Kentucky Waterways Alliance
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Working to Protect, Restore, and Celebrate Kentucky's Waterways

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September 28, 2026

Jenny Gilbert, Legislative Liaison
Kentucky Department of Fish and Wildlife Resources
1 Sportsman's Lane
Frankfort, Kentucky 40601

RE: Proposed Amendment to 301 KAR 1:001 – Definition of "Private Waters"

Dear Ms. Gilbert,

Kentucky Waterways Alliance ("KWA") respectfully submits these comments opposing the proposed addition of subsection (49) to 301 KAR 1:001:

"Private waters" means any water body that is not a public water or a private lake or pond.

KWA does not object to incorporating the definition of "private lake or pond" enacted by the General Assembly through 2026 Senate Bill 39. KWA does object to the Department's creation of a new and fundamentally broader category of "private waters."

The significance of the proposed definition lies in its structure. By defining "private waters" as any waterbody that does not fall within either of two specifically defined categories, the regulation makes "private waters" the default classification. Every waterbody in Kentucky would begin in the "private waters" category unless it can be affirmatively shown to meet the definition of "public waters" or the separate statutory definition of a "private lake or pond."

The General Assembly did not establish that presumption. Senate Bill 39 created a narrow and carefully conditioned category of private lakes and ponds. It did not declare all other waters as presumptively private, create a general category of "private waters," or direct the Department to make such a classification.

The proposed definition therefore does considerably more than clarify terminology. It establishes a new starting point for classifying Kentucky waters; water is private unless it qualifies for another defined status.

For the reasons discussed below, KWA respectfully requests that the Department remove the proposed definition of "private waters" from 301 KAR 1:001.

The Department lacks clear authority to establish "private waters" as the default classification of Kentucky waterbodies

Kentucky law expressly limits an administrative agency's authority to create substantive law through regulation.

KRS 13A.120 permits an administrative body to promulgate regulations to implement statutes within its delegated authority, but prohibits regulations addressing matters beyond that statutory authorization or matters "not clearly authorized by statute." It further prohibits regulations that modify or vitiate a statute or its intent. A regulation violating those limitations or their spirit is "null, void, and unenforceable." KRS 13A.120(1), (2)(h)-(i), (4).

The Department cites KRS 150.025(1)(h) as authority to promulgate regulations necessary to carry out KRS Chapter 150. That authority allows the Department to implement the laws enacted by the General Assembly. It does not give the Department independent authority to establish substantive classifications that alter the framework chosen by the legislature.

Kentucky courts have recognized the same limitation. An administrative agency may fill in details necessary to implement legislation, but a regulation may not "amend, alter, enlarge or limit the terms of legislative enactment." *Faust v. Commonwealth*, 142 S.W.3d 89 (Ky. 2004) (*Appalachian Racing LLC v. Family Trust Found. Of KY*, 423 S.W.3d 726 (Ky. 2014)).

That distinction is particularly important here because the General Assembly expressly addressed the treatment of private lakes and ponds in Senate Bill 39.

Senate Bill 39 created a specific definition of "private lake or pond." To qualify, a lake or pond must be on private land, have no surface-water connection to public waters, be inaccessible to fish from other public bodies of water, and be outside the 100-year floodplain. The General Assembly then attached specific fishing and stocking privileges to waterbodies meeting those conditions.

Those requirements demonstrate a deliberate legislative choice. The General Assembly did not broadly declare waters on private property to be private. It did not define every waterbody outside "public waters" as private. Instead, it required a waterbody to satisfy several affirmative conditions before qualifying for the narrow statutory treatment afforded a "private lake or pond."

The proposed regulation reverses legislative intent.

Under Senate Bill 39, a lake or pond receives special treatment only after it satisfies the criteria established by the General Assembly. Under the proposed definition of "private waters," however, no affirmative showing of private ownership, isolation, lack of fishing access, or absence from a floodplain is necessary. A waterbody becomes a "private water" simply because it does not fit within either of two other definitions.

The practical structure is therefore:

1. Begin with the universe of Kentucky waterbodies;
2. Remove those that satisfy the definition of "public waters";
3. Remove those that satisfy the statutory definition of "private lake or pond"; and
4. Label **everything remaining** "private waters."

