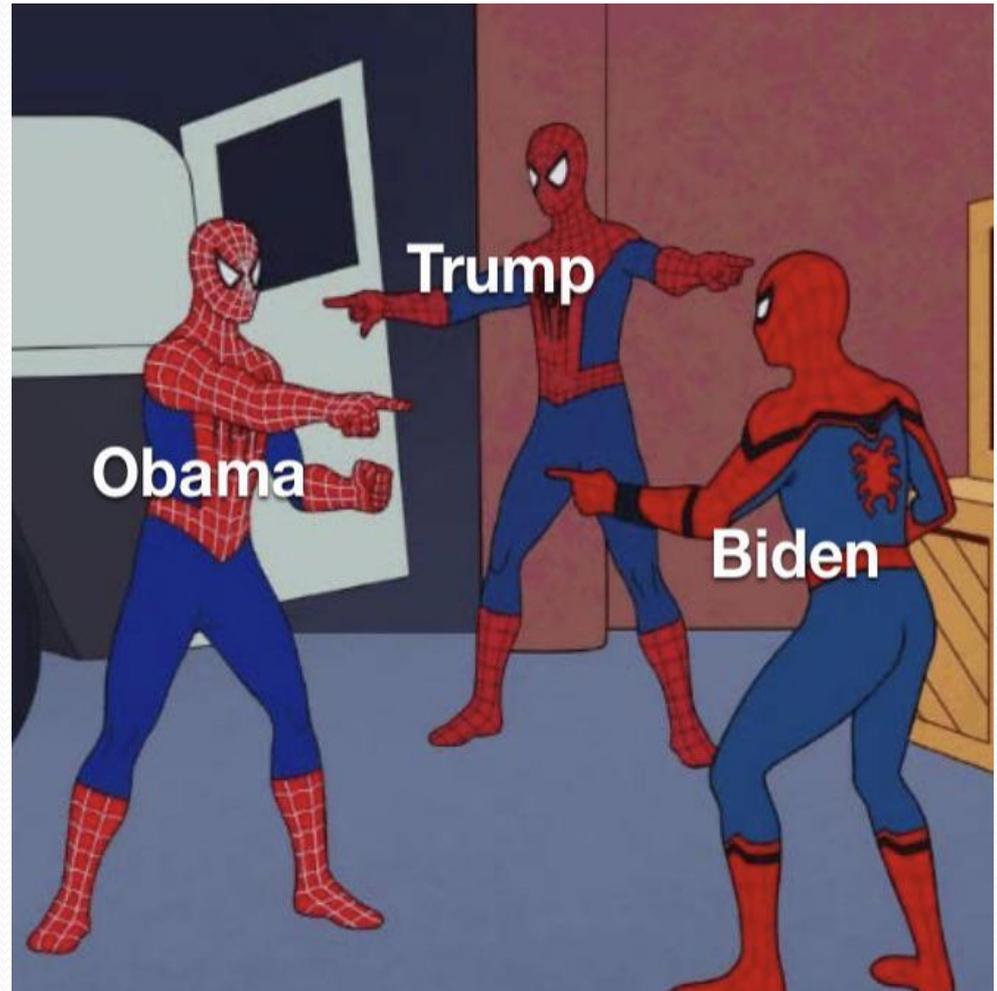
Examples



I'll rollback what you did.

No, I'll rollback what he did.

Then I'll rollback what you did...



Nationwide Permit Changes

- In January 2021, sixteen of the former Nationwide Permits (NWP) were issued, reissued, or modified
- In February 2022, forty-one other NWPs were issued, reissued, or modified
- There are currently a total of 57 available NPWs
- Most NWPs remain the same with the same or similar PCN requirements and impact thresholds
- NWPs are issued for common activities with the goal of expediting the permitting process (when compared with obtaining an Individual Permit)



Highlighted NWP Changes

- NWPs 12, 57, & 58
- NWP 12 was formerly for utility line activities
- The revised NWP 12 is specific to Oil and Natural Gas Pipeline Activities
- The new NWP 57 is for Electric Utility Line and Telecommunications Activities
- The new NWP 58 is for Water and “Other” Substances (specifically excluding oil and gas related products)



Highlighted NWP Changes

- “300-Foot Rule”
- For a number of NWPs (e.g., Commercial and Institutional Developments, Residential Developments, etc.) there was a $\frac{1}{2}$ acre waters impact limit AND a 300’ limit (unless waived by the district engineer) for coverage under a NWP
- Removal of the 300-Foot Rule has been very important and resulted in numerous projects being able to proceed under a NWP rather than requiring an Individual Permit

