Kentucky KWA Waterways Alliance
Healthy waterways.
Healthy communities.

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

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Milton Boyd
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Department of the Army
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Submitted to Docket ID No. EPA-HQ-OW-2025-0322

RE: Updated Definition of "Waters of the United States" Supplemental Notice of Proposed Rulemaking

Dear Ms. Jensen and Mr. Boyd,

Kentucky Waterways Alliance, joined by Kentucky Conservation Committee, Appalachian Citizens Law Center, Kentucky Resources Council, and Kentucky Sierra Club (Commenters), respectfully submits these comments opposing the supplemental regulatory alternatives proposed by the Environmental Protection Agency and Department of the Army for defining "waters of the United States" under the Clean Water Act. Together, our organizations represent Kentuckians with an interest in clean water, healthy watersheds, fish and wildlife, outdoor recreation, and the communities and economies that depend on them.

KWA is a statewide nonprofit organization whose mission is to protect, restore, and celebrate Kentucky's waterways. For more than three decades, KWA has worked throughout the Commonwealth to improve water quality, restore rivers and streams, protect aquatic habitat, and support public participation in decisions affecting Kentucky's waters. The organizations joining these comments bring complementary experience in environmental law, conservation policy, community advocacy, and natural resource protection. Collectively, our organizations work to safeguard Kentucky's rivers, streams, wetlands, and watersheds, ensure meaningful public participation in decisions affecting these resources, and maintain effective legal and regulatory protections for the waters on which Kentuckians depend.

The Commenters recognize the need for a clear and durable definition of federal Clean Water Act jurisdiction consistent with *Sackett v. EPA*, 598 U.S. 651 (2023). The agencies have already amended the 2023 WOTUS

rule to conform with *Sackett*. The September 2026 Supplemental Notice proposes to narrow jurisdiction further by limiting "relatively permanent" waters essentially to perennial waters and, under one alternative, requiring perennial surface water in wetlands continuously connected to another jurisdictional water.[1]

These alternatives would have significant consequences in Kentucky. EPA acknowledges most intermittent streams would not satisfy the proposed perennial standard, and the majority of wetlands currently jurisdictional as adjacent wetlands would not satisfy the proposed continuous-surface-connection standard because most wetlands do not contain perennial surface water.[2]

Kentucky's own Division of Water has already warned EPA against these approaches. DOW specifically stated that "relatively permanent waters should not be limited to perennial waters" and explained that flow duration alone is not a reliable measure of hydrologic permanence or functional connection.[3] DOW further warned that because Kentucky law now ties much of the Commonwealth's water jurisdiction directly to federal WOTUS jurisdiction, additional federal narrowing will "almost certainly" result in a significant loss of protection for Kentucky waters and wetlands.[4]

The Commenters therefore asks the agencies not to adopt the supplemental perennial-flow and perennial-surface-water alternatives and to retain a definition of WOTUS that complies with *Sackett* while continuing to protect waters with meaningful connections to downstream waters.

I. The proposed perennial standard does not reflect Kentucky's watersheds

The Clean Water Act establishes a national objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Accomplishing that objective requires a jurisdictional framework that recognizes how upstream waters affect downstream rivers, lakes, and drinking-water sources.

The September supplement instead proposes to define "relatively permanent" as perennial waters having standing or continuously flowing water every day of the year during ordinary conditions. A water could remain perennial following certain anomalous events, such as drought, or following a single temporary interruption of no more than 30 consecutive days caused by non-anomalous conditions such as low tide or a regularly occurring dry spell. More than one ordinary interruption could cause a stream to fail the proposed test.[5]

EPA acknowledges most intermittent streams would not satisfy this standard.[6] That distinction is particularly problematic in Kentucky. Intermittent and headwater streams can convey water, sediment, nutrients, pollutants, and aquatic organisms downstream during important hydrologic periods even though they do not maintain continuous surface flow throughout the year.

Kentucky DOW made precisely this point in its comments on the 2025 proposal. The Division explained that many Kentucky streams that may not satisfy a continuous-flow requirement remain "functioning, integral parts

[1] Updated Definition of "Waters of the United States"; Supplemental Notice of Proposed Rulemaking, 91 Fed. Reg. 57,284, 57,288, 57,297–98 (Sept. 9, 2026).

[2] *Id.* at 57,297–98.

