



## SB89: FACT CHECKING THE “FACT CHECK”

Supporters of Senate Bill 89 have circulated a “fact sheet” purporting to counter the Governor’s veto message. Let’s fact-check the “Fact Check.”

### **(1) Supporters claim that SB 89 “is not ceding its regulatory authority to the federal government.”**

**FACT:** By defining what waters will be protected in Kentucky by reference to a federal definition – one which has been amended four times since 2015 and which EPA is considering amending yet again – the General Assembly is **in fact** ceding regulatory authority over Kentucky waters to federal law and federal agency interpretations of a federal law. SB 89 eliminates pollution protections for groundwater and the upper reaches of most streams, **because** the federal definition of “navigable waters” does not include these and other critical water resources that Kentuckians rely on for drinking water, recreation, fishing, hunting, watering livestock, and crop irrigation.

*And that’s a fact.*

The Governor is correct that by tying our definition of protected state waters to the federal definition, SB 89 makes Kentucky the only state in the United States to surrender its authority to define and regulate its own waters to the federal government. Kentucky should protect **all** of its waters, and not cede the power to define what is worthy of state protection to Washington D.C.

*And what will be lost?*

Hundreds of thousands of Kentuckians who rely on private well water for their homes and farms will find that the groundwater they rely on is no longer protected by the general prohibition on water pollution in KRS Chapter 224, not because they are unimportant but solely because federal law does not protect them.

Ponds, lakes, reservoirs, and farmstead ponds that are excavated off-stream for water supply or flood control that do not have a “continuous connection” with a navigable river or stream will be excluded from protection, not because they are unimportant, but solely because federal law does not protect them.

Thousands of miles of headwater streams that are essential to slowing floodwaters and filtering pollution before it reaches major waterways will lose protection under Kentucky

law, not because they are unimportant parts of Kentucky's river systems, but solely because federal law does not protect them.

So, the "fact check" by supporters claiming that SB 89 doesn't cede authority to federal law is a hollow argument. SB 89 is an absolute abdication of almost all state authority over what waters deserve state protection, ceding that authority to federal agencies and an ever-changing federal standard.

**(2) Supporters of SB 89 stated that the Governor is incorrect in stating that SB 89 "fails to protect" public water systems sourced from groundwater.** To support this claim, they contend that other laws, including KRS Chapter 151, 223, 349, 350, 353 and the federal Safe Drinking Water Act's Underground Injection Control program, will continue to protect public water systems using groundwater.

**FACT:** SB 89 will substantially weaken protections for both public and private water supplies relying on groundwater. By excluding groundwater from the definition of what waters are protected against water pollution, SB 89 strikes at the heart of the Energy and Environment Cabinet's regulatory authority over groundwater protection. As the [Cabinet has pointed out](#) (link), 156 public water systems serving more than 1.5 million Kentuckians rely on groundwater.

None of the other statutes referred to contain the general prohibition against water pollution that is found in KRS Chapter 224, which is the root of the Cabinet's power to control water pollution. [Legal analysis by the Kentucky Resources Council](#) (link) explains in more detail why none of the other statutes named broadly protect all groundwater, and the limited protections added back into the new definition – for some sinkholes and some springs, and wellhead protection areas – don't protect critical groundwater resources. This is why changing the definition of protected waters in that chapter is so devastating.

**(3) Supporters claim that the final version of SB 89 adds "additional protections for groundwater" from the first version based on the inclusion of sinkholes with open throat drains, some springs, and wellhead protection areas.**

**FACT:** To be clear, groundwater is categorically removed from protection against water pollution as a "water of the Commonwealth" by SB 89. Adding back in open-throat sinkholes, wellhead protection areas, and some springs does little to fix the damage caused, since neither sinkholes nor wellhead protection areas are even waters at all, and springs provide relatively little of the groundwater in the hundreds of thousands of private water supplies on farms and in homes in rural Kentucky harmed by this bill.

The addition of wellhead protection areas may help some cities that rely on groundwater for public drinking water, but **it fails to protect the tens of thousands of homes, farms, and businesses that rely on groundwater from private wells in rural Kentucky.** Karst

underground water systems, which are particularly vulnerable to contamination, are also left unprotected.

