

waters.⁶⁷ The NWPR improperly narrowed the scope of the Clean Water Act and limited state and federal authority to control pollution in violation of the Administrative Procedure Act (“APA”), Clean Water Act, ESA, NEPA, and Supreme Court precedent. Additionally, the “typical year” requirement⁶⁸ was not applied in a consistent manner between Corps districts; the agencies found it to be inconsistent with science, “challenging and sometimes impossible to implement”; and the agencies found that data to evaluate the “typical year” requirement is frequently unavailable or unobtainable.⁶⁹ It also permitted jurisdiction to come into existence and disappear at unpredictable intervals in response to development, water withdrawals, water inputs, and other factors.⁷⁰ Similarly, the agencies should not attempt to create new, unscientific jurisdictional limitations for flow regime, flow duration, or seasonality that are unrelated to the chemical, physical, or biological integrity of waters, inconsistent with the Act or binding legal precedent, or for which data is unavailable or unobtainable.

B. Adjacent Wetlands and Relatively Permanent Lakes, Ponds, and Other Intrastate, Non-navigable Waters

The notice seeks comment on the scope of “continuous surface connection,” including whether it should be applied to determine the jurisdictional status of (a)(5) relatively permanent lakes and ponds, as well as other intrastate, non-navigable waters, and whether adjacent wetlands must physically abut another WOTUS in order to be jurisdictional. Relatively permanent lakes, ponds, and other intrastate, non-navigable bodies of water forming geographic features are waters under *Sackett* and *Rapanos* and are WOTUS when they are (a)(1) waters or are connected to (a)(1) waters directly or through other jurisdictional waters.⁷¹ *Sackett* and *Rapanos* do not require the connection to (a)(1) to be limited to a “continuous surface connection” in order for those waters to be jurisdictional. Additionally, temporary interruptions in surface connections that occur because of phenomena like low tides or dry spells, e.g., periods of drought or changes in water volume, do not render adjacent wetlands or other waters non-jurisdictional.⁷²

⁶⁷ See, e.g., 2021 Proposed Definition, 86 Fed. Reg. at 69407-16; EPA, *Army Announce Intent to Revise Definition of WOTUS*, EPA (June 9, 2021), <https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus>; *Request for Remand and Supporting Documentation*, EPA, <https://www.epa.gov/wotus/request-remand-and-supporting-documentation> (Feb. 21, 2025); EPA & DEP’T OF THE ARMY, TECHNICAL SUPPORT DOCUMENT FOR THE PROPOSED “REVISED DEFINITION OF ‘WATERS OF THE UNITED STATES’” RULE (2021), <https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0081>.

⁶⁸ See, e.g., NWPR, 85 Fed. Reg. at 22340-41.

⁶⁹ See, e.g., January 2023 Definition, 88 Fed. Reg. at 3058-61, 3081.

⁷⁰ See, e.g., NWPR RTC, *supra* note 30, TOPIC 5, at 14; NWPR, 85 Fed. Reg. at 22291.

⁷¹ See, e.g., 40 C.F.R. § 120.2(a)(1) (2023); *Rapanos*, 547 U.S. at 731-32, 742; *Sackett*, 598 U.S. at 678-79 (citing *Rapanos*, 547 U.S. at 742).

⁷² See *Sackett*, 598 U.S. at 678.