[3] Kentucky Division of Water, *Comments on U.S. Environmental Protection Agency's and Department of the Army's Proposed Rule, Updated Definition of "Waters of the United States"* 3–4 (Dec. 30, 2025).

[4] *Id.* at 2–3.

[5] 91 Fed. Reg. at 57,288.

[6] *Id.* at 57,297.

of the watershed" and directly influence downstream water quality, groundwater exchange, flood attenuation, and aquatic habitat.[7]

Kentucky's karst landscape makes a surface-flow test still less reliable. Streams can lose surface flow into subsurface systems and later reappear through springs or other surface waters. DOW specifically warned that Kentucky watersheds naturally contain short losing reaches, particularly in karst terrain, and that treating those natural breaks as jurisdictional breaks can remove protection from entire headwater networks even though those waters continue contributing to downstream waters.[8]

The agencies should not use a rigid temporal threshold as a substitute for evaluating whether a water is part of a functioning tributary system. A stream does not cease affecting downstream water quality because surface flow temporarily stops.

II. The proposed wetland standard would exclude wetlands that continue to perform important water-quality functions

The supplemental wetland alternative raises the same concern. Under the proposal, a wetland would need perennial surface water continuously connected to a jurisdictional water so that it is difficult to determine where the jurisdictional water ends and the wetland begins, subject to limited temporary interruptions.[9] EPA acknowledges this would be narrower than current practice and expects the majority of wetlands currently jurisdictional as adjacent wetlands would fail the proposed test because most wetlands do not contain perennial surface water.[10]

That approach does not account for the hydrology of many Kentucky wetlands. Kentucky DOW has explained that depressional, slope, groundwater-fed, forested, and headwater wetlands frequently function through soil saturation, perched water tables, groundwater discharge, and subsurface hydrology rather than continuous visible surface inundation.[11] Those wetlands can store water, retain sediment and nutrients, provide habitat, and affect downstream hydrology even when perennial surface water is absent.

The agencies' own 2025 Regulatory Impact Analysis illustrates the scale of the issue. EPA identified 324,233 acres of National Wetlands Inventory wetlands in Kentucky, but only 44,285 acres, approximately 14 percent, fell within the surface-water classifications EPA used as proxies for wetlands that may have surface water at least during a "wet season."[12] EPA appropriately cautioned that this analysis was not an estimate of the actual change in federal jurisdiction.

The September 2026 alternative is narrower still because it would move from surface water during the wet season to perennial surface water. EPA has not produced a Kentucky-specific estimate of the wetlands that would remain jurisdictional under this new alternative, but its acknowledgement indicates that remaining jurisdictional wetlands could be less than its 2025 estimate. Before adopting such a substantial change, the agencies should fully evaluate its effect on Kentucky wetlands and the downstream waters those wetlands support.

III. Kentucky is already struggling to meet existing water-quality goals

[7] Kentucky Division of Water, supra note 3, at 3
[8] *Id.*
[9] 91 Fed. Reg. at 57,298.
[10] *Id.*
[11] Kentucky Division of Water, supra note 3, at 3–4.
[12] U.S. Environmental Protection Agency & Department of the Army, *Regulatory Impact Analysis for the Proposed Updated Definition of Waters of the United States Rule*, Table 3-1 (Nov. 2025).

Further narrowing federal protection must also be considered in the context of existing water quality and preventing further degradation.

Kentucky's 2024 Integrated Report under Clean Water Act Sections 305(b) and 303(d) documents widespread impairment. Of 3,168 assessed waterbody units, 2,154 were impaired for at least one designated use, approximately 68 percent. Of 13,691.8 assessed river miles, 9,552.8 miles were impaired, approximately 70 percent. Kentucky also reported 186,664 impaired lake and reservoir acres out of 213,075 assessed acres, approximately 88 percent.[13]

The report also shows substantial impairment of uses directly experienced by Kentuckians. Of 1,273 river and stream assessment units evaluated for primary contact recreation, which includes swimming, 1,000 were impaired, approximately 79 percent. Of 205 river and stream assessment units evaluated for fish consumption, 127 were impaired, approximately 62 percent.[14]

These findings demonstrate why the scope of federal Clean Water Act jurisdiction matters in Kentucky. Narrowing protections for upstream streams and wetlands could allow additional pollution and degradation in watersheds where Kentucky is already struggling to restore impaired waters and meet established water-quality standards.