This makes "private water" the default classification for Kentucky waters, because the result is that every waterbody is private unless it meets one of the other two definitions.

Nothing in Senate Bill 39 establishes this framework. To the contrary, the General Assembly demonstrated that when it intended a waterbody to receive special treatment, it knew how to define that category directly and narrowly.

The breadth of the proposed definition is especially concerning because KRS 150.010's definition of "public waters" was not written as an exhaustive public-versus-private classification of every waterbody in Kentucky. It affirmatively identifies as "public waters" waters "flowing in a natural stream channel or impounded on a

natural stream" for purposes of KRS Chapter 150. It does not state the converse. Nothing in the definition declares that every waterbody not fitting those physical characteristics is private, nor does it purport to resolve the ownership or legal status of every other waterbody in the Commonwealth.

The proposed definition of "private waters" would supply that missing converse. By defining every waterbody outside "public waters" and "private lake or pond" as private, the Department would transform a limited affirmative definition into an exclusionary classification. The General Assembly did not make that choice.

The Department's own regulatory analysis underscores the problem. It explains that "private lake or pond" was added to conform to Senate Bill 39, while the separate definition of "private waters" was added administratively "to reduce confusion between those two types of water bodies."

But reducing confusion cannot supply authority to make a substantive policy choice that the General Assembly did not make. The Department is not simply clarifying the boundaries of a term enacted by the legislature. It is declaring a third category that applies to all water outside two defined categories.

Making "private waters" the default creates significant and unintended consequences

The Department's stated justification is the definition will "reduce confusion." In practice, the opposite is more likely to occur. Once "private waters" becomes the default category, any uncertainty about whether a waterbody satisfies the narrow definition of "public waters" will lean toward similar outcomes, i.e. the waterbody is classified as private.

This matters because KRS 150.010 does not attempt to comprehensively classify every type of waterbody in Kentucky as either public or private. It affirmatively identifies certain waters as "public waters" for purposes of Chapter 150.

That affirmative designation is not an express declaration that all other waters are private. The proposed regulation changes the function of the definition by using it as an exclusionary test. Under the proposal, failing to satisfy the Chapter 150 definition of "public waters" no longer functions to classify a waterbody outside that defined category. Instead, failure to qualify affirmatively categorizes the waterbody into the newly created category of "private waters," unless it meets the separate definition of a "private lake or pond." Put simply, not fitting the statutory definition of "public waters" is not the same thing as being "private waters."

This broad categorization of "private waters" could potentially include:

- wetlands, marshes, wet meadows, vernal pools, and floodplain depressions;
- springs, spring pools, seeps, and groundwater-discharge areas before a recognizable stream channel forms;
- cave streams, sinkhole waters, and other karst waters;
- oxbows, abandoned channels, sloughs, backwaters, and floodplain pools;
- intermittent and ephemeral headwater channels where the application of the term "flowing" may be disputed;
- natural streams that have been straightened, channelized, relocated, culverted, or otherwise altered;
- artificial channels, canals, drainage channels, or bypasses directly connected to public waters;
- publicly owned off-channel reservoirs and public park ponds;
- flood-control and stormwater impoundments; and
- quarry lakes, mine impoundments, and other constructed waterbodies that may exchange water or aquatic organisms with public waters.

KWA is not asserting that each of these waterbodies necessarily falls outside the existing definition of "public waters," but they might. That uncertainty is itself part of the problem.

The proposed regulation takes every uncertainty at the boundary of "public waters" and turns it into a question of whether the water should instead be affirmatively designated "private." The General Assembly never directed the Department to make that conversion.

Nor is this merely semantic. "Public waters" already has substantive consequences under Kentucky's fish and wildlife laws.

KRS Chapter 150 and 301 KAR Chapter 1 use public-water status in connection with stocking, transportation, propagation, fisheries management, and other regulatory requirements. The proposed amendment to 301 KAR 1:125 already illustrates the consequence this regulation would have, exempting certain transportation of fish intended for stocking in "private waters or a private lake or pond," while separately restricting transportation into public waters. The new definition therefore participates directly in determining when different regulatory requirements apply.