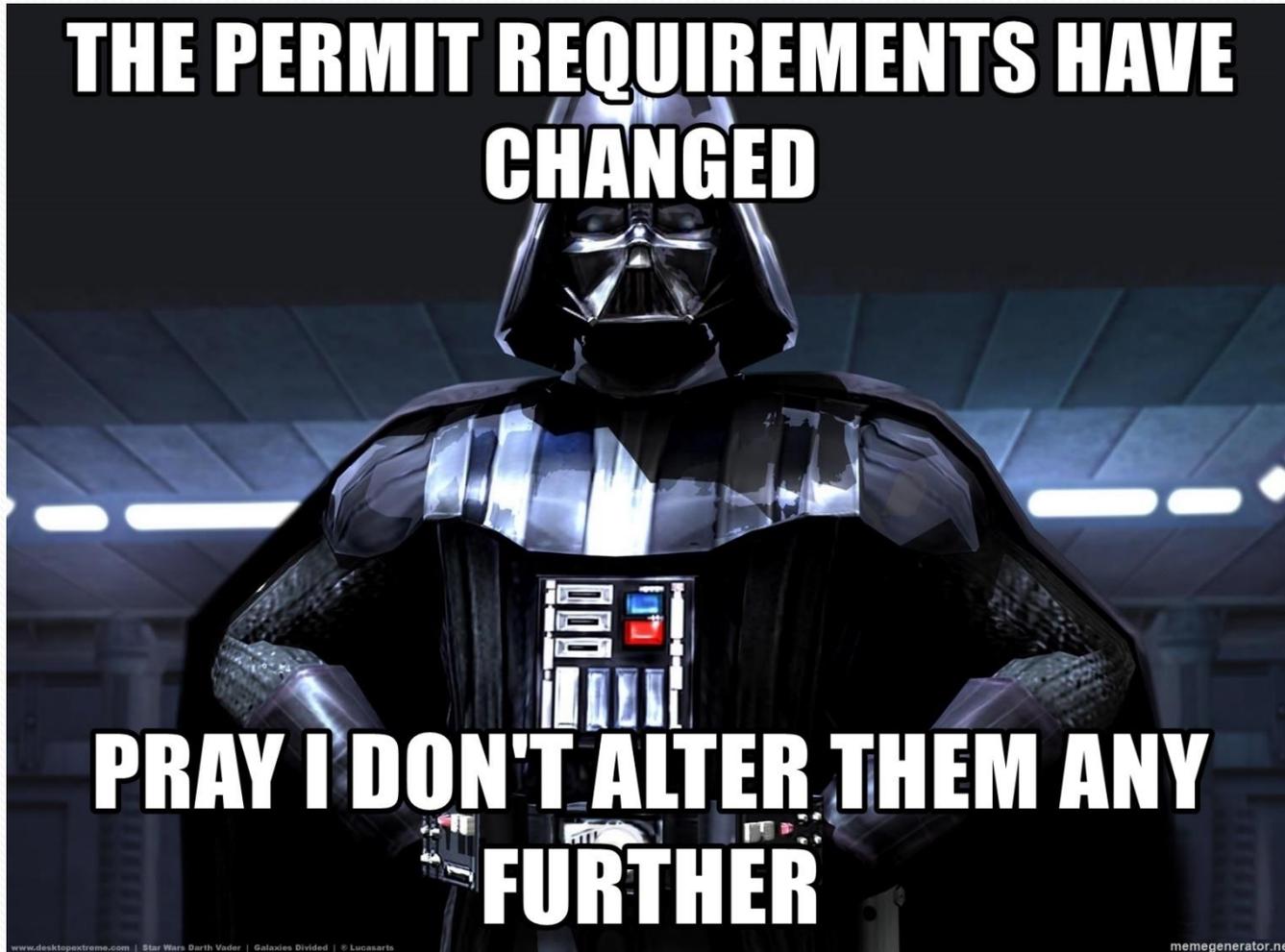


Supplemental Thoughts

- NEPA (even for NWPs)
- Cultural Resources – More projects requiring cultural resources evaluations
- T&E Species – Increased concern regarding bats, Monarch Butterfly now a candidate species
- Mitigation – Increasing costs
- As always, remember to **PLAN EARLY**



In Summary



Questions/Comments

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