Kentucky's water-quality framework is intended to prevent further degradation while restoring impaired waters. Kentucky's antidegradation policy expressly states that its purpose includes safeguarding existing and designated uses, preventing new pollution, and abating existing pollution. 401 KAR 10:029 § 1. Kentucky law also limits the Cabinet's authority to impose KPDES permit conditions more stringent than those that would apply if the permit were issued by the federal government. KRS 224.16-050(4).

Those limitations make the federal baseline particularly important. Kentucky is already working to restore thousands of impaired river miles while operating within a statutory framework that limits the Commonwealth's ability to exceed federal permitting requirements.

The 2025 General Assembly further amended KRS 224.1-010 through Senate Bill 89 so that "waters of the Commonwealth" was replaced with the definition of federal "navigable waters," defined through 33 U.S.C. § 1362 as waters of the United States.[15] EPA's own 2025 Regulatory Impact Analysis accordingly classified Kentucky as a state that does not regulate surface waters or wetlands and dredge-and-fill activities more broadly than the proposed federal rule.[16]

The practical result is important. For many Kentucky waters, a reduction in federal jurisdiction does not simply transfer responsibility from the federal government to the Commonwealth. It can reduce the regulatory protection available altogether.

Kentucky DOW reached the same conclusion, warning EPA that because Kentucky's state definition is tied directly to WOTUS, the proposed narrowing would "almost certainly" produce significant losses of protection and create gaps in regulatory coverage.[17]

[13] Kentucky Division of Water, *Kentucky's 2024 Integrated Report*, 305(b) Results and Waterbody Type Results (2024).
[14] *Id.*, Table 7.
[15] KRS 224.1-010(32); 2025 Ky. Acts ch. 119.
[16] U.S. Environmental Protection Agency & Department of the Army, supra note 12, Table 2-1.
[17] Kentucky Division of Water, supra note 3, at 2–3.

At a time when approximately 68 percent of Kentucky's assessed waters are already impaired for at least one use, creating additional regulatory gaps works against the existing state and federal objective of restoring impaired waters and preventing further degradation.

IV. Protecting headwaters also protects drinking-water

The consequences of excluding headwaters and intermittent streams from Clean Water Act protection extend to drinking-water treatment. EPA defines source water to include rivers, streams, lakes, reservoirs, springs, and groundwater that supply public drinking-water systems and private wells. EPA has long recognized that protecting these waters from contamination can reduce treatment costs and avoid or defer the need for more complex treatment.[18]

Headwaters are particularly important in Kentucky. EPA's analysis of surface drinking-water sources found that 15,065 stream miles contributed water to surface-water intakes supplying Kentucky public drinking-water systems. Of those, 8,185 miles, approximately 54 percent, were intermittent, ephemeral, or headwater streams. More than 3.2 million Kentuckians were served by public drinking-water systems that relied at least in part on these waters.[19] Although EPA conducted that analysis using older drinking-water and hydrography data, it demonstrates the basic relationship relevant here. Small and nonperennial waters occur upstream of drinking-water intakes and contribute water to the systems from which Kentuckians drink.

The importance of source-water quality is illustrated by ongoing research in eastern Kentucky concerning disinfection byproducts, or DBPs. Drinking-water systems disinfect water to control pathogens, but disinfectants can react with natural and human-derived organic matter and inorganic ions in source water to form DBPs, including trihalomethanes and haloacetic acids.[20] These compounds have been associated with adverse health effects, including urinary tract cancers and adverse birth outcomes, depending on the compound, exposure level, and duration.[21] EPA regulates several classes of DBPs under the Safe Drinking Water Act.

This is not a theoretical concern in Kentucky. A National Institute of Environmental Health Sciences-funded partnership involving University of Kentucky researchers and communities in Martin and Letcher Counties was established after residents had received DBP exceedance notices for more than a decade. The project specifically examines how source-water chemistry and drinking-water system conditions affect DBP formation in small rural systems.[22]

Research from that project demonstrates why conditions upstream of a drinking-water intake matter. A 2024 peer-reviewed study of the Martin County Water District found substantial seasonal variation in DBP concentrations. The researchers found that periods of low discharge in the Tug Fork River, a source of the system's drinking water, were associated with increased conductivity and bromide concentrations. Those changes appeared to contribute to increased concentrations of brominated trihalomethanes.[23] The researchers concluded that small drinking-water systems relying on small rivers, streams, and reservoirs may experience

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[18] U.S. Environmental Protection Agency, *Basic Information about Source Water Protection*; U.S. EPA, *Source Water Protection Practices*.