This makes the default classification particularly consequential. If one regulatory regime applies to public waters and another applies to private waters, defining "private waters" as everything that does not qualify as public effectively establishes a presumption in favor of the private-water regulatory regime whenever public-water status is uncertain. That policy choice belongs to the General Assembly, and it has not spoken to it.

The proposed definition makes the regulatory scheme less clear, not more clear

The Department states the new definition is intended to reduce confusion between "private lake or pond" and other waters. The proposed language instead creates a counterintuitive system.

A waterbody that satisfies all of the statutory requirements to be a "private lake or pond" is expressly excluded from the definition of "private waters."

At the same time, a waterbody that is owned by a city, county, the Commonwealth, or another public entity could potentially qualify as "private water" if it does not satisfy the physical definition of "public waters."

The proposed regulation therefore creates three categories:

1. Public waters;
2. Private lakes or ponds; and
3. Everything else, which becomes "private waters."

That means "private" no longer describes ownership or even necessarily the characteristics the General Assembly associated with a private lake or pond. It simply describes the remainder.

The result is a regulatory definition in which an expressly private lake is not a "private water," while a publicly owned waterbody, potentially is. That does not resolve confusion. It creates it.

The default definition disregards the safeguards the General Assembly imposed on private lakes and ponds

The proposed definition also undermines the importance of the safeguards contained in Senate Bill 39. The General Assembly required a qualifying private lake or pond to:

- be contained within private land;
- have no surface-water connection with public waters;
- be inaccessible to fish from other public bodies of water; and
- be outside the 100-year floodplain.

Those requirements limit the statutory carveout to waters that are both privately situated and relatively isolated from the public aquatic system. But none of those safeguards apply to the proposed definition of "private waters."

A waterbody could therefore fail to qualify as a "private lake or pond" precisely because it is connected to public waters, accessible to fish, within a floodplain, or even located on public property and still become "private waters" by default because it does not satisfy the definition of "public waters."

That produces a difficult result to reconcile with legislative intent. The General Assembly carefully limited private-lake status where connectivity created the possibility of effects on public fisheries. The proposed regulation potentially assigns a broader private classification to waters that fail those very safeguards.

The definition could classify publicly owned waters as "private"

The problem is perhaps most apparent when the definition is applied to public ownership. Nothing in proposed subsection (49) requires a "private water" to be privately owned.

An off-channel municipal reservoir, public park pond, government-owned flood-control impoundment, or other publicly owned waterbody may not necessarily contain water flowing in a natural stream channel or impounded on a natural stream. If it also does not meet the definition of "private lake or pond," which it could not if it is not on private land, the proposed definition leaves only one category, "private waters."

This illustrates the fundamental problem with using a residual default definition. The classification is not actually determining whether water is private. It is simply calling everything that remains private.

The definition could reach far beyond the present rulemaking

The consequences are also not limited to the provisions currently being amended. 301 KAR 1:001 is the general definitions regulation for Chapter 1. Once "private waters" is established there, the term becomes available for use throughout the Department's fisheries regulations.

It could affect or later be incorporated into provisions addressing:

- stocking;
- transportation of fish;
- invasive species;
- propagation;
- methods of take;
- creel and possession restrictions;
- fisheries management;
- enforcement and inspection; and
- future exemptions from otherwise applicable requirements.

The Department's regulatory analysis does not identify the complete universe of waters that would become "private waters" under the definition or comprehensively analyze the consequences of establishing private status as the default category.

That concern is particularly significant because "public waters" already serves as an important statutory and regulatory boundary. Its use is directed toward raising or hatching fish, acquiring brood stock, and stocking fish from and in natural streams and impounded streams. In this manner, the term is directed at identifying permissible activities in two specific types of water, and is less directed at creating categorizations of different types of water as either public or private.

Further, these laws restrict stocking in public waters, and regulations distinguish between public and private waters in controlling the transportation and movement of fish. Once the Department affirmatively creates the opposite category of "private waters" and defines it as everything outside the public-water definition, the natural regulatory implication is that waters not proven to be public receive the treatment applicable to private waters.

