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SB 89: NARROWING PROTECTIONS FOR KENTUCKY'S WATERS KRC FACT SHEET #3:

Analysis of the House Committee Amendment to Senate Bill 89

The House Committee Amendment (HCA) to Senate Bill 89 amends the definition of "waters of the Commonwealth" in KRS 224.1- 010(32) to read:

(32) "Water" or "waters of the Commonwealth" means and includes: *(a) navigable waters as defined in 33 U.S.C. sec. 1362, (b) sinkholes with open throat drains, (c) naturally occurring artesian or phreatic springs, as well as any other spring used as a source of domestic water supply, and (d) wellhead protection areas, [] that are* situated wholly or partly within or bordering upon the Commonwealth or within its jurisdiction.

(33) "Wellhead protection area" means and includes all wellhead protection areas as defined in 42 U.S.C. sec. 300h-7(e) and as determined by the cabinet pursuant to its obligations under 42 U.S.C. sec. 300h-7(a).

With few enumerated exceptions, SB89 HCA limits protections against pollution to only those waters that are defined as "navigable" under the federal Clean Water Act. That Act defines "navigable waters" as "waters of the United States, including the territorial seas" (WOTUS) and provides authority for the U.S. Environmental Protection Agency and the U.S. Department of the Army to define WOTUS in regulations – a definition that has been in flux since 2015. Because the reach of federal law is limited to pollution affecting interstate waters, the protections against pollution in the Clean Water Act have never reached all Kentucky waters of state value or concern.

Unfortunately the limited new "additions" to "waters of the Commonwealth" under the House Committee Amendment to Senate Bill 89 do not undo or fix the significant damage that SB 89 will do to the water resources that Kentuckians rely on for drinking water, recreation, fishing, watering livestock, and crop irrigation. The HCA claws back a small subset of state waters and leaves most groundwater resources and private wells outside of protected "waters of the Commonwealth."

Our analysis of House Committee Amendment to Senate Bill 89 follows:

- This language leaves thousands of private wells across the Commonwealth deprived of protection as “waters of the Commonwealth,” and leaves groundwater resources that could be developed for use without protections.
- Sinkholes are not water resources at all but instead represent a collapse of the ground surface into underground cavities that may be created by erosion, or by water flow creating solution channels through limestone formations. The new definition does not protect karst aquifers and those underground water resources, which are among the most vulnerable to contamination and may become contaminated through means other than open throat sinkholes.
- The new definition also excludes all other groundwater resources that are or could be used for a range of beneficial uses, including domestic supply other than drinking water, agricultural and farmstead use, food preparation, and industry.
- Wells, rather than springs, are the primary source of groundwater access for rural Kentuckians, and the new definition leaves all groundwater resources other than springs “used as a source of domestic water supply” at risk. The definition excludes the tens of thousands of private wells used for agricultural and for household uses with no protection. Fracture-flow dominated wells in eastern Kentucky; alluvial wells throughout Kentucky; wells drawing from confined or unconfined aquifers across the Commonwealth – all of these would be left unprotected.
- No justification has been provided for why this bill does not seek to amend KRS 224.16-050, which is the statute that specifically deals with permitting discharges into surface waters under the Clean Water Act, rather than broadly removing protections for all groundwater and for farm ponds, off-stream water ponds and impoundments. If the intent is to sync state KPDES discharge permits with *Sackett*, and if the General Assembly believes that such a provision should be in statute (even though it is already in the agency regulations under 401 KAR 5:055), then it should amend KRS 224.16-050, which specifically addresses the issuance of such permits by the Cabinet under the Clean Water Act.
- Wellhead Protection Areas only protect public water supplies, excluding all private groundwater wells. No protection is provided for the groundwater resources from which private household and agricultural wells produce.
- Ponds, lakes, and reservoirs are excluded from any protection, and may not be “waters of the United States” under the *Sackett* decision because they don’t have a “continuous” connection with navigable waters. Farmstead ponds that are excavated off-stream or which impound ephemeral streams would likely be unprotected against pollution.

- Headwater and other ephemeral streams would remain excluded under this amendment. Kentucky's ephemeral streams, which flow in response to rainwater and snowmelt, are a critical part of Kentucky's river systems, slowing floodwaters, supporting aquatic ecosystems, and would be unprotected. About 65% of all Kentucky's streams and rivers are ephemeral or intermittent (some of which may also lose protection) and make up 54% of streams providing water for 3.2 million Kentuckians through public surface water system intakes. Unregulated pollution into ephemeral streams will lower water quality downstream -- increasing costs for our drinking water systems and downstream dischargers.
- Senate Bill 89 will substantially weaken the regulation of waste disposal and will remove protections for groundwater in hazardous substances spills and resulting clean-ups. If the "environment" no longer includes groundwater or headwater streams under Kentucky law, then contamination of either will no longer trigger reporting, action, or cleanup.

In short, the proposed definition leaves private household and agricultural wells, and groundwater resources that could be developed for private wells, outside of "waters of the Commonwealth" that are protected by our water laws.

For a copy of the amendment, plus additional fact sheets and information, please see our latest news [here](#).