[19] U.S. Environmental Protection Agency, *Percentage of Surface Drinking Water from Intermittent, Ephemeral, and Headwater Streams in Kentucky* (2009). EPA reported 15,065 total stream miles within source protection areas for Kentucky surface-water systems, including 8,185 miles of intermittent, ephemeral, or headwater streams, and more than 3.2 million people served by systems relying at least in part on those waters.

[20] Jason M. Unrine et al., *Spatial and Seasonal Variation in Disinfection Byproducts Concentrations in a Rural Public Drinking Water System: A Case Study of Martin County, Kentucky, USA*, 3 PLOS Water e0000227 (2024).

[21] *Id.*

[22] National Institute of Environmental Health Sciences, *A University-Community Partnership to Reduce Exposure to Disinfection By-products in Appalachia*, Grant No. R01ES032396.

[23] Unrine et al., supra note 3. The study found that increased conductivity associated with low Tug Fork River discharge was highly correlated with increased bromide concentrations and appeared to contribute to seasonal increases in brominated trihalomethanes.

greater fluctuations in source-water chemistry during low-flow periods, which in the Martin County system were associated with increased DBP formation.[24]

The Martin County study does not establish that loss of Clean Water Act jurisdiction over a particular headwater stream will cause DBP exceedances. It does demonstrate, however, that the quality and hydrology of source waters can affect the chemical conditions drinking-water utilities must manage. EPA similarly recognizes that organic matter, nutrients, wastewater, industrial discharges, runoff, and other sources within a watershed can affect DBP precursor concentrations and that watershed management can provide long-term benefits by reducing the loading of DBP precursors and nutrients into source waters.[25]

That relationship is directly relevant to the supplemental proposal. EPA expects most intermittent streams would not satisfy the proposed perennial standard. Yet many of those waters occur upstream of public drinking-water sources and continue to transport water and constituents downstream when they flow. Removing federal pollution protections from an upstream water does not prevent pollutants or DBP precursors from reaching a downstream drinking-water source.

Kentucky's experience therefore provides another reason not to equate continuous year-round flow with importance to downstream water quality. Protecting drinking water begins before water reaches the treatment plant. Maintaining appropriate protection for headwaters and tributaries can help prevent contamination at its source rather than leaving downstream utilities and their customers to address water-quality problems after they enter the drinking-water supply.

V. Narrowing protection for tributaries is particularly consequential for the Ohio River

The effects of narrowed protections extend beyond individual state streams and wetlands. Nearly all of Kentucky lies within the Ohio River Basin, and the health of the Ohio River and downstream, the Mississippi River and the Gulf, depends on the tributaries, headwaters, wetlands, and groundwater systems that feed it.

American Rivers named the Ohio River one of America's Most Endangered Rivers in 2023, identifying pollution and climate-related pressures as threats to clean water relied upon by more than five million people along the river. American Rivers identified legacy industrial pollution, mercury, dioxins, PFAS and other emerging contaminants, and acid mine drainage among the continuing threats to the watershed.[26]

Since then, organizations, agencies, universities, communities, and other partners throughout the basin have developed *Healthy Waters, Healthy Communities, Healthy Economies: A Collaborative Plan to Restore and Protect the Waters of the Ohio River Basin*. The plan documents the scale of the existing problem. Of 204,325 stream miles assessed by states throughout the basin, more than 69 percent do not meet state water-quality standards because of pollutants including bacteria, nutrients, and sediment.[27]

The restoration plan identifies inadequate water infrastructure, toxic pollution, nonpoint source pollution, mining impacts, hydrologic modification, habitat loss, invasive species, and flooding among the major challenges facing the basin.[28] Its central premise is equally important here. The Ohio River Basin is an

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[24] *Id.* The authors concluded that reliance on small rivers, streams, and reservoirs can exacerbate fluctuations in source-water chemistry during low-flow conditions and identified source-water management as one potential component of reducing DBP formation.

[25] U.S. Environmental Protection Agency, *Stage 2 Disinfectants and Disinfection Byproducts Rule Operational Evaluation Guidance Manual*, § 6.3.1 (2008).

[26] American Rivers, *Ohio River Named Among America's Most Endangered Rivers of 2023* (Apr. 18, 2023).