The General Assembly never established that converse.

"Private waters" also creates uncertainty concerning ownership, access, and enforcement

The consequences of the term extend beyond fisheries management. "Private" ordinarily communicates something about ownership, control, or a right to exclude. A landowner, angler, enforcement officer, local government, or member of the public encountering an official regulation defining a waterbody as "private waters" could reasonably understand the designation to carry implications beyond a stocking or transportation permit.

Yet the proposed definition does not determine ownership at all. It does not ask who owns the waterbody, whether the underlying property is public, whether an easement exists, whether the public has historically used the water, whether navigability principles apply, or whether another Kentucky statute recognizes a public interest in the water.

For instance, KRS 151.120 defines public water of the Commonwealth as "water occurring in any stream, lake, groundwater, or other body of water in the Commonwealth which may be applied to any useful and beneficial purpose is hereby declared to be a natural resource and public water of the Commonwealth. . . ." Further, KRS 15.120 is mindful of not creating a "private water" classification stating diffuse surface water left standing in specific water features "shall not be regarded as public water" as opposed to declaring all other water as private.

Despite that, this regulation proposal affirmatively labels the water "private." This creates unnecessary uncertainty regarding:

- ownership and title;
- public access;
- fishing access;
- easements;
- navigability;
- enforcement authority;
- public-resource management; and
- the jurisdiction of other state agencies.

Nothing in the proposed regulation expressly limits the meaning of "private waters" to a particular permitting provision or states the designation has no bearing on ownership, access, navigability, or other legal rights.

The default structure also creates practical enforcement problems. If all waters are "private waters" unless shown to fall within another definition, disputes will naturally focus on whether the Department can establish if a particular waterbody satisfies the definition of "public waters."

This may require determining whether:

- a channel formed naturally;
- a pond was historically constructed across a natural stream;
- an intermittent or ephemeral channel constitutes flowing water within a natural stream channel;
- a straightened, relocated, or culverted stream remains a natural stream channel;
- an oxbow or floodplain feature remains part of the stream system; or
- a heavily modified waterbody retains sufficient characteristics of a natural stream.

Resolving those questions may require historical maps, construction records, hydrologic evidence, field investigation, and expert analysis.

The General Assembly avoided the need to make "private" the default by affirmatively defining the particular private lakes and ponds to which it intended the new privileges to apply. The Department should follow that approach.

The Department has also failed to provide public notice required by KRS 13A.220

KWA is additionally concerned by the Department's failure to provide timely and complete notice of proposed administrative regulations as required by KRS 13A.

KRS 13A.220(8) is explicit. Within five working days after filing an administrative regulation, an administrative body "shall prominently display on its website" notice of the filing and specified information concerning the regulation and public-participation process.

The required information includes:

- notice that an administrative regulation has been filed;
- the regulation number and title;
- a brief explanation of the new regulation or proposed changes;
- information explaining how to access the regulation on the Legislative Research Commission's website;
- the dates of the public-comment period;
- the place, time, and date of the public hearing; and
- the manner in which interested persons must provide notice of attendance and submit written comments.

The Department did not provide that information within the statutory timeframe for the current group of proposed amendments.

The Department emailed notification of amendments to 301 KAR 1:001 on July 15, 2026. However, at that time the most recent proposed KAR amendments displayed on the Department's website were changes filed with the Legislative Research Commission on November 13, 2025. No new proposed amendments were posted to the Department's website until September 3, 2026.

The September 3 update also did not provide the information required by KRS 13A.220(8). It listed only the KAR number and title as a link which directed users to a different agency's website for additional information.

Only on or shortly before September 16 did the Department's page begin identifying the regulation number, title, a brief explanation, and the public-comment deadline. The Department's current page now states, for 301 KAR 1:001, that public comment remains open through September 30 and explains that the amendment adds "private lake or pond" and "private waters."

Even now, however, the Department's own webpage does not display all the information expressly required by KRS 13A.220(8)(d). It does not display on its webpage the place, time, and date of the scheduled public hearing or the manner in which interested parties must provide notice of their intent to attend the hearing and submit written comments.