**(4) Supporters claim that SB 89 will not result on more flooding or pollution.**

**FACT:** A primary purpose of the bill was to stop the Cabinet from imposing “buffer zones” around headwater stretches of streams to prevent them from being filled with rock and soil wastes from coal strip mines. If you eliminate headwater reaches of streams by filling them with mined rock and spoil, you will remove the sediment and floodwater slowing ability of those reaches of stream and cause higher peak runoff response to storms resulting in more localized flooding.

Federal law does not regulate the headwaters of stream reaches that flow only in response to rainfall and snowmelt and removing them from state protection means that they can be altered, filled with mine spoil, and can be used for waste disposal without any state discharge permit or water quality protections. The Chapter 151 permitting scheme is insufficient to protect these waters. Without protections for our headwater streams, downstream communities will suffer greater flood risks and water quality degradation.

**(5) Supporters claim that “Kentucky’s public drinking water systems will still be fully and comprehensively regulated under the federal Safe Drinking Water Act.”**

**FACT:** SB89’s elimination of groundwater and headwater streams as protected water resources will mean that more pollution can occur without accountability, so that the raw water used by public water systems will need more treatment and higher public cost.

The Safe Drinking Water Act requires only that public and semi-public water systems treat water to reduce the level of contaminants to acceptable thresholds. This will remain true if SB89 were passed. But the cost of treatment for our public water and sewage systems will significantly increase. Excluding groundwater and headwater streams from protection will add pollution to waters downstream. Our water treatment plants can remove many of the contaminants from a water source, but it is much less expensive filter and sanitize clear, clean water, and some contaminants cannot be cheaply removed. We will have to pay more for clean, safe water.

Furthermore, the Safe Drinking Water Act does not regulate the quality and safety of drinking water from private water supplies, such as the tens of thousands of domestic wells across Kentucky, impacting rural Kentuckians most directly.

**(6) Supporters claim that after the passage of SB 89, it will still be illegal to pollute and dump hazardous substances in water.**

**FACT:** The core statute on hazardous substances spills and releases, KRS 224.1-400, seeks to control and remedy releases of hazardous substances, pollutants, and contaminants into

the “environment,” a term defined to include waters of the Commonwealth. If you define our state waters to exclude groundwater, you will no longer have to clean up spills or releases of hazardous substances into the “environment” when the contamination or harm is to groundwater. Groundwater is a significant pathway of exposure to hazardous pollution, and if it is no longer a protected resource as a “water of the Commonwealth,” then pollution to groundwater is no longer actionable, and the effectiveness of sufficiency of a response to a spill or release will no longer be measured by whether groundwater is protected, or whether contamination of groundwater is corrected.

**If Senate Bill 89 becomes law, and the “environment” no longer includes groundwater or headwater streams under Kentucky law, then contamination of either will no longer trigger reporting, action, or cleanup.** That is a fact that cannot be disputed. The federal clean-up laws do not fill this gap.

**(7) Supporters claim that the goal was simply to align state surface water discharge permits to federal law.**

**FACT:** Current state law already provides alignment of the KPDES permit program with only those waters regulated by the EPA under the Clean Water Act. Under 401 KAR 5:055 Section 4(4), a KPDES permit shall not be required for “a discharge that is not regulated by the U.S. EPA under the Clean Water Act Section 402, 33 U.S.C. 1342.”

This bill is also not about regulatory “clarity.” Instead, **it will slow and confuse the regulatory process**, requiring the Cabinet to make complex and site-specific determinations as to which waters meet a complicated and uncertain federal definition, rather than a consistent state standard. This bill far oversteps its stated goals, which could have been done by a more careful and limited amendment, without stripping away protections for critical water resources that Kentuckians rely on for drinking water, recreating, fishing, watering livestock, and crop irrigation.

**FACT:** The broad exclusion of all groundwater in KRS Chapter 224 removes the power of the Cabinet to address groundwater pollution in the Chapter of state statutes that is specific to management of wastes and water pollution. The elimination of headwater streams from protection in Kentucky – simply because the federal law doesn’t cover them – will allow unregulated dumping of wastes and filling of these stream channels. Such actions will result in degraded water quality downstream and raise costs for drinking water systems and other users.

*And that’s just a fact.*