[27] Ohio River Basin Alliance & National Wildlife Federation, *Healthy Waters, Healthy Communities, Healthy Economies: A Collaborative Plan to Restore and Protect the Waters of the Ohio River Basin* 11 (2025).

[28] *Id.* at 14–65.

interconnected hydrologic system that crosses jurisdictional boundaries. Pollution originating in one part of the basin can affect drinking water, recreation, habitat, and communities many miles downstream.[29]

The Ohio River forms much of Kentucky's northern boundary, receives water from major Kentucky tributaries, and serves communities, drinking-water systems, industries, agriculture, recreation, and fish and wildlife throughout the Commonwealth.

Restoration efforts across the basin are now focused on reducing pollution, restoring habitat, improving water infrastructure, increasing monitoring, addressing flooding, and coordinating work across state boundaries. Narrowing federal jurisdiction over the tributaries and wetlands feeding the Ohio River moves in the opposite direction. Restoration becomes more difficult when pollution controls disappear from portions of the watershed that continue carrying water and pollutants downstream.

Kentucky DOW has specifically warned of this interstate problem. The Division explained that downstream states depend on upstream headwaters and wetlands and that a narrower WOTUS definition can create cross-border water-quality impacts, "especially in interstate basins like the Ohio River."[30]

The Ohio River demonstrates why a meaningful federal baseline remains necessary. Water does not follow political boundaries. Kentucky cannot protect the Ohio River solely through regulation of waters located within Kentucky when pollution and hydrologic changes throughout the basin can move downstream across state lines.

VI. The agencies should retain a workable federal baseline consistent with Sackett

The Commenters recognize the importance of regulatory clarity for landowners, businesses, communities, agencies, and conservation organizations. Clear standards can improve permitting, compliance, restoration, and public understanding. Clarity, however, should not depend on treating hydrologically connected waters as disconnected merely because they do not contain surface water every day of the year.

The Supreme Court substantially narrowed Clean Water Act jurisdiction in *Sackett*. EPA and the Corps responded by amending the 2023 WOTUS rule to conform it to the Court's decision.[31] The September supplement would go further by establishing temporal and surface-water requirements that EPA itself acknowledges would exclude most intermittent streams and the majority of currently jurisdictional adjacent wetlands.

Kentucky DOW has concluded that limiting relatively permanent waters to perennial waters is not required by *Sackett* and would fail to reflect the hydrologic conditions found in Kentucky.[32] The Commenters agree with the Division's concern.

The appropriate question is not simply whether water is visible at the surface every day of the year. The agencies should adopt a definition that complies with the Supreme Court's decision while recognizing the physical connections through which upstream waters continue to affect downstream jurisdictional waters and flow across state boundaries.

VII. Conclusion

[29] *Id.* at 68.
[30] Kentucky Division of Water, supra note 3, at 2–3.
[31] Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. 61,964 (Sept. 8, 2023).
[32] Kentucky Division of Water, supra note 3, at 4.

Kentucky's experience demonstrates the consequences of the supplemental alternatives.

Kentucky already has widespread water-quality impairment. Its karst landscape and variable stream hydrology make year-round surface flow an incomplete measure of watershed connection. Many Kentucky wetlands function through saturation and groundwater interaction rather than perennial surface inundation. Non-perennial headwater steams still contribute substantial water and pollutants into Kentucky's drinking water sources. State law now ties much of Kentucky's jurisdiction directly to the federal WOTUS definition, while Kentucky's permitting laws constrain the Commonwealth's ability to exceed the federal baseline.

At the same time, Kentucky and its neighbors are undertaking a major effort to restore the Ohio River Basin because existing pollution, habitat loss, infrastructure needs, and flooding already exceed what states and communities can address independently.

The agencies acknowledge that most intermittent streams would fail the proposed perennial standard and that the majority of currently jurisdictional adjacent wetlands would fail the proposed perennial-surface-water test. Those exclusions would affect waters that continue to influence water quality downstream and across state boarders.

For these reasons, the Commenters oppose the September 2026 supplemental alternatives defining "relatively permanent" waters through a perennial-flow requirement and "continuous surface connection" through perennial surface water. The Commenters ask EPA and the Corps to retain a WOTUS definition that complies with *Sackett*, preserves a meaningful federal baseline, and recognizes the connections necessary to protect downstream waters.

Thank you for considering these comments.

Sincerely,

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