Instead, a member of the public must leave the Department's webpage and follow another link to the Legislative Research Commission's website to locate that information.

That is significant because KRS 13A.220(8) does not allow the actions of another agency to fulfill the Departments regulatory notice responsibilities. Subsection (8)(c) requires the agency to provide information about how to access the regulation on the LRC's website. Subsection (8)(d), separately, requires the agency to

display the dates of the comment period and the place, time, and date of the hearing, together with instructions for participating and submitting comments on its own website.

If LRC's publication of that information, or the Department's provision of a link to it, satisfied subsection (8)(d), a separate directive to the administrative body would have little independent meaning.

The statute's assignment of this responsibility to the administrative body is significant. KRS 13A does not place responsibility for satisfying subsection (8) on the Legislative Research Commission or permit the administrative body to substitute LRC's publication process for its own. Rather, the chapter assigns distinct responsibilities to each. The LRC maintains and publishes administrative regulations, while KRS 13A.220(8) separately directs the administrative body itself to prominently display the required notice and participation information on its own website. This division of responsibility protects the public by ensuring the Department's independent duty to provide complete and timely notice does not depend on any issues that arise from the LRC's website. The Department therefore cannot rely on the availability of information elsewhere, or on the LRC's publication responsibilities, as a substitute for compliance with the duties the General Assembly expressly assigned to it.

These requirements serve an important purpose. Members of the public should be able to rely on the regulating agency's own website to learn a rule has been proposed, understand generally what it would do, determine when comments are due, and learn how to participate in the public hearing.

That obligation becomes even more important where the Department proposes to establish a definition as sweeping as "private waters," one that potentially begins with the premise that every Kentucky waterbody is private unless it can be affirmatively classified otherwise.

KWA respectfully requests that the Department correct its notice procedures, and ensure that future proposed administrative regulations are prominently and completely posted on the Department's website within the five-working-day period required by KRS 13A.220(8).

Conclusion

The General Assembly made a specific policy choice in Senate Bill 39. It identified a narrow class of genuinely private and hydrologically isolated lakes and ponds and established particular privileges for those waters. It did not establish a comprehensive public-versus-private classification system for Kentucky waters.

The proposed definition of "private waters" does exactly that.

By defining "private waters" as all waterbodies that are neither a "public water" nor a "private lake or pond," the Department makes private water the default classification. Every waterbody begins on the private side of the regulatory line unless it can be affirmatively shown to satisfy another definition. The problem is not simply that the Department has created an additional definition. It has changed the function of the existing definition of "public waters." KRS 150.010 affirmatively identifies certain waters as public for purposes of Chapter 150; the proposed regulation would turn that affirmative definition into an exclusionary boundary by declaring every waterbody outside it as private. Nothing in KRS Chapter 150 or Senate Bill 39 establishes that conversion.

That is a consequential policy choice. It potentially affects waters the General Assembly never considered; disregards the ownership, connectivity, fish-access, and floodplain safeguards imposed by Senate Bill 39; could result in publicly owned or connected waters being labeled private; creates uncertainty over access, ownership, and enforcement; and establishes a new regulatory premise that may affect stocking, transportation, fisheries management, and future regulations.

The Department's stated purpose is to reduce confusion but instead this proposal has done exactly the opposite and increased confusion. A definition intended to clarify the law should not establish a presumption the legislature never enacted or make the regulatory scheme harder to understand, follow, and enforce.

There is also no need to do so. The General Assembly already supplied the definition necessary to implement Senate Bill 39 concerning a "private lake or pond." The Department can administer that narrow statutory category without declaring every waterbody outside the definition of public waters to be private.

For these reasons, and in light of the Department's failure to provide the timely and complete public notice required by KRS 13A.220(8), KWA respectfully requests that the Department delete proposed subsection (49), "private waters," from 301 KAR 1:001 in its entirety and retain only the classifications expressly established or authorized by the General Assembly.

Respectfully,

Nick Hart
Water Policy Director
Kentucky Waterways Alliance.